58th Parliament
Alert Digest

No. 8 of 2018

Tuesday, 5 June 2018
on the following Bills

Advancing the Treaty Process with Aboriginal Victorians Bill 2018
Crimes Amendment (Unlicensed Drivers) Bill 2018
Electoral Legislation Amendment Bill 2018
Flora and Fauna Guarantee Amendment Bill 2018
Justice Legislation Amendment (Terrorism) Bill 2018
Local Government Bill 2018
Long Service Benefits Portability Bill 2018
National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018
Serious Offenders Bill 2018

and Subordinate Legislation

SR No. 3 – Corrections Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

SR No. 4 – Serious Sex Offenders (Detention and Supervision) Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

SR No. 5 – Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 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;
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Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the Charter provides –

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

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

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

Glossary and Symbols

‘Assembly’ refers to the Legislative Assembly of the Victorian Parliament
‘Council’ refers to the Legislative Council of the Victorian Parliament
‘DPP’ refers to the Director of Public Prosecutions for the State of Victoria
‘human rights’ refers to the rights set out in Part 2 of the Charter
‘IBAC’ refers to the Independent Broad-based Anti-corruption Commission
‘penalty units’ refers to the penalty unit fixed from time to time in accordance with the Monetary Units Act 2004 and published in the government gazette (as at 1 July 2016 one penalty unit equals $155.46)
‘Statement of Compatibility’ refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights
‘VCAT’ refers to the Victorian Civil and Administrative Tribunal
[ ] denotes clause numbers in a Bill
Crimes Amendment (Unlicensed Drivers) Bill 2018

Bill Information

Minister                  Dr Rachel Carling-Jenkins MP
Private Members Bill     Introduction Date        27 March 2018
                         Second Reading Date       23 May 2018

Bill Summary

The Bill would amend the *Crimes Act 1958* to create an offence of causing serious injury or death while driving unlicensed in certain circumstances (new section 319AAB).

Type of Bill

☐ Government Bill
☒ Private Members Bill

CONTENT ISSUES

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

Details

*Right to be presumed innocent – Reverse legal onus*

As discussed in the *Charter Report* below, it is unclear whether new sub-sections 319AAB(2) and (4) would impose a reverse legal onus on the accused to prove the defences on the balance of probabilities.

The Committee will write to the member seeking further information as to whether or not new sub-sections 319AAB(2) and (4) would impose a reverse legal onus on the accused to prove the defences on the balance of probabilities.

Recommendation

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

CHARTER ISSUES

☐ NONE
☐ Other:
☒ Compatibility with Human Rights
☐ Operation of the Charter
**Details**

*Presumption of innocence – Offence of unlicensed driving causing death or serious injury – Defence if court ‘satisfied’ that driver had expired licence and drove carefully – Whether reverse onus*

**Summary:** The Committee will write to the member seeking further information as to whether or not the word ‘satisfied’ in new sub-sections 319AAB(2) and (4) imposes a reverse legal onus on the accused.

**Relevant provision**

The Committee notes that clause 3, inserting new sub-sections 319AAB(1) and (3), creates two new offences of causing either serious injury or death while knowingly or recklessly unlicensed. The offence does not require proof that the driver drove carelessly, dangerously, negligently or recklessly.

The Committee also notes that, for each of the offences, new sub-sections 319AAB(2) and (4) provide:

A person is not guilty of an offence against subsection [(1/3)] if the court is satisfied that—

(a) the person has held an appropriate licence (whether issued in Victoria or in another State, Territory or country) at some time before the commission of an offence against subsection [(1/3)]; and

(b) the licence was not cancelled for an offence relating to the driving of a motor vehicle committed by the person in Victoria or in another State, Territory or country; and

(c) at the time the [serious injury/death] was caused, the person was observing the standard of care in relation to the driving of the motor vehicle which a reasonable person would have observed in all the circumstances of the case.

This defence exempts a person who once had a licence, lost it for a non-offence reason (such as letting it expire) and drove carefully.

The Committee observes that the defences in new subsections 319AAB(2) and (4) will only succeed if the Court is ‘satisfied’ of the three matters listed. For example, if, at the end of the trial, the Court is not satisfied as to whether or not an accused with an expired licence drove carefully, then he or she will be convicted of the offence.

**Charter analysis**

The Statement of Compatibility remarks:

Section 25(1) of the charter provides the right to be presumed innocent, and section 25(2) outlines minimum guarantees in criminal proceedings.

An accused’s right under Section 25 (1) to be presumed innocent is not affected by the amendments as it will be necessary to prove each element of the offences.

However, the Committee notes that the Statement of Compatibility does not discuss new subsections 319AAB(2) and (4).

**Relevant comparisons**

The Committee notes that the High Court of Australia has ruled that the word ‘satisfies’, when used in an exception to a deeming provision in Victoria’s drug possession offence, requires that the defendant prove that the matter in the exception on the balance of probabilities.\(^1\) The Court rejected an

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\(^1\) *Momcilovic v R* [2011] HCA 34.
argument that the Charter permits the word ‘satisfies’ to be interpreted as imposing only an evidential burden on the accused.

Conclusion

The Committee will write to the member seeking further information as to whether or not the word ‘satisfied’ in new sub-sections 319AAB(2) and (4) imposes a reverse legal onus on the accused to prove the defences on the balance of probabilities and, if so, whether those sub-sections are compatible with the Charter’s right to be presumed innocent.

Recommendation

☐ Refer to Parliament for consideration  ☒ Write to Member for clarification  ☐ No further action required
Flora and Fauna Guarantee Amendment Bill 2018

Bill Information

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Bill Summary

The Bill would:

- amend the Flora and Fauna Guarantee Act 1988 to:
  - promote Victoria's biodiversity by establishing objectives and principles of the Act
  - impose obligations on government to consider biodiversity and reform reporting obligations
  - reform strategic biodiversity planning by creating a Biodiversity Strategy
  - reform accountability and transparency in the administration of the Act by promoting public consultation
  - create critical habitat determinations and habitat conservation orders aimed at protecting taxa and communities of flora and fauna and important habitats
  - reform existing regulation, compliance and enforcement provisions
- make consequential amendments to other Acts.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

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

Details

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 provides that the provisions of the Bill come into operation on a day or days to be proclaimed, with a default commencement date of 1 November 2019, which is more than 12 months from the date of the Bill’s introduction.

The Explanatory Memorandum states:

The additional time will allow for the making of regulations necessary for the effective implementation of the Bill and allow for any delays that may occur as a result of the election. Regulations are required under clauses 11, 20 and 21 to prescribe criteria for eligibility for listing taxa, communities of flora or fauna and potentially threatening processes and matters to be considered in respect of the issuing of a licence or permit under section 48 or 53 or the making of an authorisation under new section 48A or 53A.
The Committee is satisfied that the possible delayed commencement of the Bill is reasonable and justified in the circumstances.

Possible strict or absolute liability offence

New section 32 (clause 20) would make it an offence for a person to contravene a habitat conservation order, subject to a penalty of 240 penalty units or imprisonment for 2 years or both in the case of a natural person, or 1200 penalty units in the case of a body corporate.

While it is not beyond doubt, new section 32 may be characterised by a court as a strict liability offence.² Notably, while the Explanatory Memorandum states that a number of other offences in the Bill would operate as strict liability offences,³ it does not state whether or not section 32 would also operate on this basis.

Paragraph A (iv) of the Committee’s Practice Note, states that it is a matter of concern to the Committee where a Bill provides insufficient or unhelpful explanatory material in respect to the creation of a strict or absolute liability offence.

Given the uncertainty regarding the construction of section 32, the Committee will write to the Minister to request clarification.

Recommendation

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

CHARTER ISSUES

☒ NONE ☐ Compatibility with Human Rights ☐ Operation of the Charter

☐ Other:

Details

The Flora and Fauna Guarantee Amendment Bill 2018 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

Recommendation

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

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² An offence is one of strict liability if there is no requirement to prove that the accused actually intended to do the act for which they have been charged but the defence of ‘honest and reasonable mistake of fact’ is available. An offence is one of absolute liability if there is no requirement to prove that the accused actually intended to do the act for which they have been charged and the defence of ‘honest and reasonable mistake of fact’ is unavailable.

³ See sections 47, 47B and 52.
Local Government Bill 2018

Bill Summary

The Bill would repeal and re-enact, with amendments, the Local Government Act 1989 (except provisions dealing with sewers and drains, drainage and transport).

The Bill would also repeal the City of Greater Geelong Act 1993, amend the City of Melbourne Act 2001 to give effect to changes arising from a review of the Local Government Act 1989 and amend the Victorian Grants Commission Act 1976.

The coverage of the Bill includes:

- the structure and constitution of a Council, the election of Councillors and the appointment of a Council administration
- the role of a Council and the principles and other matters that describe the manner in which a Council must perform that role
- integrated strategic planning and financial management
- the declaration of municipal rates, service charges and special purpose charges
- the standards of conduct expected of Councillors and Council officials to support required standards of integrity and oversight and enforcement mechanisms to give effect to these standards.

Type of Bill

☒ Government Bill ☐ Private Members Bill

CONTENT ISSUES

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

Details

Delegation of legislative power – Delayed commencement — Whether justified

Clause 2 of the Bill provides that certain provisions would come into operation on 1 January 2020, which is more than 12 months from the date of the Bill’s introduction. The Explanatory Memorandum states:

These clauses introduce the new rating and strategic planning requirements and the new roles and responsibilities of Councillors, Mayors and Deputy Mayors. This will ensure that the provisions relating specifically to Councillors will apply from the new Council term following the general election of all Councils in 2020.
The Committee is satisfied that the delayed commencement of the above clauses is reasonable and justified in the circumstances.

Clause 2 of the Bill also provides that certain other provisions will come into operation on: 1 July 2019; and on a date to be proclaimed with a default commencement of 1 January 2020, which in both cases is more than 12 months from the date of the Bill’s introduction. The Explanatory Memorandum states that these clauses relate to: new governance processes, financial management requirements and council integrity processes; and long service leave entitlements of Council staff, respectively. However, the Committee notes that there is no explanation for the possible delayed commencement of these clauses in the Explanatory Memorandum or Second Reading Speech.

Paragraph A (iii) of the Committee’s Practice Note provides that where a Bill (or part of a Bill) is subject to delayed commencement (i.e., more than 12 months after the Bill’s introduction) or to commencement by proclamation, the Committee expects Parliament to be provided with an explanation as to why this is necessary or desirable.

The Committee will write to the Minister to bring paragraph A (iii) of the Practice Note to her attention and to request further information as to the reasons for the possible delayed commencement date.

Recommendation

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

CHARTER ISSUES

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

Details

Equality – Equal protection from discrimination – Exemption for religious purpose land

Summary: Clauses 101 and 102 provide an exemption from rates for land vested in or held in trust for a religious body that is used for certain purposes. The Committee will write to the Minister seeking further information as to whether or not the provision of this exemption is a reasonable limit on the right to equality.

Relevant provisions

Clause 102(1) provides that a Council may declare municipal rates on rateable land. Clause 101(1)(d) of the Bill excludes “religious purpose land” from the definition of “rateable” land. Religious purpose land is defined within clause 101:

**religion purpose land** means land which is vested in, or held in trust for, a religious body and is used exclusively for the purposes of—

(a) a residence of a practising minister of religion; or

(b) the education and training of persons to be ministers of religion.
Charter analysis

Section 8(3) of the Charter contains the right to equal protection of the law without discrimination. Discrimination is defined by reference to Part 2 of the Equal Opportunity Act 2010, which prohibits discrimination on the basis of an attribute listed in s 6 of that Act. One such attribute is “religious belief or activity”, which is defined in that Act as including “not holding a religious belief or view”.

Clause 101 excludes religious purpose land from the definition of rateable land so that owners of such land are treated favourably by not having to pay rates on that land. The definition of “religious purpose land” only covers land that is vested in or held in trust for a religious body. This may discriminate, either directly or indirectly, against people who own land for the same purposes but who do not hold religious beliefs and therefore either cannot be religious bodies, or are not otherwise able to satisfy the precondition of religious belief necessary to constitute a religious body.

Committee comment

The Committee notes that the Statement of Compatibility does not discuss clause 101 so it is not clear whether the right to equality is limited by this exemption or whether any limit on that right is a reasonable one.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not the provision of the rates exemption in clause 101 limits the right to equality and, if so, whether that limit is compatible with the Charter’s right to equality.

Privacy – Protection of home – Sale or compulsory acquisition of land on which home is located

Summary: Clauses 129 and 150 respectively empower the Council to sell or compulsorily acquire land on which a person’s home is built. These powers may allow Council to limit a person’s privacy rights to the extent that this includes a right to protection of one’s home. The Committee will write to the Minister seeking further information as to whether or not these powers impose unreasonable limits on the right to protection of one’s home.

Relevant provisions

Clause 129(1) provides for the sale of property to recover various monies owed to Council:

129 Council may sell property to recover unpaid municipal rates, service charges or special purpose charges

(1) If—

(a) any amount due to a Council for, or in respect of, municipal rates, service charges or special purpose charges (including enforcement costs and interest) in respect of any rateable land is more than 3 years overdue; and

(b) no current arrangement exists for the payment of the amount to the Council, or a current arrangement for the payment of the amount is not being complied with; and

(c) the Council has a court order requiring the payment of the amount (or part of the amount)—

the Council may sell the property, or cause the property to be transferred to itself, for an amount equal to or more than the estimated value of the property as set out in a written
valuation of the property by a valuer that was made not more than 6 months before the
date of the sale or transfer.

Clause 150(1) provides for the compulsory acquisition of land by Council in accordance with the Land
Acquisition and Compensation Act 1986:

150 Acquisition and compensation

(1) A Council may purchase or compulsorily acquire any land which is or may be required
by the Council for or in connection with, or as incidental to, the performance of its
functions or the exercise of its powers.

Charter analysis

Section 13(a) of the Charter contains the right not to have one’s home unlawfully or arbitrarily
interfered with. The forced sale or compulsory acquisition of land by a Council (where that land has a
residential property on it) may involve an interference with that right, in the same way that the right
has been considered relevant to the confiscation and sale of a property containing a family home under
civil forfeiture provisions.4

The concept of “home” under s 13(a) has been interpreted broadly,5 and will clearly encompass a
residence that a person owns and lives in. The concept of “interference” with home under s 13(a) has
been approached in a similarly broad and pragmatic manner.6

Committee comment

The Committee notes that the Statement of Compatibility does not discuss the impact of clauses 129
and 150 on the right to non-interference with one’s home in s 13(a) of the Charter. It is not clear
whether the likely impact on that right is justifiable under s 7(2) of the Charter. In particular, there may
be less restrictive means of achieving the purposes of those sections, in light of the fact that the sale
of one’s home is a significant limit on that right.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not the
impact of new sections 129 and 150 on the protection of one’s home in s 13(a) of the Charter is a
reasonable limit on that right or whether there are any less restrictive means of achieving the
purposes of those sections.

Freedom of expression – Commission of Inquiry documents – Exclusion of application of the FOI Act

Summary: Clause 257 provides that the Freedom of Information Act 1982 (FOI Act) does not apply to
Commission of Inquiry documents. This may limit the right to seek, receive and impart information in

4 DPP v Ali (No 2) [2010] VSC 503, [28].
5 Director of Housing v Sudi [2010] VCAT 328 at [32].
6 “[T]he question of what amounts to an ‘interference’ with the rights in s 13(a) is approached in a ‘simple and
untechnical’ manner… Evicting or seeking to evict someone living in social housing is interfering with the human rights
relating to their home. … Other decisions which deprive a person of, or impair their capacity to live in, their home also
constitute an interference, such as denying them planning permission and undertaking enforcement measures, and
withdrawing a permission already held, rendering people homeless.” Director of Housing v Sudi [2010] VCAT 328 at
[34].
s 15 of the Charter, which is facilitated by the FOI Act. The Committee will write to the Minister seeking further information as to whether or not this is a reasonable limit on freedom of expression.

Relevant provision

Division 5 of Part 8 of the Bill allows for the appointment of a Commission of Inquiry by the Minister to conduct an inquiry into the affairs of one or more Councils.

Clause 257(1) of the Bill states:

(1) The Freedom of Information Act 1982 does not apply to—
(a) a document that is in the possession of a Commission of Inquiry; or
(b) a document of a Commission of Inquiry that is in the possession of an agency at any time during which the Commission of Inquiry is in existence.

Charter analysis

Section 15(2) of the Charter contains the freedom to seek, receive and impart information of all kinds, which is facilitated by Victoria’s FOI Act. The right has been held to include a positive right to access information held by the government. This right is likely to be limited by provisions such as the proposed s 257(1), which limit the application of the FOI Act.

Committee comment

The Committee notes that the Statement of Compatibility does not discuss the impact of clause 257(1) on the freedom to seek, receive and impart information under s 15(2) of the Charter. It is not clear whether the likely impact on that right is justifiable under s 7(2) of the Charter, in particular whether there are less restrictive means of achieving the purposes of that limit.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not the impact of new section 257 on freedom of expression is a reasonable limit on that right or whether there are any less restrictive means of achieving the purpose of that section.

The right to take part in public life – Enrolment to vote – Only two occupiers per property can be enrolled to vote

Summary: Clause 273 limits the number of occupiers of rateable land that can be enrolled to vote. This will prevent some occupiers from being allowed to vote in municipal elections. This may limit the rights in s 18 of the Charter. The Committee will write to the Minister seeking further information as to whether or not this is a reasonable limit on the right to take part in public life.

Relevant provision

Clause 273 of the Bill provides that up to two occupiers of rateable property liable to pay the rates, may apply to be enrolled to vote as ratepayers in place of the owners:

273 Occupier ratepayers may apply to be enrolled

(1) A person who as at the close of the roll—

(a) is not a person referred to in section 270, 271 or 272; and
(b) is not less than 18 years of age or is less than 18 years of age but will attain the age of 18 years on or before the election day; and
(c) is the occupier of any rateable property in the municipal district, whether solely or jointly with any other person or persons and is liable to pay the rates in respect of that rateable property—
is entitled as a ratepayer to apply to be enrolled on the voters' roll in respect of the ward in which that rateable property is located.

(2) For the purposes of subsection (1), only 2 joint occupiers can be enrolled in respect of each rateable property.

Charter analysis

Section 18 of the Charter provides:

18 Taking part in public life
(1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

(2) Every eligible person has the right, and is to have the opportunity, without discrimination —

(a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and
(b) to have access, on general terms of equality, to the Victorian public service and public office.

Notably, the rights in s 18(2) apply only to “eligible persons”, whereas the right in s 18(1) applies to “all persons in Victoria”. The Charter does not define who is an eligible person and this phrase has not yet been considered by a Victorian court. In their Annotated Guide to the Charter, Pound and Evans discuss whether the phrase “eligible person” is capable of having an autonomous meaning, or merely incorporates Victorian laws regarding eligibility that would otherwise apply from time to time (of which the Bill will become one).8 This question is not settled. In any event, the right to participate in the conduct of public affairs in s 18(1) applies to all persons in Victoria, and could itself be limited if a person is not able to participate “through freely chosen representatives” by being allowed to vote.

Further, there has not been any consideration of significance of the phrase “without discrimination” in s 18 and whether only limits on the right to participate in public life, or the right to vote, that involve discrimination as defined in the Equal Opportunity Act 2010 will be considered limits on the right.

In the related context of the right to vote under the Australian Constitution the High Court has emphasised the need for a rational connection between measures limiting the entitlement to vote with a “legitimate government aim”. A majority of the High Court in Rowe v Electoral Commissioner held that legislation which prevented a voter from enrolling after the writs for the election had been issued, was invalid (not on the basis of the Charter but on the basis of constitutional guarantees).9

Committee comment

The Committee notes that the Statement of Compatibility does not discuss the impact of clause 273 on the rights in s 18 of the Charter. It is not clear whether the likely impact on that right is justifiable under s 7(2) of the Charter, in particular it is unclear what the “legitimate government aims” of that clause are and whether those aims are sufficiently important to warrant limitation of the right under s 7(2) of the Charter. There is no reason given why there needs to be a limit to the number of people who are entitled to vote as occupier ratepayers in municipal elections.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not the impact of new section 273 on the right to participate in public life is a reasonable limit on that right and in particular what the purposes of that section are.

Liberty – Imprisonment on the basis of arbitrary law – Uncertainty of meaning of law creating imprisonment offence

Summary: Clause 330 creates an offence punishable by imprisonment for interfering with another person’s “political right or duty”. It is unclear what is meant by a “political right or duty”. Section 21(2) of the Charter prohibits any deprivation of liberty that is arbitrary. The Committee will write to the Minister seeking further information as to whether or not clause 330 exposes a person to the arbitrary deprivation of their liberty on the basis that it is not possible to predict what behaviour is prohibited by the offence.

Relevant provision

Clause 330 of the Bill provides for what is termed “interference with political liberty”:

330 Interference with political liberty

(1) A person must not hinder or interfere with the free exercise or performance by any other person of any political right or duty that is relevant to an election under this Act.

(2) A person who contravenes subsection (1) is guilty of an indictable offence.

Penalty: 600 penalty units or imprisonment for 5 years.

(3) ...
Deprivations of liberty that are “arbitrary” will limit the right in s 21(2) of the Charter. The concept of arbitrariness in international human rights law involves considerations of proportionality and predictability.\footnote{Although it is not settled whether the “human rights definition” or the “dictionary definition” of arbitrariness applies in the Charter, the prevailing view appears to be that the “human rights definition” applies, consistent with \textit{PIB v Melbourne Health (Patrick’s Case)} [2011] VSC 327, [85]; \textit{DPP v Kaba} [2014] VSC 52, [154]; ZZ v Secretary, Department of Justice [2013] VSC 267, [85] and contrary to \textit{WBM v Chief Commissioner of Police} (2010) 27 VR 469; [2010] VSC 219 [51], [56].} In \textit{PIB v Melbourne Health}, Justice Bell found that arbitrariness:\footnote{\textit{PIB v Melbourne Health} (2011) 39 VR 373; [2011] VSC 327 [82]-[85] (Bell J).} ...extends to interferences which, in the particular circumstances applying to the individual, are capricious, \textit{unpredictable} or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought. (emphasis added)

There is no right to “political liberty” (as referred to in the title of clause 330) in the Charter, nor is a right in those terms included in relevant international instruments such as the \textit{International Covenant of Civil and Political Rights} (ICCPR). Article 25 of the ICCPR includes a political right in similar terms to s 18 of the Charter (to participation in public affairs and the right to vote) but it is possible that the concept of “political liberty” is broader than this and is in fact an amalgam of various political rights. The Explanatory Memorandum does not provide any indication of the phrase’s meaning, nor is it defined in the Bill.

The phrase “political right or duty” is used in section 327 of the \textit{Commonwealth Electoral Act 1918} (Cth). There has been very little judicial consideration of that section. In \textit{Re Cusack} a single justice of the High Court did not consider the contents or scope of the right or duty but did consider the nature of the behaviour addressed by the section:\footnote{\textit{Re Cusack} (1985) 66 ALR 93, 95 (Wilson J).}

[The section] is concerned with intimidatory or other practices which tend to overbear the freedom of will of the person exercising the right or duty.

In \textit{Hudson v Entsch} [2005] FCA 460 a single justice of the Federal Court considered whether certain behaviour interfered with a relevant right or duty but did not attempt to define the phrase. Justice Dowsett found that the right to vote and the right to stand for election were “political rights” but did not determine whether the phrase captured more than that.\footnote{\textit{Hudson v Entsch} [2005] FCA 460, [49] (Dowsett J).} Importantly, his Honour noted the uncertainty of what was captured by the phrase:\footnote{\textit{Hudson v Entsch} [2005] FCA 557, [5] (Dowsett J).}

It may be incorrect to describe the curtailment of a legislative or executive power as a “right” vested in an individual citizen, but it is not clear to me that the expression necessarily describes only a legally enforceable right.

In the subsequent costs decision, Dowsett J noted that:\footnote{\textit{Hudson v Entsch} [2005] FCA 557, [5] (Dowsett J).}

The second respondent demonstrated a significant interest in having light thrown upon the relevant provisions of the legislation, which provisions pose some difficulties of construction. I do not pretend to have solved those problems.

Clause 330 exposes a person to 5 years imprisonment if they “hinder or interfere with the free exercise of a person’s political right or duty”. Given that the phrase “political right or duty” has no commonly understood meaning (and may extend so far as to include “rights” that are not legally enforceable rights), it cannot be predicted with any certainty what behaviour clause 330 will criminalise. The clause therefore unpredictably exposes a person to deprivation of their liberty in a manner likely to be
considered arbitrary, particularly given the length of that potential imprisonment is 5 years (noting that the Commonwealth equivalent exposes a person to 6 months imprisonment).

**Committee comment**

The Committee notes that the Statement of Compatibility does not discuss clause 330. It is not clear whether the likely impact on the liberty right is justifiable under s 7(2) of the Charter, and in particular why it is not possible to set out what a “political right or duty” is or otherwise to provide greater predictability as to the coverage of that offence provision.

**Relevant comparisons**

Some electoral acts in other Australian jurisdictions contain similarly worded offence provisions. This is the *Commonwealth Electoral Act 1918* (Cth) provision:

327 Interference with political liberty etc.

(1) A person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act.

Penalty: Imprisonment for 6 months or 10 penalty units, or both.

As discussed above, the precise meaning of the phrase in question has not been resolved.

**Conclusion**

The Committee will write to the Minister seeking further information as to the meaning of the phrase ‘political right or duty’ in clause 330 and whether this clause exposes a person to the arbitrary deprivation of their liberty on the basis that it is not possible to predict what behaviour is prohibited by the offence, which is punishable by up to 5 years imprisonment.

**Freedom of expression – Powers of election official – Removal of person who causes a disturbance at any election**

Summary: Clause 331 empowers election officials to remove any person who “causes a disturbance at any election”. This clause may limit the ability of voters to undertake political protest at any election, in that they may be removed for doing so. The Committee will write to the Minister seeking further information as to whether or not clause 331 limits political protest and therefore the right to freedom of expression in s 15 of the Charter.

**Relevant provision**

Clause 331 of the Bill provides:

331 Powers of election manager or election official

(1) Any election manager or election official has the power and authority—

(a) to maintain order and keep the peace at any venue used for an election; and

(b) to cause to be removed any person who—

... (v) causes a disturbance at any election.
(2) Police officers must aid and assist an election manager or election official in the exercise of the powers conferred by this section.

**Charter analysis**

Section 15 of the Charter provides the right to freedom of expression, which includes the freedom “to seek, receive and impart information and ideas of all kinds”. The right does not merely protect benign or popular expression, it protects unpopular and popular protest and even offensive, disturbing or shocking information or ideas.\(^{16}\)

Clause 331 allows a person to be “removed” by an election manager (with the assistance of the police) if they “cause a disturbance”. This broad phrase is likely to allow removal of people for acts of protest.

The Committee notes that the Statement of Compatibility does not discuss clause 331, although there is the following discussion of the impact of Part 9, Division 9 (in which clause 331 is contained) on the right to freedom of expression:

Part 9 of the Bill impacts on the right to freedom of expression by prohibiting the distribution of certain information related to council elections. Part 9, Division 9 of the Bill contains offence provisions which include restrictions on publishing misleading information, a requirement to have electoral materials authorised by a named person and a requirement to make and lodge electoral campaign donation returns. These impacts are reasonable and necessary to promote the right to participate in public life by preventing the distribution of false or misleading information that could unduly influence elections, to ensure that voters have relevant information to inform their decisions and to maintain the transparency and integrity of council decision making.

**Committee comment**

The Statement of Compatibility does not specifically consider the potential impact of clause 331 on the aspect of freedom of expression that protects political protest. It is not clear whether the likely impact on the right to protest is considered justifiable under s 7(2) of the Charter.

**Conclusion**

The Committee will write to the Minister seeking further information as to whether or not clause 331 is a reasonable limit on the right to freedom of expression, in particular the right to protest, and whether any such limit is considered justifiable under s 7(2) of the Charter.

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**The right to take part in public life – Failure to pay surcharge – Disqualification from being a Councillor**

Summary: Clause 350 limits the right to participate in public life by disqualifying Councillors who do not pay a “surcharge” within 3 months. The Committee will write to the Minister seeking further information as to whether or not this is a reasonable limit on the right to take part in public life.

**Relevant provision**

Clause 350 of the Bill provides that if a Councillor does not pay a surcharge within 3 months of it being imposed, or confirmed on review, then they cease to be qualified to be a Councillor:

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\(^{16}\) *Sunday Times v United Kingdom (No 2)* [1992] 14 EHRR 123.
350 Payment of the surcharge

(1) A surcharge is a debt due and payable to the Council by the Councillor on whom it is imposed.

(2) The Council is entitled to deduct any amount towards the discharge of the amount of the surcharge from any allowances or other benefit payable to the Councillor on whom the surcharge is imposed.

(3) If a Councillor on whom a surcharge is imposed does not pay the surcharge within 3 months of it being imposed or confirmed on a review, the Councillor ceases to be qualified to be or to become a Councillor until the surcharge is paid.

Charter analysis

Section 18 of the Charter provides that every person has the right to participate in the conduct of public affairs and to be elected at municipal elections that guarantee the free expression of the will of the electors. Removing a person from office who has been elected as an “expression of the will of the electors” for their failure to pay a surcharge is a very significant measure that requires weighty justification, particularly given the impact of this disqualification on others’ choice of representative. Further, the impact is indiscriminate in that there is no limit on how large or how small the surcharge needs to be in order for it to result in loss of office and there is no discussion of why less restrictive means such as those provided for in clause 350(2) are not considered sufficient.

Committee comment

The Committee notes that the Statement of Compatibility does not discuss the impact of clause 350 on the rights in s 18 of the Charter. It is not clear whether the likely impact on that right is justifiable under s 7(2) of the Charter, in particular it is not clear whether there are less restrictive means reasonably available for recovering the debt resulting from the surcharge.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not clause 350 is a reasonable limit on the right to participate in public life and in particular whether there are less restrictive means to achieve the purpose of the clause.

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SR No. 3 – Corrections Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

SR No. 4 – Serious Sex Offenders (Detention and Supervision) Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

SR No. 5 – Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

The Committee wrote to the Attorney-General in relation to the above regulations.

The Committee thanks the Attorney-General for the attached response.
28 March 2018

Hon Martin Pakula MP
Attorney-General
Level 26
121 Exhibition Street
Melbourne VIC 3000

By email: attorney-general@justice.vic.gov.au
cc: adrian.browne@minstaff.vic.gov.au

Dear Attorney-General,

SR No. 3-18 – Corrections Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

SR No. 4-18 – Serious Sex Offenders (Detention and Supervision) Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

SR No. 5-18 – Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018

The Regulation Review Subcommittee (the Subcommittee) carefully considered the above three regulations collectively at a meeting on 26th March 2018. Pursuant to sections 21(1)(a)(c),(d),(e) and (ha) of the Subordinate Legislation Act 1994 the Subcommittee seeks the provision of further information in respect of various matters. The Subcommittee appreciates that the matters set out below are detailed and lengthy.

(a) Background

By way of background the Subcommittee notes that the Corrections Legislation Miscellaneous Amendment Act 2017 (Amendment Act) was an omnibus statute. Sections 4-7 of the Amendment Act amended the Corrections Act 1986 (Corrections Act). Sections 42-44 amended the Serious Sex Offenders (Detention and Supervision) Act 2009 (SSODS Act). Section 64 amended the Children, Youth and Families Act 2005 (Children, Youth and Families Act). The Amendment Act inserted new offences into the these Acts to prohibit the operation of remotely piloted aircraft and helicopters or possession of remotely piloted aircraft, in, at or in the vicinity of prisons, residential facilities and youth justice facilities. The above three regulations respond to the amendments made by the Amendment Act. In the context of the review of regulations, the Subcommittee has some general queries about the operation of the amendments made by the Amendment Act. In addition, the Subcommittee also has specific queries with respect to the regulations.
(b) **Operation of the Amendment Act**

More specifically, the Amendment Act introduced the following common provisions into each principal Act:

- An offence provision barring the operation or possession of a remotely controlled aircraft or helicopter in, over or near a corrections facility in a manner that threatens or is likely to threaten the safety or good order of that facility or someone in it. It also introduced provisions permitting a corrections officer to require someone reasonably believed to be committing that offence to leave the neighbourhood of the facility or to arrest that person (s32A Corrections Act, s414A SSDS Act, s488DD Children, Youth and Families Act.)

- A provision permitting a corrections officer who reasonably believes (or who has been directed by an officer in charge of the facility who reasonably believes) that the offence has been committed to conduct a search outside but near the facility, including searching or examining the person reasonably believed to have committed the offence, including things (including a vehicle) that that person possesses or controls, or requiring a person outside or near the facility to submit to a search if the officer reasonably believes that the person possesses a thing that could evidence the offence (s 45(2C)(a),(d) Corrections Act, s142(2C)(a),(d) Serious Sex Offenders (Detention and Supervision) Act & s488DD(3)(a),(d) Children, Youth and Families Act.)

However, the Subcommittee generally observes that the Amendment Act included significant differences between the regimes:

- The Corrections Act (s. 45(2D)) and Children, Youth and Families Act (s. 488DD(6)) provide that a search under these provisions ‘must be conducted in accordance with the regulations’ whereas the SSDS Act does not.

- The SSDS Act provides that a ‘search’ means ‘means either or both a garment search or a pat-down search’ and must be conducted by a person of the same sex (s. 142(4),(5).) The Corrections Act and the Children, Youth and Families Act do not.

- The Corrections Act (s. 45(3)) and the SSDS Act (s. 142(6)) state that ‘If a person... refuses to submit to be searched under this section while inside the [facility], the [officer in charge] may order the person to leave the [prison/residential facility] immediately’ By contrast, the Children, Youth and Families Act (s. 488DD(4)) states that (for all searches, whether inside or outside the facility) ‘before conducting a search... the officer who is to conduct the search must... inform the person that the person may refuse the search’.

- The SSDS Act (s. 142(7A)) states that ‘If necessary, a supervision officer, a specified officer or a police officer may use reasonable force to carry out a search under this section.’ The Corrections Act (s. 45(5)) only says that ‘A prison officer may, if necessary, use reasonable force to compel a person to obey an order to leave the prison.’ The Children, Youth and Families Act has no relevant provisions on reasonable force.
(c) Request for the provision of further information

Given the foregoing, the Subcommittee seeks the provision of further information in relation to two aspects of the operation of the Amendment Act.

First, the Subcommittee seeks further information as to whether or not the a member of the public searched outside but near a prison under the search powers in s 45(2)(a),(d) Corrections Act, s142(2)(a),(d) SSODS Act and s48DD(3)(a),(d) Children, Youth and Families Act can refuse to be searched and what happens if that person refuses to be searched. While the Subcommittee understands that a search power usually cannot be refused, it notes that the provisions on refusals of searches (s. 45(3) Corrections Act, s.142(6) SSODS Act and s. Children, Youth and Families Act s. 48DD(4)) may be interpreted as allowing a person to refuse to be searched, at least in some circumstances. The Subcommittee observes that this question is relevant to its assessment of whether the regulations are authorised by the Act under its scrutiny grounds (a) and (ha) (including whether the regulations are compatible with the Charter’s right against unlawful interferences in privacy.)

Second, the Subcommittee seeks further information as to the reasons for the differences among the three statutory regimes noted above. In particular this includes any difference in the law on refusal to search and to the differing provisions for matters to be dealt with by regulations instead of in the statute. While the Subcommittee understands that the regimes for prisons, residential facilities and youth justice facilities are different in various ways, it notes that the ban on drones outside but near each facility and the accompanying search powers for outside but near the facility are relevant enough similar. The Subcommittee observes that this question is relevant to its assessment of the regulations pursuant to sections 21(1) (c), (d), (e) and (ha) of the Subordinate Legislation Act 1994. (The Subcommittees notes that in particular its assessment includes whether the nature of the search and information to be provided for each regime should be set out in legislation, rather than regulations (sections 21(1)(c) and (d). It also includes whether the regulations are compatible with the Charter’s right against arbitrary interferences in privacy (section 21(1)(ha))

(d) SR No. 3-18 – Corrections Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018 (SR No. 3-18)

The Subcommittee also seeks further information in respect of four aspects of the operation of SR No. 3-18.

First, the Subcommittee seeks further information as to why these regulations do not require a similar instruction to be given such as that as set out in section 48DD(4) of the Children, Youth and Families Act and whether the absence of such an instruction is compatible with the Charter’s right to privacy.
The Subcommittee notes that new reg. 71A(1)(a), (b) obliges the searcher to:

(a) inform the person of the officer’s authority to conduct the search;
(b) inform the person of the reason for the search in that particular case;

However, it observes that, in contrast to searches outside a youth justice facility, the regulations do not require the officer to ‘inform the person that the person may refuse the search’.

Second, the Subcommittee seeks further information as to why the terms of new regulation 71A(1)(c) differ from the terms of both s32A and s45(2C)(d) of the Corrections Act. The Subcommittee notes that new reg 71A(1)(c) requires that the searcher:

(c) ask the person if the person has any thing in their possession which may threaten the good order or security of the prison, including a remotely piloted aircraft or helicopter;

However, it observes that the terms of this provision (which appear to be based on existing reg 71(2)(a), which sets out this rule for prison visitors who consent to be randomly searched) do not match the terms of either the offence provision in s. 32A of the Corrections Act. (Section 32 of the Corrections Act provides for a remotely piloted aircraft or helicopter that is possessed or used in a manner that threatens good order or security, not ‘any thing’ that threatens). The search provision in section 45(2C)(d) provides for things that ‘will afford evidence of the commission of the offence’.

Third, the Subcommittee seeks further information as to how new regulation 71A(1)(c) interacts with the requirements of Subdivision (30A) (‘Custody and investigation’) of Division 1 of Part III of the Crimes Act 1958, and whether its terms are compatible with the Charter’s right with respect to self-incrimination. The Subcommittee notes that, in contrast to the random searches of prison visitors under regulation 71, searches regulated by 71A are based on a reasonable belief that an offence has or is being committed. The Subcommittee observes that if (as would be typical) the searcher suspects that the person being searched has committed the offence, then that brings the encounter between the officer and person within the terms of s. 464(1)(c) of the Crimes Act 1958. Section 464(1)(c) defines a person as being ‘in custody’ if s/he is being investigated by an ‘investigating official’ (which would include an officer conducting a search in relation to an offence) and ‘there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence’ (which will be the case of the officer reasonably believes that the person committed the offence.) In turn, the person being ‘in custody’ means that ‘[b]efore any questioning (other than a request for the person’s name and address), the official must caution the person (s464A(3)) and tell him/her of his/her rights to communicate with a friend or lawyer (s464C(1)) (as well as various other specific rights for children, foreigners, etc.)

Fourth, the Subcommittee seeks further information as to whether there are any reasons as to why these regulations do not contain an equivalent provision to 142(5) of the SSODS Act or regulation 34B(1)(a)(i) of SR No. 5-18 (which provide that ‘[t]o the extent practicable a pat-down search must be conducted by a person of the same sex as the person being searched’) and whether that absence is compatible with the Charter’s right to privacy. The Subcommittee notes that new reg 7A(3)(b) only provides that the search ‘not be conducted by more officers than is reasonably necessary to ensure the safety of the officers and the person being searched.’
(e) SR No. 4-18 – Serious Sex Offenders (Detention and Supervision) Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018 (SR No. 4-18)

In relation to the SR No. 4-18, the Subcommittee seeks your advice as to why the regulations do not contain equivalent provisions to:

- regulation 71A(1)(a),(b) of SR No. 3-18 (requiring that the person searched be informed of the officer’s authority to conduct the search and the reason for the search in the particular case);
- regulation 71A(3) of the SR No. 3-18 (barring more officers than reasonable necessary for safety);
- regulation 71A(4) of SR No. 3-18 (on vehicle searches);
- regulation 74AB of SR No. 3-18 (dealing with things seized); or
- section 488DD(4) of the Children, Youth and Families Act (informing the person that he or she can refuse to be searched)

The Subcommittee also seeks your advice as to whether the absence of these provisions is compatible with the Charter’s rights to privacy and property.

(f) SR No. 5-18 – Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018 (SR No. 5-18)

Finally, the Subcommittee seeks your advice in relation to two aspects of the operation of SR No. 5-18.

First, the Subcommittee seeks your advice as to whether there are any reasons as to why these regulations do not contain a requirement equivalent to regulation 71A(1)(b) of SR 3-18 (requiring that the person be informed of the reason for the search in the particular case) and whether that absence if compatible with the Charter’s right to privacy. The Subcommittee notes that SR 5-2018 (as amended) does not require that the searcher inform the person who is searched of anything and that the Children, Youth and Families Act only requires that the person searched be told of the officer’s authority to search and the right to refuse.

Second, the Subcommittee seeks your advice as to whether there are any reasons as to why the regulations make no mention of searching a vehicle using an electronic or mechanical device (as referred to in the Human Rights Certificate and regulation 71A(4)(b) of SR No. 3-18) and whether that absence is compatible with the Charter’s right to privacy.

In that regard, The Subcommittee notes that the Human Rights Certificate states:

‘Search are defined in section 482A of the Principal Act. New regulation 34B(2) further provides that a search of a vehicle must be conducted by an officer examining the exterior and interior of the vehicle and/or passing an electronic or mechanical device over or in close proximity to the vehicle.’

However the Subcommittee also further observes that regulation 34B(2) only requires that ‘a search of a vehicle must be conducted by an officer examining the exterior and interior of the vehicle.’
(g) Conclusion

The Subcommittee has not yet approved the Regulations. However, in that regard the Subcommittee appreciates that the matters raised are detailed, complex and lengthy and require careful consideration and analysis. The Subcommittee however would appreciate a response to the matters raised by Wednesday Friday 18 May 2018 so that it may discharge its scrutiny obligations in a timely manner.

Please do not hesitate to contact me should you wish to discuss any aspect of the foregoing.

Yours sincerely

The Honourable Richard Dalla-Riva MP
Deputy Chair
Regulation Review Subcommittee
The Hon Richard Dalla-Riva MP  
Deputy Chair  
Regulation Review Subcommittee  
Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002  

Dear Mr Dalla-Riva  

Remotely Piloted Aircraft and Helicopter Ban Regulations  

Thank you for your letter to the Attorney-General on behalf of the Regulation Review Subcommittee (the Subcommittee) in relation to the remotely piloted aircraft and helicopter ban. The Subcommittee requested further information in respect of the Corrections Legislation Miscellaneous Amendment Act 2017 (the Amendment Act) and the three regulations related to the remotely piloted aircraft and helicopter ban which commenced on 1 February 2018. The three regulations (the new regulations) are:  

- SR No. 3-18 – Corrections Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018;  
- SR No. 4-18 – Serious Sex Offenders (Detention and Supervision) Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018; and  
- SR No. 5-18 – Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018.  

As I am the Minister responsible for the Corrections Act 1986, the Serious Sex Offenders (Detention and Supervision) Act 2009 (SSODS Act) and associated regulations, the Attorney-General has forwarded your letter to me to respond. I have also consulted with the Minister for Families and Children in relation to the Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018 (CYF Regulations).  

Addressing the risk of remotely piloted aircraft and helicopters  

Remotely piloted aircraft and helicopters pose distinct security threats to prisons and other facilities operated by the Department of Justice and Regulation. For example, the remotely piloted aircraft or helicopter may be a means of smuggling contraband into a prison, be used as a surveillance tool, or potentially be used as a weapon.  

The Corrections Act, the SSODS Act and the Children, Youth and Families Act 2005 (the CYF Act) were amended to introduce a new offence prohibiting the possession or operation of remotely piloted aircraft and helicopters.
piloted aircraft (commonly referred to as 'drones') and the operation of helicopters at, near or above prisons, residential facilities and youth justice facilities.

The amendments to the three Acts contain a number of safeguards. The Acts do not criminalise inadvertent behaviour as the conduct must be intentional or reckless and must threaten the good order or security of the facility. The Act also provides exemptions for using a remotely piloted aircraft or helicopter such as by police or emergency services. The prison Governor or officer in charge of the facility may also authorise the use of a remotely piloted aircraft or helicopter by a person, for example to monitor prison infrastructure.

The legislative schemes make it clear that existing search and other related powers in the Corrections Act, SSODS Act and CYF Act can be exercised in relation to the new offence. Safeguards were included in relation to these powers. For example, there is a requirement under the Corrections Regulations 2009 and CYF Regulations to give an explanation to the person prior to conducting a search. Searches can also only be conducted in specified, limited circumstances.

Nonetheless, the remotely piloted aircraft and helicopter ban amends three distinct schemes which have their own separate legislative basis. The Corrections Act governs adult corrections administration including prisons and community-based corrections. The SSODS Act is a civil non-punitive scheme providing for the post-sentence supervision or detention of serious sex offenders. The CYF Act is the principal legislation for youth justice services. The operational frameworks and associated search powers differ to address distinct offender cohorts and security risks of the facilities administered by these legislative schemes. As a result, the search and seizure powers were drafted to conform to the different objectives and existing powers across the three legislative schemes.

The Amendment Act

The Subcommittee sought further information in relation to two aspects of the operation of the Amendment Act.

Right to refuse a search

The Subcommittee queried whether a member of the public outside but near a correctional facility may refuse a search under sections 45(2C)(a) and (d) of the Corrections Act, sections 142(2C)(a) and (d) of the SSODS Act, or sections 488DD(3)(a) and (d) of the CYF Act. The Subcommittee further queried what would happen if a search was refused. In particular, the Subcommittee has queried if these search powers outside but near a correctional facility are within the powers conferred by the authorising Act and if the regulations are compatible with the right to privacy in the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

In summary, there is no explicit power for a member of the public to refuse a search outside but near a correctional facility under the relevant provisions of the Corrections Act or SSODS Act. However, section 488DD(4)(b) of the CYF Act requires a person to be informed of their right to refuse the search. The associated regulations have been drafted to reflect the search powers under each legislative scheme and to ensure that the regulations are within the power conferred by the authorising Act.

Both sections 45(3) of the Corrections Act and 142(6) of the SSODS Act allow the prison Governor and officer in charge of the residential facility to order a person who refuses a search under those sections to leave the facility. While the Corrections Act explicitly states that the person refusing must be inside the prison, the SSODS Act implies the same, as the consequence for refusing only applies to a person who is inside the residential facility at the time. Both legislative schemes are silent on the right of a member of the public to refuse a search while outside the prison or residential facility.
Section 488DD(4)(b) of the CYF Act, on the other hand, requires that an officer, before a search is conducted, inform the person that he or she may refuse the search. This provision is based on other search provisions in the CYF Act, which require a person to be informed that they may refuse a search. In the case of the remotely piloted aircraft and helicopter ban provisions, the CYF Act does not prescribe any procedure that must be followed if a person refuses to be searched.

However, if an officer believes on reasonable grounds that a person is committing or has committed an offence under section 488DB(1), they may order the person to leave the neighbourhood of the youth justice facility under section 488DB(3) of the CYF Act or apprehend the person until they can be placed into the custody of a police officer under section 488DB(6) of the CYF Act. An officer must advise the person why they are being ordered to leave, and it is an offence to disobey such an order (section 488DB(4)-(5) of the CYF Act).

In practice, while the Corrections Act and SSODS Act do not explicitly permit a person to refuse a search, it is anticipated that search powers would only be used in such circumstances where it is necessary and appropriate having regard to the relevant security risks, including whether those risks could be managed in other ways. Existing operational procedures for corrections officers exercising similar powers ensure they are always proportionate to the relevant security risk, and recommend that matters occurring outside the boundary of the facilities be referred to Victoria Police. In circumstances that require the involvement of corrections officers, operational procedures being developed will recommend that the corrections officer consider whether it is more appropriate to order a person to leave the neighbourhood, or apprehend the person until they can be placed into the custody of a police officer.

The search powers outside but near a correctional facility are not an unlawful or arbitrary interference with the right to privacy under section 13 of the Charter. The search powers are reasonable and proportionate in addressing threats to the good order or security of a correctional facility. The searches may only be conducted outside but near a correctional facility if the officer reasonably believes that a person has committed, or is committing, the new offence. Any powers exercised to order a person a leave a neighbourhood or apprehend the person must also be made on reasonable grounds and must be proportionate to the threat to the good order or security of the correctional facility.

**Differences in the statutory regimes**

**Searches conducted in accordance with the regulations**

The Subcommittee requested further information on the reasons for setting out search-related powers and procedures in either legislation or regulations.

The search-related powers were drafted to conform to the objectives and pre-existing powers of the different statutory regimes. The legislative schemes for both the Corrections Act and the CYF Act provided for regulations to detail further matters in relation to searches. However, it is important to note that the authorisation or power to conduct the search is contained in the Acts – the regulations simply provide operational detail about the manner of searching. This is considered an appropriate balance between ensuring that the human rights and other impacts of authorising a search have been subjected to Parliamentary scrutiny, while providing flexibility for the manner of searches to be updated and adapted to operational practices.

Under the SSODS Act, the search powers are in the Act alone, and an explicit regulation-making power for searches is not present in the Act. Accordingly, the search powers in relation to the new offence were also provided in the Act alone, and therefore there is no corresponding requirement for the searches to be conducted in accordance with the regulations. This is due in part to the fact that the SSODS Act establishes a civil, non-punitive scheme for post-sentence detention and supervision of serious sex offenders, and the general approach in the SSODS Act is for anything which impacts on an offender’s rights to be expressly set out in the Act as an additional safeguard.
This can be contrasted with the Corrections Act and CYF Act which primarily concern persons who are still under sentence.

Types of searches

The Subcommittee noted that the SSODS Act provides that a ‘search’ means either or both a garment search or a pat-down search and must be conducted by a person of the same sex, whereas the Corrections Act and CYF Act do not.

This is another example of the pre-existing differences between the legislative schemes. The SSODS Act provides for all the powers relating to conducting searches without reference to the regulations. As such, the types of searches and the manner of conducting the searches is contained in the Act.

By comparison, the Corrections Act and CYF Act provide further detail about the manner in which searches should be undertaken in the regulations as well as the primary legislation. In particular, regulations 34B(1)(a)(i) and (ii) of the CYF Regulations state that a search of a person must be undertaken by either or both a frisk search by an officer of the same sex or a screening search. These two types of search are defined in detail in section 482A of the CYF Act. On the other hand, section 71(3) of the Corrections Regulations allows searches to be conducted by either one or more of a scanning search, garment search, or a pat-down search.

In each case, the types of searches that may be undertaken are restricted to those listed, whether in the Act or in the regulations. The same applies to whether the search must be conducted by a person of the same sex. The absence of the requirement for searches by an officer of the same sex in the Corrections legislative scheme is addressed in detail below.

Use of reasonable force

The Subcommittee noted that subsections 142(7) and (7A) of the SSODS Act states that, if necessary, a supervision officer, a specified officer or a police officer may use reasonable force to compel a person to leave the residential facility or to carry out a search under this section. By comparison, the Corrections Act at section 45(5) only states that a prison officer may, if necessary, use reasonable force to compel a person to obey an order to leave the prison. The Subcommittee also notes that the CYF Act does not contain any provisions relating to the use of force when conducting a search under section 48BDD as the use of force is only permitted as a last resort under the scheme.

The right to use reasonable force under sections of the Corrections and SSODS acts listed above was in existence before the Amendment Act commenced. The differences between when, or in what circumstances, reasonable force may be used are based on the distinct security risks and offender cohorts related to the facilities administered by the three legislative schemes. This has not changed with the introduction of the new offence. Any use of force that is authorised is subject to safeguards such as using reasonable force only where necessary, and requirements for reporting each instance of using force to the prison Governor in the Corrections Act and the Commissioner and the Secretary to the Department of Justice and Regulation in the SSODS Act.

The Corrections Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018 (SR No. 3-18)

The Subcommittee also sought further information in respect of four aspects of SR No. 3-18.

Right to refuse a search

The Subcommittee sought further information as to why the Corrections Regulations do not require an instruction to the officer conducting the search to inform the person of the right to refuse a search, as is required in searches outside a youth justice facility.
As discussed above, there is no right to refuse a search under the Corrections Act, whereas a person must be informed that they may refuse a search under the CYF Act. The regulations have been drafted to reflect the different positions in the authorising Acts. However, operational procedures under both statutory schemes will ensure that corrections officers exercise powers proportionate to the security threat and with appropriate safeguards. Officers may order someone to leave the neighbourhood of the facility as an alternative to conducting a search, if this is a more appropriate response in the circumstances.

**Difference in terms used in the Act and regulations**

The Subcommittee noted that new regulation 71A(1)(c) of the Corrections Regulations requires the officer undertaking the search to ask if the person being searched has “any thing in their possession which may threaten the good order or security of the prison, including a remotely piloted aircraft or helicopter.” It further noted that section 32A of the Corrections Act refers to a remotely piloted aircraft that is possessed or used in a manner that threatens good order or security, and not “any thing”, while section 45(2C)(d) of the Corrections Act provides for searches of things that “will afford evidence of the commission of the offence.”

Regulation 71A(1)(c) has been drafted to also cater for section 45(2C)(a) of the Corrections Act which allows an escort officer or police officer (if the prison is in the metropolitan zone) to search and examine “any thing belonging to, in the possession of, or under the control of, the person, including the person’s vehicle.”

The broader drafting acknowledges that one of the objectives of the new offence is to prevent the introduction of contraband into the prison. While the definition of remotely piloted aircraft includes any controls for the aircraft, the broader drafting is intended to capture contraband or other delivery mechanisms that may be associated with the remotely piloted aircraft. The request also provides an opportunity for the person to declare any matters that may present a danger to the officer conducting a search.

**Interaction with the Crimes Act 1958**

The Subcommittee noted that new regulation 71A(1)(c) may interact with the requirements of Subdivision (30A) (Custody and Investigation) of Division 1 of Part III of the Crimes Act 1958 and queried whether its terms are compatible with the Charter’s right against self-incrimination.

Subdivision 30A of Division 1 of Part III of the Crimes Act outlines, among other things, the protections that apply to a person who is in custody or under investigation. For the purposes of the subdivision, a person is in custody if they are being investigated by an officer appointed under an Act to determine the person’s involvement in the commission of an offence if there is enough information in the possession of the officer to justify the arrest of that person in respect of that offence (section 464(2) of the Crimes Act).

In the case of an escort officer conducting a search in relation to the new offence, the officer would be an investigating official for the purposes of the Crimes Act, and the person being searched would be taken to be in custody as the officer is required to have a belief on reasonable grounds that the person has committed the offence, which is the same threshold required to arrest someone for an offence.

I agree with the Subcommittee’s view that, as a result, any person who is searched must be cautioned prior to any questioning (other than a request for the person’s name and address), and must be informed of their rights to communicate with a friend or lawyer. Officers conducting searches in relation to the new offence will be required to inform the person being searched of the protections provided under subdivision 30A of Division 1 of Part III of the Crimes Act. This requirement will be set out clearly in relevant operating procedures which deal with functions undertaken by officers at a prison. Escort officers are required to comply with these operating procedures.
The requirement to inform a person of the protections afforded to them under Subdivision 30A of Division 1 of Part III of the Crimes Act will ensure that the questioning of persons under regulation 71A(1)(c) is compatible with the Charter’s right with respect to self-incrimination. The person being searched will be cautioned and provided the opportunity to obtain legal representation prior to making any statements which may self-incriminate. In my view, neither the Amendment Act nor the new regulations by their terms, or by implication, limit or otherwise affect the protections provided in the Crimes Act in relation to the right with respect to self-incrimination.

Search conducted by someone of the same sex

The Subcommittee also seeks an explanation of why SR No 3-18 does not contain an equivalent provision to the SSODS Act and associated regulations which require that pat-down searches be conducted by a person of the same sex as the person being searched, and whether such an absence is compatible with the Charter’s right to privacy.

Under current operating procedures, all searches undertaken by escort officers must be undertaken with due regard to the person’s privacy and dignity. Where possible, pat-down searches of individuals will be conducted by an officer of the same sex as the person being searched. However, in considering the risks and security considerations of prisons (compared to residential facilities or youth justice facilities), pat-down searches are not limited to being conducted by officers of the same sex.

The absence of the requirement that the search be undertaken by someone of the same sex is not incompatible with the Charter as the circumstances in which a person may be searched are clearly stated in the legislation, and are circumscribed by the fact that the officer must believe on reasonable grounds that the person has committed an offence. While officers may have the power to conduct the search, operating procedures currently being developed will require that where a person requests to be searched by someone of the same sex, the officer will apprehend the person until they can be placed into the custody of a police officer who will deal with them according to the law, unless there are exceptional circumstances.

The Serious Sex Offenders (Detention and Supervision) Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018 (SR No. 4-18)

The Subcommittee queried why SR No. 4-18 did not contain the following provisions which were part of the other legislative schemes and whether their absence is compatible with the Charter’s rights to privacy and property:

- notifying the person being searched of the officer’s authority to conduct the search and the reason for the search;
- limiting the number of officers to conduct the search to no more than required to ensure the safety of the person being searched or the officers;
- the manner to conduct vehicle searches;
- the manner of dealing with things seized; and
- the right to refuse a search.

As noted above, the search powers provided in relation to the new offence were based on the existing search powers in each legislative scheme. Accordingly, the Amendment Act was drafted to provide search powers in a similar format to the existing powers to search visitors, and did not include an explicit regulation-making power to specify further matters that need to be complied with when undertaking searches.

Under current operating procedures, all searches undertaken by supervision officers and specified officers must be undertaken with due regard to the person’s privacy and dignity. While the legislation does not require that the person be notified of the authority and reason for the search, operationally this will be done as a matter of course. The absence of the explicit requirement to
notify a person of the authority and reason for the search does not render the power incompatible with the Charter’s right to privacy, as the power to search is lawful and confined to situations in which the officer has a belief on reasonable grounds that the person committed an offence against section 141A of the SSODS Act.

Similarly, the SSODS Act does not place limits on the number of officers to conduct a search, nor specify the manner in which vehicle searches should be undertaken. While the legislative scheme is silent on these matters, the operational procedures provide guidance on how these searches should be undertaken.

The Subcommittee noted that the Serious Sex Offenders (Detention and Supervision) Regulations 2009 do not specify matters on how to deal with things seized. Again, in the SSODS Act, there is no explicit regulation-making power in relation to seizures of property under that Act. However, section 144 of the SSODS Act sets out the manner in which seized property should be dealt with. Section 144 of the SSODS Act is similar to regulation 74AA of the Corrections Regulations.

As discussed above, the SSODS Act does not explicitly permit a person outside but near a residential facility to refuse a search in relation to the new offence. Nevertheless, operational guidelines will inform officers that search powers can only be exercised as a proportionate response to a security risk that cannot be addressed by alternative powers. Operational procedures will advise corrections officers to consider the alternative powers of ordering a person to leave the neighbourhood or apprehending the person until they can be delivered into police custody.

The Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018 (SR No. 5-18)

The Subcommittee has requested further advice in relation to two aspects of the operation of SR No. 5-18.

Requirement to inform persons of the reasons for conducting a search

In its letter, the Subcommittee questioned whether there were any reasons that the regulations proposed in SR No. 5-18 did not contain a requirement that a person being searched under section 488DD of the CYF Act be informed of the reason for the search, noting that such a requirement is set out in SR No. 3-18 in relation to similar searches conducted under the Corrections Act. The Subcommittee also requested advice as to whether the absence of such a provision in SR No. 5-18 is compatible with the right to privacy under the Charter.

The CYF Act provides that an officer at a youth justice facility may conduct a search outside but near the youth justice facility if the officer believes on reasonable grounds that the person has committed or is committing an offence against section 488DB(1) of the CYF Act. Regarding searches of persons, an officer may search and examine a person they reasonably believe to have committed the offence, or if they reasonably believe that a thing on the person or in the person’s possession will afford evidence of the offence (sections 488DD(3)(a) and (c) of the CYF Act). Searches may include any thing belonging to, in the possession of or under the control of the person, including their vehicle. Before such a search is conducted, the CYF Act requires that a person to be searched must be informed of the officer’s authority to conduct the search and that they may refuse to submit to the search (section 488DD(4)).

Corrections officers are given similar powers to conduct searches outside but near prisons. As the Subcommittee has noted in its letter, one difference between the searches authorised under the Corrections Regulations and the CYF Regulations is that correctional officers must inform the person to be searched of the reason for the search (regulation 71A(1)(b) of the Corrections Regulations).
The CYF Regulations and Corrections Regulations differ because they are drafted in conformity with pre-existing search powers in the CYF Act and Corrections Act respectively. To the extent that the search provisions of the Regulations differ, this difference reflects distinctions between the two legislative schemes.

Despite officers at youth justice facilities not being required to inform a person of the reasons for conducting a search under section 488DD of the CYF Act, the CYF Regulations are compatible with the right to privacy under the Charter. Section 13 of the Charter provides that a person's privacy must not be interfered with unlawfully or arbitrarily. An interference with privacy will not be considered unlawful or arbitrary where it is permitted by a law which is clear and appropriately circumscribed, and where it is just, proportionate and reasonable in the circumstances. The circumstances in which an officer may conduct a search are clearly set out in the CYF Act and in the Regulations, along with the procedures that must be followed when a search is conducted. These confined circumstances are intended to prevent the risk of searches being conducted arbitrarily.

The search methods prescribed by the CYF Regulations are proportionate to the purpose of protecting the security of youth justice facilities. The search powers are just and reasonable, and have been drafted so as to impose the minimum level of restriction on a person's right to privacy. To the extent that the Regulations modify the legislative power to search a person under section 488DD of the CYF Act, the Regulations merely constrain the manner in which these searches can be conducted. New regulation 34B(1) of the CYF Regulations also provides additional safeguards to the search procedures detailed in the CYF Act, specifying that a search of a person must not be conducted by more officers than reasonably necessary to ensure the safety of the officers and the person being searched. If a frisk search is conducted, it must be carried out by an officer of the same sex as the person being searched.

**Method of conducting a vehicle search**

In its letter, the Subcommittee questioned whether there were any reasons as to why the CYF Regulations did not mention using an electronic or mechanical device to search a vehicle, having identified a discrepancy between the new regulation 34B of the CYF Regulations as described in the Explanatory Memorandum and Human Rights Certificate, and regulation 34B as made by the Governor in Council. The Subcommittee also requested clarification as to whether this absence is compatible with the right to privacy set out in the Charter.

The Human Rights Certificate states that "regulation 34B further provides that a search of a vehicle must be conducted by an officer examining the exterior and interior of the vehicle and/or passing an electronic or mechanical device over or in close proximity to the vehicle". However, regulation 34B only requires that "a search of a vehicle must be conducted by an officer examining the exterior and interior of the vehicle". The reference to electronic or mechanical devices in the Explanatory Memorandum and Human Rights Certificate was a drafting error, which should have been rectified prior to submitting the CYF Regulations to the Governor in Council.

The impact of regulation 34B of the CYF Regulations on the right to privacy is unaffected by vehicle searches not involving use of an electronic or mechanical device. The CYF Regulations as they relate to vehicle searches do not limit the right to privacy, as any interference with the right is lawful and not arbitrary.

The limited circumstances in which a vehicle search may be conducted are clearly set out in section 488DD of the CYF Act. The power to search a person's vehicle is appropriately restricted in its scope, as such a search may only be conducted outside but near a youth justice facility, if a relevant officer believes on reasonable grounds that a person has committed an offence against section 488DB(1) of the CYF Act. This prevents the risk of searches being conducted arbitrarily. Before a search is conducted, the person whose vehicle is to be searched must be informed of the officer's authority to conduct the search, and that they may refuse the search (section 488DB(4) of
the CYF Act). Furthermore, a search must be conducted in accordance with the regulations (section 488DD(6) CYF Act). As noted above, regulation 34B(2) provides that a search of a vehicle must be conducted by an officer examining the exterior and interior of the vehicle.

The nature and scope of the power to search a person’s vehicle is proportionate to the purpose of protecting the security of youth justice facilities. In particular, a person’s ability to refuse a search minimises any potential interference with the right to privacy under the Charter.

Conclusion

I thank the Subcommittee for its questions and comments and trust the above response assists the Subcommittee’s consideration of these regulations.

If you require further information about this matter, please do not hesitate to contact Sabbir Hamid, Senior Legal Policy Officer, Corrections Victoria on 03 8684 7074 or sabbir.hamid@justice.vic.gov.au.

Yours sincerely

The Hon Gayle Tierney MP
Minister for Corrections
Appendix 1

Ministerial responses to Committee correspondence

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.

Advancing the Treaty Process with Aboriginal Victorians Bill 2018

Electoral Legislation Amendment Bill 2018

Justice Legislation Amendment (Terrorism) Bill 2018

Long Service Benefits Portability Bill 2018

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

Serious Offenders Bill 2018
Dear Chairperson,

I am writing in response to your letter regarding the Scrutiny of Acts and Regulations Committee’s (the Committee) consideration of the Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (the Bill), as noted in Alert Digest No. 5 of 2018. Thank you for the opportunity to provide the Committee with further information on the Bill’s compatibility with the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

Clause 8 – Aboriginal Representative Body and cultural rights

The Committee has requested further information regarding the compatibility of clause 8 of the Bill with the distinct cultural rights of Aboriginal people set out in section 19(2) of the Charter. Clause 8 provides for the recognition of the Aboriginal Representative Body as the sole representative of Aboriginal Victorians for the purpose of establishing the elements necessary to support future treaty negotiations.

The Aboriginal Representative Body will be a democratically elected voice of Aboriginal Victorians. It will be a representative body designed and chosen by Aboriginal Victorians. Its role under the Bill is to work in equal partnership with the State to advance the treaty process. Clause 9(2)(a) provides that the Aboriginal Representative Body in performing its functions under the Bill must ensure that the cultures of Aboriginal Victorians are promoted and respected. In this way, the Aboriginal Representative Body, and the treaty process broadly, is expected to promote the distinct cultural rights of all Aboriginal Victorians.

Under clause 10, the Minister can only declare an entity to be the Aboriginal Representative Body on the recommendation of the Victorian Treaty Advancement Commissioner (the Commissioner). In December 2017, the Commissioner was created by the Governor in Council in accordance with section 88 of the Constitution Act 1975. The Commissioner is responsible for forming the Aboriginal Representative Body.

Aboriginal community consultation on the design of the Aboriginal Representative Body has been led by the Aboriginal Treaty Working Group throughout 2016 and 2017 and it provided its final report on the design of the Aboriginal Representative Body to the Commissioner in...
March 2018. The report’s recommendations were informed by community consultations and the outcomes of the Aboriginal Community Assembly to ensure they reflect the desires and priorities of the Victorian Aboriginal community.

Of particular relevance to comments raised by the Committee, the Working Group has recommended that only Victorian traditional owners can stand for election to the Aboriginal Representative Body, but all Aboriginal people living in Victoria be able to vote for the Aboriginal Representative Body.

Subject to the further consideration by the Commissioner, the Working Group also supported the establishment of a body comprised of both Elders and youth, to ensure cultural accountability in the Aboriginal Representative Body. The Working Group’s report is accessible on the Aboriginal Victoria website (www.vic.gov.au/aboriginalvictoria).

As a result of the process outlined above, and with reference to the recommendations of the Working Group, I am of the opinion that the distinct cultural rights of Aboriginal people will be reflected in the design of the Aboriginal Representative Body.

Although it is my view that Aboriginal cultural rights are not limited, but rather promoted by clause 8, I acknowledge that section 19(2) of the Charter has not been considered by Victorian Courts in the treaty context, and further that, as the Committee itself notes ‘there has been little Victorian judicial consideration of the rights in s19(2)(a) or of s19 as a whole’.

**Clauses 21, 22, and 24 – benefits or rights for Aboriginal Victorians**

The Committee has requested further information regarding the compatibility of clauses 21, 22 and 24 of the Bill with equality rights under section 8 of the Charter, and whether any limit is reasonable. These clauses articulate some of the guiding principles for the treaty process.

Clauses 21, 22 and 24 recognise, promote and protect the distinct cultural rights held by Aboriginal Victorians, and serve as necessary measures to address power imbalances throughout the treaty process, and close the gap in outcomes for Aboriginal Victorians. In doing so, these clauses promote a more equal and reconciled society for the benefit of all Victorians.

In my view, and for such reasons, the conferral of any benefits or rights only on Aboriginal Victorians under clauses 21, 22 and 24 does not constitute discrimination on the basis of race as they may be characterised as both:

- a special measure to promote substantive equality under section 12 of the *Equal Opportunity Act 2010*, and
- a measure taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination under section 8(4) of the Charter.

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

Yours sincerely

[Signature]

HON NATALIE HUTCHINS MP
Minister for Aboriginal Affairs
Hon Richard Dalla-Riva MP
Deputy Chairperson, Scrutiny of Acts and Regulations Committee
Parliament of Victoria
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EAST MELBOURNE VIC 3002

Dear Richard,

I refer to your letter dated 22 May 2018 on behalf of the Scrutiny of Acts and Regulations Committee. I thank the Committee for its interest in the Bill.

I have considered the concerns outlined in your letter regarding the application of amended section 158 and new sections 158A and 217D of the Electoral Act 2002 (Electoral Act). In my opinion, these provisions are compatible with the Charter of Human Rights and Responsibilities Act 2006 (Charter), and the implied freedom of political communication under the Australian Constitution for the reasons outlined below.

**New section 217D (clause 55)**

New section 217D provides that political donations made to a candidate, elected member, group, registered political party, nominated entity, associated entity or third party campaigners must not exceed a general cap of $4,000 for each election period. As outlined in the statement of compatibility for the Bill, section 217D engages the right to freedom of expression under the Charter, and the implied freedom of political communication under the Constitution by limiting a person’s ability to donate to engage in political communication.

However, section 217D is a justified and proportionate restriction on the freedom of political communication and the freedom of expression, for the reasons outlined below.

**Implied freedom of political communication under the Constitution**

As your letter points out, a law that restricts the implied freedom of political communication is valid if it is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the constitutionally prescribed system of government. This question requires a consideration of whether the law is proportionate to its aim, and whether the law is suitable, necessary and adequate in its balance.

In the case of McCloy & Ors v New South Wales & Anor [2015] HCA 34 (‘McCloy’), the High Court reiterated that the freedom of political communication is not absolute, and that ‘a law is not invalid merely because its operation effects some restriction upon political communication that is the subject of the implied freedom’. The Court decided that the cap on political donations in the New South Wales Electoral Act was permissible, even though it
restricted the implied freedom of political communication. The Court determined that the law was valid because it was compatible with a legitimate purpose, being the prevention of corruption and undue influence in the New South Wales government, as well as reducing the perception of corruption and undue influence, which may undermine public confidence in government and in the electoral system itself. The Court accepted that legislative restrictions on political donations not only reduce the risk of corruption, but also create a 'level playing field' to 'equalise participation in the electoral process'. The judges decided that a cap on political donations was necessary to 'restrict the voices which dominate the political discourse so that others may be heard as well' which 'enables voters to be better informed [as] no one voice is overwhelmed by another'. In this way, it was decided that the restriction on the freedom was more than balanced by the benefits and the public interest in removing the perception of corruption.

I consider that the same reasoning applies to the cap on political donations imposed by new section 217D. The purpose of the cap is to reduce the risk and public perception of corruption and undue influence in the State political process, and to equalise participation in the electoral process. That purpose is plainly a legitimate end. The measures are also proportionate and reasonably necessary to achieving that end.

Right to freedom of expression under the Charter

Similarly, in my view there is no incompatibility between new section 217D and the Charter.

The human rights under the Charter may be subject to reasonable limits, taking into account the purpose and extent of the limitation. As your letter points out, many jurisdictions both in Australia and overseas impose expenditure caps, and the principles that underpin the justification for expenditure caps can, in my view, be translated to the proposed cap on donations under new section 217D.

Courts in the United Kingdom and Canada have considered whether similar caps are compatible with the freedom of expression that exists in those jurisdictions. The majority of the European Court has accepted that imposing caps on political advertising funding was a justified and proportionate response to avoid the unacceptable risk that the political debate would be distorted in favour of wealthy individuals or organisations funding advertising in the most potent and expensive media. Similarly, the Canadian Supreme Court determined that restrictions enhance the right to vote and secure effective representation of each citizen.

It is my view that the cap on political donations imposed by new section 217D is a reasonable limitation of the Charter right to freedom of expression, taking into account the purpose of the reform to promote the equality of voices in the public sphere and to prevent corruption and undue influence over the political process.

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

The implied freedom of political discussion derived from the Commonwealth Constitution:

- extends 'to all political discussion, including discussion of political matters relating to government at State level' (Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211 at 232 per Mason CJ, Toohey and Gaudron JJ).
- captures signage at an election which was intended to influence voters, contains electoral matter or references to political candidates etc; and
• captures canvassing activities designed to influence electors’ vote, or to cast an informal vote.

For the reasons set out below the amended section 158 and new section 158A of the Electoral Act are legitimate and proportionate burdens on the implied freedom of political discussion derived from the Commonwealth Constitution.

The High Court has found that an Act of Parliament can burden the implied freedom only if the Act is reasonably proper to serve a legitimate end (Lange v Australian Broadcasting Corporation (1997) 189 CLR 520). This is determined by assessing whether the Act is compatible with the maintenance of a representative and responsible form of government and whether the means adopted are ‘reasonably appropriate and adapted’.

The proposed prohibitions on signage are a legitimate and proportionate burden as the prohibitions further enhance the democratic processes of Victoria. Impugned provisions in Muldowney v South Australia (1996) 136 ALR 18, which made it an offence to encourage voters to mark their ballot papers other than in accordance with the prescribed method, was found valid and Gaudron J stated that the implied freedom ‘does not operate to strike down a law which curtails freedom of communication in those limited circumstances where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic processes of the States (Muldowney v South Australia (1996) 136 ALR 18 at 31). The prohibitions on canvassing and signage in section 158 and 158A further enhance the Victorian democratic process by:

• better facilitating voting by allowing electors to cast their vote in a neutral environment, free of undue political pressure of inducement;
• helping to safeguard electors’ right to freedom of political thought (again, by removing political pressure and inducement where it occurs in such close proximity to their voting);
• creating parity between established political participants and others, by removing the advantage enjoyed by those with greater resources to print and distribute electoral material on election day and to deploy persons to canvass and solicit votes at voting centres;
• providing opportunities for political communications to be imparted in a fair and impartial way within the 100m zone.

Amended section 158 and new section 158A are also proportionate in their application as the provisions do not unduly infringe on citizens’ private conduct, nor prohibit all political communications in a blanket fashion. This is because the provisions are drafted to prohibit certain forms of communications and because:

• there are exemptions so that items that do not fall within the ordinary and narrow meaning of political communications are not captured within the definition of a sign or notice relating to the election, such as clothing being worn, t-shirts, cars, badges, official notices, etc;
• private residences are carved out so as not to unduly infringe on a citizens’ private conduct;
• one sign of the prescribed size (in new section 158A or as further prescribed in the regulations) per candidate/party is still allowed within 100 metres, ensuring that there is still the opportunity for political participants to impart, and electors to receive, some form of political communication within these boundaries;
• the prohibition on canvassing (etc) only applies up to 6 metres from a voting centre;
there is flexibility for the Victorian Electoral Commission to determine distances shorter than 6 metres for the purposes of applying the prohibitions in areas where enforcement may prove difficult or electors may have difficulty assessing the relevant zone.

The prohibition on signage does not favour established political parties and their candidates. It has an equalising effect as it removes the advantage enjoyed by the parties and candidates with the resources to print and distribute material widely on election day and to deploy persons to canvass near voting centres.

The High Court has suggested that a restriction which targets ideas or information will be more difficult to justify than one targeting an activity or mode of communication (Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, Mason CJ at 143). The prohibitions in amended section 158 and new section 158A primarily targets conduct and activities (i.e. canvassing, soliciting, exit polling etc). The only prohibition in those sections that targets an idea is the prohibition on signs or notices relating to the election, which targets both the ‘idea’ (the election) and the mode of communication (sign or notice).

However, to compensate, the Bill includes a number of exceptions and exemptions so that there are still ways for this ‘idea’ to be communicated – via a sign of the prescribed size, if falling within an exception for certain items or if communicated on a private residence.

I trust that the information provided will assist the Committee in considering and reporting to Parliament on the Bill.

Yours sincerely

Gavin Jennings MLC
Special Minister of State
1 JUN 2018

The Hon. Richard Dalla-Riva MP
Deputy Chairperson
Scrutiny of Acts and Regulations Committee
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Also by email: nathan.bunt@parliament.vic.gov.au

Dear Mr Dalla-Riva,

Thank you for your letter of 22 May 2018 in relation to the Justice Legislation Amendment (Terrorism) Bill 2018. I understand that the Committee is seeking further information regarding the compatibility of clause 42 of the Bill with the Charter of Human Rights and Responsibilities Act 2006 (the Charter) and in relation to less restrictive alternatives that may be available to preventative detention orders for children.

The Bill contains a range of measures to give effect to recommendations of the Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers (the Expert Panel). The Bill supports the safety of Victorians by ensuring that Victoria Police and other justice agencies are equipped with the tools they need to address the threat of violent extremism and keep the community safe.

Threshold test for preventative detention

I note the Committee’s query about clause 42 of the Bill, which amends the threshold test for making a preventative detention order for terrorist acts yet to occur from being ‘imminent’ to ‘being necessary to prevent a terrorist act that is capable of being carried out, or could occur, within the next 14 days’. This change was recommended by the 2014 Victorian Review of Counter-Terrorism Legislation, which identified the existing test as problematic due to the difficulties in predicting, with precision, when a terrorist act may occur. The amended test is also consistent with the threshold test for Commonwealth preventative detention orders made under the Criminal Code Act 1995 (Cth) and is desirable given the cross-jurisdictional nature of terrorism.

The Government considers that clause 42 is compatible with the Charter on the basis that any infringement on rights is reasonably proportionate. As noted in the Statement of Compatibility, a person must only be detained if it is ‘reasonably necessary’ to either prevent a terrorist act occurring or to preserve evidence of or relating to a terrorist attack that has occurred in the last 28 days. It is implicit in this requirement that police must demonstrate, and the court must be satisfied, that there is no other option reasonably available with respect to that person (including a child) that would achieve the purposes of preventing a terrorist attack or preserving the evidence.
This remains an appropriately high threshold test and there are a range of safeguards and oversight mechanisms in the Bill to ensure this power is used appropriately.

**Preventative detention orders for children**

In their second report, the Expert Panel noted the unfortunate reality that children as young as 14 years of age can present a terrorist threat. On this basis, the Expert Panel recommended the extension of eligibility for preventative detention orders to children aged 14 and 15. The Bill implements this recommendation and a number of additional safeguards that have been noted by the Committee.

As noted above, a child can only be detained if it is 'reasonably necessary' to either prevent a terrorist act occurring or to preserve evidence of or relating to a terrorist attack that has occurred in the last 28 days. It is implicit in this requirement that police must demonstrate, and the court must be satisfied, that there is no other less restrictive option reasonably available with respect to that person (including a child) that would achieve the purpose of preventing a terrorist attack or preserving the evidence.

As noted in your letter, in recommendation 23 of their second report, the Expert Panel proposed empowering the Supreme Court to make alternative orders, on its own motion, when an application is made for a preventative detention order in respect of a child. This is based on the proposal in recommendation 22 that the Supreme Court have the power to make a preventative detention order in respect of a child only if the Court is satisfied that there are 'no less restrictive means available' for addressing the risk posed by that child.

Due to the legal and practical complexities in developing an alternative community-based order, and concerns as to whether such an order would appropriately address the risk posed by a child in those circumstances, these recommendations are not implemented by the Bill. The Government intends to give further consideration to implementation of these recommendations in a subsequent stage of legislative reform, but considers that there are not less restrictive alternatives reasonably available at this time.

In relation to the Committee’s final query about the absence of an express provision requiring a police officer who suspects, or has grounds to suspect, that a child subject to preventative detention may be under 14 to immediately make enquiries about the child’s age, I note the requirement in existing 13J of the **Terrorism (Community Protection) Act 2003** and the amendment to this section created by clause 17 of the Bill. The effect of this amendment will be to expressly require a police officer detaining a person under a preventative detention order to arrange for that person’s release as soon as practicable if the officer is satisfied on reasonable grounds that the person is under 14 years of age. While these provisions are constructed differently to the example given by the Committee, I am confident that they will, in the event of a child under 14 years old being detained in preventative detention, result in their prompt release from custody. The Bill also provides for the involvement of the Commission for Children and Young People in the preventative detention of any child under the age of 18. This provides an additional safeguard against the detention of children aged under 14.
I trust this information is of assistance to the Committee.

Yours sincerely

THE HON MARTIN PAKULA MP
Attorney-General
Ref: CMIN002516R

The Hon Richard Dalla-Riva MP
Deputy Chairperson
Scrutiny of Acts and Regulations Committee
Parliament of Victoria
1 Spring Street
MELBOURNE VIC 3002

Dear Mr Dalla-Riva

LONG SERVICE BENEFITS PORTABILITY BILL 2018

I write in response to your Committee’s request for further information on the Long Service Benefits Portability Bill 2018 (the Bill).

Delayed commencement

As the Committee notes, the Bill has a default commencement date of 1 April 2019. The Bill was introduced and first-read on 27 March 2018. Whilst the commencement date is more than 12 months after the introduction date, the delay is a matter of days.

Given that the Bill creates a new statutory body, the Portable Long Service Benefits Authority, as well as a Governing Board to oversee the Authority, sufficient time has been allowed to establish the Authority, and appoint suitably qualified Board members.

Sufficient time is also required for an information campaign, so that employers and workers in the three covered industries are made properly aware of their rights and obligations, ahead of the scheme’s commencement date.

Finally, sufficient time is required to develop regulations, particularly in respect of the community services sector, to address matters such as possible double-dipping.

In all these circumstances, it has been assessed that a default commencement date of 1 April 2019 is appropriate.
Requirement that appointees be representatives of industrial organisations

Clause 38 of the Bill provides for the appointment of members to the scheme’s Governing Board. At least one of the Board members must represent an organisation representing employers for a covered industry, and at least one member must represent an organisation representing employees. At least two of the members must not represent an organisation representing either employers or employees. Further, a member representing either an employers’ or employees’ organisation is not eligible to be the chairperson or deputy chairperson of the Governing Board pursuant to clause 40, and may be removed from office if they cease to represent such an organisation.

I am satisfied that this provision is compatible with the right to equality in the Charter as it ensures that the Board contains equal and fair representation of those whose interests are affected by the Bill, and includes members with appropriate skills and experience. Clause 38 may interact with the right to equality under section 8(3) of the Charter by preventing a person from being appointed to the Governing Board based on their industrial activity. In my view, any such limitation will be demonstrably justified in accordance with section 7(2) of the Charter. The purpose of the eligibility criteria in clause 38 is to ensure that the Governing Board comprises an appropriate balance of members from organisations representing employers and employees, and those who represent neither but have the necessary skills and qualifications. Moreover, union members will not be precluded from being 'neutral' members, provided they do not formally represent an industrial association.

I hope that this information has addressed your Committee’s concerns.

[Hon Natalie Hutchins MP]
Minister for Industrial Relations

Date: 21.5.2018
1 JUN 2018

The Hon Richard Dalla-Riva MP
Deputy Chairperson
Scrubtny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

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

Dear Mr Dalla-Riva,

Thank you for your letter of 22 May 2018 regarding the Scrutiny of Acts and Regulations Committee’s (SARC’s) queries in relation to the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (Bill). The responses to SARC’s queries are set out below.

The Committee seeks 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 26 of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) recommended that in order to provide redress under the most effective structure for ensuring justice to survivors, the Australian Government should establish a single national redress scheme. Of paramount importance is ensuring the maximum possible consistency for survivors between the different state and territory schemes, along with ensuring that decision making on redress is independent of the responsible institutions. For this reason, the Royal Commission preferred a single national scheme over separate state and territory schemes.

Referring powers to the Commonwealth under section 51(3xxvii) of the Constitution is the most effective way to implement a nationally consistent scheme and maximise participation. The Bill refers powers to the Commonwealth Parliament to the extent necessary for the Victorian government and non-government institutions to participate in the National Redress Scheme.
(Scheme) for Institutional Child Sexual Abuse. This is done by a text reference, in clause 4(1), which refers the power to the Commonwealth Parliament to establish the Scheme as set out in the National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 (Commonwealth Bill) scheduled to the Bill. The Bill also includes an amendment reference in clause 4(2). This refers power to the Commonwealth to make amendments to the Commonwealth Bill, after it is enacted by the Commonwealth Parliament.

All aspects of the Scheme have been subject to ongoing consultation with state and territory responsible Ministers. In order to ensure the adaptability and workability of the Scheme, the Commonwealth may need to make limited amendments to the National Redress Act. Flexibility is required to allow the adjustments for the differing needs of survivors, participating institutions, and to enable the Scheme to quickly implement changes required to ensure positive outcomes for survivors. It is uncertain how many applications for redress the Scheme will be received upon commencement, and whether there will be any unforeseen issues requiring prompt response. It is appropriate that aspects of the Scheme are able to be modified in a timely and efficient manner, including through legislative instruments where necessary.

The inclusion of an amendment reference is standard for referrals of power of this nature, and, as SARC has noted, is subject to specific limitations. The amendment reference is limited by clause 5(2) to ensure that no amendments are made that would prevent or limit the operation of state redress mechanisms, such as the Victorian Victims of Crime Assistance Scheme. The requirement for state agreement to certain matters in the Scheme legislation is also protected.

The second limitation in clause 6 prevents the Commonwealth from making any amendments that would remove or override a provision in the Commonwealth legislation requiring agreement of the states. This effectively preserves provisions that require states to agree to certain matters. For example, states must agree to a state institution being declared as a ‘participating institution’.

In addition to these limitations, the Intergovernmental Agreement on the National Redress Scheme for Institutional Child Sexual Abuse (IGA) includes important safeguards to ensure that participating states and territories are consulted on and have voting powers to approve or oppose changes to the Scheme. Amendments to the National Redress Act will only be made with the agreement of participating jurisdictions in accordance with the provisions of the IGA, which all participating jurisdictions will sign, and which the Victorian Government has already signed. This includes any amendments to primary legislation, legislative instruments, assessment framework, scope of redress, the National Redress Scheme Rules, and governance arrangements. Such arrangements will allow the Victorian Government to properly scrutinise future amendments to the Scheme, and assess the continued compatibility of the Scheme laws with the Charter.

Clause 7 of the Bill allows the Governor in Council to terminate the text or amendment reference, or both, by proclamation. This ensures Victoria is protected from continued participation in the Scheme should its terms no longer be acceptable for any reason, including on Charter grounds.

The Committee seeks further information as to the compatibility of s 13(1)(e) 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.

Discrimination is differential treatment that results in less favourable treatment, based on one or more attributes in the Equal Opportunity Act 2010, including nationality and national origin. Clause 13(1)(e) provides that a person is eligible for redress if at the time of the application, the person is an Australian citizen or a permanent resident. This restriction does constitute discrimination and therefore a limitation on the right to equality under the Charter. However, for the reasons outlined in the Statement of Compatibility for the Commonwealth Bill, I consider that the limitation is reasonable and justifiable under section 7(2) of the Charter.
As explained in the Statement of Compatibility for the Commonwealth Bill, this eligibility requirement mitigates the risk of fraudulent claims and thereby supports the integrity of the Scheme, particularly given the comparative size of payments under the Scheme and lower evidentiary burden that will be required of survivors making applications. Opening eligibility to non-citizens and non-permanent residents would increase the difficulty of verifying the identity of applicants, and would risk a large volume of fraudulent claims being made. This would require primary documentation and verification from foreign governments and Australian embassies, and increase overall processing times of legitimate applications by diverting the Scheme’s resources.

Lengthened processing times of applications would be of significant detriment to survivors. Many survivors have waited decades for recognition and justice, with over half of survivors anticipated to apply for redress being over 50 years of age. There is a risk that further delay may result in survivors passing away prior to obtaining the opportunity to accept redress and receive closure. Timely decision-making is also critical due to the recognition that survivors are also more likely to experience poorer health and social outcomes. For these reasons, I consider that clause 13(1)(a) is compatible with the Charter.

The Committee refers to Parliament for its consideration the question of whether ss 20(1)(b) and (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.

Sections 20(1)(b) operates to prevent a person from making an application if they are subject to a security notice. A security notice under the National Redress Act will apply where a person’s visa or passport has been cancelled on security grounds. This provision may indirectly discriminate on the grounds of race, and therefore constitute a limitation on the right to equality under section 8 of the Charter. However, I consider that the limitation is reasonable and justified under section 7(2) of the Charter.

As outlined in the Commonwealth Statement of Compatibility, the restriction applies to ensure that redress funds are not given to people 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 with respect to national security. In addition, a security notice must be reviewed annually, and can be revoked. This operates as a safeguard, because once revoked, a person can apply for redress under the Scheme.

Section 20(1)(d) operates to prevent a person who is in gaol applying for redress. This provision may also indirectly discriminate on the grounds of race, and therefore constitute a limitation on the right to equality under section 8 of the Charter. For example, the Royal Commission found Aboriginal and Torres Strait Islander children faced additional vulnerabilities to child sexual abuse in institutional contexts. Over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system has also been of significant and ongoing concern, with Aboriginal and Torres Strait Islander people sentenced to custody at a higher rate than non-Indigenous defendants.

While recognising the potential impact of section 20(1)(d) on the right to equality, I consider that the limitation is reasonable and justified under section 7(2) of the Charter in order to ensure the Scheme is able to deliver appropriate redress support services to survivors. The Statement of Compatibility for the Commonwealth Bill notes that 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 to understand the implications of releasing participating institutions from liability for sexual abuse and related non-sexual abuse within the scope of the Scheme. Institutions may also not be able to provide a direct personal response, one
of the key aspects of the Scheme, to survivors who are in gaol. In addition, maintaining survivor confidentiality and privacy in gaol raises considerable challenges in a closed institutional setting.

As noted in the Statement of Compatibility, the National Bill provides discretion to the Scheme Operator to prevent unjust or unfair outcomes. Survivors who are incarcerated for a short period of time will still be able to apply for redress under the Scheme upon release. 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.

Survivors who are incarcerated for five or more years may not be entitled to redress in the first instance. Restricting eligibility on the grounds of criminal history is necessary to ensure the Scheme is aligned with community expectations. There is a risk that the public, and in particular victims, would not support a Scheme that paid redress to perpetrators of serious crimes.

However, subclause 63(5) allows the Scheme Operator to determine a person is entitled to redress despite a serious criminal conviction if providing redress would not bring the Scheme into disrepute, or adversely affect public confidence in, or support for, the Scheme. Subclause 63(6) outlines a list of factors that the Scheme Operator must take into account when making this determination, including advice given by relevant Attorneys-General, the nature of the offence, the length of the sentence of imprisonment, the length of time since the person committed the offence, and any rehabilitation of the person. This ensures that the decision-making process is not arbitrary, and individual circumstances are taken into account in the exercise of discretion under this section. Although an identical discretion is not provided in relation to incarcerated survivors, the ‘exceptional circumstances’ provision there allows for flexibility and the avoidance of arbitrary outcomes.

For this reason, I consider that both sections 20(1)(b) and (d) are compatible with the Charter.

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

Yours sincerely,

[Signature]

THE HON MARTIN PAKULA MP
Attorney-General
Hon Richard Dalla-Riva MP  
Deputy Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House, Spring Street  
EAST MELBOURNE VIC 3002  

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

Dear Mr Richard Dalla-Riva

Serious Offenders Bill 2018

I refer to your letter of 22 May 2018 seeking further information on aspects of the Serious Offenders Bill 2018 (Bill), which was introduced on 9 May 2018.

Minimum sentence threshold for eligibility

The Bill provides that offenders convicted and sentenced by the Supreme Court or County Court for a serious sex offence or a serious violence offence will be eligible for the scheme. The Committee has sought further information as to whether or not the imposition of the minimum sentence threshold of 3-4 years imprisonment on eligibility for a post-sentence order is a less restrictive alternative on the Charter’s right to liberty reasonably available to achieve the Bill’s purpose of community safety.

The Harper Review recommended that an audit be undertaken by the Department of Justice and Regulation to inform consideration of whether the proposed eligibility criteria (including the minimum sentence recommendation) would achieve the intended purpose. That audit found that there are substantial legal and practical issues and risks associated with using minimum sentence length as a pre-requisite for eligibility.

In practice, many offenders are convicted and sentenced for multiple charges in relation to the same incident. Some of these convictions may relate to one or more serious violence or sex offences and some may relate to other types of offending. As such, identification of eligible offenders would require a manual review of records to identify the relevant sentence length, which is resource intensive and creates risk of identification errors.

Determining eligibility based on the sentence received for the most serious sex or violence offence without reference to the total effective sentence may also artificially reflect the sentencing process adopted by the court. Where an offender receives an aggregate sentence for multiple convictions (rather than individual sentences for each conviction), it would be very difficult to identify whether or not the sentence imposed for the serious violence or sex offence reached the minimum threshold for eligibility.
In addition, the minimum threshold approach may capture offenders whose violent or sexual offending is relatively low level, but who nonetheless have a significant total sentence arising from other offending that is not violent or sexual in nature (such as drug trafficking).

Linking eligibility for the scheme to conviction in the County Court or Supreme Court (instead of the minimum sentence length) for an offence prescribed by the Bill most closely aligns with the overall aim and intent of the Harper Review to limit the scheme to only those who pose the greatest risk of causing serious interpersonal harm. More serious matters are generally heard in the higher courts. As such, the higher court criterion ensures that the seriousness of the offending is directly linked to the types of offences the scheme intends to capture, so is the least arbitrary and restrictive encroachment on offenders’ rights to liberty to meet the public’s expectations on community safety. It also provides for clear and precise criteria as recommended by the Harper Review.

Contravention of a supervision order condition

The Committee has also sought further information regarding the effect of clauses 169 and 174 of the Bill in terms of when the Supreme and County Courts may conduct a summary hearing of a charge for contravention of a supervision order, and the maximum penalty that may be imposed. The Department of Justice and Regulation sought legal advice as to the interpretation and effect of clause 174 of the Bill.

The advice confirmed that clause 174 of the Bill, as drafted, gives rise to ambiguity as to how the rules of court and the practice and procedure of the Magistrates’ Court are to apply to proceedings for contraventions of supervision orders.

Case law has confirmed that the rules, practice and procedure of the Magistrates’ Court apply to the County Court and the Supreme Court as far as appropriate in relation to the hearing and determination of the breach offence under the existing scheme.¹

It was not intended that the Bill alter the existing powers and procedures for commencing proceedings under sections 172 and 172A of the Serious Sex Offenders (Detention and Supervision) Act (SODDSA). Specifically, it is intended that the rules, practice and procedure of the Magistrates’ Court continue to apply to proceedings for a contravention offence so that:

- the offence is an indictable offence that may be triable summarily;
- where the charge is sought to be determined summarily, the consent of the accused is required; and
- where the court grants a summary hearing of the charge, the maximum term of imprisonment that may be imposed is 2 years.

Accordingly, I will be seeking to make House Amendments to the Bill to ensure the provisions reflect the stated policy intent and existing jurisprudence and do not give rise to ambiguity regarding the rules for granting summary hearings.

I take this opportunity to thank the Committee for its diligence in its scrutiny and bringing this ambiguity to the Government’s attention.

Post-Sentence Authority determination of serious contravention

Lastly, the Committee has sought clarification as to the legal consequences (if any) arising from the Post-Sentence Authority’s determination under clause 172 that an alleged contravention of a supervision order is or is not a serious contravention.

¹ Loader v The Queen and Anor [2011] VSCA 292
Clauses 170 and 172 re-enact sections 162 and 163 of the SSODSA setting out types of conduct the Authority may consider to be a serious contravention, and what action the Authority may take having regard to the seriousness of the contravention.

The matters listed in clause 172 give statutory guidance to the Authority as to what Parliament considers to be a serious contravention of a supervision order. Consistent with its role as an independent statutory body providing independent oversight and monitoring of offenders subject to the scheme, the Authority may consider the matters listed in clause 172 to inform its assessment of what action under clause 170(2) may be appropriate in light of Parliament’s guidance as to what constitutes a serious contravention.

Yours sincerely

[Signature]

The Hon Gayle Tierney MP
Minister for Corrections
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Appendix 3
Committee Comments classified
by Terms of Reference

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

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| (vi) inappropriately delegates legislative power |
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<p>| (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities |
| Advancing the Treaty Process with Aboriginal Victorians Bill 2018 | 5, 8 |
| Audit Amendment Bill 2017 | 1, 2, 3 |
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**Section 17(b)**

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

Long Service Benefits Portability Bill 2018 | 5, 8
## Appendix 4

**Current Ministerial Correspondence**

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

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

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<td>Family and Children</td>
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<td>Electricity Safety Amendment (Electrical Equipment Safety Scheme) Bill 2018</td>
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<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>
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<td>Charities Amendment (Charitable Purpose) Bill 2018(^\text{18})</td>
<td>Fiona Patten MP</td>
<td>27.03.18</td>
<td>4 of 2018</td>
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<td>Engineers Registration Bill 2018</td>
<td>Treasurer</td>
<td>27.03.18 / 27.04.18</td>
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<td>Guardianship and Administration Bill 2018</td>
<td>Attorney-General</td>
<td>27.03.18 / 30.04.18</td>
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<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>
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\(^{18}\) 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>
<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>
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<td>Advancing the Treaty Process with Aboriginal Victorians Bill 2018</td>
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<td>Justice Legislation Amendment (Terrorism) Bill 2018</td>
<td>Attorney-General</td>
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<td>National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018</td>
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<td>Serious Offenders Bill 2018</td>
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<td>State Taxation Acts Amendment Bill 2018</td>
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<td>Crimes Amendment (Unlicensed Drivers) Bill 2018</td>
<td>Dr Rachel Carling-Jenkins MP</td>
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<td>Flora and Fauna Guarantee Amendment Bill 2018</td>
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<td>Local Government Bill 2018</td>
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<td>05.06.18</td>
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Appendix 5
Statutory Rules and Legislative Instruments considered

The following Statutory Rules were considered by the Regulation Review Subcommittee on 4 June 2018.

Statutory Rules Series 2018

SR No. 3 – Corrections Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018
SR No. 4 – Serious Sex Offenders (Detention and Supervision) Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018
SR No. 5 – Children, Youth and Families Amendment (Remotely Piloted Aircraft and Helicopter Ban) Regulations 2018