Alert Digest

No. 7 of 2016

Tuesday, 24 May 2016

on the following Bills

Infant Viability Bill 2015

Justice legislation (Evidence and Other Acts) Amendment Bill 2016

Land (Revocation of Reservations - Regional Victoria Land) Bill 2016

Local Government (Greater Geelong City Council) Act 2016

Primary Industries Legislation Amendment Bill 2016

State Taxation and Other Acts Amendment Bill 2016
The Committee

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Member for Pascoe Vale

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

Ms Melina Bath MLC
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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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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
Land (Revocation of Reservations - Regional Victoria Land) Bill 2016

Introduced 3 May 2016
Second Reading Speech 4 May 2016
House Legislative Assembly
Member introducing Bill Hon. Lisa Neville MLA
Minister responsible Hon. Lisa Neville MLA
Portfolio responsibility Minister for Environment, Climate Change and Water

Purpose

The Bill would provide for the revocation of permanent reservations over four areas of Crown land in regional Victoria to enable the sites to be used for other purposes or sold.

Charter report

The Land (Revocation of Reservations – Regional Victoria Land) Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.
Primary Industries Legislation Amendment Bill 2016

Introduced 3 May 2016
Second Reading Speech 4 May 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:

- the *Domestic Animals Act 1994* to extend the current moratorium on the euthanasia of restricted breed dogs (for dogs that were not living in Victoria prior to 30 September 2011) to 30 September 2017
- the *Public Administration Act 2004* to replace the Chairperson of the Game Management Authority with the Chief Executive Officer as the public service body head of the Authority
- the *Wildlife Act 1975* to:
  - permit the Game Management Authority (GMA) to refuse to grant an application of a new licence to an applicant who has been found guilty of an offence under the Act
  - enable the GMA to specify a period of disqualification of up to five years for the holder of a cancelled licence and to require the return of a cancelled licence to the GMA within a specified period
  - include the offence of hunting, taking or destroying game during close season on the list of offences for which the GMA can conduct ‘controlled operations’ to collect evidence
  - amend the definition of ‘punt gun’ to provide for the use of 10-gauge calibre firearms or firearms with three barrels for hunting game
  - transfer the responsibility for the reporting of ‘controlled operations’ to the Victorian Inspectorate from the board to the CEO of the GMA
- the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* to abolish the Agricultural Chemicals Advisory Committee
- the *Veterinary Practice Act 1997* to:
  - permit the Veterinary Practitioners Registration Board to suspend the registration of a practitioner at the beginning of an investigation where there are concerns for public health and safety or animal health and welfare
  - close a loophole under which a veterinary practitioner who is subject to a formal hearing can reduce the sanctions against them by becoming unregistered
- the *Prevention of Cruelty of Animals Act 1986* to:
  - enable a notice to comply to be issued to the most appropriate person, whether they are the owner of the animal, the person in charge of the animal or another person
  - increase the maximum duration of scientific and breeding licences from three years to four years.
Charter report

Presumption of innocence – Notice to Comply – Requirement to disprove underlying offence

Summary: Clause 8 substitutes a new notice to comply provision that requires a person to comply with a notice issued by a POCTA inspector who reasonably believes that a person is committing an offence, requiring that person not to commit the offence or to cease committing the offence. A person may be required to disprove the commission of an underlying offence in order to escape liability for the offence of non-compliance with the notice. This may be incompatible with the Charter’s right to the presumption of innocence and the right to silence.

The Committee notes that clause 8, which replaces s. 24ZP(1) of the Prevention of Cruelty to Animals Act 1986 (POCTA), provides that if a POCTA inspector reasonably believes that a person is committing or is likely to commit an offence under Part 2 of the POCTA or the regulations, the POCTA inspector may issue a notice requiring that person not to commit the offence or to cease committing the offence. The existing s. 24ZP(2) provides that a person must comply with the notice in s. 24ZP(1), and imposes a penalty of 120 penalty units for non-compliance.

This clause does not appear to require proof of the commission of the underlying offence in order to make out the charge of non-compliance with the notice. It is unclear whether non-commission of the underlying offence is in fact a defence to the offence of non-compliance with the notice. If so, where a person who is charged with the offence of non-compliance with a notice under s. 24ZP(2) disputes that any offence has been committed, that person may be required to prove that they did not commit the underlying offence in order to defend a charge of non-compliance with the notice.

These aspects of the compliance notice regime in s. 24ZP may limit the right to the presumption of innocence s. 25(1) of the Charter and the right to silence in s. 25(2)(k) of the Charter.

The Fair Work Act 2009 contains a compliance notice regime in s. 716 of that Act whereby a Fair Work Ombudsman inspector may issue a compliance notice not dissimilar to those under the POCTA regime. However the Fair Work Act 2009 compliance notice regime explicitly includes the following rights protections:

- The section explicitly provides that a person who complies with a notice in relation to a contravention is not taken to have admitted contravening the provision or to have contravened the provision: s. 716(4B).
- The prohibition on non-compliance with the notice does not apply if the person has a reasonable excuse: s. 716(6).
- Compliance notices may be reviewed by a court on the ground that the person has not committed an underlying contravention set out in the notice or that the notice did not comply with the requirements of the section, after which a court may confirm, cancel or vary the notice: s. 717.

The protections in the Fair Work Act 2009 compliance regime in ss. 716 and 717 of that Act may be a less restrictive means reasonably available to achieve the purposes of the compliance notice regime in the POCTA.

The Committee will write to the Minister seeking further information as to whether clause 8 limits the right to the presumption of innocence s. 25(1) and the right to silence in s. 25(2)(k) of the Charter and whether there are less restrictive means reasonably available to achieve the purposes of that clause.

The Committee makes no further comment.
State Taxation and Other Acts Amendment Bill 2016

Introduced 27 April 2016
Second Reading Speech 3 May 2016
House Legislative Assembly
Member introducing Bill Hon. Tim Pallas MLA
Minister responsible Hon. Tim Pallas MLA
Portfolio responsibility Treasurer

Purpose

The Bill would amend:

- the Duties Act 2000 to increase the foreign purchaser duty surcharge from 3 per cent to 7 per cent and the land tax absentee surcharge from 0.5 to 1.5 per cent
- the Fire Services Property Levy Act 2012 to:
  o clarify the scope of the single farm enterprise exemption
  o to provide a discount on the fire services property levy insert to certain concession card holders
  o clarify the methodology for the indexation of the fixed charge determined under the Act.
- the First Home Owner Grant Act 2000 to:
  o empower the Commissioner to recover amounts owed by applicants and former applicants from third parties
  o introduce ‘substituted service’ provisions for the service of documents relating to recover proceedings (i.e., allow for the service of such documents by post or email)
  o permit the disclosure of certain information by the State Revenue Office to the Ombudsman’s Office.
- the Land Tax Act 2005 in relation to the absentee owner surcharge and the primary production land exemption
  o the Mineral Resources (Sustainable Development) Act 1990 to provide for a threefold increase in the rate for royalties for lignite (brown coal)
  o the Payroll Tax Act 2007 to provide a new exemption for wages paid or payable to an apprentice or trainee who resumes an apprenticeship or traineeship with a different employer and to raise the payroll tax threshold by $25,000 each year over the next four years to $650,000 in the 2019–20 financial year
- the Planning and Environment Act 1987 to clarify the methodology for the indexation of certain amounts under that Act
- the State Taxation Acts Further Amendment Act 2015 to make miscellaneous amendments
- the Taxation Administration Act 1997 in relation to refunds and to permit the disclosure of taxation information by the Commissioner of State Revenue to certain Councils for the purposes of determining and collecting the fire services property levy.
Content

Retrospective commencement – clarification of the methodology for the indexation of the fire services property levy fixed charge amount and various amounts under the Planning and Environment Act 1987

Section 13 of the Bill would commence retrospectively from 30 June 2014. The Explanatory Memorandum provides the following explanation:

Section 13 clarifies the methodology for the indexation of the fire services property levy fixed charge amount under the Fire Services Property Levy Act 2012, to ensure the correct reference periods are used for the calculation of the CPI adjusted fixed charge. The amendment addresses an ambiguity arising as a consequence of amendments made by Part 5 of the Treasury Legislation and Other Acts Amendment Act 2014. The amending provision in this Bill is intended to be made retrospective to 30 June 2014, which is the date that Part 5 of the Treasury Legislation and Other Acts Amendment Act 2014 commenced.

Section 44 of the Bill would commence retrospectively from 1 July 2015. The Explanatory Memorandum provides the following explanation:

Section 44, which clarifies the methodology for the indexation of the threshold amount in section 96R(1) of the Planning and Environment Act 1987 for the purposes of the metropolitan planning levy, operates retrospectively from 1 July 2015. This amendment ensures the correct reference periods are used for the calculation of the CPI adjusted threshold amount. The amending provision is intended to be made retrospective to 1 July 2015, which is the date that the metropolitan planning levy commenced.

Sections 45, 46 and 47 would commence retrospectively from 30 June 2014. The Explanatory Memorandum provides the following explanation:

Sections 45, 46 and 47, which clarify the methodology for the indexation of various amounts calculated under Parts 3, 4 and 5 of Schedule 1 to the Planning and Environment Act 1987, operate retrospectively from 30 June 2014. Amendments made to those Parts by Part 5 of the Treasury Legislation and Other Acts Amendment Act 2014 have created some ambiguity as to the relevant reference periods. The amendments made by this Bill ensure the correct reference periods are used for the calculation of the CPI adjusted amounts. These amending provisions are intended to be made retrospective to 30 June 2014, which is the date that Part 5 of the Treasury Legislation and Other Acts Amendment Act 2014 commenced.

The Committee accepts that the retrospective amendments are necessary to clarify the methodology for the indexation of various statutory amounts that do not appear to have an adverse impact on any person.

Charter report

The State Taxation and Other Acts Amendment Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Infant Viability Bill 2015

The Bill was introduced into the Legislative Council on 12 April 2016 by Dr Rachel Carling-Jenkins MLC, Member for Western Metropolitan. The Committee considered the Bill on 2 May 2016 and made the following comments in Alert Digest No. 6 of 2016 tabled in the Parliament on 3 May 2016.

Committee comments

Charter report

Statement of Compatibility – Clauses requiring support services for pregnant women and requiring medical practitioners to take reasonable steps to preserve the life of a child born alive after 24 weeks’ gestation – Whether ‘law applicable to abortion or child destruction’

Summary: The Committee will write to the Member seeking further information as to whether or not Part 2 of the Bill is ‘applicable to abortion or child destruction’ and, if not, whether and how it is compatible with human rights.

The Committee notes that the Bill contains two substantive Parts:

- Part 2, titled ‘Infant viability’, which consists of clauses whose purpose is ‘to require medical practitioners and certain other registered health practitioners to refer pregnant women to appropriate support services in certain circumstances’ and ‘to require registered medical practitioners to take reasonable steps to preserve the life of a child born alive after 24 weeks’ gestation but before full term’; and

- Part 3, titled ‘Amendment of other acts’, which consists of clauses amending the Abortion Law Reform Act 2008 to limit the operation of that Act to abortions at less than 24 weeks and the Crimes Act 1958 to prohibit late-term abortions’.

The Committee observes that the Member who introduced the Bill tabled the following statement:

In accordance with section 28 of the Charter of Human Rights and Responsibilities Act 2006 (the charter), a statement of compatibility is not required. The effect of section 48 is that none of the provisions of the charter affect the bill.

The Committee notes that Charter s. 28 states:

1. A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.

2. A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

3. A statement of compatibility must state—

   a. whether, in the member’s opinion, the Bill is compatible with human rights and, if so, how it is compatible; and

   b. if, in the member’s opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
Scrutiny of Acts and Regulations Committee

(4) A statement of compatibility made under this section is not binding on any court or tribunal.

Charter s. 48 states:

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

The Committee observes that, although Part 3 of the Bill is clearly ‘applicable to abortion or child destruction’, Part 2 of the Bill may not be. Part 2 regulates the provision of medical services to pregnant women, to preborn children and to certain newborn infants, whether or not those services are associated with an abortion. Accordingly, Charter s. 28’s requirement for a statement of compatibility may apply to Part 2 of the Bill.¹

The Committee notes that, by regulating medical care, Part 2 may engage the Charter’s rights to life, medical treatment without consent and privacy.¹ As well, the clauses may engage the Charter’s right to equal protection of the law without discrimination on the basis of pregnancy (as clause 4’s obligation to provide holistic care to a distressed patient applies only if the patient is pregnant³) and on the basis of age (as clauses 5 and 6’s duties to protect preborn or newborn children apply only to children of 24 or more weeks’ gestation.⁴)

The Committee will write to the Member seeking further information as to whether or not Part 2 of the Bill is ‘applicable to abortion or child destruction’ and, if not, whether and how it is compatible with human rights.

Privacy – Security – Late-term abortions – Whether defence of sudden or extraordinary emergency applicable – Meaning of ‘24 or more weeks pregnant’

Summary: Clause 10 makes it an offence to ‘intentionally caus[e] the termination of the pregnancy of a woman who is 24 or more weeks pregnant’. The compatibility of clause 10 with the Charter’s rights to privacy and security may depend on whether or not an accessible, effective, safe and fair procedure or standard is available to determine if a late-term abortion is permitted for the purpose of saving the pregnant woman’s life. The Committee will write to the Member seeking further information.

Note: Section 17(a)(viii) of the Parliamentary Committees Act 2003 permits the Committee to report on whether or not any Bill introduced into Parliament directly or indirectly is incompatible with the human rights set out in the Charter, regardless of whether or not the Bill is a law applicable to abortion or child destruction.

The Committee notes that clause 10, inserting a new section 65A into the Crimes Act 1958, makes it an offence to perform a late-term abortion, defined to mean ‘intentionally causing the termination of the pregnancy of a woman who is 24 or more weeks pregnant’. A woman who consents to or assists in a late-term abortion on herself commits no offence, but anyone else may be liable to up to 5 years imprisonment.

¹ The Committee notes that Part 2 of the Bill, if enacted, may also be subject to the Charter’s other operative provisions, such as Charter s. 32’s requirement that statutory provisions be interpreted so far as is possible consistently with their purpose in a way that is compatible with human rights.
² Charter ss. 9, 10(c) and 13(a).
³ Charter s. 8(3) read with Charter s. 3’s definition of ‘discrimination’ and s. 6(i) of the Equal Opportunity Act 2010.
⁴ Charter s. 8(3) read with Charter s. 3’s definition of ‘discrimination’ and s. 6(a) of the Equal Opportunity Act 2010. The Committee observes that the argument depends on whether ‘age’ in s. 6(a) of the Equal Opportunity Act 2010 includes age since conception (rather than only age since birth) and also, in the case of clause 5, whether ‘human being’ in Charter s. 3 (read with Charter s. 6(1)) includes preborn children: see the discussion in Scrutiny of Acts and Regulations Committee, Alert Digest No 11 of 2008 (reporting on the Abortion Law Reform Bill 2008), p. 5.
The Committee observes that:

- the Supreme Court of Canada, applying that nation’s constitutional right to security of the person, has held that Parliament may limit abortions in order to balance the interests of pregnant women against foetal interests, with the primacy given to the women’s life but with progressively greater conditions permitted at later stages of pregnancy.” In 1988, a majority gave various reasons for invalidating a law prohibiting all abortions unless they are approved by a ‘therapeutic committee’: that it did not establish ‘either a standard or a procedure whereby any [foetal] interests might prevail over those of the woman in a fair and non-arbitrary fashion’vii, that its ‘practical effect is to undermine the health of the womanviii or that it gave primacy to foetal interests at early stages of pregnancy.viii

- the United States Supreme Court, applying the implied right to privacy in that nation’s Bill of Rights, has held that a law may ‘restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health’.vii In 2007, the Court upheld a law prohibiting a particular form of abortion used in late-term pregnancies (‘partial‐birth abortion’), noting medical uncertainty about the necessity of the procedure, the availability of alternatives and an express exception where the abortion ‘is necessary to save the life of a mother’.vii

- the European Court of Human Rights, applying the right to privacy in the Council of Europe’s rights convention, has held that a ‘woman’s right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child’.vii In 2010, the Court held that Ireland’s prohibition on local abortions for health reasons was compatible with the right to privacy, given that women in Ireland had the option of seeking an abortion in another country.viii However, the Court also held that Irish abortion law, although it permitted abortions to protect the mother’s life, was incompatible with the right to privacy because that permission did not provide ‘an accessible and effective procedure’ to allow a doctor to determine whether an abortion was permitted under that regime.ix

In short, the compatibility of clause 10 with the Charter’s rights to privacy and security may depend on whether or not an accessible, effective, safe and fair procedure or standard is available to determine if a late-term abortion is permitted for the purpose of saving the pregnant woman’s life.xi

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vi R v Morgentaler [1988] 1 SCR 30, 76 (Dickson CJ & Lamer J)
vii R v Morgentaler [1988] 1 SCR 30, 125 (Beetz & Estey JJ)
viii R v Morgentaler [1988] 1 SCR 30, 183 (Wilson J)
xv Gonzales v Carhart, 550 U.S. 124 (2007). See 18 U.S. Code § 1531(a): “Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial‐birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial‐birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life‐endangering physical condition caused by or arising from the pregnancy itself.”
xv Charter ss. 13(a) & 21(1). The Committee observes that the Explanatory Memorandum for the Charter Bill stated that Charter s. 21(1) ‘is intended to operate in a different manner to article 7 of the Canadian Charter of Rights and Freedoms which guarantees the right to “life, liberty and security of the person” in that the Victorian provision is not intended to extend to such matters as a right to bodily integrity, personal autonomy or a right to access medical procedures.’ However, Charter s. 32(2) provides that: “International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.’
The Committee notes that new section 65A does not provide any express exceptions to protect the mother’s life. By contrast, Victoria’s pre-2008 abortion law was subject to a judicial interpretation that established when such abortions were lawful,\textsuperscript{\textit{xv}} while the \textit{Abortion Law Reform Act 2008} currently provides that late-term abortions are lawful when two doctors reasonably believe that the abortion is appropriate in all the circumstances.\textsuperscript{\textit{xvi}} While existing s. 322R of the \textit{Crimes Act 1958} provides that ‘A person is not guilty of an offence in respect of conduct that is carried out in circumstances of sudden or extraordinary emergency’, the Committee observes that a question of statutory interpretation may arise as to whether or not this defence applies to new section 65A.\textsuperscript{\textit{xvii}}

The Committee also notes that new section 65A does not define the term ‘24 or more weeks pregnant’. Current Victorian practice is to measure the time of pregnancy from the first day of the woman’s last period; however, conception typically occurs two weeks later and implantation in the uterus a week after that.\textsuperscript{\textit{xviii}} The Committee observes that, while this issue can be managed under the existing law by obtaining two doctors’ opinions as to the appropriateness of the abortion in the case of uncertainty as to how to measure the length of pregnancy, this solution may not be available under new section 65A’s complete prohibition on late-term abortions.

The Committee will write to the Member seeking further information as to whether or not a late-term abortion will be lawful in Victoria if carried out in circumstances of sudden or extraordinary emergency under s. 322R of the \textit{Crimes Act 1958}; and as to the meaning of ‘24 or more weeks pregnant’ in new section 65A.

\textsuperscript{\textit{xv}} \textit{R v Davidson} [1979] VR 667, interpreting the word ‘unlawfully’ in the then s65 of the \textit{Crimes Act 1958}.

\textsuperscript{\textit{xvi}} \textit{Abortion Law Reform Act 2008}, ss. 5 & 7 (to be repealed by clauses 8 and 9.) These provisions were the subject of correspondence between the Committee and the Minister, published in \textit{Scrutiny of Acts and Regulations} Committee, \textit{Alert Digest No 13 of 2008} (reporting on the Abortion Law Reform Bill 2008), pp. 30-31.

\textsuperscript{\textit{xvii}} Compare \textit{Quayle v R} [2005] EWCA Crim 1415, holding that the common law defence of necessity does not apply to the English offences of cultivating, importing or possessing cannabis.

23 May 2016

Hon Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE
Victoria 3002

Dear Ms Blandthorn,

I am writing in relation to your request for advice on aspects of the Infant Viability Bill 2015.

The Scrutiny of Acts and Regulations Committee (Committee) raises an issue regarding the requirement of a Statement of Compatibility for the bill, in relation to Part 2. The clauses contained in Part 2, relate to holistic care for women and neonatal care for premature infants. These clauses relate directly to the intent of the bill – which is to provide the care and support required in order to prevent the perceived need for the late term abortion of preborn children, ie, to promote infant viability. I therefore remain of the opinion that, as for the Abortion Law Reform Act 2008, this bill does not require a Statement of Compatibility.

The Committee raises the issue of Clause 10, and questions the inclusion/exclusion of the availability of a safe and fair procedure for the purpose of saving the life of the mother. I note with disappointment that the committee has relied on medically out-dated information, such as the Canadian case of 1988. Since 1988, indeed even since 2008, medical advances are such that we now do not need to choose between the life of the child and the life of the mother. Once a preborn child reaches the age of viability in the womb (ie, 24 weeks’ gestation), there is no medical condition a mother acquires which requires the death of her preborn child. As expanded on in both the Explanatory Memorandum and the Second Reading speech, in the rare event that a mother’s life is in danger, for example, hypertensive disorders (eg. pre-eclampsia), cardiac problems (eg. heart failure), or haemorrhage (eg. placenta praevia), then a registered medical practitioner can perform a premature delivery of a live child. There is no need to intentionally end the life of the child.
(ie, perform a late term abortion). There is a safe and fair procedure – a live birth delivery – which can be used to save the life of the mother.

The Committee raises the issue of the definition of ‘24 weeks or more gestation’: The meaning of 24 weeks gestation is a medical determination, which is exactly the same as the medical determination currently contained within the current Abortion Law Reform Act 2008.

If you require any further information, please do not hesitate to contact me.

Kind Regards,

Dr Rachel Carling-Jenkins MCL
Member for Western Metropolitan
Justice legislation (Evidence and Other Acts) Amendment Bill 2016

The Bill was introduced into the Legislative Assembly on 12 April 2016 by Hon Robin Scott MLA, Minister for Police. The Committee considered the Bill on 2 May 2016 and made the following comments in Alert Digest No. 6 of 2016 tabled in the Parliament on 3 May 2016.

Committee comments

Charter report

Right to be tried in person – Accused in custody during proceedings in the Magistrates’ Court – Presumption of attendance via audiovisual link at guilty pleas and sentencing hearings

Summary: The effect of clauses 3 and 4(2)(b) is to reverse an existing presumption that an accused in custody must be brought physically before a Magistrates’ Court when pleading guilty and at a sentencing hearing. The Committee will write to the Attorney-General seeking further information.

The Committee notes that clause 4(2)(b), amending existing s. 42K of the Evidence (Miscellaneous Provisions) Act 1958, exempts Magistrates’ Courts from that section’s requirement that, unless a court orders otherwise, an accused in custody ‘is required to appear, or be brought, physically before the court’:

(a) on a committal proceeding; or
(b) on an inquiry into his or her fitness to stand trial; or
(c) on the trial (apart from the arraignment of the accused) or hearing of the charge; or
(d) on a sentencing hearing

In its place, clause 3, inserting a new section 42JA(2), requires that an accused in custody appear, or be brought, physically before the court’:

(a) on an inquiry in the accused’s fitness to plead the charge; or
(b) on the hearing of the charge if the accused is pleading not guilty; or
(c) on a committal hearing.

The Committee observes that the effect of clauses 3 and 4(2)(b) is to remove the existing presumption that an accused in custody must be brought physically before a Magistrates’ Court when pleading guilty and at sentencing. Further, clause 3 and existing s. 42L provide that an accused in custody must appear at such hearings ‘by audio visual link’ unless the Court is satisfied that a physical appearance is required in the interests of justice or it is not reasonably practicable for the accused to appear before the Court by audio visual link.

The Committee considers that clauses 3 and 4(2)(b) may engage the Charter right of a criminal defendant ‘to be tried in person and to defend himself or herself personally’. The Statement of Compatibility remarks:

The presumption of appearing via audiovisual link will not apply for the following types of Magistrates Court hearings: appearance before a bail justice after arrest, the appearance before a magistrate after arrest, a fitness to plead inquiry, a summary hearing of a plea of not guilty, or a committal hearing. For these hearings, when an

xix Charter s. 25(2)(d).
accused is challenging the allegations against them or challenging their mental capacity to be tried, a physical attendance at court will be required...

In any event, an accused still participates in their hearing 'in person' even if they attend by audiovisual link. The accused is not being tried in abestintia. Due to the requirements of section 42R of the Evidence (Miscellaneous Provision) Act 1958 the audiovisual technology must be of such a standard that the accused can ‘see and hear the person appearing before the court or giving the evidence or making the submission’. This requirement will ensure that the audiovisual court hearing enables the accused to be fairly tried in person albeit by audiovisual link.

The Committee notes that:

• a hearing where the accused pleads guilty requires a court to assess whether the accused is pleading guilty under compulsion or a misunderstanding of the charges against him or her. The Committee observes that the Supreme Court of Illinois has held that requiring an accused to plead guilty by video link is incompatible with that nation’s constitutional right to confrontation, remarking that:xx

A guilty plea is a decisive moment for the defendant in the criminal process. The plea obviates the prosecution’s burden of proof. It supplies both evidence and verdict, ending controversy. It carries the same finality as a jury verdict. The atmosphere of the courtroom can play a critical, albeit intangible, role in the proceedings, including a hearing on a plea. A courtroom ‘is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to the integrity of the trial process.

In a televised appearance, crucial aspects of a defendant’s physical presence may be lost or misinterpreted, such as the participant’s demeanor, facial expressions and vocal inflections, the ability for immediate and unmediated contact with counsel, and the solemnity of a court proceeding. In a guilty plea hearing, as in a trial, these components may be lost if a defendant’s appearance is through closed circuit television.

• a sentencing hearing requires a court to assess the accused in various ways and may also involve the accused challenging factual allegations made against him or her that are relevant to the sentence. The Committee observes that existing s. 87 of the Criminal Procedure Act 2009 provides that ‘If the Magistrates’ Court proceeds to hear and determine a charge in the absence of the accused and finds the accused guilty, the court must not make a custodial order’, a provision explained when it was introduced as necessary to avoid ‘an inherent unfairness to the defendant’.xxi However, the Bill does not expressly state whether or not this section applies where an accused is physically absent from the court but attends via audiovisual link.

The Committee will write to the Minister seeking further information as to whether or not a person who attends a sentencing hearing via audiovisual link can be subject to a custodial order.

Minister’s response

The Committee thanks the Minister for the attached response.

xxi Hon R Hulls MP, Second Reading Speech to the Courts Legislation (Jurisdiction) Bill 2006, Legislative Assembly, 7 June 2006.
20 MAY 2016

Ms Lizzie Blandthorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament of Victoria

By email to nathan.bunt@parliament.vic.gov.au

Dear Ms Blandthorn

Thank you for your letter to the Hon Robin Scott MP regarding the Justice Legislation (Evidence and Other Acts) Amendment Bill 2016. As previously advised by the Department of Justice and Regulation, this Bill falls within my portfolio, and therefore I am pleased to provide a response to your letter of behalf of the Government.

This Bill is an important reform to the justice system to increase the use of audio-visual technology in the courts. As you point out, section 87 of the Criminal Procedure Act 2009 provides that if the Magistrates’ Court proceeds to hear and determine a charge in the absence of the accused and finds the accused guilty, the court must not make a custodial order under Division 2 of Part 3 of the Sentencing Act 1991. This is in contrast to the County and Supreme Courts, which can sentence an accused to a custodial order in the absence of the accused.

Section 3 of the Criminal Procedure Act 2009 currently provides that a person can attend court either by being physically present or by audio-visual link, where authorised to do so under Division 2 or 3 of Part IIA of the Evidence (Miscellaneous Provisions) Act 1958. This means that a person appearing via audio-visual link is considered to be attending court and not absent for the purposes of section 87.

Accordingly, under the current legislation, accused people are regularly sentenced to a custodial order when appearing via audio-visual link. Data supplied by the Melbourne Magistrates’ Court indicates that for the month of February 2016 alone, 20 accused people appeared by audio-visual link whilst in custody and were sentenced to a custodial order.

The Justice Legislation (Evidence and Other Acts) Amendment Bill 2016 creates a presumption for most hearings in the Magistrates’ Court, where an adult accused is remanded in custody, the hearing will proceed via audiovisual link, unless a magistrate orders otherwise.
Clause 9 of the Bill will amend the definition of 'attend' in the *Criminal Procedure Act 2009* to reflect this presumption by including an appearance in court via audio-visual link, where the appearance is **required** under Division 2 or 3 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*.

Thank you for taking the time to write to me about this important issue.

Yours sincerely

THE HON MARTIN PAKULA MP
Attorney-General
Local Government (Greater Geelong City Council) Act 2016

The Bill was introduced into the Legislative Assembly on 12 April 2016 by Hon Natalie Hutchins MLA, Minister for Local Government. The Committee considered the Bill on 2 May 2016 and made the following comments in Alert Digest No. 6 of 2016 tabled in the Parliament on 3 May 2016.

Committee comments

Charter report

The Local Government (Greater Geelong City Council) Act 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

Charter requires that the Committee report on every bill – Consequences of non-compliance.

The Committee notes that it did not report on the compatibility of the Local Government (Greater Geelong City Council) Bill 2016 while it was a bill, although it is now exercising its power to report on the bill now that it has become an Act.xxiii

The Committee observes that Charter s. 30 provides that the Committee ‘must consider any bill’ and ‘must report as to whether the bill is incompatible with human rights.’ The Committee is concerned that it is mandatory for the Committee to report on a bill while it is a bill. In contrast to other procedural provisions of the Charter, xxiv there is no savings provision for the validity of a law that was passed without compliance with Charter s. 30. Given the existence of specific savings provisions in relation to other aspects of non-compliance with the Charter’s requirements for the introduction of legislation into the Victorian Parliament, non-compliance with s. 30 of the Charter may affect the validity of the Local Government (Greater Geelong City Council) Act 2016.

In accordance with past practice, the Committee will write to the Attorney-General seeking further information as follows:

1. Has Charter s. 30 been complied with in relation to the Local Government (Greater Geelong City Council) Bill 2016?

2. If not, what are the consequences of non-compliance?

3. Should Charter s. 30 be amended to clarify its operation in light of the Committee’s power to report on an Act under s. 17(c)(ii) of the Parliamentary Committees Act 2003?

4. Should Charter s. 30 be amended to clarify the consequences of any non-compliance with Charter s. 30?

Pending the Attorney-General’s response, the Committee draws attention to Charter s. 30.

xxiii Parliamentary Committees Act 2003, s. 17(c)(ii)
xiv E.g. Charter ss. 29, 31(9) & 36(5)
Minister’s response

The Committee thanks the Minister for the attached response.

23 May 2016
Committee Room
Dear Ms Blandthorn,

Thank you for your letter of 3 May 2016 regarding the consideration of the Local Government (Greater Geelong City Council) Act 2016 by the Scrutiny of Acts and Regulations Committee (the Committee), and related queries about section 30 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

As you are aware, section 30 of the Charter provides that the Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights. Section 17(a)(viii) of the Parliamentary Committees Act 2003 is a related provision that gives the Committee the function to consider any Bill introduced into the Legislative Council or Legislative Assembly and report to the Parliament as to whether the Bill directly or indirectly is incompatible with the human rights in the Charter. Section 17(c)(ii) of that Act gives the Committee the power to consider and report retrospectively on an Act that was not considered when it was a Bill, within 10 sitting days after the Act receives Royal Assent.

The Charter report for the Local Government (Greater Geelong City Council) Act notes that the Committee did not report on the compatibility of that Act while it was a Bill, and exercised its power under the Parliamentary Committees Act to report on the Bill now that it is an Act. The Bill received Royal Assent on 15 April 2016 and commenced operation on 16 April 2016. The Committee reported on the Act on 3 May 2016, which is within 10 sitting days of 15 April.

I acknowledge the importance of the Committee having sufficient time to consider and report on Bills, but note that particular Bills require the urgent consideration of the Parliament. In this instance, the urgency of the Bill meant that the Committee was unable to report on it before it passed and commenced operation.

I respond to each of the Committee’s queries below.

1. Has Charter section 30 been complied with in relation to the Local Government (Greater Geelong City Council) Bill 2016?

Section 30 of the Charter requires the Committee to consider and report on any Bill introduced into Parliament, without specifying a timeframe within which this must be done. Regardless of whether the section only allows for consideration and report while a Bill is before the Parliament, section 17 of the Parliamentary Committees Act clearly allows the Committee to consider and report on the compatibility of a Bill with the Charter within the timeframes specified by section 17(c)(ii) of that Act.
2. If not, what are the consequences of non-compliance?

Even if retrospective consideration of a Bill is not permitted under section 30, the Charter does not specify any consequence of non-compliance. There is no effect on the validity or operation of an Act by reason of the Committee not considering and reporting on that Act while it was still a Bill; nor is there any consequence for the Committee and its functions.

3. Should Charter section 30 be amended to clarify its operation in light of the Committee’s power to report on an Act under section 17(c)(ii) of the Parliamentary Committees Act 2003?

Last year, the Government appointed Mr Michael Brett Young to lead an independent review of the Charter. The report of that review was tabled in Parliament on 17 September 2015. It made a number of recommendations relevant to the Committee’s functions. The Government is considering the recommendations and will respond in due course.

Although the Charter review did not specifically recommend amending section 30 to clarify its operation in this way, it made a number of recommendations for greater consistency between relevant provisions of the Charter and the Parliamentary Committees Act.

I will take this question from the Committee into account when considering the Government’s response to the review’s recommendations and any possible amendments to the Charter.

4. Should Charter section 30 be amended to clarify the consequences of any non-compliance with Charter section 30?

The Charter review recommended that the Charter should be amended to provide explicitly that the failure of the Committee to report on any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision (recommendation 39). The Committee made a similar recommendation in its 2011 review of the Charter (recommendation 14). As noted, the Government is currently considering the review’s recommendations.

I thank the Committee for raising these important matters regarding the Charter’s operation.

Yours sincerely,

THE HON MARTIN PAKULA MP
Attorney-General

cc: Minister for Local Government, the Hon Natalie Hutchins MP
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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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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

(vi) inappropriately delegates legislative power

Victorian Funds Management Corporation Amendment Bill 2016 6

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

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