58th Parliament
Alert Digest

No. 7 of 2018

Tuesday, 22 May 2018
on the following Bills

Electoral Legislation Amendment Bill 2018

Justice Legislation Amendment (Access to Justice) Bill 2018

Justice Legislation Amendment (Terrorism) Bill 2018

National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018

Serious Offenders Bill 2018

State Taxation Acts Amendment Bill 2018
The functions of the Scrutiny of Acts and Regulations Committee are –

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

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

Alert Digest No. 7 of 2018

<table>
<thead>
<tr>
<th>Bill</th>
<th>Page Nos.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electoral Legislation Amendment Bill 2018</td>
<td>1</td>
</tr>
<tr>
<td>Justice Legislation Amendment (Terrorism) Bill 2018</td>
<td>7</td>
</tr>
<tr>
<td>National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018</td>
<td>14</td>
</tr>
<tr>
<td>Serious Offenders Bill 2018</td>
<td>22</td>
</tr>
<tr>
<td>State Taxation Acts Amendment Bill 2018</td>
<td>34</td>
</tr>
</tbody>
</table>

Appendices

<table>
<thead>
<tr>
<th>Appendix</th>
<th>Page Nos.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 – Ministerial responses to Committee correspondence</td>
<td>37</td>
</tr>
<tr>
<td>Justice Legislation Amendment (Access to Justice) Bill 2018</td>
<td></td>
</tr>
<tr>
<td>2 – Index of Bills in 2018</td>
<td>41</td>
</tr>
<tr>
<td>3 – Committee Comments classified by Terms of Reference</td>
<td>43</td>
</tr>
<tr>
<td>4 – Current Ministerial Correspondence</td>
<td>45</td>
</tr>
</tbody>
</table>
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
Electoral Legislation Amendment Bill 2018

Bill Information

Minister
Hon Martin Pakula MP

Portfolio
Special Minister of State

Introduction Date
8 May 2018

Second Reading Date
10 May 2018

Bill Summary

The Bill would:

- amend the Electoral Act 2002 to streamline early voting procedures and processing. This would include:
  - establishing a Victorian political donations disclosure and reporting scheme
  - providing that the early voting period for a by-election is 12 days
  - providing that early voting commences on the Monday following final nomination day
  - removing the requirement to provide a reason for voting early
  - providing for online postal vote applications and simplifying their witnessing requirements
  - allowing postal votes received after election day to be counted based on the dates they are witnessed and received
  - providing the Speaker of the Legislative Assembly with discretion to issue writs for by-elections close to an election

- amend the Public Administration Act 2004 to provide for the provision of Parliamentary advisers.

Type of Bill

☒ Government Bill
☐ Private Members Bill

CONTENT ISSUES

☐ NONE
☐ Other:
☒ Trespasses unduly on Rights or Freedoms

Details

_Trespasses unduly on rights or freedoms – Implied freedom of political communication_  

New section 217D (clause 55)

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.
As discussed in the Charter Report below, new section 217D would set a cap of $4000 on the aggregated amount of political donations that a political party may accept from a donor, excluding small donations. It may therefore abrogate the implied freedom of political communication under the Australian Constitution.

As the Statement of Compatibility notes, the section limits (i.e., effectively burdens) freedom of expression. However, it is unclear whether or not the section would satisfy the proportionality test articulated by the High Court in McCloy & Others v New South Wales & Another.¹

The Committee will write to the Special Minister of State to request further information as to whether section 217D is consistent with the implied freedom of political communication under the Constitution.

Amended section 158 and new section 158A (clauses 35 and 36)

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.

Clause 35 would engage the implied right to freedom of political communication (as well as the right to freedom of expression under section 15(2) of the Charter) by amending section 158 to extend the prohibition on all forms of soliciting and canvassing for votes from within 3 metres of the entrance to a voting centre to within 6 metres.

Clause 36 of the Bill would extend the prohibition on the display of political signage to within 100 metres of any entrance to a voting centre. However, private residences within 100 metres of a voting centre would be excluded from the prohibition.

The Statement of Compatibility provides:

To the extent that these clauses limit the freedom of expression by making it an offence for persons to canvass for votes within close proximity of voting centres, the limitation is reasonable and proportionate to the objective of protecting electors' right to cast their votes in a neutral environment, free from political pressure or inducement. This, in turn, safeguards electors' right to freedom of political thought in section 14 of the Charter.

By extending the area near voting centres in which these prohibitions operate, these clauses safeguard electors' right to freedom of political thought by ensuring that they may vote in a neutral environment, free from political pressure or inducement.

The Committee will write to the Special Minister of State to request further information as to whether amended section 158 and new section 158A are consistent with the implied freedom of political communication under the Constitution.

### Recommendation

- Refer to Parliament for consideration
- Write to Minister for clarification
- No further action required

1  McCoy & Others v New South Wales & Another [2015] HCA 34. See also Brown v Tasmania [2017] HCA 43.
Freedom of expression – Political Communication – Funding caps on donations to political parties

Summary: The new section 217D being introduced by the Bill imposes a cap of $4000 on the aggregated amount of political donations that a political party may accept, excluding small donations. The Committee will refer to Parliament the question of whether this is a reasonable limit on the right to freedom of expression, in particular freedom of political communication.

Relevant provisions

217D General cap

(1) A political donation made to, or for the benefit of, any of the following—
(a) a registered political party;
(b) a candidate at an election;
(c) a group;
(d) an elected member;
(e) an associated entity;
(f) a third party campaigner;
(g) a nominated entity of a registered political party—
must not exceed the general cap for the election period.

(2) Except as provided in this section, it is unlawful for a registered political party, candidate, group, elected member, nominated entity, associated entity or third party campaigner to accept a political donation if—
(a) the political donation; or
(b) the political donation when aggregated in accordance with section 217E—
would exceed the general cap.

Charter analysis

Section 15(2) of the Charter provides that:

Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds...

A cap on political donations operates in a similar, although not the same, manner as a political expenditure cap. The United States Supreme Court has struck down a number of restrictions on campaign expenditures as violations of the First Amendment. For example Arizona Free Enterprise Club’s Freedom Club PAC v Bennett 564 US_(2011).
freedom of expression in the European Convention on Human Rights. Expenditure caps are common in other jurisdictions such as Canada, France and Germany. They are justified on the basis that an expenditure cap ensures that candidates that have a monetary advantage (not necessarily because they have voter support but because they are personally well off or have wealthy benefactors) will not have an unfair advantage in regard to other candidates with lesser financial resources. A cap on political donations operates differently in that it does not level the playing field in terms of expenditure per se but rather limits the amount of donations.

New South Wales introduced a cap on political donations that was challenged in the High Court in *McCloy & Others v New South Wales & Another*. The High Court held that the NSW donations cap did not impermissibly burden the implied freedom of political communication in the Commonwealth Constitution because it was suitable, necessary and adequate in its balance. In doing so the plurality of French CJ, Kiefel, Bell and Keane JJ confirmed the following propositions to be applied when determining whether a limit on political communication impermissibly burdens the right:

A. The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors." It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

B. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in Lange as modified in Coleman v Power:

1. Does the law effectively burden the freedom in its terms, operation or effect? If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as "compatibility testing". The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government. If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are

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4 *McCloy & Others v New South Wales & Another* [2015] HCA 34.

5 *McCloy & Others v New South Wales & Another* [2015] HCA 34, [2].
the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable — as having a rational connection to the purpose of the provision;

necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be “no” and the measure will exceed the implied limitation on legislative power.

The proportionality assessment outlined by the High Court with respect to the limits on the constitutional freedom of political communication is analogous to the assessment that is required by the reasonable limits provision in section 7(2) of the Charter.

The Statement of Compatibility notes that:

The cap engages the right to freedom of expression by:

limiting the funds available to a candidate, elected member, group, registered political party, nominated entity, associated entity, or third party campaigner to engage in political communication; and

limiting a person’s ability to donate to engage in political communication.

To the extent this clause limits freedom of expression, it is reasonable and demonstrably justified to reduce the risk and public perception of corruption and undue influence in the political process, and is necessary to ensure equal participation in the electoral process.

The brief discussion in the Statement of Compatibility does not canvas whether there are less restrictive means reasonably available to achieve the purposes of the donations cap, or (in the High Court’s words) whether the cap is “suitable” and “adequate in its balance”. Section 32(2) of the Charter allows the use of the High Court’s jurisprudence on the equivalent common law right to the right to freedom of expression in the Charter. It is therefore unclear whether the donations cap is a reasonable limit on freedom of expression, given the importance of freedom of political communication “in a free and democratic society based on human dignity, equality and freedom”.⁶

Relevant comparisons

The Election Funding, Expenditure and Disclosures Act 1981 (NSW) imposes a donations cap of $2,700 per candidate and $6,100 per party or group. The NSW legislation also bans donations from property developers and from tobacco, alcohol and gambling businesses. The High Court held that this legislation was suitable, necessary and adequate in its balance.⁷

In other Australian states there are no donation caps.

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⁶ Section 7(2) Charter.
⁷ McCloy & Others v New South Wales & Another [2015] HCA 34.
Conclusion

The Committee will write to the Special Minister for State to ask whether these limits on freedom of expression, and particularly on freedom of political communication, are reasonable limits under section 7(2) of the Charter in light of the High Court’s jurisprudence in relation to the implied freedom of political communication.

<table>
<thead>
<tr>
<th>Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Refer to Parliament for consideration</td>
</tr>
</tbody>
</table>
Justice Legislation Amendment (Terrorism) Bill 2018

Bill Information

<table>
<thead>
<tr>
<th>Minister</th>
<th>Hon Martin Pakula MP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portfolio</td>
<td>Attorney-General</td>
</tr>
<tr>
<td>Introduction Date</td>
<td>9 May 2018</td>
</tr>
<tr>
<td>Second Reading Date</td>
<td>10 May 2018</td>
</tr>
</tbody>
</table>

Bill Summary

The Bill would amend the *Terrorism (Community Protection) Act 2003* and related Acts to:

- provide new powers and obligations for police relating to the detention of persons for the prevention of terrorist acts under a police detention decision (PDD)
- amend the provisions for granting a preventative detention order (PDO) and authorising the use of special police powers
- allow for questioning and gathering of identification material of detainees who are subject to a PDO or detained under a PDD
- extend the PDO scheme to children aged 14 and 15
- strengthen the protection of counter-terrorism intelligence
- amend certain aspects of Victoria's bail and parole schemes in relation to relevant offenders
- extend and expand special police powers in relation to events that may be the subject of a terrorist act (including the extension of such powers to Protective Services Officers (PSOs))
- amend section 462A of the *Crimes Act 1958* to provide an instructive example of the ability of an officer to use force in certain circumstances.

The Explanatory Memorandum to the Bill states:

Following the siege and hostage incident in Brighton on 18 June 2017, the Government appointed the Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers (the Expert Panel) to review current legislation relating to terrorism and violent extremism. The Expert Panel produced 2 reports provided to the Government in August and September 2017.

The Bill implements the legislative aspects of all 16 recommendations from Report 1 and recommendations 18 to 21 and 24 from Report 2.

The Bill also implements 4 outstanding recommendations from the 2014 Victorian Review of Counter-Terrorism Legislation.

Submissions

The Committee has received and considered submissions from the Victorian Equal Opportunity and Human Rights Commission and the Commission for Children and Young People.


Type of Bill

- × Government Bill
-  Private Members Bill
Procedural fairness – The right to a fair hearing

New Part 2AA would restrict the contact that a person in detention may have with another person, including their lawyer. New section 13AZX provides that communications with another person may only take place if they can be 'effectively monitored” by a police officer. Under section 13AZY, communications with a person’s lawyer may also be monitored but only if the nominated senior police officer is satisfied that it is reasonably necessary.

The Statement of Compatibility provides:

The restrictions on confidential communication between a detainee and other people, including his or her lawyer, most likely engage the fair hearing right. Although a person detained under preventative police detention is not charged with a criminal offence, the person may later be charged or become the subject of an application for a PDO under Pt 2A of the Act. In my view, the fair hearing right is therefore engaged.

The confidentiality of communications between a person and their legal representative is an essential aspect of the right to fair hearing. The restrictions on confidential communication between a detainee and other people including his or her lawyer limit the fair hearing right in section 24(1).

In my opinion, the limitation is reasonable and demonstrably justified. As I have already noted, the purpose of these provisions is to prevent a terrorist act and to preserve evidence of a terrorist act. Monitoring communications ensures that contact between a person detained and his or her family members and other persons does not interfere with gathering information about a terrorist act, lead to the destruction of evidence, allow for another person to abscond or cause serious harm to a person. The Bill prohibits the use of information obtained from monitoring contact between a detainee and his or her lawyer in any proceeding in a court or tribunal. In addition, it prohibits the derivative use of any information that may be obtained during monitoring. The restriction imposed by the Bill is in my opinion proportionate.

The Committee is satisfied that the potential limitation of the fair hearing right is necessary and justified in the circumstances.

Powers of detention, entry, search and seizure without a warrant

Clause 51 of the Bill would include Protective Services Officers (PSOs) in section 21K of the Act so that they may exercise special police powers. In certain circumstances in which there is a risk of terrorist related acts, and subject to certain criteria, PSOs would be able to request proof of a person’s identity (and detain the person for as long as is necessary for the purpose of doing so); search a person or a vehicle without a warrant; move a vehicle; enter and search premises; place a cordon around a target area; seize and detain things; and use reasonable force for the purpose of exercising such powers.

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8 Schedule 1 of the Act clarifies that a person may only be strip searched in limited circumstances. This is where the person is suspected of being the target of the authorisation, and the strip search is necessary to...
The Statement of Compatibility provides:

PSOs are already entrusted to protect places of significance, public office holders (including the Premier), and to maintain the safety of the Victorian community more generally. It is appropriate that PSOs are further entrusted with special police powers to supplement the role of police officers where authorisation for special police powers has been given pursuant to the strict requirements contained in Division 2, Part 3A of the Act.

The circumstances in which the Chief Commissioner or Governor in Council may issue an authorisation or interim authorisation for the exercise of special police powers are strictly confined and subject to stringent requirements.

In my view, in circumstances where PSOs form a class of person with similar responsibilities and training to that of police officers, and given the extraordinary nature of the events that would precipitate the issuing of an interim authorisation, or authorisation, the extension of special powers to PSOs is appropriate and does not raise any additional Charter issues.

The Committee considers that the extension of special police powers to PSOs is necessary and justified in the circumstances.

**Recommendation**

- Refer to Parliament for consideration
- Write to Minister for clarification
- No further action required

**CHARTER ISSUES**

- NONE
- Other:
  - Compatibility with Human Rights
  - Operation of the Charter

**Details**

*Liberty – Children – Detention to prevent a terrorist act that, could, but is not expected to, be carried out imminently – Preventative detention of 14- and 15-year-olds*

**Summary:** The effect of clause 17(2) is to permit a court to order the detention and questioning of a 14 or 15 year-old for up to 14 days where the Court is satisfied that doing so is reasonably necessary to preserve evidence of a terrorist act in the last 28 days or to prevent a terrorist act that the child has prepared to commit and could happen in the next 14 days. The effect of clause 42 is to permit a person to be detained where that is reasonably necessary to substantially assist in preventing a terrorist act that could occur in the next 14 days, even if the act is not imminent or expected to occur in that period.

*The Committee will write to the Attorney-General seeking further information.*

**Relevant provision**

The Committee notes that existing s. 13E(1)(a) permits the Supreme Court to make a preventative detention order if the Court is satisfied on reasonable grounds that making the order is reasonably
necessary to substantially assist in preventing a terrorist act that the person will or has prepared to commit (or possesses something connected with preparation or committing.)

The Committee observes that clause 42 amends s. 13E(2) so that it states:

A terrorist act referred to in subsection (1)(a) must be capable of being carried out, and could occur, within the next 14 days.

By contrast, the existing s. 13E(2) requires that the terrorist act be imminent and expected to occur in the next 14 days. The effect of clause 42 is to permit a person to be detained where that is reasonably necessary to substantially assist in preventing a terrorist act that could occur in the next 14 days, even if the act is not imminent or expected to occur in that period.

The Committee also observes that clause 17(2), amends existing s. 13J so it now states:

(1) A preventative detention order cannot be applied for, or made, in relation to a person who is under 14 years of age.

(2) If—

(a) a person is being detained under a preventative detention order or a purported preventative detention order; and

(b) the police officer who is detaining the person is satisfied on reasonable grounds that the person is under 14 years of age—

the police officer must release the person or arrange in writing for his or her release, as soon as practicable, from detention under the order or purported order.

By contrast, existing s. 13J prohibits the preventative detention of persons under 16 years of age. The Committee observes that the effect of clause 17(2) is to permit a court to order the detention and questioning of a 14 or 15 year-old for up to 14 days where the Court is satisfied that doing so is reasonably necessary to preserve evidence of a terrorist act in the last 28 days or to prevent a terrorist act that the child has prepared to commit (or possesses a thing relating to that preparation or commission) and could happen in the next 14 days.

Charter analysis

The Statement of Compatibility remarks:

Amending the PDO framework to lower the minimum age from 16 to 14 was recommended by the Expert Panel based on evidence of the involvement of children as young as 14 years in the planning, preparation and carrying out of terrorist acts.

There are already provisions in Part 2A of the Act to take into account the special and vulnerable position of children. Section 13WA provides for a child subject to a PDO to be detained in a youth justice facility rather than a prison, section 13ZBA requires that a child not be detained together with adults, and there are special contact rules for children under section 13ZH.

The Bill will include further safeguards to protect children detained under a PDO:

• a requirement to notify the Commission for Children and Young People of any PDO made in relation to a child, in new section 13F(11);

• the addition of the Commission for Children and Young People to the persons who may make representations to the nominated senior police officer in relation to the carrying out of the PDO, in new section 13P(7)(ba);
an entitlement to contact the Commission for Children and Young People, under new section 13ZFA, supplemented by new sections 13X(2)(ga) and 13ZC(2)(c); and

• a prohibition on questioning a child unless a parent or guardian or independent person is present and has been allowed to communicate with the child before questioning commences, under new section 13ZNF; and

• the requirement for a police officer to request Victoria Legal Aid to arrange for a lawyer to be present during questioning where the child or their parent or guardian has not made arrangements for a lawyer (new section 13ZNF(3)). Where the child refuses the legal assistance of the lawyer arranged by Victoria Legal Aid, that lawyer will be a further independent person present during questioning.

In my opinion, the Bill does not limit a child’s right to be protected in his or her best interests.

The Statement of Compatibility does not address clause 42.

Committee comment

The Committee notes that, in the Statement of Compatibility for the Terrorism (Community Protection) Amendment Bill 2015, which extended the then preventative detention order scheme for a further five years, the Attorney-General remarked:

The PDO provisions affect a number of fundamental human rights. In particular, the potential for solitary confinement, the detention of young persons, and the monitoring of communications with lawyers have significant implications in relation to the right to be treated humanely while in detention, the rights of children, and the fair hearing right. In light of the above analysis, and in particular the potential limitation of the rights under sections 17(2), 22 and 24 of the charter, I consider that, while there are strong grounds for concluding that extending the operation of the PDO provisions is compatible with the charter, the bill may be partially incompatible with the charter.

In his response to the Committee’s report on that Bill, the Attorney-General noted that this was not a statement of incompatibility under Charter s. 28(3)(b).9

As set out in the Statement of Compatibility, in my view, these provisions are compatible with human rights. In the Statement, I acknowledged that others may take a different view as to compatibility, as the provisions have serious impacts on human rights and the Charter analysis is finely balanced.

The Committee observes that these remarks were made about the existing scheme, which is limited to preventing imminent terrorist acts that are expected within 14 days and to persons 16 years and over, but also lacks the additional safeguards for children referred to in the current Statement of Compatibility, set out above.

Relevant comparisons

The Committee notes that the Expert Panel recommended:10

Recommendation 22

That the power to make a preventative detention order in respect of a minor only be available to the Supreme Court if it is satisfied:

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9 Scrutiny of Acts and Regulations Committee, Alert Digest No 15 of 2015, p. 23.

that there are no other less restrictive means available to prevent an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act; and

• that the particular requirements in relation to the preventative detention of a minor, including any conditions imposed on that detention by the court, can be met.

Recommendation 23

That if the Supreme Court is satisfied that an order other than a preventative detention order would be a less restrictive means of preventing an imminent terrorist act occurring or preserving evidence of, or relating to, a recent terrorist act:

• the court be empowered to make alternative orders and impose appropriate conditions in response to an application for a preventative detention order in respect of a minor; and

• the court be required, in making such orders or imposing such conditions, to consider a range of specific matters with respect to the minor including the minor’s physical and mental health and vulnerability.

The Committee observes that the Bill does not expressly provide for either of these recommendations. The Committee notes that these recommendations may assume that the existing statute’s requirement that the terrorist act be imminent would be retained in the case of preventative detention orders for children.

The Committee also notes that, while similar laws in other Australian states and territories have minimum ages for preventative detention ranging from 14 through to 18, there is a procedural difference in the Australian Capital Territory’s statute. While Victoria’s ss. 13AG & 13J and all other state laws provide that a child must be released from detention if the police officer ‘is satisfied on reasonable grounds’ that the child is under the minimum age, the ACT law contains a further provision that:

If a person is being detained under a preventative detention order, and the police officer detaining the person suspects, or has any grounds to suspect, that the person may be a child… the police officer must immediately make reasonable inquiries about the person’s age...

There is no equivalent provision in Victoria’s statute.

Conclusion

The Committee will write to the Attorney-General seeking further information as to:

• the compatibility of clause 42, which provides for preventative detention orders to be made in relation to terrorist acts that are capable of being committed and could occur within 14 days, even if they are not imminent or expected to occur in that period; and

• whether, in the case of preventative detention orders for children:
  o expressly requiring the Supreme Court to be satisfied that there are no less restrictive means available to prevent a terrorist act and that the particular requirements of children can be met (see recommendation 22 of the Expert Panel on Terrorism and Violent Extremism and Response Powers);
  o empowering the Supreme Court to impose alternative orders or conditions for minors after considering a range of specific matters with respect to the minor’s mental and physical health (see recommendation 23 of the Expert Panel on Terrorism and Violent Extremism and Response Powers); and

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o expressly requiring a police officer who suspects, or has any grounds to suspect, that a child subject to preventative detention may be under 14 to make immediate reasonable inquiries about the child’s age (see section 11 of the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)).

are less restrictive alternatives reasonably available to meet clause 17(2)’s purpose of preserving evidence of or preventing terrorist acts.

<table>
<thead>
<tr>
<th>Recommendation</th>
</tr>
</thead>
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<td>☐ Refer to Parliament for consideration</td>
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National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018

Bill Information

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<tr>
<th>Minister</th>
<th>Hon Martin Pakula MP</th>
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<tr>
<td>Portfolio</td>
<td>Attorney-General</td>
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Introduction Date 8 May 2018

Second Reading Date 9 May 2018

Bill Summary

The Bill would refer certain matters relating to the National Redress Scheme for Institutional Child Sexual Abuse to the Commonwealth Parliament for the purposes of section 51 (xxxvii) of the Australian Constitution.

Type of Bill

☒ Government Bill
☐ Private Members Bill

CONTENT ISSUES

☐ NONE
☒ Inappropriately delegates legislative power
☐ Other:
☒ Trespasses unduly on Rights or Freedoms

Details

Natural justice – Right to a fair hearing

Subclauses 42(2)(c) to (e) of the National Bill provide that accepting an offer of redress would require the person to release and discharge relevant institutions and officials from all civil liability, damages in civil proceedings, and current and future claims, for abuse of the person that is within the scope of the Scheme. Clause 43 of the National Bill would give effect to acceptance of redress on civil liability.

The clauses would limit the right to a fair hearing because the person would be permanently prevented from commencing future court proceedings relating to the institutional child abuse they suffered. They would also be unable to make another application for redress under the Scheme, whether or not the offer is accepted.

The Statement of Compatibility provides:

Applying for, and accepting, an offer of redress is voluntary, and is subject to safeguards contained in the National Bill to ensure that survivors are able to make an informed decision in relation to their individual circumstances. An offer of redress, as per clause 39(l) of the National Bill, requires the Scheme Operator to give information about the opportunity for the person to access legal services under the Scheme for the purposes of obtaining legal advice about whether to accept the offer. Legal Support Services will be provided by the Scheme to survivors, to ensure survivors seeking access to redress are provided with quality, trauma informed advice on their legal options and at key steps in the redress process.

Clause 40(1) of the National Bill provides that the acceptance period, from the date of the offer, must be at least six months. In exceptional circumstances, clause 40(2) provides that the Scheme Operator may extend the acceptance period. This will provide sufficient time for a survivor to consider their options and obtain legal advice as to whether the offer should be
accepted, including whether they should otherwise elect to commence civil proceedings through the courts.

Division 2 of Part 4-1 provides for a process around internal review of determinations. Where the Scheme Operator has made a determination on a redress application, the person may apply to the Scheme Operator for review. The Scheme Operator must either review the original determination or cause it to be reviewed by an independent decision-maker to whom the Scheme Operator’s power is delegated and who was not involved in the making of the determination. The Scheme does not provide an external review process. The Scheme is intended to operate as an alternative to the adversarial court process, and I also consider that there are important public policy reasons for ensuring that finality is provided with respect to decisions made under the Scheme.

The Committee is satisfied that the limitation of the right to a fair hearing is reasonable and justified in the circumstances.

Right to be presumed innocent – Legal burden to prove defence

Clause 171(4) would provide for a defence where a financial institution fails to comply with a notice in 171(2), if the financial institution proves that it was incapable of complying with the notice. The note to clause 171(4) states that a defendant bears a legal burden of proof when raising the defence.

The Statement of Compatibility provides:

To the extent that this section may apply to individuals that are subject to the protections of the Charter, I consider that it is reasonable and justifiable to create a legal burden of proof in these circumstances. Proving that a financial institution was incapable of complying with a notice is a matter peculiarly within the knowledge of that financial institution. The financial institution would be best placed to prove why it was incapable of complying, based on its internal system, records processes, and policies and procedures. Conversely, it would be significantly more difficult and costly for the prosecution to disprove the matter, than for the financial institution to establish the matter. There would be no less restrictive means reasonably available to achieve the intended purpose that the legal burden seeks to achieve.

The Committee is satisfied that the reversal of the onus of proof is reasonable and justified in the circumstances.

Double jeopardy and retrospective penalty

Clause 20(1)(d) of the National Bill excludes a person in gaol (within the meaning of subsection 23(5) of the Social Security Act 1991 (Cth)) from applying for redress under the Scheme. Division 2 of Part 3-2 of the National Bill requires special assessment of applicants with serious criminal convictions (defined as a sentence of imprisonment for five years or longer).

The Statement of Compatibility provides:

On one view, which is my preferred view, preventing a person in gaol from applying for redress, and setting parameters around the application of persons with serious convictions, would not
constitute a penalty imposed for an offence, but would be a further consequence of conviction for an offence.

However, it could also be argued that the Bill imposes a 'penalty' for the offence for the purposes of the Charter because a person may be unable to apply for redress as a direct result of the person's criminal conviction, which could be seen as constituting additional punishment.

... If a broader interpretation is adopted, and the rights in both sections 26 and 27 [of the Charter] are considered to be limited, then I consider that any limitation is reasonable and justifiable under section 7(2) of the Charter, in order to uphold public confidence and support for the Scheme. While people in gaol will generally be unable to apply for redress under the Scheme, clause 20(2) allows the Scheme Operator to accept applications if he or she determines there are exceptional circumstances justifying the application being made, on a case-by-case basis. Persons in gaol are only excluded from applying for redress under the Scheme during their period of incarceration. Upon release, they will be eligible to apply (subject to the provisions in the National Bill in relation to serious criminal convictions).

Clause 63 of the National Bill outlines a special assessment process of applicants with serious criminal convictions. The Scheme Operator may determine that such an applicant is entitled to redress if satisfied that providing redress would not bring the Scheme into disrepute, or adversely affect public confidence in, or support for, the Scheme. In making this determination, the Scheme Operator must take into account a number of relevant factors including any advice given by an Attorney-General, the nature of the offence, the length of the sentence of imprisonment, the length of time since the person committed the offence, any rehabilitation of the person, and any other matter that the Scheme Operator considers relevant.

These provisions are sufficiently targeted to ensure that decision-making by the Scheme Operator is tailored to individual circumstances and do not operate in an arbitrary manner, while balancing public policy considerations and community expectations. For these reasons, I do not consider that there would be any less restrictive means reasonably available to achieve these purposes.

**The Committee is satisfied that clause 20(1)(d) is reasonable and justified in the circumstances.**

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<th>CHARTER ISSUES</th>
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<td>☐ Other:</td>
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Details

Operation of the Charter – Amendments to the National Redress Act – National Redress Scheme Rules – Assessment framework – Assessment framework guidelines

Summary: Clause 4(1) and 4(5)(b), together with ss 32(1), 33(2) and 179 of the schedule, may allow the federal Minister for Social Services to effectively define the scope and operation of the National Redress Scheme. The Committee will write to the Attorney-General seeking further information.

Relevant provisions

The Committee notes that clause 4(1) makes a referral of matters to the Commonwealth Parliament under s. 51(37) of the federal Constitution ‘to the extent of making laws... by including the initial referred provisions in a Commonwealth Act’. The ‘initial referred provisions’ are set out in the Bill’s schedule. Clause 4(5)(b) provides that ‘it is the intention of the Parliament of the State that the National Redress Act may be expressly amended, or have its operation otherwise affected, at any time... by provisions of instruments made or issued under the National Redress Act’.

The Committee also notes that clause 4(2) makes a referral for ‘making express amendments to the National Redress Act’. Clause 6 excludes from this referral the ‘making a law to the extent that that law would substantively remove or override a provision of the National Redress Act that requires the agreement of the State.’ However, clause 6 does not appear to limit clauses 4(1) or 4(5)(b).

Section 179 of the initial referred provisions provides that the federal Minister for Social Services ‘may, by legislative instrument, make rules prescribing matters... required or permitted by this Act to be prescribed by the rules’. Matters that can be prescribed by the National Redress Scheme Rules include:

- who is and isn’t entitled to, or eligible for, redress under the scheme: ss. 12(3),(4) & 13(2),(3);
- what abuse is and isn’t within the scope of the scheme: s. 14(2),(3);
- when a participating institution is or isn’t responsible for abuse (and to what extent): s. 15(5),(6);
- what is and isn’t a State institution, or a participating non-government institution, under the scheme: ss. 111(1)(c),(2) & 114(3); and
- overriding provisions of settlement agreements or deeds that relate to confidentiality or would inhibit the scheme’s operation: s 179(2)(e).

Sections 32(1) and 33(2) authorise the Minister to make an ‘assessment framework’ (setting out matters to take into account when working out the amounts of redress payments and counselling and psychological components of the redress) and ‘the assessment framework policy guidelines’ (which the scheme’s Operator must take into account when applying the framework.)

The Committee observes that clause 4(5)(b), read with ss. 32(1), 33(2) and 179 of the schedule, may allow the federal Minister for Social Services to effectively define the scope and operation of the National Redress Scheme.

Charter analysis

The Statement of Compatibility remarks:

The precise application of the charter to national schemes remains unclear. Section 51(xxxxvii) of the Australian constitution allows the Australian Parliament to make laws relating to ‘matters referred’ by the states that are otherwise outside of the scope of commonwealth legislative power. This model allows the commonwealth to make a single law extending to all participating jurisdictions, which then link in to the broader federal system. When legislative
power is referred to the Australian Parliament, any resulting legislation is a law of the commonwealth. The charter does not apply to commonwealth laws. Nonetheless, I consider that consideration of compatibility with human rights should be an integral part of the development of any national scheme.

The Committee notes that the initial referred provisions have been the subject of repeated human rights scrutiny in the federal parliament. As well, the federal Minister for Social Services is required to prepare a statement of compatibility for any amending Bill and the Rules, while the federal Parliamentary Joint Committee on Human Rights will eventually report on the Bill for the initial referred provisions, any amendments to the eventual Act, the National Redress Scheme Rules and the assessment framework.

The Committee observes that there is no provision for scrutiny of the amendments, rules, framework or guidelines by the Victorian Parliament or the Scrutiny of Acts and Regulations Committee.

**Conclusion**

The Committee will write to the Attorney-General seeking further information as to:

- the effect of clause 4(5)(b), which permits the National Redress Act to be expressly amended, or otherwise have its operation affected, by legislative instruments made under the Act by the federal Minister for Social Services;

- whether the agreement of Victoria is required for legislative instruments made under the National Redress Act; and

- what mechanisms exist for the consideration of compatibility with Charter rights in the development of any amendments to the National Redress Act, and of the development and amendment of the National Redress Scheme Rules, the assessment framework and the assessment framework guidelines.

**Recommendation**

| Refer to Parliament for consideration | Write to Minister for clarification | No further action required |

**Equality – Indirect race discrimination – Limits on applications for redress by some sexual abuse victims**

**Summary:** The effect of ss. 13(1) and 20(1)(b) & (d) of the initial referred provisions may be to largely deny redress under the national scheme to Victorian victims of institutional child sexual abuse who are not Australian citizens or permanent residents, who have ever had their visas or passports cancelled for

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security reasons or are in gaol. The Committee will write to the Attorney-General seeking further information.

Relevant provision

The Committee notes that section 13(1) of the initial referred provisions provides that a person is eligible for redress under the scheme if he or she was sexually abused, the sexual abuse occurred when the person was a child in a participating State before 1st July 2018 and one or more participating institutions are responsible for abuse.

However, the initial referred provisions are subject to a number of limitations, including:

- limiting eligibility for redress to people who are Australian citizens or permanent residents when they apply: s. 13(1)(e).
- barring applications by people (and limiting eligibility for redress) where ‘a security notice is in force in relation to the person’: ss. 12(2)(a), 12(4), 20(1)(b) & 64. Section 65 provides for the Home Affairs Minister to give a notice if the person’s visa was cancelled on security grounds or the Foreign Affairs Minister cancelled the person’s passport in order to prevent the person from endangering Australia’s security, endangering anyone or committing a crime. Section 69 requires that the Home Affairs Minister review the notice annually.
- barring applications by people who are in gaol (including people remanded in custody), except if the scheme Operator ‘determines there are exceptional circumstances justifying the application to be made’: ss. 12(2)(a) & 20(1)(d).

The Committee observes that the effect of ss. 13(1) and 20(1)(b) & (d) of the initial referred provisions may be to largely deny redress under the national scheme to Victorian victims of institutional child sexual abuse who are not (or no longer) Australian citizens or permanent residents, who have ever had their visas or passports cancelled for security reasons or are in gaol (including on remand.) Such people will instead have to individually seek redress for institutional child abuse through civil proceedings or alternative dispute resolution.

Charter analysis

The Statement of Compatibility remarks:

I note that these provisions propose to treat certain claimants unfavourably on the basis of lawful detention, criminal convictions or being subject to a security notice. However, the provisions do not constitute direct discrimination under the charter because the attributes set out in section 6 of the Equal Opportunity Act do not include a person’s criminal record, criminal history, or criminal activity, incarceration or being subject to a security notice. To the extent that the provision would indirectly discriminate against people on the basis of any protected attributes, such as race or nationality, I consider that any limitation of equality under the charter is reasonable and justifiable due to the importance of maintaining the integrity of the scheme. The national bill provides discretion to the scheme operator to prevent unjust or unfair outcomes. Clause 20(2) allows the scheme operator to consider a redress application from a person in gaol if he or she determines that there are exceptional circumstances.

However, the Committee observes that the Operator has no discretion in relation to the limitations based on citizenship or residency, and security notices. The Committee also observes that the
Statement of Compatibility does not address s. 13(1)(e)’s restriction to Australian citizens or permanent residents.¹⁴

The Committee notes that the Statement of Compatibility from the federal Minister for Social Services for the federal version of the initial referred provisions addresses all three limitations. In relation to the restriction to Australian citizens or permanent residents, the federal statement remarks:

Non-citizens and non-permanent residents will be ineligible to ensure the integrity of the Scheme. Verification of identity documents for non-citizens and non-permanent residents would be very difficult. Opening the Scheme to all people overseas could result in organised overseas groups lodging false claims in attempts to defraud the Scheme, which could overwhelm the Scheme’s resources and delay the processing of legitimate applications. Past examples of fraud highlight this as a key concern; for example, flood relief payments after the 2011 Queensland floods identified a number of fraudulent applications. These restrictions on eligibility for the Scheme are necessary to achieving the legitimate aims of ensuring the Scheme receives public support and protecting against large scale fraud.

Whilst administrative considerations are generally insufficient for the permissible limitation of human rights, it is relevant in the context of this particular Scheme, as the nature of the survivor cohort is such that timeliness in processing Scheme applications is critical. Over half of the survivors anticipated to apply to the Scheme are over 50 years of age, and so significant delays to the processing of applications may result in survivors passing away before they have the opportunity to accept redress. It is also widely recognised survivors of child sexual abuse also experience poorer health and social outcomes, amplifying the need for timely decision-making and for promoting the rights of survivors. Timeliness in the processing of applications is also critical to providing closure to survivors, and prolonging the processing of applications is likely to re-traumatise those survivors.

In relation to security notices, the federal statement remarks:

The Bill specifies that persons are not entitled to redress while a security notice is in force in relation to the person. A person’s security notice must be reviewed annually, and can be revoked. Once revoked, the person can apply for redress under the Scheme. This limitation is necessary to ensure that redress funds are not given to persons who may prejudice Australia’s national security interests, or may use those funds for purposes against Australia’s national security interests. This restriction is consistent with broader Commonwealth policy.

In relation to gaol, the federal statement remarks:

This restriction is necessary as the Scheme will be unable to deliver appropriate Redress Support Services to incarcerated survivors, which may make it more difficult for those survivors to write an application, or for those survivors to understand the implications of releasing responsible participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Additionally, institutions may not be able to deliver an appropriate direct personal response to a survivor if that survivor is incarcerated. As the Scheme will run for 10 years, survivors who are incarcerated for a short period of time will be able to apply when they are no longer incarcerated. In a closed institutional setting there will also be greater difficulty maintaining survivor privacy and confidentiality.

¹⁴ The Charter’s equality rights include protection from discrimination on the grounds of ‘nationality or national origin’, and includes protection from indirect discrimination, as defined by the Equal Opportunity Act 2010.
Relevant comparisons

The Committee notes that Division 2 of Part 3-2 of the initial referred provisions sets out an alternative regime for victims of institutional sexual abuse who have ever been sentenced to five or more years for a criminal offence (including in a foreign country.) In such cases, the Operator must be satisfied (after consulting with the relevant Attorney-General, whose advice must be given ‘greater weight’ than other matters) that providing redress to the victim would not bring the scheme into disrepute or adversely affect public confidence in, or support for, the scheme.

The Committee also notes that past or existing redress schemes for institutional child sexual abuse in Queensland, South Australia, Tasmania and Western Australia do not contain any express restrictions on payments to non-citizens or residents, prisoners or people whose visas or passports had been cancelled for security reasons.\(^{15}\)

Conclusion

The Committee will write to the Attorney-General seeking further information as to the compatibility of s. 13(1)(a) of the initial referred provisions, which limits redress to victims of sexual abuse who are currently Australian citizens or permanent residents, with the Charter’s rights to equality with respect to discrimination on the basis of nationality and national origin.

The Committee refers to Parliament for its consideration the question of whether ss. 20(1)(b) & (d) of the initial referred provisions, which prevent redress to victims of sexual abuse who are in gaol (except in exceptional circumstances) or who are subject to a security notice due to the cancellation of their visa or passport for security reasons, indirectly discriminate on the grounds of race and, if so, are reasonable limits on the Charter’s equality rights.

Recommendation

|  Refer to Parliament for consideration |  Write to Minister for clarification | ☐ No further action required |

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Serious Offenders Bill 2018

Bill Information

Minister: Hon Lisa Neville MP
Portfolio: Corrections
Introduction Date: 8 May 2018
Second Reading Date: 9 May 2018

Bill Summary

The Bill would establish a civil, protective scheme under which offenders who have served custodial sentences for certain serious sex offences and certain serious violence offences, and who present an unacceptable risk of harm to the community, could be made subject to ongoing detention or supervision.

The Bill would repeal the Serious Sex Offenders (Detention and Supervision) Act 2009 and expand the post-sentence scheme under the superseded Act in order to protect the community from serious interpersonal harm (whether violent or sexual), and reform the identification, management and treatment of post-sentence offenders.

The Bill includes the following substantive changes:

- expansion of eligibility for the post-sentence scheme to offenders who have been convicted and sentenced for certain serious violence offences in a higher court
- introduction of new requirements for core conditions on orders made by a Court under the Bill, and powers for the Courts to prohibit the possession or use of firearms
- creation of new Emergency Detention Orders to provide for an additional mechanism for managing a supervision order offender’s escalating and imminent risks
- establishment of a new secure residential treatment facility to provide intensive treatment and supervision to offenders who pose an unacceptable risk of reoffending.

The Explanatory Memorandum to the Bill states:

The Bill gives effect to the recommendations of the Review of Complex Adult Victim Sex Offender Management (referred to as the “Harper Review” in this explanatory memorandum) on how to improve the legislative framework, operational decision making and case management between the criminal justice and mental health service systems in relation to complex adult victim sex offenders.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

☐ NONE ☐ Inappropriately delegates legislative power
☐ Other: ☒ Trespasses unduly on Rights or Freedoms
**Procedural fairness – The right to a fair hearing**

Clause 88 would allow hearings for emergency detention orders to be heard ex parte (i.e., in the absence of the accused).

The Statement of Compatibility provides:

In deciding whether or not to hear an emergency detention order application in the absence of the offender, the court is obliged under s 6(2)(b) of the Charter to give effect to the right to a fair hearing, including ensuring that any limit on this right from proceeding with an ex parte hearing is justified in the circumstances under s 7(2) of the Charter.

The Explanatory Memorandum states:

This reflects the urgent nature of applications for emergency detention orders and the need to respond quickly to any imminent risk of harm to the community. The Supreme Court has discretion, however, to determine whether an ex parte hearing is appropriate in the circumstances. An ex‐parte hearing may be appropriate, for example, if requiring the offender’s attendance would delay the hearing, such as if the offender has absconded.

**The Committee considers that allowing for hearings of emergency detention orders to be heard ex parte is necessary and justified in the circumstances.**

**Powers of arrest, entry and search without a warrant**

A number of provisions in the Bill would allow a police officer or other officer to arrest a person or conduct a search without a warrant:

- clause 162(1) would empower a police officer to arrest an offender without a warrant if they reasonably suspect that the offender has committed an offence against clause 169.
- Clause 163 would provide police officers with powers to enter and search premises to arrest an offender (including any residence or vehicle) for the purposes of clause 162 where the police officer reasonably suspects that the offender is present.
- clause 168 would provide supervision officers or specified officers with power to arrest an offender in a residential treatment facility without a warrant, if the officer believes on reasonable grounds that the offender has contravened the conditions of the supervision order or interim supervision order by:
  - committing a serious sex offence; or
  - committing a serious violence offence; or
  - committing an offence listed in Schedule 3; or
  - engaging in conduct that poses a risk to the good order of the facility; or
  - engaging in conduct that poses a risk to the safety or welfare of offenders or staff at the facility, or visitors at the facility.
- clause 192 would give supervision officers and specified officers powers to arrest a person, without a warrant, where they reasonably believe that the person has committed an offence under clause 190(1) or clause 190(2) and deliver the person to a police officer as soon as practicable.
- clause 229 would empower a police officer to enter and search the place or premises occupied by an offender or any place or premises where an offender is residing (other than residential...
facilities or residential treatment facilities) and anything (including a vehicle) belonging to or in the possession of, or under the control of the offender at the place or premises.

- clause 234 would empower an officer to enter and search any part of the place occupied by an offender who fails to comply with a direction from the Authority under clause 233, and where the offender is subject to a supervision order or an interim supervision order which contains a condition requiring the offender to comply with a direction from the Authority in relation to computers and other devices to allow for auditing of contents.

- Clause 252 would empower an officer to enter a place where the offender resides to remove an electronic monitoring device or equipment

- Clause 323 would empower a security officer, in the course of performing functions under the Bill, to arrest an offender without a warrant if they believe on reasonable grounds that the offender has committed an indictable offence. The security officer, after arresting the offender, would be required to deliver the offender to police as soon as practicable and may detain the offender in a suitable place until such time.

The Committee notes the reasons given in the Statement of Compatibility for the creation of the above powers and considers that they are reasonable and justified in the circumstances.

**The privilege against self-incrimination**

Clause 236 would empower a relevant officer, during a search, to direct an offender to provide information or other assistance that is reasonably necessary to access data on a computer, copy data or convert data into documentary form. The provision would also apply to any person being searched under Part 14, which could include non-offenders inside or near a residential facility or residential treatment facility (e.g. staff members or visitors). It would be an offence, subject to imprisonment for a maximum of five years, not comply with such a direction without reasonable excuse.

As noted in the Statement of Compatibility, the clause creates the potential for self-incrimination or the discovery of further incriminating evidence and may therefore limit the privilege against self-incrimination in certain circumstances.

The Committee notes the reasons given in the Statement of Compatibility for the possible limitation of the privilege against self-incrimination in clause 236 and considers that it is reasonable and justified in the circumstances.

### Recommendation

- [ ] Refer to Parliament for consideration
- [ ] Write to Minister for clarification
- [x] No further action required

### CHARTER ISSUES

- [ ] NONE
- [ ] Other: Compatibility with Human Rights
- [ ] Operation of the Charter
**Details**

*Liberty — Double punishment — Retrospective criminal penalty — Detention or supervision of certain offenders without further charge or conviction*

**Summary:** The effect of clauses 8, 14 and 62 is that any adult who has ever been sentenced by the Supreme or County Court to any time in custody for an offence relating to sexual penetration, sexual assault, child sexual abuse, child abuse materials, non-vehicle homicide, non-negligent serious injury or kidnapping can, in some circumstance, be ordered to comply with ‘core’ and other ‘appropriate’ supervision conditions or detained in prison without further charge or conviction. The Committee will write to the Minister seeking further information.

**Relevant provisions**

The Committee notes that clause 14 provides that the Supreme Court or County Court may make a supervision order in respect of an eligible offender if, and only if, the court is satisfied by acceptable cogent evidence to a high degree of probability that the offender will pose an unacceptable risk of committing a serious sex offence or a serious violent offence after release from custody. Clauses 62 provides that the Supreme Court may make a detention order in respect of an eligible offender if and only if the Court is further satisfied that the offender will pose such an unacceptable risk unless detained. A supervision order consists of fifteen ‘core conditions’ set out in clause 31, as well as any other condition the court considers appropriate (clause 38). A detention order commits the offender to detention in prison for the duration of the order (clause 66).

The Committee also notes that clause 8 provides that a person is an eligible offender if the person is over 18, the Supreme or County Court has at any time imposed a custodial sentence on the person for a serious sex offence or serious violence offence, and the person is currently in prison, on remand or subject to a supervision or detention order. Serious sex offences include sexual penetration offences, sexual assault offences, child sexual abuse offences, child abuse material offences and various related offences (schedule 1). Serious violence offences are homicide offences (other than culpable driving causing death), causing serious injury offences (other than negligently causing serious injury), kidnapping and various related offences (schedule 2).

The Committee observes that the effect of clauses 8, 14 and 62 is that any adult who has ever been sentenced by the Supreme or County Court to any time in custody for an offence relating to sexual penetration, sexual assault, child sexual abuse, child abuse materials, non-vehicle homicide, non-negligent serious injury or kidnapping can be ordered to comply with ‘core’ and other ‘appropriate’ supervision conditions or detained in prison without further charge or conviction in some circumstances.

**Charter analysis**

The Statement of Compatibility remarks:

This Bill, by providing for the ongoing supervision and detention of serious offenders, will necessarily limit a number of human rights. However, the Bill seeks to address pressing and substantial social concerns regarding the need to protect the community against acts of serious interpersonal harm. In general terms, the main purpose of the Bill is to enhance community safety by requiring that offenders who have served custodial sentences for serious sexual or violence offences (or both), and who pose an unacceptable risk of harm to the community, be subject to either a supervision or detention order. In doing so, the Bill promotes the human rights of community members, such as the rights to life (s 9), liberty and security of person (s 21) and the protection of children and families (s 17).
While I acknowledge that the Bill imposes limitations on the human rights of offenders that will be subject to the scheme, I consider that the structure of the scheme and the safeguards it includes will ensure that these limits are reasonably justified under section 7(2) of the Charter. Serious sexual and violence offences can cause enduring harm to individuals and to families, can inflict lifelong damage to victims' wellbeing and may target the most vulnerable members of our community. It is the public's expectation that all possible steps be taken [to] reduce an offender's risk of further offending in order to reduce the risk of harm to the community.

Consistent with the non-punitive purposes of the scheme, the secondary purpose of the Bill is to facilitate the treatment and rehabilitation of offenders subject to orders to reduce their risk of harm to the community. The scheme is preventative in nature, and is designed to ensure that any orders effect the minimum limitation upon rights necessary to ensure community safety. It is a civil scheme rather than criminal, and it effects prevention, protection and rehabilitation of offenders, rather than imposing any additional form of punishment on offenders.

However, the Committee observes that the United Nations Human Rights Committee held in 2010 (after the current Act was enacted) that the post-sentence detention of a convicted sex offender under similar NSW laws violated the international equivalents to Charter ss. 21(1) (right to liberty) & 21(2) (right against arbitrary detention).16 In an 11-2 decision, the UN Committee remarked that ‘the most significant’ of its reasons were:

(1) The author had already served his 10 year term of imprisonment and yet he continued, in actual fact, to be subjected to imprisonment in pursuance of a law which characterises his continued incarceration under the same prison regime as detention. This purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law.

(2) Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. The author’s further term of imprisonment was the result of Court orders made, some 10 years after his conviction and sentence, in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence. This new sentence was the result of fresh proceedings, though nominally characterised as ‘civil proceedings’ and fall within [the international right equivalent to Charter s. 27: retrospective punishment]. In this regard, the Committee further observes that, since the CSSOA was enacted in 2006 shortly before the expiry of the author’s sentence for an offence for which he had been convicted in 1998 and which became an essential element in the Court orders for his continued incarceration, the CSSOA was being retroactively applied to the author....

(3) The CSSOA prescribed a particular procedure to obtain the relevant Court orders. This particular procedure, as the State party conceded, was designed to be civil in character. It did not, therefore, meet the due process guarantees required under [the international equivalent to Charter s. 24(1): fair hearing] in which a penal sentence is imposed.

(4) The ‘detention’ of the author as a ‘prisoner’ under the CSSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric

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experts. But psychiatry is not an exact science. The CSSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness, in these circumstances, the State party should have demonstrated that the author’s rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention...

The Statement of Compatibility does not discuss the UN Committee’s decision.17

The Statement of Compatibility remarks:

[T]he imposition of an order, which is protective, preventative and rehabilitative in purpose, does not constitute a ‘penalty’ so as to engage the protections against double jeopardy or retrospective penalty in ss 26 and 27 of the Charter. In considering this issue, I note that the High Court has categorised post-sentence management schemes of high-risk offenders based on criteria relating to public safety as a protective rather than punitive enactment.

The Committee notes that the distinction between protection and punishment is a difficult one and that Charter rights are not equivalent to the constitutional separation of powers addressed by the High Court. The Committee observes that, to the extent that either supervision or detention orders are characterised as punitive for the purposes of the Charter, clause 8 – in particular, the inclusion of offenders who are already convicted of homicide, serious injury or kidnapping offences – may limit the Charter’s rights against double punishment and retrospective criminal punishment.18 The Committee notes that eligible offenders may include those who have already pled guilty to offences under legal advice as to the legal consequences they would face under existing laws.

Relevant comparisons

The Second Reading Speech remarks:

The Government commissioned a panel of experts — former Court of Appeal Judge the Honourable David Harper, AM, Professor Paul Mullen and Professor Bernadette McSherry — to provide advice on how to improve the legislative framework, operational decision making and case management between the criminal justice and mental health service systems in relation to complex adult victim sex offenders. The Harper Review (as this Panel’s report is known) made 35 recommendations for significant legislative, governance and operational reforms. The Government accepted in principle all of the recommendations of the Review and 24 have already been implemented through legislative and operational reforms... Once the bill currently before the house and the supporting operational changes commence, the Government will have implemented all of the recommendations of the Harper Review.

The Committee notes that the Harper Review remarked:19

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17 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.’
18 Charter ss. 26 & 27.
19 Complex Adult Victim Sex Offender Management Review Panel, Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009, November 2015, [3.29]-[3.33].
Critically, the Panel considers that the paramount principle underpinning the selection of the eligibility criteria is that it be precise. This is important for a number of reasons, including that it provides:

- fairness to offenders by ensuring that notice can be provided of their eligibility for post-sentence supervision or detention, upon conviction of, and sentence for, an eligible offence
- an appropriately clear foundation for the Department of Justice and Regulation to develop manageable administrative and governance processes for the assessment and review of offenders for the purposes of referring eligible offenders to the Public Protection Authority and determining whether to bring an application for a supervision order or refer the matter to the Director of Public Prosecutions to consider an application for a detention order, and
- an appropriately consistent platform for the Public Protection Authority to consider eligible offenders referred to it.

The Panel’s preferred approach for defining eligibility for offenders is, therefore, that it commences with a broad base of qualifying offences and is further narrowed so that only offenders who receive a sentence above a minimum threshold are eligible offenders. Accordingly, the Panel envisages that there should be two parts to the criteria for determining eligibility:

- a list of relevant offences defined in legislation encompassing sexual offences and serious violent offences, and
- a sentence of imprisonment of a minimum length defined in legislation imposed on any relevant sexual or violent offence.

An approach that combines offence type and imprisonment sentence length incorporates the key elements from the approaches above, which are necessary in the Panel’s view to identify the pool of eligible offenders, which the Victorian postsentence scheme should target to identify and protect the community from those who present the greatest likelihood of causing serious interpersonal harm:

- the offence type captures the nature of the most recent offending behaviour, and is broad enough to cover offences that result in the commission of interpersonal harm, whether it be sexual or non-sexual
- the length of the sentence of imprisonment reflects a judicial assessment of a range of important factors taken into account by a court in the sentencing process, including the seriousness of the offence committed and the offender’s previous convictions, including any pattern of similar offending or a course of conduct, and
- the length of the sentence of imprisonment also reflects a court’s assessment of the offender’s prospects for rehabilitation and the extent to which there is a need for the sentence to protect the community from such offending in the future, which bring in an appropriate measure of judicial assessment at the time of sentence of the extent to which the offender might be likely to commit such an offence in the future.

The Panel’s view is that these are all appropriate considerations that ought to be imported in the selection of the eligibility criteria.

The Panel notes that a two-part approach is reflected in the eligibility criteria for postsentence supervision in the New South Wales scheme. The New South Wales criteria, which differ from those recommended by the Panel, include a requirement that an offender must have been, at any time, convicted and sentenced to imprisonment for a specified ‘serious’ sexual or violent offence (which, in some instances, incorporates a requirement that the offence be punishable by a sentence of imprisonment of seven years or more) and be currently subject to a post-
sentence order or a sentence of imprisonment for that offence or a broad range of sexual or violent offences (or offences co-sentenced with such offences). While the scheme in New South Wales is broader than the current Victorian scheme in terms of including violent offenders, it uses different eligibility criteria to that in Victoria and has less than half the number of offenders (56 compared with 118) subject to postsentence orders.

The Committee observes that, while clause 8 requires that the offender have been sentenced to a custodial offence (rather than, e.g. an intensive correction order) by the Supreme or County Court (rather than, e.g. the magistrates’ or children’s court), it does not set any minimum length for a sentence of imprisonment before an offender becomes eligible for a supervision or detention order.

The Committee notes that the Harper review recommended:

Recommendation 3
In defining the criteria under Recommendation 2, consideration should be given to:

- including in the legislative definition of an eligible offence 'sexual offences' as currently defined under the Serious Sex Offenders (Supervision and Detention) Act 2009 (Vic) and 'serious violent offences' as currently defined under the Corrections Act 1986 (Vic), and

- fixing the minimum length of an eligible sentence of imprisonment imposed on an eligible offence at three or four years' imprisonment.

Recommendation 4
To inform the determination of the approach envisaged by the Panel under Recommendation 3, the Department of Justice and Regulation should undertake an audit of offenders that includes an examination of the number of 'sex offenders' and 'serious violent offenders' and the sentences imposed on such offenders for eligible offences, to ensure there is careful consideration of the implications of defining the criteria in this way. This should be undertaken with a view to achieving the Panel's aim, that the cohort of offenders eligible for postsentence supervision or detention and possible inclusion in the Public Protection Authority's purview is appropriately confined to those offenders who present the greatest likelihood of causing serious interpersonal harm.

The Second Reading Speech remarked:

To ensure that the right balance was struck, the Harper Review recommended that an audit be undertaken to understand the implications of any proposed criteria and to ensure the eligibility criteria selected was appropriately confined to those offenders who present the greatest likelihood of causing serious interpersonal harm.

Drawing on the findings of this audit, which was conducted in 2016, the bill provides that offenders convicted and sentenced in the higher courts—the Supreme Court or the County Court—to a custodial sentence for a serious sex offence or a serious violence offence are eligible for the scheme. The chosen offences target criminal conduct where the motivation or result of the offending is serious interpersonal harm, that is, harm inflicted by a person upon another person. Murder, manslaughter (except culpable driving), child homicide, defensive homicide, arson causing death, causing serious injury offences and kidnapping are deemed to be serious violence offences. In terms of serious sex offences, the bill adopts the existing list of relevant offences under the Serious Sex Offenders (Detention and Supervision) Act but excludes any summary offences. Incomplete instances of these offences (such as attempts and conspiracies to commit) and interstate equivalent offences will also be captured.
Conclusion

The Committee will write to the Minister seeking further information as to whether or not the imposition of a minimum sentence threshold of three or four years imprisonment on eligibility for a supervision or detention order under clause 8 is a less restrictive alternative on the Charter’s right to liberty reasonably available to achieve the Bill’s purpose of meeting the public’s expectations on community safety.

Recommendation

☐ Refer to Parliament for consideration  ☒ Write to Minister for clarification  ☐ No further action required

Fair hearing – Contravening a supervision order – Supreme or County Court may try indictable offence summarily

Summary: Clause 169(1)'s compatibility with the Charter’s fair hearing and liberty rights may depend on the clarity and accessibility of the rules on how charges of contravening a supervision order are to be determined. The Committee will write to the Minister seeking further information.

Relevant provisions

The Committee notes that clause 169(1) makes it an offence for an offender to contravene a condition of a supervision order (other than one relating to medical treatment or self-harm) without a reasonable excuse, punishable by a maximum of five years imprisonment.

The Committee also notes that clause 172(1) provides that ‘a criminal proceeding for an offence against section 169 is to be heard and determined by the Supreme Court or the Country Court’. Clauses 174(1) and (3) provide that that court ‘may hear and determine summarily a charge for an offence against section 169’ and that the ‘summary hearing is to be conducted without a jury’. Clause 174(4) provides that clauses 174(1) and (3) apply ‘despite anything to the contrary in any Act or rule of law (other than the Charter...’). As well, clause 174(2) provides that s. 29(1) of the Criminal Procedure Act 2009, which provides that an indictable offence cannot be held summarily unless the court considers it appropriate and the accused consents, does not apply for the purposes of clause 174(1). The Committee observes that the effect of clause 174 may be that a person charged with contravening a supervision order can be tried summarily without his or her consent.

The Committee further notes that clause 172(1) provides that the Post Sentence Authority ‘may consider that conduct of an offender constitutes a serious contravention of a condition of a supervision order... if the conduct’ satisfies one of a number of conditions to do with safety, repetition, risk of offending or rehabilitation.

Charter analysis

The Statement of Compatibility addresses the one-year mandatory minimum sentence imposed for breaches of contravention orders by existing s. 10AB of the Sentencing Act 1991 as follows:

Section 10 of the Charter relevantly provides that a person must not be punished in a cruel, inhuman or degrading way. Section 21 of the Charter relevantly provides that a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law. To be compatible with these rights, a scheme of minimum sentencing must be proportionate to the punishment that is appropriate by normal sentencing standards, having regard to the nature of the offence and the circumstances of the offender.
In my opinion, a statutory minimum sentence of 12 months imprisonment (with any non-parole period) for an offence of intentional or reckless failure to comply with a restrictive condition does not limit these rights, as it does not compel the imposition of a grossly disproportionate sentence, for the following reasons.

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

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

Finally, the exception for special reasons safeguards against the imposition of a disproportionate sentence by allowing a court to depart from the statutory minimum sentence if it finds that the personal characteristics and/or the particular circumstances of the case justify doing so. Once a special reason is found to exist, a court has full discretion, and may impose any sentence it considers appropriate, including a non-custodial sentence.

Section 24 of the Charter relevantly provides that a person charged with a criminal offence has the right to have the charge decided by an independent and impartial court or tribunal after a fair and public hearing.

Although the Bill limits the permissible sentence a court may impose for an intentional or reckless breach of a restrictive condition by setting a ‘floor’ with a minimum period of imprisonment, the court has complete discretion above this floor and may apply general sentencing principles.

Furthermore, as outlined above, the Bill’s special reasons provision allows a court to take account of factors that justify removal of the statutory minimum sentence. I also note that the High Court has consistently held that provisions imposing minimum sentences do not constitute a usurpation of judicial power and, as such, do not limit the independence of a court.

However, the Statement of Compatibility does not address the process for determining a charge of breaching a contravention order set out in clause 174.

**Committee comment**

The Committee considers that, while the elements and minimum sentence of clause 169(1) are compatible with Charter rights, the clause’s compatibility with the Charter’s fair hearing and liberty rights may depend on the clarity and accessibility of the rules on how charges of contravening a supervision order are to be determined.

The Committee notes that existing law provides that ‘unless the contrary intention appears’, clause 169(1) (an offence punishable by a maximum of five years (level 6) imprisonment):20

- ‘is... an indictable offence’

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20 *Sentencing Act 1991*, ss. 112 & 113; *Criminal Procedure Act 2009*, s. 28,
• ‘may be heard summarily by the Magistrates’ Court, if section 29 [of the Criminal Procedure Act 2009] is satisfied’; and

• ‘if a person is convicted by the Magistrates’ Court in a summary hearing of an indictable offence under section 28(1) of the Criminal Procedure Act 2009, the maximum term of imprisonment to which the Court may sentence the offender is 2 years’.

Existing law also provides that the maximum punishment for a person convicted of a ‘summary offence’ is two years imprisonment, a rule that ‘has effect despite anything to the contrary in any Act.’ 21 The Committee observes that it may not be clear whether the effect of clause 174 is that clause 169(1) is an indictable offence or a summary offence and whether, if the offender is tried summarily by the Supreme Court or County Court, that court can impose a punishment that is higher than two years imprisonment.

The Committee also notes that the language of clause 174(1) – providing that a court ‘may hear and determine summarily a charge for an offence against section 169’ – differs from the equivalent language in the existing Act, which provides in s. 172(5):

The Supreme Court or the County Court may, if it made the supervision order or interim supervision order, grant a summary hearing of an offence against section 160.

The Explanatory Memorandum states:

This provision is not intended to alter the existing powers and procedures under section 172...

However, the Committee observes that the existing word ‘grant’ carries an implication of consent by a party, while clause 174(1) may not. As well, the existing law has no equivalent to clause 174(2), which expressly exempts clause 169(1) from the Criminal Procedure Act’s rule requiring an accused’s consent to a summary trial of an indictable offence. Accordingly, it may not be clear whether an accused’s consent is required for a summary trial of a charge of breaching clause 169(1).

The Committee further notes that the Bill does not appear to specify any consequence for the Post Sentence Authority’s finding under clause 172 that an alleged contravention of clause 169(1) is a ‘serious contravention.’ Rather, clause 170 only provides that ‘the Authority, having regard to the seriousness of the alleged contravention, may’ do one or more actions, including ‘no action’ and recommending criminal prosecution. The Committee observes that it may not be clear whether or not a finding of a serious consequence or its absence is a precondition for any of these actions.

Relevant comparisons

The Committee notes that the equivalent offence provision in NSW’s law is expressly subject to the usual rule on accused persons electing between indictable or summary hearings. 22

Conclusion

The Committee will write to the Minister seeking further information as to:

• whether clause 169(1) is a summary or indictable offence;

• whether or not a person convicted summarily by the Supreme Court or County Court of a breach of clause 169(1) can be imprisoned for more than two years;

21 Sentencing Act 1991, s. 113A.

22 Crimes (High Risk Offenders) Act 2006 (NSW), s. 25A(2).
• whether the Supreme Court or County Court can try an accused summarily for a breach of clause 169(1) without the accused’s consent; and
• what legal consequences (if any) arise from the Post Sentence Authority’s determination under clause 172 that an alleged contravention of clause 169(1) is or is not a serious contravention.

Recommendation

☐ Refer to Parliament for consideration  ☒ Write to Minister for clarification  ☐ No further action required
State Taxation Acts Amendment Bill 2018

Bill Information

Minister: Hon Tim Pallas MP
Portfolio: Treasurer
Introduction Date: 1 May 2018
Second Reading Date: 8 May 2018

Bill Summary

The Bill would amend the *Duties Act 2000* in relation to:

- the aggregation of the interests of all foreign persons for the purposes of the foreign purchaser additional duty
- foreign purchasers who jointly purchase a principal place of residence with an Australian spouse or domestic partner
- partners' interests in partnership property
- property vested in apparent purchasers
- exemptions for transfers of property between spouses or domestic partners
- the exemption for equity release programs
- principal place of residence exemptions and concessions for first home buyers who are members of the Australian Defence Force
- the exemption from duty payable in respect of first time purchasers of farmland by farmers under 35 years of age.

The Bill would also:

- amend the *Payroll Tax Act 2007* to reduce the rate for payroll tax payable by regional Victorian businesses
- amend the *Unclaimed Money Act 2008* in relation to executors and administrators.

Type of Bill

- [x] Government Bill
- [ ] Private Members Bill

CONTENT ISSUES

- [ ] NONE
- [ ] Other:
  - [x] Trespasses unduly on Rights or Freedoms
- [ ] Inappropriately delegates legislative power

Details

*Retrospective operation*

Clause 2 provides that section 25, which would make a statute law revision amendment to the *Land Tax Act 2005* in relation to a formula, would operate retrospectively from 1 January 2018.
The Explanatory Memorandum states:

This amendment ensures the correct formula is used to calculate land tax in relation to the absentee owner surcharge for certain subtrust structures. In cases affected by this formula, the absentee owner surcharge has been calculated in accordance with the intended operation of the formula to ensure taxpayers were not disadvantaged by the technical defect in the formula.

The Committee is satisfied that the retrospective operation of section 25 will not adversely affect any person and is reasonable and justified in the circumstances.

**Recommendation**

- Refer to Parliament for consideration
- Write to Minister for clarification
- No further action required

**CHARTER ISSUES**

- NONE
- Other: Compatibility with Human Rights
- Operation of the Charter

**Details**

*Equality – Direct age discrimination – Increases to the Young Farmers Concessions*

**Summary:** Division 7 of the Bill amends the Young Farmers exemptions and concessions in the Duties Act 2000 to double the dutiable value for certain concessions. This appears to discriminate against people who are 35 and older, which may breach the right to equality. The Committee will write to the Attorney-General seeking further information.

**Relevant provisions**

Division 7 of the Bill makes various changes to the Young Farmers exemptions and concessions in the Duties Act 2000. The Duties Act 2000 defines a Young Farmer as a person under the age of 35. The changes increase the allowable dutiable value of the property, where there is a transfer of two or more dutiable properties, from the current amount of $300,000 to $600,000.

The Committee observes that the changes made by Division 7 provide increased benefits to farmers that are under 35, which are not provided to farmers who are 35 or over.

**Charter analysis**

Section 8(3) of the Charter provides that:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

The definition of discrimination is drawn from the Equal Opportunity Act 2010 and refers to direct or indirect discrimination on the basis of an attribute. Age is an attribute protected by that Act, and treating someone unfavourably because of their age amounts to direct discrimination.
Section 8(4) of the Charter provides that:

Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

It is not clear that farmers under 35 are a group of persons disadvantaged because of discrimination, so the concessional duties provided may not be a section 8(4) measure. It may be that these concessional duties limit the right to equality, but that there is a demonstrable justification for the limit.

However the Statement of Compatibility does not discuss any limit on the right to equality or whether it is a reasonable limit under section 7(2) of the Charter.

Conclusion

The Committee will write to the Treasurer seeking further information as to whether Division 7 limits the right to equality and whether any such limit is reasonable.

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<thead>
<tr>
<th>Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Refer to Parliament for consideration</td>
</tr>
</tbody>
</table>
The Committee received Ministerial responses on the Bills listed below.

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

*Justice Legislation Amendment (Access to Justice) Bill 2018*
Dear Mr Dalla-Riva,

Thank you for your letter of 1 May 2018 regarding the Scrutiny of Acts and Regulations Committee’s (the Committee’s) request for further information in relation to the Justice Legislation Amendment (Access to Justice) Bill 2018 (the Bill).

Clause 2 of the Bill provides that the Bill will come into operation on a day or days to be proclaimed, with default commencement dates of 12 October 2018, 1 July 2019, and 1 July 2020. The Committee has asked for further information as to the reasons for the possible delayed commencement dates of more than 12 months after the Bill’s introduction on 27 March 2018.

The Bill’s commencement provisions are intended to allow for sufficient time for passage of the Bill through Parliament, and to provide stakeholders with an appropriate period to prepare for commencement of the Bill’s reforms.

The default commencement date of 1 July 2019 will allow for an implementation period of approximately 12 months from the estimated date of passage of the Bill. Twelve months is an appropriate period for the Government and stakeholders to prepare for commencement of the Bill’s reforms, which include amendments to the functions, processes or governance structures of statutory entities including Victoria Legal Aid, the Victoria Law Foundation and the Victorian Civil and Administrative Tribunal (VCAT).

It is the Government’s intention to proclaim relevant Parts of the Bill as soon as practicable. For example, the Government intends that Part 5 of the Bill, which amends the County Court Act 1958, will commence on the same date as the new County Court (Fees) Regulations 2018. The Government is working closely with the County Court to design the new Regulations, which are proposed to commence in late 2018.

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1 In relation to Part 3 (amendments to the Births, Deaths and Marriages Registration Act 1996).
2 In relation to Part 2 (amendments to the Australian Consumer Law and Fair Trading Act 2012); Part 4 (amendments to the Civil Procedure Act 2010); Part 5 (amendments to the County Court Act 1958); Part 6 (amendments to the Legal Aid Act 1978); Part 7 (amendments to the Legal Profession Uniform Law Application Act 2014); Part 9 (amendments to the Victoria Law Foundation Act 2009); and Divisions 1, 2, 3, 4 and 6 of Part 10 (amendments to the Victorian Civil and Administrative Tribunal Act 1998).
3 In relation to Division 5 of Part 10 (amendments to the Victorian Civil and Administrative Tribunal Act 1998).
The default commencement date of 1 July 2020 for Division 5 of Part 10 of the Bill provides flexibility, should it be required, for VCAT and the courts to establish rules and procedures for transmitting orders from VCAT to the courts for enforcement. For example, the courts will need to consider clauses 68 and 69 of the Bill, which remove the requirements to file documents with the courts and deem that a VCAT order is taken to be an order of the court in which it is to be enforced. The courts will consider whether to make any changes to court rules and procedures to take into account these amendments.

The Government will work closely with stakeholders to facilitate the timely commencement of the amendments.

I trust that this information is of assistance to the Committee.

Yours sincerely,

THE HON MARTIN PAKULA MP
Attorney-General
# Appendix 2

## Index of Bills in 2018

<table>
<thead>
<tr>
<th>Alert Digest Nos.</th>
<th>Bill Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Advancing the Treaty Process with Aboriginal Victorians Bill 2018</td>
</tr>
<tr>
<td>1, 2, 3</td>
<td>Audit Amendment Bill 2017</td>
</tr>
<tr>
<td>1, 2</td>
<td>Bail Amendment (Stage Two) Bill 2017</td>
</tr>
<tr>
<td>4</td>
<td>Charities Amendment (Charitable Purpose) Bill 2018</td>
</tr>
<tr>
<td>1, 2</td>
<td>Children Legislation Amendment (Information Sharing) Bill 2017</td>
</tr>
<tr>
<td>5</td>
<td>Education Legislation Amendment (Victorian Institute of Teaching, TAFE and Other Matters) Bill 2018</td>
</tr>
<tr>
<td>3</td>
<td>Emergency Management Legislation Amendment Bill 2018</td>
</tr>
<tr>
<td>2, 3</td>
<td>Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018</td>
</tr>
<tr>
<td>7</td>
<td>Electoral Legislation Amendment Bill 2018</td>
</tr>
<tr>
<td>4, 5</td>
<td>Engineers Registration Bill 2018</td>
</tr>
<tr>
<td>4, 5</td>
<td>Guardianship and Administration Bill 2018</td>
</tr>
<tr>
<td>2, 3</td>
<td>Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018</td>
</tr>
<tr>
<td>5, 7</td>
<td>Justice Legislation Amendment (Access to Justice) Bill 2018</td>
</tr>
<tr>
<td>7</td>
<td>Justice Legislation Amendment (Terrorism) Bill 2018</td>
</tr>
<tr>
<td>1</td>
<td>Justice Legislation Amendment (Victims) Bill 2017</td>
</tr>
<tr>
<td>1, 2</td>
<td>Labour Hire Licensing Bill 2017</td>
</tr>
<tr>
<td>4, 5</td>
<td>Legal Identity of Defendants (Organisational Child Abuse) Bill 2018</td>
</tr>
<tr>
<td>5</td>
<td>Liquor and Gambling Legislation Amendment Bill 2018</td>
</tr>
<tr>
<td>5</td>
<td>Long Service Benefits Portability Bill 2018</td>
</tr>
<tr>
<td>1, 2</td>
<td>Marine and Coastal Bill 2017</td>
</tr>
<tr>
<td>7</td>
<td>National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018</td>
</tr>
<tr>
<td>3, 4</td>
<td>Parks Victoria Bill 2018</td>
</tr>
<tr>
<td>1</td>
<td>Planning and Environment Amendment (Distinctive Areas and Landscapes) Bill 2017</td>
</tr>
<tr>
<td>1</td>
<td>Primary Industries Legislation Amendment Bill 2017</td>
</tr>
<tr>
<td>7</td>
<td>Serious Offenders Bill 2018</td>
</tr>
<tr>
<td>7</td>
<td>State Taxation Acts Amendment Bill 2018</td>
</tr>
<tr>
<td>1</td>
<td>Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Bill 2017</td>
</tr>
</tbody>
</table>
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.

**Alert Digest Nos.**

### Section 17(a)

**(i) tresspasses unduly upon rights or freedoms**

<table>
<thead>
<tr>
<th>Bill</th>
<th>Alert Digest Nos.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Audit Amendment Bill 2017</td>
<td>1, 2</td>
</tr>
<tr>
<td>Electoral Legislation Amendment Bill 2018</td>
<td>7</td>
</tr>
<tr>
<td>Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018</td>
<td>2, 3</td>
</tr>
<tr>
<td>Engineers Registration Bill 2018</td>
<td>4, 5</td>
</tr>
<tr>
<td>Guardianship and Administration Bill 2018</td>
<td>4, 5</td>
</tr>
<tr>
<td>Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018</td>
<td>2, 3</td>
</tr>
<tr>
<td>Marine and Coastal Bill 2017</td>
<td>1, 2</td>
</tr>
</tbody>
</table>

**(vi) inappropriately delegates legislative power**

<table>
<thead>
<tr>
<th>Bill</th>
<th>Alert Digest Nos.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Audit Amendment Bill 2017</td>
<td>1, 2</td>
</tr>
<tr>
<td>Charities Amendment (Charitable Purpose) Bill 2018</td>
<td>4</td>
</tr>
<tr>
<td>Guardianship and Administration Bill 2018</td>
<td>4, 5</td>
</tr>
<tr>
<td>Justice Legislation Amendment (Access to Justice) Bill 2018</td>
<td>5, 7</td>
</tr>
<tr>
<td>Labour Hire Licensing Bill 2017</td>
<td>1, 2</td>
</tr>
<tr>
<td>Legal Identity of Defendants (Organisational Child Abuse) Bill 2018</td>
<td>4</td>
</tr>
<tr>
<td>Long Service Benefits Portability Bill 2018</td>
<td>5</td>
</tr>
<tr>
<td>Parks Victoria Bill 2018</td>
<td>3, 4</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Bill</th>
<th>Alert Digest Nos.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advancing the Treaty Process with Aboriginal Victorians Bill 2018</td>
<td>5</td>
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<tr>
<td>Audit Amendment Bill 2017</td>
<td>1, 2, 3</td>
</tr>
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<td>Bail Amendment (Stage Two) Bill 2017</td>
<td>1, 2</td>
</tr>
<tr>
<td>Charities Amendment (Charitable Purpose) Bill 2018</td>
<td>4</td>
</tr>
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<td>Children Legislation Amendment (Information Sharing) Bill 2017</td>
<td>1, 2</td>
</tr>
<tr>
<td>Electoral Legislation Amendment Bill 2018</td>
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<td>2, 3</td>
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</tr>
<tr>
<td>Guardianship and Administration Bill 2018</td>
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<tr>
<td>Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018</td>
<td>2, 3</td>
</tr>
<tr>
<td>Justice Legislation Amendment (Terrorism) Bill 2018</td>
<td>7</td>
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<tr>
<td>Legal Identity of Defendants (Organisational Child Abuse) Bill 2018</td>
<td>4</td>
</tr>
<tr>
<td>Long Service Benefits Portability Bill 2018</td>
<td>5</td>
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<tr>
<td>Bill</td>
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<tr>
<td>National Redress Scheme for Institutional Child Sexual</td>
<td>7</td>
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<tr>
<td>Abuse (Commonwealth Powers) Bill 2018</td>
<td></td>
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<tr>
<td>Serious Offenders Bill 2018</td>
<td>7</td>
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<tr>
<td>State Taxation Acts Amendment Bill 2018</td>
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</tbody>
</table>

**Section 17(b)**

**(i) and (ii) repeals, alters or varies the jurisdiction of the Supreme Court**

Long Service Benefits Portability Bill 2018 5
## Appendix 4

### Current Ministerial Correspondence

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.

<table>
<thead>
<tr>
<th>Bill Title</th>
<th>Minister/ Member</th>
<th>Date of Committee Letter / Minister's Response</th>
<th>Alert Digest No. Issue raised / Response Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>Audit Amendment Bill 2017</td>
<td>Special Minister for State</td>
<td>06.02.18 19.02.18</td>
<td>1 of 2018 2 of 2018</td>
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<tr>
<td></td>
<td>Attorney-General</td>
<td>20.02.18 02.03.18</td>
<td>2 of 2018 3 of 2018</td>
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<tr>
<td>Bail Amendment (Stage Two) Bill 2017</td>
<td>Attorney-General</td>
<td>06.02.18 19.02.18</td>
<td>1 of 2018 2 of 2018</td>
</tr>
<tr>
<td>Children Legislation Amendment (Information Sharing) Bill 2017</td>
<td>Family and Children</td>
<td>06.02.18 14.02.18</td>
<td>1 of 2018 2 of 2018</td>
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<tr>
<td>Labour Hire Licensing Bill 2017</td>
<td>Industrial Relations</td>
<td>06.02.18 14.02.18</td>
<td>1 of 2018 2 of 2018</td>
</tr>
<tr>
<td>Marine and Coastal Bill 2017</td>
<td>Energy, Environment and Climate Change</td>
<td>06.02.18 15.02.18</td>
<td>1 of 2018 2 of 2018</td>
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<tr>
<td>Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018</td>
<td>Energy, Environment and Climate Change</td>
<td>20.02.18 03.03.18</td>
<td>2 of 2018 3 of 2018</td>
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<tr>
<td>Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018</td>
<td>Special Minister of State</td>
<td>20.02.18 05.03.18</td>
<td>2 of 2018 3 of 2018</td>
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<tr>
<td>Parks Victoria Bill 2018</td>
<td>Energy, Environment and Climate Change</td>
<td>06.03.18 23.03.18</td>
<td>3 of 2018 4 of 2018</td>
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<tr>
<td>Charities Amendment (Charitable Purpose) Bill 2018²³</td>
<td>Fiona Patten MP</td>
<td>27.03.18</td>
<td>4 of 2018</td>
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<tr>
<td>Engineers Registration Bill 2018</td>
<td>Treasurer</td>
<td>27.03.18 27.04.18</td>
<td>4 of 2018 5 of 2018</td>
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<td>Guardianship and Administration Bill 2018</td>
<td>Attorney-General</td>
<td>27.03.18 30.04.18</td>
<td>4 of 2018 5 of 2018</td>
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<tr>
<td>Legal Identity of Defendants (Organisational Child Abuse) Bill 2018</td>
<td>Attorney-General</td>
<td>27.03.18 30.04.18</td>
<td>4 of 2018 5 of 2018</td>
</tr>
</tbody>
</table>

²³ On 28 March 2018, the President of the Legislative Council ruled that the Bill infringed the provisions of section 62 of the Constitution Act 1975 and ordered that the Bill be withdrawn.
<table>
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<th>Date of Committee Letter / Minister’s Response</th>
<th>Alert Digest No.</th>
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</thead>
<tbody>
<tr>
<td>Advancing the Treaty Process with Aboriginal Victorians Bill 2018</td>
<td>Aboriginal Affairs</td>
<td>01.05.18</td>
<td>5 of 2018</td>
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<td>Justice Legislation Amendment (Access to Justice) Bill 2018</td>
<td>Attorney-General</td>
<td>01.05.18 21.05.18</td>
<td>5 of 2018 7 of 2018</td>
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<td>Long Service Benefits Portability Bill 2018</td>
<td>Industrial Relations</td>
<td>01.05.18</td>
<td>5 of 2018</td>
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<tr>
<td>Electoral Legislation Amendment Bill 2018</td>
<td>Special Minister of State</td>
<td>22.05.18</td>
<td>7 of 2018</td>
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<td>Justice Legislation Amendment (Terrorism) Bill 2018</td>
<td>Attorney-General</td>
<td>22.05.18</td>
<td>7 of 2018</td>
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<tr>
<td>National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018</td>
<td>Attorney-General</td>
<td>22.05.18</td>
<td>7 of 2018</td>
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<td>Serious Offenders Bill 2018</td>
<td>Corrections</td>
<td>22.05.18</td>
<td>7 of 2018</td>
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<tr>
<td>State Taxation Acts Amendment Bill 2018</td>
<td>Treasurer</td>
<td>22.05.18</td>
<td>7 of 2018</td>
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