



58th Parliament Alert Digest



No. 6 of 2015

**Tuesday, 9 June 2015
on the following Bills**

Alcoa (Portland Aluminium Smelter)
(Amendment) Act Amendment Bill 2015

Children, Youth and Families
Amendment (Restrictions on the Making of
Protection Orders) Bill 2015

Delivering Victorian Infrastructure (Port of
Melbourne Lease Transaction) Bill 2015

Judicial Entitlements Bill 2015

Justice Legislation Amendment Bill 2015

Planning and Environment Amendment
(Recognising Objectors) Bill 2015

Victoria Police Amendment (Validation) Bill 2015

Wrongs Amendment (Prisoner Related
Compensation) Bill 2015



The Committee



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Terms of Reference - Scrutiny of Bills

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

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *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

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

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

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

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

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

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

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

'VCAT' refers to the Victorian Civil and Administrative Tribunal

[] denotes clause numbers in a Bill

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Alcoa (Portland Aluminium Smelter) (Amendment) Act Amendment Bill 2015

Introduced	26 May 2015
Second Reading Speech	27 May 2015
House	Legislative Council
Member introducing Bill	Mr Greg Barber MLC
Private Member's Bill	

Purpose

The Bill repeals section 14 of the of the *Alcoa (Portland Aluminium Smelter) Amendment Act 1984* ('the Act') to remove the special exemption in the Act to the Freedom of Information laws for matters affecting or relating to the Alcoa smelters at Portland and Port Henry.

Charter report

The Alcoa (Portland Aluminium Smelter) Act Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015

Introduced	26 May 2015
Second Reading Speech	27 May 2015
House	Legislative Assembly
Member introducing Bill	Hon. Martin Foley MLA
Portfolio responsibility	Minister for Families and Children

Purpose

The Bill substitutes a new section 17 into the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* ('the Amendment Act') which is set to commence on 1 March 2016 unless it is proclaimed to come into effect earlier. The Amendment Act amends the *Children, Youth and Families Act 2005*.

Extract from the explanatory memorandum:

The effect of the new section 17 of the Amendment Act is to retain the current requirements set out in section 276 of the Children, Youth and Families Act 2005 for the making of child protection orders, including the requirement that the Children's Court of Victoria must be satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary in the best interests of the child. The new section 17 of the Amendment Act updates the term custody with the term care in section 276 of the Children, Youth and Families Act 2005, for consistency with the new terminology in the Amendment Act.

Charter report

The Children, Youth and Families Amendment (Restrictions on the Making of Protection) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Bill 2015

Introduced	26 May 2015
Second Reading Speech	27 May 2015
House	Legislative Assembly
Member introducing Bill	Hon. Tim Pallas MLA
Portfolio responsibility	Treasurer

Purpose

The main purposes of the Bill are to:

- authorise and facilitate transactions under which land in the port of Melbourne is leased, and assets of the Port of Melbourne Corporation are disposed of, to a private sector entity.
- establish the Victorian Transport Fund into which the transaction proceeds are to be paid.
- guarantee the employment entitlements of employees of the Port of Melbourne Corporation who become employees of a private sector entity.
- amend the *Transport Integration Act 2010* and the *Port Management Act 1995* to revise the Port of Melbourne Corporation's functions and powers to reflect the port of Melbourne's operation by the private sector entity and the continuing role of the Port of Melbourne Corporation in relation to the port.
- amend the *Port Management Act 1995* and the *Essential Services Commission Act 2001* to establish a new licensing and economic regulatory framework to apply to the private sector entity that will be providing services at the port of Melbourne.
- amend the *Marine Safety Act 2010* to ensure that, when carrying out activities at the port, the private sector entity is subject to marine safety duties.
- make consequential amendments to other Acts.

Charter report

Obligations of public authorities – Port of Melbourne operator

Summary: The Committee will write to the Minister seeking clarification regarding the Port of Melbourne operator that is provided for under clause 80 and their obligations under the Victorian Charter of Human Rights when exercising powers under clauses 119, 124, 125, 127 and 131.

The Committee notes that clause 80, inserting a new section 4A into the *Port Management Act 1995*, provides that the Minister for Ports may declare that a specified person is the 'port of Melbourne operator'.

The Committee also notes that:

- clauses 119, 124, 125 and 127, amending existing Part 5B of that Act, empower the port of Melbourne operator to clean up, remove, move and dispose of certain property;
- clause 131, inserting a new Part 5C into that Act, empowers the port of Melbourne operator (and employees or agents authorised by the chief executive officer of the operator) to make various directions, to enter certain premises and to gather certain information.

The Statement of Compatibility remarks that clause 131 engages, but does not limit (or reasonably limits) various Charter rights.

The Committee observes that, under Charter s.38, entities that are established by a statutory provision to exercise functions of a public nature, or who exercise such functions on behalf of the State, must give proper consideration to human rights and to make decisions compatibly with human rights.¹ However, unlike the existing Port of Melbourne Corporation,² the port of Melbourne operator provided for under clause 80 may be neither established by a statutory provision nor act on behalf of the State.

The Committee will write to the Minister seeking clarification regarding the Port of Melbourne operator that is provided for under clause 80 and their obligations under the Victorian Charter of Human Rights when exercising powers under clauses 119, 124, 125, 127 and 131.

The Committee makes no further comment

¹ See Charter ss. 4(1)(b), (c) and 38(1).

² See *Transport Integration Act 2010*, s. 141B.

Judicial Entitlements Bill 2015

Introduced	26 May 2015
Second Reading Speech	27 May 2015
House	Legislative Assembly
Member introducing Bill	Hon. Martin Pakula MLA
Portfolio responsibility	Attorney-General

Purpose

The Bill is for an Act to:

- modernise the processes and structures for determining salaries, allowances and conditions of service for judicial officers in a manner that recognises and maintains judicial independence.
- repeal the *Judicial Salaries Act 2004* and the *Judicial Remuneration Tribunal Act 1995*.
- make consequential and miscellaneous amendments to other Acts.

Charter report

The Judicial Entitlements Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Planning and Environment Amendment (Recognising Objectors) Bill 2015

Introduced	26 May 2015
Second Reading Speech	27 May 2015
House	Legislative Assembly
Member introducing Bill	Hon. Richard Wynne MLA
Portfolio responsibility	Minister for Planning

Purpose

The Bill amends the *Planning and Environment Act 1987* to provide for the Victorian Civil and Administrative Tribunal (Tribunal) and responsible authorities to have regard to the number of objectors to permit applications in considering whether a proposed use or development may have a significant social effect.

Extract from the second reading speech:

This Bill amends the Planning and Environment Act 1987 to ensure the extent of community objection to planning proposals is considered. It does this by requiring the two key decision-makers in the permit process —responsible authorities and VCAT — to have regard, where appropriate, to the number of objectors when considering whether a proposal may have a significant social effect.

...The number of objectors alone will not establish that there is a significant social effect. However, the number of objectors may be indicative of the scale of a social effect on the community, the presence of a specific social need in the community that may be affected, or the social significance of a site to the community.

Charter report

The Planning and Environment Amendment (Recognising Objectors) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

Victoria Police Amendment (Validation) Bill 2015

Introduced	26 May 2015
Second Reading Speech	27 May 2015
House	Legislative Assembly
Member introducing Bill	Hon. Wade Noonan MLA
Portfolio responsibility	Minister for Police

Purpose

This Bill amends the *Victoria Police Act 2013* ('the Act') to address defects identified by Victoria Police in relation to the exercise by Deputy Commissioners of the Chief Commissioner's power to authorise police officers to conduct drug or alcohol tests or assessments under the *Road Safety Act 1986*, the *Marine (Drug, Alcohol and Pollution Control) Act 1988* and the *Rail Safety (Local Operations) Act 2006*.

Extract from the second reading speech:

The Victoria Police Amendment (Validation) Bill 2015 will amend the Victoria Police Act 2013 to remedy an issue identified by Victoria Police in relation to an administrative oversight in the chief commissioner's instrument of delegation. The oversight has resulted in 660 invalid authorisations being issued to police officers under road, marine and rail safety legislation which affects the conduct of drug and alcohol testing between 1 July 2014 and 5 March 2015. This has resulted in a risk that legitimate prosecutions and infringements for drink and drug driving that rely on evidence obtained through these tests could fail on a technicality.

...

The error occurred under unique circumstances following the enactment of the Victoria Police Act 2013, which involved major reforms to the administration and corporate governance of Victoria Police. Under the previous Police Regulation Act 1958, deputy commissioners exercised the same powers as the chief commissioner, allowing them to authorise police officers to operate drug and alcohol testing equipment and conduct impairment assessments. It was standard operating protocol for deputy commissioners to issue these authorisations rather than the chief commissioner. The change in legislation on 1 July 2014 limited the exercise of power by deputy commissioners to only those powers that had been delegated to them by the chief commissioner. By omission, no instrument of delegation was made at this time to allow deputy commissioners to continue to issue these authorisations as they had historically done. The deputy commissioners, unaware of this omission, continued in good faith to grant these authorisations to police officers under the mistaken belief that they still had the legislative power to do so.

Content

The Bill inserts new section 276A into the Act and applies to purported authorisations made by a Deputy Commissioner on or after 1 July 2014 and before 6 March 2015. The amendment validates those delegations to accord with the new delegation requirements of the Act.

The Committee accepts that the retrospective validation of purported actions taken under defective delegations made by Deputy Commissioners is administrative in nature and does not appear to disturb substantive rights or the admissibility of evidence. The validation appears justifiable in the circumstances.

Charter report

The Victoria Police Amendment (Validation) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment

House Amendments to Bills

Justice Legislation Amendment Bill 2015

[Alert Digest 4 of 2015]

On 25 May 2015 amendments were proposed in the Legislative Council by Ms Hartland MLC and the Hon. Steve Herbert MLC, with both sets of amendments being agreed to. The Bill as amended was sent to the Legislative Assembly for its consideration.

The amendments proposed by Hon. Mr Herbert MLC inserted new provisions in the *Firearms Act 1996*. The Bill as originally introduced made no amendments to that Act. The House amendments deal with matters not canvassed by the Statement of Compatibility tabled with the Bill. (Refer to Charter report below)

The amendment inserts an additional purpose provision in clause 1 which provides:

to amend the Firearms Act 1996 to lower the minimum age for participation in paintball activities from 18 to 16 and make other amendments to the requirements imposed on operators of paintball ranges;

Charter report

Age discrimination – Unlicensed paintball marker use – Users aged under 16 Firearms Act 1996

Summary: The Committee will write to the Attorney-General seeking further information as to whether or the amendments relating to firearms made to the Justice Legislation Amendment Bill 2015 in the Legislative Council are compatible with human rights.

The Committee notes that an amendment to the Justice Legislation Amendment Bill 2015 made in the Legislative Council, amending existing Schedule 3 of the *Firearms Act 1996*, extends the exemption from the licensing requirements in Part 2 of that Act for users of paintball markers to the non-prohibited persons over the age of 16. The Committee observes that, while this amendment increases eligibility for unlicensed paintball marker use, it nevertheless engages the Charter's rights with respect to age discrimination in relation to users under the age of 16.³

The Committee notes that, while Charter's requirement for statements of compatibility⁴ is limited to Bills when introduced and does not apply to amendments to Bills, the amendments to the *Firearms Act 1996* made in the Legislative Council broaden the purpose clause of the Bill as introduced and may in substance be equivalent to a new Bill.⁵

The Committee will write to the Attorney-General seeking further information as to whether or not the firearms amendments relating to firearms made to the Justice Legislation Amendment Bill 2015 in the Legislative Council are compatible with human rights.

³ Charter s. 8.

⁴ Charter s. 28.

⁵ See Scrutiny of Acts and Regulations Committee, *Alert Digest No. 8 of 2011*, p. 13 (reporting on the Justice Legislation Amendment (Infringement Offences) Act 2011).

Ministerial Correspondence

Wrongs Amendment (Prisoner Related Compensation) Bill 2015

The Bill was introduced into the Legislative Assembly on 5 May 2015 by the Hon. Martin Pakula MLA. The Committee considered the Bill on 25 May 2015 and made the following comments in Alert Digest No. 5 tabled in the Parliament on 26 May 2015.

Committee comments

Application irrespective of when causation occurred – Future operation based on past events – Act to apply to pending proceedings – Whether retrospective application adversely impacts person – Costs thrown away for fruitless litigation

The Bill includes a transitional provision providing that the amendments apply irrespective of when the act or omission causing death or injury giving rise to the claim for damages occurred. The provision also provides that the amendments apply to proceedings commenced but not finally determined. (new section 28LAH)

The Committee notes that there is a distinction to be made between an enactment that takes into account past facts or conduct as a basis for future operation and on the other hand an enactment that alters past rights based on past events. A recent example of an enactment that has future operation based on past facts is the *Working with Children Act 2005*. That legislation takes into account past convictions in assessments of future suitability to engage in child related work.

The matter concerning the application of the enactment to pending proceedings is less clear. The Committee considers that an applicant may be disadvantaged in respect to legal costs incurred in bringing the proceedings. The Committee notes the passage of judgement on *Mason JA in Bawn Pty. Ltd. V Metropolitan Meat Industry Board (1971) 92 WN (NSW) 823 at 824ⁱ* where this matter is considered.

The Committee will request further information from the Attorney-General whether any person with a pending proceedings will be disadvantaged in respect to costs thrown away in circumstances where subsequent legislative change renders the proceedings fruitless or substantially different to accrued rights existing prior to the amendment.

Minister's response

Thank you for your letter of 27 May 2015 regarding the Wrongs Amendment (Prisoner Related Compensation) Bill 2015 (the Bill).

ⁱ Once it is accepted that the general principle of construction recognizes that a statute may operate retrospectively so as to disturb and alter substantive rights which accrued before the commencement of the statute, provided that the statutory intention in that behalf is manifested with sufficient clarity, it is not easy to see why any different rule should be applied to the possible operation of the statute on rights which have already accrued, but are the subject of pending proceedings, at the time when the statute commences to operate. True it is that in the latter case an added element of injustice may arise in the form of a liability to costs in circumstances in which the award of costs lies not in the discretion of the court, but follows automatically the result of the litigation. Nevertheless, it does not seem that the injustice which will or may result from an interference with substantive rights in pending suits is in general so much greater that a stronger presumptive rule should be applied in such a case, in particular a rule which, according to its formulation, insists on a specific or explicit reference to rights in pending actions as an essential preliminary to the application of the new statute to those rights.

You have sought further information as to whether any person with current or pending proceedings will be disadvantaged in respect of costs thrown away in circumstances where subsequent legislative change renders the proceedings fruitless or substantially different to accrued rights existing prior to the amendment.

As identified in your letter, the Bill will affect matters not finally determined before the commencement of the Bill, including any proceedings that are pending.

If the State is found to be negligent in respect of existing claims, the Bill's amendments may operate to reduce the damages payable, to the extent that it can be shown that the claimants have adult criminal convictions and fall within the scope of the other provisions of the Bill.

If a claimant is successful and has adult criminal convictions for "profit-motivated" offences, as defined by the Bill, the provisions which direct a reduction in damages of at least 90 per cent would apply to any such damages that were obtained in respect of non-economic loss in the circumstances prescribed by the Bill.

As the Bill does not extinguish the relevant cause of action, it is a matter for the claimants to decide whether or not to proceed with their claims. I note that if a claim is successful, any order as to costs is likely to be favourable to the claimant.

Great care needs to be exercised when discussing proceedings that are currently before the courts. I emphasise the need to avoid any statement that could be construed as pre-determining an issue that is before a court or as seeking to influence the outcome of those particular proceedings.

HON. MARTIN PAKULA MP
Attorney-General

3 June 2015

The Committee thanks the Attorney-General for this response.

Committee Room
9 June 2015

Appendix 1

Index of Bills in 2015

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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)

(i) trespasses unduly on rights and freedoms

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

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

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Justice Legislation Amendment Bill 2015 – House Amendment 6

Appendix 3

Ministerial Correspondence 2015

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

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

Bill Title	Minister/ Member	Date of Committee Letter / Minister's Response	Alert Digest No. Issue raised / Response Published
Back to Work Bill 2014	Treasurer	24-02-15 13-03-15	1 of 2015 2 of 2015
Wrongs Amendment (Prisoner Related Compensation) Bill 2015	Attorney-General	26-05-15 03-06-15	5 of 2015 6 of 2015
Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Bill 2015	Treasurer	09-06-15	6 of 2015
Justice Legislation Amendment Bill 2015 – House Amendment	Attorney-General	09-06-15	6 of 2015

