No. 9 of 2014

Tuesday, 5 August 2014
on the following Bills

Courts Legislation Miscellaneous Amendments Bill 2014
Crimes Amendment (Abolition of Defensive Homicide) Bill 2014
Criminal Organisations Control and Other Acts Amendment Bill 2014
Disability Amendment Bill 2014
Gambling Regulation and Casino Control Amendment Bill 2014
Judicial Commission Bill 2014
Judicial Entitlements Bill 2014
Justice Legislation Amendment (Firearms and Other Matters) Bill 2014
Melbourne Market Authority Amendment Bill 2014
Powers of Attorney Bill 2014
Public Health and Wellbeing Amendment (Hairdressing Red Tape Reduction) Bill 2014
Sentencing Amendment (Emergency Workers) Bill 2014
Statute Law Amendment (Red Tape Reduction) Bill 2014
Water Bill 2014
Working with Children Amendment (Ministers of Religion and Other Matters) Bill 2014
The Committee

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Member for Eastern Metropolitan

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Member for Pascoe Vale

Ms Ann Barker MLA
Member for Oakleigh

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Terms of Reference - Scrutiny of Bills

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

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
(i) trespasses unduly upon rights or freedoms;
(ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
(iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000;
(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;

Parliamentary Committees Act 2003, section 17
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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 from 1 July 2013 one penalty unit equals $144.36)

‘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
Alert Digest No. 9 of 2014

Courts Legislation Miscellaneous Amendments Bill 2014

Introduced 24 June 2014
Second Reading Speech 25 June 2014
House Legislative Assembly
Member introducing Bill Hon Robert Clark MLA
Portfolio responsibility Attorney-General

Purpose

The purpose of the Bill is to make a range of amendments to Acts that regulate the operation of Victorian courts and tribunals. It amends the:

Supreme Court Act 1986 to:
- provide for appeals to the Court of Appeal in civil proceedings to be generally by leave of the Court of Appeal. Appeals may only be granted where the Court considers that the appeal has a real prospect of success;
- make other procedural amendments in relation to appeals to the Court of Appeal in civil proceedings.

Victorian Civil and Administrative Tribunal Act 1998 to:
- make further provision for the service arrangements and the terms and conditions of appointment of non-judicial members;
- make further provision for hearings and the efficiency of VCAT.

Coroners Act 2008 to:
- further provide for various coronial processes;
- further provide for appeals to the Supreme Court;
- amend the period for bringing an appeal in respect of certain decisions of a coroner.

Court Security Act 1980 to:
- make further provision in relation to the recording of court proceedings;
- prohibit the recording of proceedings without the permission of a relevant court or tribunal and the subsequent transmission or publication of those proceedings;
- make further provision in relation to the office of judicial registrar, including review of, and appeals from, determinations of judicial registrars.

Content

More specifically the Bill:
- requires that leave be obtained for civil appeals to the Court of Appeal (subject to limited exceptions. Leave is not required for an appeal from a refusal to grant habeas corpus or for an appeal under the Serious Sex Offenders (Detention and Supervision) Act 2009 or if the Rules so
provide) and provide that such leave will only be granted where the appeal has a real prospect of success; extends, to 28 days, the time in which an application to the Court of Appeal for leave to appeal can be filed and provide that the appeals process is commenced by filing such an application; permits applications to the Court of Appeal for leave to appeal to be determined without an oral hearing and by a single Judge of Appeal. [4] The Committee notes the extract from the second reading speech:

The Bill introduces a requirement that leave be obtained in all civil appeals to the Court except in appeals against a refusal to grant habeas corpus, cases arising under the Serious Sex Offenders (Detention and Supervision) Act 2009 and in other cases that may be provided for in the Court Rules. Currently, in cases where a party may appeal to the Court of Appeal ‘as of right’, that party can have their full appeal heard and determined by three judges of appeal, even if the appeal lacks merit. The result is that a significant amount of the Court’s time and the parties’ costs are taken up hearing and determining such appeals. The universal leave requirement for civil appeals will enable the Court to determine at an earlier stage which matters merit a full hearing. This will reduce costs for parties, and the time savings for the Court will allow the Court to focus on those appeals that do merit a full hearing, enabling those matters to be dealt with more promptly...

The Bill modernises and simplifies the test for leave to appeal by providing that leave to appeal may only be granted where the Court considers that the appeal has a real prospect of success. This replaces the existing common law test for granting leave to appeal which requires an applicant for leave to appeal to demonstrate that the original decision is attended with sufficient doubt to warrant it being reconsidered on appeal and a substantial injustice would be caused were the decision allowed to stand...The Bill allows the Court to determine applications for leave to appeal without an oral hearing. If the Court dismisses an application for leave without an oral hearing, the applicant may apply to have the dismissal set aside or varied at an oral hearing before two or more judges of appeal. However, if the Court dismisses an application for leave to appeal without an oral hearing and has determined that the application is totally without merit, the applicant will have no right to have the dismissal set aside or varied. This will ensure that completely unmeritorious applications for leave will not unreasonably consumer court time and resources.

- set outs the circumstances in which a single tribunal member may exercise the powers of the Victorian Civil and Administrative Tribunal (VCAT);
- provides that a person with a statutory right to intervene in a proceeding before VCAT, including the Valuer-General, may also become a party to the proceeding;
- permits a member of VCAT who has conducted a mediation in a proceeding to hear the proceeding, subject to objection by the parties;
- introduces threshold requirements that VCAT must consider before it reopens a proceeding determined in the absence of a party; [37]
- set outs the circumstances in which VCAT member (or past member) may appear as an expert witness before VCAT;
- empowers VCAT to make rules regarding service of Tribunal process outside of Australia;
- provides that VCAT may admit evidence in a proceeding that has already been admitted in another proceeding;
- confers on VCAT jurisdiction to issue injunctions restraining breaches of enforcement orders made under the Planning and Environment Act 1987;
- provides that, in certain applications under the Planning and Environment Act 1987, the relevant responsible authority will reimburse fees paid by the applicant;
• amends the *Retail Leases Act 2003* to allow VCAT to make orders against a guarantor or indemnifier of a tenant’s obligations under a retail premises lease;

• provides that an application for review of a Transport Accident Commission decision may be lodged with VCAT within 3 months after negotiations have concluded under specified No Fault Dispute Resolution Protocols;

• clarifies that the Governor in Council may determine the terms and conditions for appointment of a non-judicial member to VCAT;

• amends the *Coroners Act 2008* to further provide for various coronial processes, including inquests, and for appeals to the Supreme Court. [72] The Committee notes the extract from the second reading speech:

> In addition, aspects of the pre-2008 inquest appeals provisions will be restored, so that senior next of kin may appeal to the Supreme Court on broader grounds from a decision not to hold an inquest or not to reopen an inquest. Rather than confining such appeals to a matter of law, an appeal will be allowed where the Court is satisfied that it is necessary or desirable in interests of justice. This appeal provision is an important safeguard in the operation of the proposed ‘natural causes’ provisions, but will also apply to decisions in relation to inquests more broadly.

• amends the periods for bringing an appeal in respect of certain decisions of a coroner; [70]

• introduces new offences into the *Court Security Act 1980* in relation to the unauthorised recording, transmission and publication of certain court and tribunal proceedings. Exemptions are provided for journalists and lawyers in specified circumstances, subject to the direction of the presiding judicial officer. [78] The Committee notes the extract from the second reading speech:

> The Bill will prohibit the recording of proceedings without the permission of a relevant court or tribunal and the subsequent transmission or publication of those proceedings. For the Bill’s purposes the relevant courts and tribunals are the Supreme Court, the County Court, the Magistrates’ Court, the Children’s Court, the Coroner’s Court, the Victims of Crime Assistance Tribunal and the Victorian Civil and Administrative Tribunal. A standing exemption will apply to audio recordings (and the transmission of those audio recordings) by journalists and lawyers in specified circumstances, subject to the direction of the presiding judicial officer. Conditions of entry into court buildings will continue to apply, and the offences will not limit general contempt powers.

• provides that the Attorney-General must obtain the support of the relevant head of jurisdiction before recommending to the Governor in Council the re-appointment of a judicial registrar;

• empowers courts to determine, in court rules, the manner of reviewing a determination of a judicial registrar;

• protects the salaries and aggregate value of allowances of judicial registrars from reduction and require judicial registrars to make an oath or affirmation of office upon appointment.

**Charter report**

The Courts Legislation Miscellaneous Amendments Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Crimes Amendment (Abolition of Defensive Homicide) Bill 2014

Introduced 25 June 2014
Second Reading Speech 25 June 2014
House Legislative Council
Member introducing Bill Hon Edward O’Donohue MLC
Portfolio responsibility Attorney-General

Purpose

The Bill amends the:

*Crimes Act 1958* to:

- abolish the offence of defensive homicide;
- provide for self-defence, duress, sudden or extraordinary emergency and intoxication in relation to all offences;
- reform the law in relation to complicity.

*Evidence Act 2008* to:

- empower the court to refuse to admit evidence if its probative value is substantially outweighed by the danger that it might unnecessarily demean the deceased in a homicide trial.

*Jury Directions Act 2013* to:

- insert jury directions about family violence in a criminal trial in which self-defence or duress in the context of family violence is in issue.

Content

Clause [3] abolishes the offence of defensive homicide. The Committee notes the extract from the second reading speech:

*Introduction…*

Defensive homicide applies when a person kills someone else with a genuine but unreasonable belief that his or her actions are necessary in self-defence. Unlike murder, which carries a maximum sentence of life imprisonment, the maximum penalty for defensive homicide is 20 years’ imprisonment.

Defensive homicide was introduced in 2005 following recommendations made by the Victorian Law Reform Commission (VLRC) in its Defences to Homicide – Final Report. The VLRC argued that the law should recognise the lower culpability of a person who kills with a genuine belief that their life is in danger, but who cannot prove that their actions were objectively reasonable. At the same time as recommending the abolition of provocation, it recommended on balance the introduction of a partial defence to murder to provide a ‘halfway house’ for women who kill in response to family violence who were unable to successfully argue self-defence (and thereby obtain an acquittal).

However since its introduction, defensive homicide has predominantly been relied upon by men who have killed other men in violent confrontations, often with the use of a weapon and often involving the infliction of horrific injuries. This has caused justifiable community concern that the law, like provocation once did, is allowing these offenders to ‘get away with murder’.
Abolishing defensive homicide follows recommendations made by the Department of Justice in its 2013 Consultation Paper on Defensive Homicide: Proposals for Legislative Reform...

Clause [4] provides a new statutory test for self-defence. The Committee notes the extract from the second reading speech:

Changes to self-defence laws

The Bill will introduce a clearer and simpler statutory test for self-defence, which will apply to all offences. Currently, differences between the self-defence tests for fatal and non-fatal offences make the law confusing and difficult for juries to apply.

Under the new self-defence test, self-defence will apply where:

- a person believes that his or her conduct is necessary in self-defence, and
- that person’s conduct is a reasonable response in the circumstances as he or she perceives them.

Self-defence will be limited in the case of murder by requiring the accused to believe that his or her conduct is necessary to prevent the infliction of death or really serious injury (which includes serious sexual assault).

Clause [4] provides that evidence of family violence may be relevant to whether a person acted under duress. The Committee notes the extract from the second reading speech:

Jury directions on family violence

... The Bill will introduce new provisions into the Jury Directions Act 2013 to address common misconceptions about family violence. When a direction on family violence is requested by defence counsel, the judge will explain to the jury (among other things) that family violence is not limited to physical abuse and may include sexual and psychological abuse, and that it is not uncommon for victims of family violence to stay with their abusive partner, rather than leave or seek help. The directions will also explain to jurors that family violence may be relevant to their assessment of whether the woman was acting in self-defence. These directions may be given early in the trial before any evidence is heard. This will ensure that any misconceptions about family violence are dispelled early on.

Clause [9] amends the general discretion to exclude evidence in section 135 of the Evidence Act 2008. The Committee notes the extract from the second reading speech:

New evidence laws

The Bill will amend the Evidence Act 2008 to empower a court to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might unnecessarily demean the deceased in a criminal proceeding for a homicide offence. This reform is designed to reduce unjustifiable attacks on the character and reputation of the deceased during homicide proceedings.

Clause [6] inserts a new subdivision (1) in Division 1 of Part II of the Crimes Act 1958 which makes amendments to the law of complicity. The Committee notes the extract from the second reading speech:

Complicity

In line with the recommendations of the Weinberg report, the Bill will amend the Crimes Act 1958 to provide that a person who is involved in the commission of an offence is taken to have committed the offence. A person is involved in the commission of an offence if, for
example, they assist or encourage the offence, or if they enter into an agreement or understanding with another person to commit the offence.

... The Bill will abolish the doctrine of ‘extended common purpose’.

... The Bill will provide that a person is guilty of an offence that is different from the planned or agreed offence when that person foresaw the probability of the offence occurring in the course of carrying out the planned or agreed offence. Focussing on ‘probability’ rather than ‘possibility’ is consistent with general principles of criminal liability, and will result in simpler jury directions. If a person foresaw the possibility, but not the probability of a person being killed, under the new provisions, such a person could still be guilty of manslaughter, but not murder.

Charter report

Right to life / Security – no recourse to the defence of duress where voluntary association for the purpose of ‘violent conduct’

Clause 322O provides a new defence of duress that applies to all offences. It replicates the current provision in s.9AG, Crimes Act 1958, but applies it to all offences (unlike s.9AG which only applies to fatal offences).

Clause 322O(3) provides an exception to the defence of duress where ‘the threat is made by or on behalf of a person with whom the person is voluntarily associating for the purpose of carrying out violent conduct.’

‘Violent conduct’ is not defined in the Bill (or the current Act). The Committee notes that the explanatory memorandum states that the ‘provision is designed to ensure duress cannot be relied upon by people voluntarily involved in criminal activities’. It appears that the term ‘violent conduct’ may be intended to be limited to criminal conduct.

If ‘violent conduct’ is construed more broadly to include non-criminal activities, depriving a person who is engaging in activities that are ‘violent’ of the defence of duress could limit their right to life (s 9(1), Charter) or their right to liberty and security (s 21(1), Charter), depending on the nature of the threat. This is because it puts the person in the situation of succumbing to the threat to their (or someone else’s) life or personal security or face prosecution without being able to avail themselves of the defence of duress.

The Committee will write to the Attorney-General seeking clarification as to whether expressly limiting the exception to the defence of duress in clause 322O(3) to circumstances where the violent conduct is criminal conduct is less restrictive of the right to life and the right to liberty and security of the person than the current wording of the provision. Pending the Attorney-General’s response, the Committee draws attention to clause 322O(3).

The Committee makes no further comment
Criminal Organisations Control and Other Acts Amendment Bill 2014

Introduced 24 June 2014
Second Reading Speech 26 June 2014
House Legislative Assembly
Member introducing Bill Hon Robert Clark MLA
Portfolio responsibility Attorney-General

Purpose

The Bill amends various Acts to make a range of reforms to Victoria’s justice system. This includes:

- Confiscation Act 1997;
- Criminal Organisation Control Act 2012;
- Criminal Procedure Act 2009;
- Crimes (Mental Impairment and Unfitness to be Tried) Act 1997;
- Children, Youth and Families Act 2005;

Submission received

The Committee has received and considered a submission from the Victorian Equal Opportunity and Human Rights Commission. The submission will be posted on the Committee’s website.

Content

Confiscation Act 1997

It amends the Confiscation Act 1997 to:

- modify the operation of the civil forfeiture regime to allow an application for a civil forfeiture restraining order to be made in relation to more than one Schedule 2 offence. [3] The Committee notes the explanatory memorandum:

  This addresses the difficulty in linking property to the commission of a single Schedule 2 offence especially where the proceeds are used to purchase the property are from multiple Schedule 2 offences.

- modify the provisions relating to hardship so that a court may only take into account hardship that is undue hardship;

- establish a new regime for the automatic mandatory forfeiture of all property owned or controlled by a person convicted of a serious drug offence and declared by the court to be ‘serious drug offenders’. [17, 29] The Committee notes the extract from the second reading speech:

  The Bill will establish a regime for the forfeiture of assets by persons declared by the court to be ‘serious drug offenders’. The court will make such a declaration when convicting a person of one of several very serious drug offences, including the trafficking or the cultivation of a large commercial quantity of drugs. These offences are the most serious drug offences –
punishable by up to life imprisonment—ensuring that serious drug declarations are only targeted at the most serious of offenders. The effect of a serious drug declaration will be the mandatory forfeiture to the State of almost all of the offender’s property. The offender and dependants will be able to retain household goods and clothing, and a modestly priced vehicle. Dependants of the offender will be able to seek relief from hardship caused by the forfeiture, to ensure they are not left homeless.

- permit the holders of prescribed positions within the Department of Justice to take control of restrained property and exercise the powers of a trustee in relation to that property.

**Criminal Organisations Control Act 2012**

It amends the *Criminal Organisations Control Act 2012* to:

- change the standard of proof that applies in relation to the making of restrictive declarations applying to organisations. It sets out the circumstances in which the Supreme Court may make a declaration. A Supreme Court may make a prohibitive declaration if it is (1) satisfied beyond reasonable doubt that the matters set out in section 19(2B) apply to the organisation and (2) satisfied on the balance of probabilities that the activities of an organisation pose a serious threat to public safety and order. A Supreme Court may make a restrictive declaration if it is satisfied on the balance of probabilities that the matters set out in section 19(2B) apply to the organisation and that the activities of an organisation pose a serious threat to public safety; [65]

- provide for the making of different kinds of declarations applying to organisations;

- change the matters of which the Court must be satisfied in making control orders to remove the requirement that a characteristic include, that the offence involved substantial planning and organisation; [65]

- provide for the making of declarations and control orders by consent;

- provide for applicants, respondents and objectors to bear their own costs in proceedings under the Act;

- to apply that Act in relation to a wider range of offences at a lower that can trigger the making of a declaration against an individual or an organisation. [60] The Committee notes the extract from the second reading speech:

  *The Bill will broaden the range of criminal offence that can trigger the making of a declaration against an individual or an organisation. Currently the Criminal Organisations Control Act requires that an offence be punishable by at least ten years imprisonment or specifically listed in the Schedule to the Act. The Bill will lower this threshold to an offence punishable by five years imprisonment ensuring that violent offences such as common assault and affray are captured.*

**Criminal Procedure Act 2009**

It amends the *Criminal Procedure Act 2009*:

- In relation to the cross-examination of a witness at a committal hearing by introducing a more rigorous test for determining when leave to cross examine a witness at a committal is to be granted. It also amends provisions in respect to the service of documents relating to traffic camera offences. Ordinary service may be effected for documents relating only to a traffic camera offence by sending a copy of the document by prepaid ordinary post, addressed to the person to be served, to a post office box address nominated by that person. [117]
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA Act) and the Children, Youth and Families Act 2005

The Bill amends the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (the CMIA Act) and the Children, Youth and Families Act 2005 to:

- enable the Children’s Court to determine fitness to plead under the CMIA Act in relation to all indictable offences that may be heard in the Children’s Court;
- require offences outside the jurisdiction of the Children’s Court (which are offences resulting in death), or offences that the Children’s Court considers it cannot adequately deal with, to continue to be committed to the higher courts for fitness to be determined;
- require the Children’s Court President to determine cases involving the most serious offending (offending with a maximum penalty of 25 years) when fitness to plead or the mental impairment defence are raised, while permitting Children’s Court magistrates to determine all other cases, and the President to nominate a magistrate to determine a serious matter if he is unavailable;
- maintain the Children’s Court’s jurisdiction over a ‘child’, so a person aged under 18 years of age at the time of the alleged commission of the offence will be dealt with in that court (unless the person is 19 years or above when a proceeding for the offence is commenced);
- allow the Children’s Court to declare a child liable to supervision under the CMIA Act if required for the protection of the child or the community, and enable the Children’s Court to impose custodial and non-custodial supervision orders;
- limit Children’s Court supervision orders to up to six months duration, with extensions of up to a maximum of two years for children aged 15 and over, and up to a maximum of one year for children aged under 15 to ensure regular supervision of the supervision order by the court (given the major review provisions in the CMIA Act will not apply to orders made by the Children’s Court);
- require orders made in the Children’s Court to be transferred to the County Court for review and supervision when a child reaches 19 years of age, which is the criminal jurisdictional limit of the Children’s Court;
- require children on custodial supervision orders to be held in youth justice centres and supervised by the Department of Human Services;
- amend the Working with Children Act 2005 to include in the definition of ‘finding of guilt’, a finding of not guilty on account of insanity.

Major Crime (Investigative Powers) Act 2004

The Committee notes the extract from the second reading speech:

The Major Crime (Investigative Powers) Act 2004 will be amended to ensure that the coercive powers available under that Act can be used to investigate the criminal activities of declared organisations. Currently the process required to obtain a coercive powers order under that Act duplicates substantially the process required to obtain a declaration under the Criminal Organisations Control Act. These amendments will eliminate this duplication to ensure that coercive powers can be more readily used against organisations found by a court to be engaged in serious criminal activity.

The Bill amends the Major Crime (Investigative Powers) Act 2004 to:

- improve the operation of that Act by expediting the examination process where a witness only attends to produce documents; clarify the privilege against self-incrimination in respect to derivative use of evidence [162]; [See Charter report]
• remove the sunset period in the Act relating to contempt of the Chief Examiner and the rule against a person being charged with both an offence under the Act and contempt of the Chief Examiner in respect of the same set of circumstances; and provide a ‘reasonable excuse’ defence in section 37 of the Act (refusal to answer questions or produce documents) It amends existing section 20 which relates to the issuing of a notice by the Supreme Court or Chief Examiner that states that a summons or order is confidential and that it is an offence to disclose certain matters [158]. (See Charter report) It also amends existing section 43 in relation to directions that evidence must not be published or communicated by anyone. [163] It amends section 39 in relation to the ‘derivative use’ of answers or documents; [162] (See Charter Report)

• make a related amendment to the Criminal Procedure Act 2009 in relation to the inclusion of transcripts of an examination in a hand-up brief where the evidence is relevant in a prosecution.

The Committee notes the extract from the second reading speech:

The Bill also makes it expressly clear that the Chief Examiner can commence, or continue to conduct, an examination of a person even if court or tribunal proceedings (whether civil or criminal) that relate to the same subject matter of the examination are already on foot or are subsequently commenced. This amendment responds to the recent decision of the High Court in X7 v Australian Crime Commission [2013] HCA 29. The Court decided, in the context of considering legislation governing the Australian Crime Commission, that the coercive examination of a person charged with an offence cannot occur where the examination concerns the subject matter of the offence charged, without express language or by necessary implication. The amendment inserts the necessary express language...

Section 39 of the act abrogates the privilege against self-incrimination when answering questions put in an examination or producing a document or other thing. The Act includes a ‘use-immunity’ that restricts answers or documents or things being used as evidence against the person in criminal and civil proceedings. However, the use-immunity was never intended to prevent the use of other evidence derived from answers, documents or things in a criminal prosecution against the person, or the use of such material in a prosecution against a third party. Nevertheless, the Supreme Court in In the Matter of the Major Crime (Investigative Powers) Act 2004 [2009] restricted this use of evidence.

The Bill amends section 39 to make it clear that the abrogation of the privilege against self-incrimination applies whether the person has been or may be charged with an offence in respect of the subject-matter of the question, document or thing. It also clarifies that section 39 does not prevent the admission in a criminal proceeding (or proceeding for a penalty) of any evidence obtained as a direct or indirect consequence of an answer, document or thing. Any such evidence is otherwise admissible in accordance with the normal rules of evidence.

The amendment is a direct response to the Supreme Court’s decision and is intended to reverse that ruling and restore the original intention of Parliament. Consequently, any witness in an examination under the Major Crime (Investigative Powers) Act cannot claim the privilege. The witness must answer all questions that the chief examiner directs the witness to answer. Any evidence given by a witness is not admissible against them in a criminal proceeding or a proceeding for the imposition of a penalty. It is, however, admissible against other persons. That evidence may also be admissible in relation to offences against the Major Crime (Investigative Powers) Act, confiscation proceedings and the offence of giving false or misleading evidence.

Although answers given by a witness cannot be used against them, police may rely upon the evidence to further investigations into organised crime offences. The answers might lead police to discover new evidence and new lines of enquiry. This is generally known as
derivative use. While the Act clearly states there can be no direct use of your evidence against you, the amendments will ensure derivative use is available to investigators.


The Bill:

- amends the *Sentencing Act 1991* provide that an application to vary an alcohol exclusion order must, in most cases, be made to the Magistrates’ Court, regardless of which court first made the order. If the Supreme Court made the order, it may retain the variation power for itself or direct that any variation application be made to the Magistrates’ Court; [169]

- amends the *Firearms Act 1996* change how that Act operates in respect to a new provision providing a presumption that a declared member is not a fit and proper person to possess firearms. [88] The Committee notes the explanatory memorandum:

  *amends section 17 of the Firearms Act 1996 to provide a rebuttable presumption that a person who is a declared organisation member is not a “fit and proper person” for the purposes of the Chief Commissioner of Police deciding whether to issue that person with a longarm or handgun licence.*

  *Section 17 of the Act provides that a longarm or handgun licence must not be issued to a person unless the Chief Commissioner of Police is satisfied that person is a "fit and proper person". This clause will amend section 17 to provide that persons who are declared organisation members are presumed not to be "fit and proper persons". The amendment provides that this presumption may be rebutted.*

- amends the *Summary Offences Act 1966* with respect to the recent provisions concerning ‘move-on directions’, to empower a protective services officer to request the name and address of a person they intend to give a move-on direction in the same way police officers are empowered to; [179]


**Charter report**

**Reputation – Confidentiality of witness summons – Publication of evidence**

**Summary**: The effect of clauses 158 and 163 may be to permit or require the publication of defamatory claims about a person, which the person may not be able to contest in court. The Committee will write to the Attorney-General seeking further information as to the compatibility of these clauses with the Charter right of a person not to have his or her reputation unlawfully attacked.

The Committee notes that clause 158, amending existing s.20 of the *Major Crime (Investigative Powers) Act 2004*, specifies circumstances when the Supreme Court and Chief Examiner must or may give a person who has been given a witness summons a notice that the summons is a confidential document and that it is a criminal offence to disclose its existence, its subject-matter or any official matter connected with it. The new version of section 20 omits existing requirements that a notice
must or may be given if a failure to do so respectively would or might ‘prejudice the... reputation of a person’.¹

The Committee also notes that clause 163, amending existing s.43, specifies circumstances when the Chief Examiner must direct that evidence must not be published or communicated by anyone. The new version of section 43 omits an existing requirement that a direction must be given if a failure to do so ‘might prejudice the... reputation of a person’.²

The Committee observes that a witness summons and evidence or documents adduced to the Chief Examiner may contain claims of serious misconduct about any person, including claims that a person has committed a serious offence. Witnesses who give evidence before the Chief Examiner have the same immunities as witnesses in the Supreme Court and therefore cannot be sued in defamation in respect of their evidence.³ The effect of clauses 158 and 163 may be to permit or require the publication of defamatory claims about a person, which the person may not be able to contest in court. The Committee considers that clauses 158 and 163 may engage the Charter right of a person ‘not to have his or her reputation unlawfully attacked’.⁴

The Statement of Compatibility does not discuss clauses 158 and 163. The second reading speech remarks:

The bill also amends the criteria the Supreme Court must consider when giving notices under section 20 of the Major Crime (Investigative Powers) Act... The provision protects witnesses who have been summonsed. However, under the new amendments, the effect on witness’ reputation will no longer be a consideration for the court in determining when to make such a notice... As with the amendments to section 20 of the Major Crime (Investigative Powers) Act, the bill amends section 43(2) so that the effect on witness’ reputation will no longer be a consideration for the court in determining when to restrict the publication and communication of evidence and identifying information.

However, the Committee observes that both the existing and new sections 20 and 43 regulate decisions by the Chief Examiner (in addition to or instead of courts) and are expressed to protect any ‘person’ (rather than just the summoned witness). As well, neither new section expressly states that ‘witness’ reputation will no longer be a consideration’.⁵

The Committee notes that equivalent provisions governing the Australian Crime Commission, the NSW Crime Commission and Western Australia’s Corruption and Crime Commission require the giving of a confidentiality or non-publication notice to protect the reputation of any person,⁶ and that no equivalent provisions in Australia bar a crime commissioner from considering such effects.⁷

The Committee will write to the Attorney-General seeking further information as to the compatibility of clauses 158 and 163 with the Charter right of a person not to have his or her reputation unlawfully attacked. Pending the Attorney-General’s response, the Committee draws attention to clauses 158 and 163.

¹ Existing s. 20(2)(a), (3)(a)(i).
² Existing s. 43(2).
³ Existing s. 33.
⁴ Charter s. 13(b).
⁵ In the case of new section 20, it is possible that such effects may still be considered to the extent that any prejudice to someone’s reputation would or may be ‘contrary to the public interest’; see new section 20(2)(b), (3)(b). In the case of new section 43, clause 163 only alters the circumstances where a non-publication direction ‘must’ be given, not when the Chief Examiner ‘may’ give such a direction: see existing s. 43(1).
⁷ Crime and Misconduct Commission Act 2001 (Qld), ss. 84, 202; Corruption and Crime Commission Act 2003 (WA), s. 151(4)(a).
Compelled self-incrimination – Coercive powers order – People charged with a criminal offence may be compelled to lead investigators to evidence that may be used against them in a criminal prosecution

Summary: The effect of clause 162 is that the Chief Examiner may compel a person to lead investigators to evidence that can then be used against him or her in any criminal or civil penalty proceeding. The Committee considers, on the basis of a Supreme Court of Victoria ruling in 2009, that clause 162 may be incompatible with the Charter right of people charged with criminal offences not to be compelled to testify against themselves. The Committee refers to Parliament for its consideration the question of whether or not clause 162 is a reasonable limit to achieve the purpose of enabling serious organised crime to continue to be investigated and prosecuted.

The Committee notes that clause 162, inserting a new sub-section 39(4) into the Major Crimes (Investigative Powers) Act 2004, provides that the existing bar on the admission of self-incriminatory answers or documents provided by a person to the Chief Examiner does not prevent ‘the admission... of any evidence obtained as a direct or indirect consequence of’ such answers or documents.

The Committee observes that the effect of clause 162 is that the Chief Examiner may compel a person (including a person currently facing criminal charges) to lead investigators to evidence that can then be used against him or her in any criminal or civil penalty proceeding. For example, a person facing criminal prosecution might be forced (under pain of a term in prison) to reveal the location of a warehouse he or she has access to, or who his or her associates are, and evidence from those premises or associates could then be admitted as part of the prosecution case against the accused.8

The Committee notes that the Supreme Court of Victoria held in 2009 that existing s.39, as it operated prior to the enactment of the Charter, ‘limits the right to a fair hearing and the right not to testify against oneself because it requires people to testify against themselves and then fails to protect them from derivative use of their testimony’.9 The Court then applied the Charter’s requirement that all statutory provisions must be interpreted compatibly with human rights ‘[s]o far as it is possible to do so consistently with their purpose’,10 to interpret existing s.39 so that ‘[d]erivative use of the evidence obtained pursuant to compelled testimony must not be admissible against any person affected by s.39 of the Act unless the evidence is discoverable through alternative means’.11 The second reading speech remarks that clause 162 ‘is intended to reverse that ruling’. The Committee therefore considers that clause 162 may limit the Charter’s rights to a fair hearing and against compelled self-incrimination.12

The Statement of Compatibility remarks:

There are significant difficulties in detecting and prosecuting organised crime offences. Criminal organisations are well known to engage in serious violence against persons who provide information to police. They use that reputation to ensure that even persons who are not involved in the offences do not assist police with their investigation. This code of silence can operate both within the criminal organisation and outside it. The Major Crime (Investigative Powers) Act aims to assist in the detection and prosecution of such offences and thereby prevent further offences.

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8 See the various examples discussed in Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381 at [70]-[74] and [86]-[94].
10 Charter s. 32.
12 Charter ss. 24(1) & 25(2)(k).
The inability to use any evidence derived from answers, against the person who gave them, significantly undermines the effectiveness of the coercive powers scheme in achieving that aim. Because of the code of silence and culture of rear, the chief examiner may examine a person without being aware of the level of criminal activity in which that person is involved or which the person knows about. By providing answers that lead to the discovery of evidence against them, that person can be effectively immunised from prosecution. This undermines the ability to prosecute persons responsible for serious organised criminal offences, which is an important purpose of the act. In addition, the risk of a person immunising themselves from prosecution adversely affects the way in which Victoria Police and the chief examine use the powers under the act, reducing the scope and value of the chief examiner’s powers...

I consider that ensuring that derivative evidence is able to be used is necessary to enable serious organised crime to continue to be investigated and prosecuted. While it may limit the privilege against self-incrimination, the reading in of a derivative use immunity significantly undermines the important purposes of the act and there are no other less restrictive means available.

However, the Committee observes that the Supreme Court in 2009 expressly considered similar arguments and nevertheless held that such a limitation did not satisfy the test set out in s. 7(2) of the Charter.  

Charter s.7(2) provides:

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.

Chief Justice Warren remarked:  

I find that the relationship between the limitation and its purpose is more drastic than is justified. In the context of organised crime, such a limitation means that investigators are not required to give careful consideration to which persons will be charged and interrogated (which is different to saying that they do not give such consideration), thereby raising the possibility of innocent or deliberate breaches of the right against self-incrimination, and possibly other human rights. Under the procedures in the Act, it is not necessary to compel the persons who are intended to be charged to give evidence. In reality it would be sufficient to compel persons who will ultimately not be charged to give evidence, or to compel persons who will be charged based on evidence obtained independently from their own testimony.

The Chief Justice also held that the narrow form of derivative use immunity that she read into existing s.39 in 2009 ‘is a less restrictive means of achieving the purpose of the original limitation, but which also gives effect to a reasonable limitation on the right against self-incrimination’.

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The Committee considers that, on the basis of the Supreme Court of Victoria’s ruling in 2009, clause 162 may be incompatible with the Charter right of people charged with criminal offences not to be compelled to testify against themselves.

The Committee notes that the Charter does not restrict the powers of Parliament to pass any legislation, including legislation that is incompatible with a Charter right or that reverses a court ruling applying the Charter. The Committee observes that the Supreme Court, if it finds that s.39, as amended by clause 162, cannot be interpreted consistently with a Charter right, may make a declaration to that effect under Charter s.36. However, such a declaration would not affect the validity or meaning of s.39.

The Committee refers to Parliament for its consideration the question of whether or not clause 162, by permitting the Chief Examiner to compel a person (including a person currently facing criminal charges) to lead investigators to evidence that can then be used against him or her in any criminal or civil penalty proceeding, is a reasonable limit on the Charter right of people facing criminal charges not to be compelled to testify against themselves, in light of the clause’s purpose of enabling serious organised crime to continue to be investigated and prosecuted.

The Committee makes no further comment.
Disability Amendment Bill 2014

Introduced 24 June 2014
Second Reading Speech 25 June 2014
House Legislative Assembly
Member introducing Bill Hon Mary Wooldridge MLA
Portfolio responsibility Minister for Disability Services and Reform

Purpose

The Bill amends the:

- \textit{Disability Act 2006} to enable residents detained in a Disability Forensic Assessment and Treatment Service who participate in a leave program to be electronically monitored at certain times and in certain circumstances; [4, 6]
- \textit{Crimes (Mental Impairment and Unfitness to be Tried) Act 1997} to enable electronic monitoring at certain times and in certain circumstances of people who are committed to custody in a residential treatment facility under a custodial supervision order. [11-14]

The Committee notes the extract from the second reading speech:

\begin{quote}
This Bill will create the capacity for electronic monitoring to be applied to residents of the Disability Forensic Assessment and Treatment Service.

Before electronic monitoring may be required of a person it will be necessary for the Secretary, a court or the Forensic Leave Panel to have regard to the risk of harm the person poses to the community, including consideration of the nature and circumstances of the person's history of offending and offending behaviours. The views of the Senior Practitioner or a registered medical practitioner about the person's treatment needs, and the likely impact of electronic monitoring on the person’s progress, must also be considered.
\end{quote}

Charter report

The Disability Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Gambling Regulation and Casino Control Amendment Bill 2014

Introduced 11 June 2014
Second Reading Speech 25 June 2014
House Legislative Council
Member introducing Bill Ms Colleen Hartland MLC
Private Member’s Bill

Purpose

The purpose of the Bill is to amend the Gambling Regulation Act 2003 and the Casino Control Act 1991 to amend the method by which bet limits for gaming machines are set.

Clause [4] inserts new Divisions 3 and 4 in relation to the setting of betting limits for large and small approved venues. Betting limits will be set by legislation rather than Ministerial directions. It provides that from 1 January 2016 until 31 December 2019, any new gaming machines installed in large approved venues and small approved venues must have the capacity to set a $1 bet limit. It provides that from 1 January 2016 until 31 December 2021 any new gaming machines installed in small approved venues must have the capacity to set a $1 bet limit.

The Committee notes the extract from the second reading speech:

The Greens Gambling Regulation and Casino Control Amendment Bill will implement dollar bet limits through the following steps. It inserts into the legislation the current bet limit of five dollars which has previously been set by ministerial direction and it removes the power for the Minister to provide direction as to the bet limit. The five dollar bet limit will continue until the end of 2019. From 2020, one dollar bet limits will come into force.

Charter report

The Gambling Regulation and Casino Control Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Judicial Commission Bill 2014

Introduced 25 June 2014
Second Reading Speech 26 June 2014
House Legislative Assembly
Member introducing Bill Hon Robert Clark MLA
Portfolio responsibility Attorney-General

Purpose

The purpose of the Bill is to:

- establish the Judicial Commission of Victoria under the Constitution Act 1975;
- provide for investigations into judicial officers and non-judicial members of VCAT.

The Committee notes the extract from the second reading speech:

The Bill will establish a Judicial Commission to investigate complaints about the conduct or capacity of judges, magistrates and members of VCAT. The Judicial Commission will be the first body of its kind in Victoria and only the second in Australia. The establishment of a formal judicial complaints system will help strengthen confidence in the accountability and transparency of the courts... The Bill establishes a process to hear and respond to both serious and less serious complaints and concerns about poor or inappropriate performance or conduct by judicial officers and VCAT members. Serious issues can result in removal of an officer whilst less serious complaints can be referred to the relevant head of jurisdiction to respond appropriately...

...It is important to emphasise that it is expected that the vast majority of the matters that the Commission will deal with will be matters relating to performance, such as allegations of delay or inappropriate or insensitive remarks... The investigation of alleged corruption will primarily be the responsibility of the IBAC or Victoria Police. However any removal of a judicial or VCAT officer, consequent upon an IBAC investigation will only occur under the mechanisms set out in this Bill...

The bill provides for interaction between IBAC and the Commission including in relation to protected disclosures about judicial officers or members of VCAT, which may be made either to the Commission or IBAC. Complaints made to the Commission which relate to alleged corruption by a judicial officer or VCAT member will be able to be referred to the IBAC. IBAC has jurisdiction over judicial officers and members of VCAT but is not empowered to remove a judicial officer or member of VCAT from office. Only the Commission can set in train the process to have a judicial officer removed from office.

Content

Privilege against self-incrimination abrogated – Use limitations – Derivative use permitted

A person is required to answer questions provide information or documents that may incriminate the person. However, the person is provided with immunity against prosecution for such compelled answers or disclosures expect in proceedings for:

- perjury or giving false information;
- an offence against the Act;
- an offence against the Independent Broad-based Anti-corruption Commission Act 2011 or the Victorian Inspectorate Act 2011;
Committee

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abrogated.

[81] (See Charter report) A report

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Judicial

Commission. [130]

Privilege – Journalist privilege

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warrant

power. [82, 83]

No reasons to be given for decisions

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person

is

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Judicial

Commission

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Conduct

Division. [102]

The

Committee

notes

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extract

from

the

explanatory

memorandum:

The Bill provides a comprehensive and targeted regime for the disclosure of material, and already allows certain persons to obtain reasons for a decision by requiring the Conduct Division to issue notifications and reports in relation to decisions.

Power to declare a person vexatious

The Judicial Commission may declare that a person is a vexatious complainant or to revoke or suspend such a declaration. The Judicial Commission must dismiss any complaint (see section 14) that is made by a person who is a vexatious complainant. [135]

Oversight by Parliamentary Committee

The Bill amends the Parliamentary Committees Act 2003 to provide the Accountability and Oversight Committee with additional functions relating to oversight of the proposed Act and of the Judicial Commission. The Bill specifies the functions that the Accountability and Oversight Committee cannot perform. [194]

Charter report

Compelled self-incrimination – Witness summons – People may be compelled to lead investigators to evidence that may be used against them in a criminal prosecution

Summary: The Committee refers to Parliament for its consideration the question of whether or not clause 81(4), by permitting the Conduct Division to compel a person to lead investigators to evidence
that can then be used against him or her in any criminal or civil penalty proceeding, is a reasonable limit on the Charter’s rights to a fair hearing and against self-incrimination.

The Committee notes that clause 81(4) provides that a provision barring the admission of self-incriminatory answers provided by a person questioned by the Conduct Division does not prevent ‘the admission… of any evidence obtained as a direct or indirect consequence of’ such answers.

The Committee observes that the effect of clause 81(4) is that the Conduct Division may compel any person (including the judge who is the subject of the complaint, family, friends and neighbours of the judge, a litigant or criminal defendant before the judge, and anyone else with knowledge relevant to the complaint) to lead investigators to evidence that can then be used against him or her in any criminal or civil penalty proceeding. The Committee considers that clause 81(4) may engage the Charter’s rights with respect to a fair hearing and against compelled self-incrimination.19

The Statement of Compatibility remarks:

*Any such limitation is demonstrably justifiable... Where incriminating material is elicited through a process that has, as its aim, the broader advancement of the administration of justice, there would be serious ramifications in seeking to require law enforcement bodies to ignore evidence relating to judicial misconduct that came to light.*

*An indiscriminate prohibition on the use of derivative material may encourage the admission of wrongdoing to ‘sterilise’ any future criminal investigation concerning disclosed misconduct. Admissions made during formal conduct division hearings will often be the only source available to law enforcement to imitate a criminal investigation, which, having regard to the above factors, is in the public interest to pursue.*

The Committee notes that the equivalent regime in N.S.W. is to the same effect as clause 81(4).20 However, similar provisions for judicial conduct bodies for the federal and A.C.T. courts bar the admission of evidence obtained directly or indirectly from compelled answers to those bodies in many criminal proceedings.21

The Committee refers to Parliament for its consideration the question of whether or not clause 81(4), by permitting the Conduct Division to compel a person to lead investigators to evidence that can then be used against him or her in any criminal or civil penalty proceeding, is a reasonable limit on the Charter’s rights to a fair hearing and against self-incrimination, in light of clause 81(4)’s aim of the broader advancement of the administration of justice.

The Committee makes no further comment

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19 Charter ss. 24(1), 25(2)(k).
20 *Judicial Officers Act 1986* (NSW), s. 25; *Royal Commissions Act 1923* (NSW), s. 17.
21 *Judicial Behaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), s. 54(2)(c); *Judicial Commissions Act 1994* (ACT), s. 32(3).
Judicial Entitlements Bill 2014

Introduced: 24 June 2014
Second Reading Speech: 25 June 2014
House: Legislative Assembly
Member introducing Bill: Hon Robert Clark MLA
Portfolio responsibility: Attorney-General

Purpose

The Bill:

- modernises the processes and structures for determining salaries, allowances and conditions of service for judicial officers in a manner that recognises and maintains judicial independence;
- repeals the Judicial Salaries Act 2004 and the Judicial Remuneration Tribunal Act 1995;
- consolidates the provisions governing the determination of judicial salaries and non-salary entitlements into a single Act.

The Committee notes the extract from the second reading speech:

*The Judicial Entitlements Bill will modernise and clarify the processes and legislative provisions that determine judicial entitlements. The Bill will repeal the Judicial Remuneration Tribunal Act and Judicial Salaries Act and consolidate the provisions governing the determination of judicial salaries and non-salary entitlements into a single Act. While the underlying framework will be preserved, the Bill update the framework, fill legislative gaps and introduce new process and transparency requirements. The bill will replicate the existing arrangements for determining judicial salaries... The Bill establishes the Judicial Entitlements Panel as a successor to the JRT with similar jurisdiction, structure and processes... The Bill provides that the Panel must make an own motion report to the Attorney-General as soon as practicable, being within one year at the latest. Thereafter the Panel must make an own motion report to the Attorney-General at least once every four years... The Bill also includes a new requirement to publish reports of the Panel and other documents made pursuant to the Bill in a register on the internet.*

Charter report

The Judicial Entitlements Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Justice Legislation Amendment (Firearms and Other Matters) Bill 2014

Introduced 24 June 2014
Second Reading Speech 25 June 2014
House Legislative Assembly
Member introducing Bill Hon. Kim Wells MLA
Portfolio responsibility Minister for Police and Emergency Services

Purpose

The Bill purpose of the Bill is to amend the Firearms Act 1996 and make a range of minor amendments to the Control of Weapons Act 1990, the Sex Offenders Registration Act 2004 and the Drugs, Poisons and Controlled Substances Act 1981 to improve the operation and effectiveness of the regulatory schemes under those Acts.

It amends the Firearms Act 1996 to:

- lower the traffickable quantity of unregistered firearms from 10 firearms to 3 firearms; [5, 17]
- create a separate offence and higher penalties for persons who manufacture firearms otherwise than in accordance with a firearms dealers licence; [12]
- clarify that a person who occupies or is in the care of, control or management of premises or in charge of a vehicle on or in which a firearm is found is taken to be in possession of that firearm in the absence of reasonable evidence to the contrary; [26] (See Charter report)
- provide for the extension of a junior firearm licence where the holder of that licence has applied for a full firearm licence before the person turns 18, in accordance with the section, pending the consideration of that application; [6]
- change restrictions relating to receiving instruction in the use of a handgun. The Committee notes the extract from the second reading speech:

  The Bill also makes amendment to the number of times that an unlicensed person can receive instruction in the use of a general category handgun at an approved shooting range, making the maximum number of times a person can receive instruction 10 times over their lifetime, rather than allowing 10 times once the person is over the age of 18 years, and 2 times between the age of 12 and 18 years. This will allow young persons who are interested in the sport of shooting to receive instruction prior to applying for a junior firearm licence more than 3 times, but does not increase the total number of times a person can receive instruction in shooting without applying for a firearm licence.

- lower the minimum age for participation in paintball activities from 18 to 16. The requirement for a full set of fingerprints to be provided when applying for employment as paintball field employee is abolished; [25]
- insert a new section 145 into the Firearms Act 1996 in relation to firearms found on premises or vehicles; (See Charter report)
- provide for direct applications to be made to VCAT for review of certain decisions regarding firearms licences made on the basis that a person is not a fit and proper person; [27]
- increase the number of legal members that may serve on the Firearms Appeals Committee. [20]
It amends the Control of Weapons Act 1990 to provide that disposable plastic knives designed for eating purposes are not controlled weapons for the purposes of the offences set out in section 6(1AA) and (1AB) of the Act. [28]

It amends the Sex Offenders Registration Act 2004 to:

- allow the Chief Commissioner of Police to arrange for another entity to establish, house and maintain the Register of Sex Offenders
- clarify that personal information from the Register of Sex Offenders may be disclosed to the CrimTrac Agency for inclusion on the Australian National Child Offender Register. [30 to 32]

It amends the Drugs, Poisons and Controlled Substances Act 1981 to prohibit several synthetic psychoactive substances as drugs of dependence by including them as prohibited substances in Schedule 11 of the Act. [33 to 36]

Charter report

Presumption of innocence – Deemed possession of firearms on the accused’s premises or vehicle

Summary: The Committee will write to the Minister seeking further information as to the compatibility of clause 26, to the extent that it conclusively deems a person to possess every firearm that he or she knows is in his or her premises or vehicle, with the Charter’s right to be presumed innocent until proved guilty of an offence.

The Committee notes that clause 26 replaces existing s.145 of the Firearms Act 1996:

In any proceedings under this Act, evidence that a person occupies any land or premises on or in which any firearm is found is evidence, and, in the absence of evidence to the contrary, is proof that that person possessed the firearm.

with a new section 145:

A firearm is taken to be in the possession of a person if the firearm is found—

(a) on land or premises occupied, in the care of or under the control or management of the person; or

(b) in a vehicle of which the person is in charge—

unless the person did not know, or could not reasonably be expected to know, that the firearm was on the premises or in the vehicle.

While existing s. 145 permits an accused to adduce any evidence to show that he or she did not possess a firearm on his or her premises, new section 145 requires that the accused must adduce evidence that he didn’t know of the firearm or that it was reasonable for him to not know of the firearm.22

The Committee observes that the effect of clause 26 may be to conclusively deem a person to possess every firearm that he or she is aware is on his or her premises or vehicle, even if the firearm is lawfully possessed by another occupant of the premises or vehicle (such as a visitor, roommate or

22 The Committee notes that this drafting, in providing that either an actual ‘or’ a reasonable lack of knowledge will suffice, is unusual. It is more common for an accused to have to adduce evidence that he or she both actually and reasonably lacked knowledge of an incriminating fact: see, e.g. Firearms Act 1997 (NT), s. 105(1)(b); Firearms Act 1996 (NSW), s. 4A(1)(b); Weapons Act 1990 (Qld), s. 163(3A)(b); Firearms Act 1977 (SA), s. 5(15)(a). As presently drafted, the phrase ‘or could not reasonably be expected to know’ appears to be redundant, as the presumption will be displaced by mere lack of knowledge, reasonable or otherwise.
passenger who holds a licence to possess it.) New section 145 may apply to a criminal prosecution, for example the offence in s.5 barring prohibited persons from possessing a firearm, which is punishable by 10 years in prison.

The Statement of Compatibility addresses the compatibility of clause 26 with the presumption of innocence, but only in regards to it placing an evidentiary burden on the accused. It does not address the possible narrowing of the circumstances when the presumption of possession can be displaced.

The Committee notes that similar presumptions in the firearms laws of other Australian jurisdictions expressly permit for the presumption to be displaced in one or both of the following circumstances:

- the firearm was placed in or on, or brought into or on to, the premises by or on behalf of a person who was lawfully authorised by or under this Act to possess the firearm; or
- on the evidence before the court, the person was not in possession of the firearm.

The Committee will write to the Minister seeking further information as to the compatibility of clause 26, to the extent that it conclusively deems a person to possess every firearm that he or she knows is in his or her premises or vehicle (even if it is lawfully brought there by someone else), with the Charter’s right to be presumed innocent until proved guilty of an offence.

To the extent that new section 145 is intended to allow an accused to adduce evidence of lack of possession on grounds other than lack of knowledge, the Committee seeks further information from the Minister as to whether providing expressly for that alternative in the text of new section 145 would be a less restrictive alternative reasonably available to achieve the section’s purpose.

The Committee makes no further comment.

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23 Charter s. 25(1).

24 Tasmania has a conclusive presumption without any exceptions, but it only applies to people who are subject to firearms prohibition orders: Firearms Act 1996 (Tas), s. 133. See also Firearms Act 1997 (NT), s. 58(4).

25 Firearms Act 1996 (ACT), s. 10(1)(b); Firearms Act 1997 (NT), s. 105(1)(a); Firearms Act 1996 (NSW), s. 4A(1)(a); Weapons Act 1990 (Qld), s. 163(3A)(a); Firearms Act 1977 (SA), s. 5(15)(b).

26 Firearms Act 1996 (ACT), s. 10(1)(d); Firearms Act 1997 (NT), s. 105(1)(c); Firearms Act 1996 (NSW), s. 4A(1)(c); Weapons Act 1990 (Qld), s. 163(3A)(c).
Powers of Attorney Bill 2014

Introduced: 24 June 2014
Second Reading Speech: 26 June 2014
House: Legislative Assembly
Member introducing Bill: Hon Robert Clark MLA
Portfolio responsibility: Attorney-General

Purpose

The purpose of the Bill is to consolidate and provide for certain aspects of the law relating to powers of attorney.

This includes:

- the principles to be applied by persons acting under enduring powers of attorney or under the provisions of this Act relating to enduring powers of attorney;
- the powers and duties of attorneys under enduring powers of attorney;
- the protection of persons whose affairs are being dealt with under enduring powers of attorney;
- provides for the meaning of the capacity of persons to make decisions for matters to which enduring powers of attorney and supportive attorney appointments relate;
- provides for the appointment of a supportive attorney as one who supports the person making the appointment to make and give effect to the person’s own decisions;
- repeals Parts XI and XIA of the Instruments Act 1958 and Division 5A of Part 4 of the Guardianship and Administration Act 1986;

Part 2 makes provision for non-enduring powers of attorney and when it is exercisable. [7, 10] Decision making is defined in clause. [4] A power of attorney for security is a type of non-enduring power of attorney. [17] The Committee notes the extract from the second reading speech:

**Definition of decision making capacity**

*Neither the Instruments Act nor the Guardianship and Administration Act define capacity, which is a key concept in the operation of powers of attorney legislation. The Bill addresses this gap by defining decision making capacity and providing guidance about how it should be assessed. These provisions protect a person’s right to make their own decisions whenever possible. They are consistent with the new mental health laws that were recently enacted by Parliament. The Bill makes clear that a person is presumed to have decision making capacity unless there is evidence to the contrary.*

Parts 3-6 sets out those matter relating to enduring powers of attorney, scope and their making. [21] The Committee notes the extract from the second reading speech:

*The Bill provides for a consolidated enduring powers of attorney form to cover both financial and personal matters with a separate form for general non-enduring powers of attorney... The Bill allows for the appointment of alternative attorneys or multiple attorneys to act jointly, severally, jointly and severally as or majority attorneys. The Bill provides that where there is a disagreement between an attorney for personal matters and an attorney for financial matters where they both have power over a matter, the view of the attorney for personal matters will prevail... The Bill more clearly sets out the duties of an attorney under*
an enduring power of attorney without excluding more common law duties... The Bill also specifies particular duties for attorneys with financial power... The Bill requires the revocation of an enduring power of attorney by a principal or an enduring attorney's appointment to be in writing in the prescribed form and to be witnessed.

Part 7 sets out those matters relating to supportive attorney appointments. [84] The Committee notes the extract from the second reading speech:

Supportive attorneys

The Bill provides for an adult, described as the ‘principal’ to appoint a person of their choice to act as their ‘supportive attorney’ to support them to make and give effect to some or all of their own decisions. The availability of such appointments will help promote autonomy and dignity for people with a disability who have the capacity to make various decisions for themselves provided they have support to make and give effect to those decisions. It provides legislative acknowledgement that mechanisms other than substituted decision-making can be used to allow people with a disability to engage in activities requiring legal capacity and to make and give effect to decisions that affect their lives.

The Bill allows a person to specify whom they want to support them in their decision-making, the types of decision they want support to make and the types of support they want in order to make and give effect to those decisions. This will provide certainty for third parties, allowing them to deal with a supportive attorney more confidently than if the relationship were informal, and thus better enabling principals to have their wishes and decisions respected and implemented...

A principal may also authorise a supportive attorney to do such things as are necessary to give effect to the principal’s decisions. For example, a principal who wishes to receive a home service may authorise the supportive attorney to make arrangements for the service to be provided once the decision has been made to proceed with the service. This is intended to be a practical power so that a principal’s decisions are implemented. This power is not intended to make the supportive attorney a substitute decision-maker for the principal and a supportive attorney cannot give effect to a supported decision about a significant financial transaction.

Charter report

The Powers of Attorney Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Public Health and Wellbeing Amendment (Hairdressing Red Tape Reduction) Bill 2014

Introduced 25 June 2014
Second Reading Speech 25 June 2014
House Legislative Council
Member introducing Bill Hon Edward O’Donohue MLC
Portfolio responsibility Minister for Health

Purpose

The Bill amends the Public Health and Wellbeing Act 2008 to provide for the registration, on an ongoing rather than periodic basis, of premises in which certain businesses are conducted. The new regulatory provisions will apply from 1 January 2016.

The Committee notes the extract from the second reading speech:

All businesses regulated under the Act are currently required to renew their registration periodically – usually annually – and council Environmental Health Officers generally inspect premises both when they are first registered and on every renewal. Under this Bill, businesses that provide only hairdressing and make-up services will be required to register their premises only once, when they open their business at that premises. Their registration will continue, on an ongoing basis, until the business closes, moves premises, is sold or its registration is suspended or cancelled. In practice this will mean that councils will inspect these premises on registration, an on receipt of a complaint but not annually...

This Bill represents a risk-based approach to public health regulation. It is based on the principle that regulatory burden and regulatory resources should be carefully targeted to appropriately address real risks to public health.

Hairdressing and the application of temporary make-up pose a much lower risk to public health than other beauty therapies and body art. This is because these activities do not involve intentional penetration of the skin—unlike tattooing and body piercing – and the risk of accidental penetration is extremely low – unlike in manicures and pedicures and abrasive skin treatments.

Skin penetration, and the associated risk of transmission of blood-borne viruses such as hepatitis and HIV, is the most serious risk associated with personal care and body art businesses.

Under this bill regulatory resources will be targeted to this serious risk by ensuring that higher risk businesses are the focus of councils’ regulatory attention.

Hairdressing and make-up businesses that also perform other higher risk services – including permanent tattooed make-up – will continue to be regulated as higher risk businesses and required to renew their registrations periodically.

Charter report

The Public Health and Wellbeing Amendment (Hairdressing Red Tape Reduction) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Sentencing Amendment (Emergency Workers) Bill 2014

Introduced 25 June 2014
Second Reading Speech 26 June 2014
House Legislative Assembly
Member introducing Bill Hon Robert Clark MLA
Portfolio responsibility Attorney-General

Purpose

The Bill amends the:

- *Sentencing Act 1991* and the *Crimes Act 1958* to provide a custodial sentence for certain violent offences committed against emergency workers;
- *Crimes Act 1958* to fix a 30 year baseline sentence for murder of an emergency worker on duty;
- *Crimes Act 1958* and the *Summary Offences Act 1966* to expand certain existing assault offences to include emergency workers;
- *Sentencing Act 1991* in relation to community correction orders and to expand the list of arson offences in Schedule 1;
- *Children, Youth and Families Act 2005* in relation to the release on parole of persons in respect of whom a youth justice centre order has been made under section 10AA(2) of the *Sentencing Act 1991*.

It substitutes a new section 51 of the *Summary Offences Act 1966*. It creates the summary offence of assaulting, resisting, obstructing, hindering or delaying an emergency worker on duty. This offence is punishable by 60 penalty units or six months imprisonment. [14] *(See Charter report)* It also amends section 52 of the *Summary Offences Act 1966* in relation to the offence of besetting premises. [15]

Committee comment

*Insufficient explanatory material – Court may order sum to cover damage from besetting premises – Practice Note A.iv*

The explanatory memorandum to clause 15 does not address clause 15(3), which amends existing s.52(2) of the *Summary Offences Act 1966*. The Committee notes that the apparent purpose of clause 15(3) is to empower a court to order that a person who is guilty of besetting premises pay a sum sufficient to cover damage resulting from the besetting.

The Committee observes that:

- the terms of new sub-section 52(2) refer to ‘assault, resistance… or delay’, but none of those terms appear in the offence of besetting premises in s.52(1A).
- the terms of new sub-section 52(2) appear to be limited to damage sustained by the person whose lawful right to enter, use or leave premises was impeded. The Committee notes that, in some instances (for example, where a commercial premises is beset), it is the owner of the premises who is more likely to have suffered damage (for example, because of the lost custom to the premises.)

In accordance with the Committee’s Practice Note (A.iv), the Committee will write to the Attorney-General seeking further explanation of clause 15(3).
Charter report

Non-consensual medical treatment – Offence to resist, obstruct, hinder or delay an ambulance or hospital emergency treatment employee

Summary: The Committee considers that, to the extent that a patient’s refusal of medical treatment may amount to resisting, obstructing, hindering or delaying an ambulance service employee or hospital emergency treatment employee attempting to provide medical treatment to the patient, clause 14 may engage the patient’s Charter right not to be subjected to medical treatment without his or her consent. The Committee notes that the Charter’s right against non-consensual medical treatment may be reasonably limited in the case of patients who lack the capacity to give informed consent. The Committee will write to the Minister seeking further information.

The Committee notes that clause 14, substituting existing s.51 of the Summary Offences Act 1966, provides (in new sub-section 51(2)) that a person ‘must not assault, resist, obstruct, hinder or delay an emergency worker on duty’. An ‘emergency worker’ includes a person employed or engaged by an ambulance service as an ambulance paramedic, an intensive care paramedic or in any other capacity to provide medical or other assistance to patients in an emergency, or a person employed or engaged to provide, or support the provision of, emergency treatment to patients in a hospital. Such persons are ‘on duty’ if they are ‘providing, or attempting to provide, care or treatment to a patient’.

The Committee observes that the equivalent offence in existing s.51(1) expressly provides in existing s.51(2)) that it ‘does not apply to a patient’ who is being given treatment. A possible purpose of existing s.51(2) is to ensure that patients retain the right to refuse medical treatment, including medical treatment provided by ambulance officers and hospital emergency treatment employees.

The Committee therefore considers that, to the extent that a patient’s refusal of medical treatment may amount to resisting, obstructing, hindering or delaying an ambulance service employee or hospital emergency treatment employee providing that treatment, clause 14 may engage the patient’s Charter right not to be subjected to medical treatment without his or her consent. The Committee notes that the Charter’s right against non-consensual medical treatment may be reasonably limited in the case of patients who lack the capacity to give informed consent. The Statement of Compatibility does not address clause 14 or the Charter’s right to refuse medical treatment.

The Committee will write to the Minister seeking further information as to the compatibility of clause 14, to the extent that a patient’s refusal of medical treatment may amount to resisting, obstructing, hindering or delaying an ambulance service employee or hospital emergency treatment employee providing that treatment, with the Charter’s right not to be subjected to medical treatment without consent.

To the extent that new section 51 is intended not to limit a patient’s right to refuse medical treatment, the Committee seeks further information from the Minister as to whether providing expressly to that effect in the text of new section 51 would be a less restrictive alternative reasonably available to achieve the section’s purpose.

The Committee makes no further comment.

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27 Compare Health Services Act 1997 (NSW), s. 67J, which is limited to a person obstructing or hindering an ambulance officer attempting to provide services to another person, and Emergency Workers (Obstruction) Act 2006 (UK), s. 1, which contains an exception for a ‘reasonable excuse’.

28 Charter s. 10(c).
Statute Law Amendment (Red Tape Reduction) Bill 2014

Introduced 25 June 2014
Second Reading Speech 25 June 2014
House Legislative Council
Member introducing Bill Hon Edward O’Donohue MLC
Portfolio responsibility Attorney-General

Purpose

The Bill amends the:

- *Food Act 1984* to remove the requirement for the proprietor of a food business to display the proprietor’s name on the food premises; [3 to 5]
- *City of Melbourne Act 2001* to repeal Part 4A of the Act relating to the Docklands Co-ordination Committee, so as to dissolve that Committee and repeal provisions related to the functions and operation of that Committee; [6]
- *Victorian Energy Efficiency Target Act 2007* to close the scheme established by that Act from the year commencing 1 January 2016. [7 to 11]

The Committee notes the extract from the second reading speech:

*The Bill amends the Victorian Energy Efficiency Target Act 2007 to provide for the closure of the Victorian Efficiency Target Scheme, also known as the Energy Saver Incentive Scheme on 1 January 2016.*

*The closure of the Energy Saver Incentive Scheme is the result of a wide ranging review undertaken in 2013 to assess the performance of the scheme and the options for its future. The review found that continuing with the Energy Saver Incentive scheme would result in a higher cost of producing energy for the Victorian economy, and would be likely to advantage higher income households at the expense of low income households.*

*A one year transitional phase, with a scheme target of 2 million tonnes of greenhouse gas emissions savings for 2015, allows for the careful and orderly winding down of the scheme. The transitional phase will give participating businesses time to adjust their business plans, while balancing the costs of continuing the scheme for a further year.*

Charter report

The Statute Law Amendment (Red Tape Reduction) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Water Bill 2014

Introduced 24 June 2014
Second Reading Speech 26 June 2014
House Legislative Assembly
Member introducing Bill Hon Peter Walsh MLA
Portfolio responsibility Minister for Water

Purpose

The Bill creates a new principal Act to:

- restate, with amendments, the law relating to water in Victoria;
- reform the regulatory framework for water management and use across Victoria;
- further improve how water corporations are governed;
- provide enhanced compliance and enforcement provisions;

Additional major changes are set out in the explanatory memorandum:

- amending the powers of water corporations, catchment management authorities or persons authorised by the Minister to enter land to perform functions or exercise powers under the Bill, to reflect current best practice. Specifically, the Bill alters the powers of water corporations and catchment management authorities to enter land they don’t manage or control to construct or install certain types of infrastructure. These changes are intended to provide greater protection for a person’s property rights and privacy.
- consolidating the existing statutory liability regime in the Water Act 1989 with changes to reflect recent VCAT and Supreme Court decisions.
- establishing a new two-step process for identifying and managing long-term risks to water resources. The process encompasses assessing water resources (regional resource assessments) and determining ways to manage the risks identified (strategic reviews);
- establishing a set of core considerations that decision-makers will be required to take into account before making certain decisions, for example, deciding whether or not to issue new water entitlements;
- simplifying and regrouping the functions of water corporations and catchment management authorities based on the current water industry structure, while providing flexibility for the industry to change in future;
- setting out in primary legislation a licensing regime for activities which may have an impact of waterways and their surrounds, to ensure they are appropriately regulated; and
- creating an enhanced contemporary compliance and enforcement “toolbox” with alternatives to court action and new penalties that are more in line with the nature of the offences.
Content

Delayed commencement – One year rule

Other than Part 1.1 of the Bill the remaining provisions come into operation on proclamation but not later than by 1 January 2016.

The Committee notes the extract from the explanatory memorandum:

A delayed commencement provision has been employed to facilitate a smooth transition from the Water Act 1989 to the new Act. It allows time to prepare the legislative instruments needed for the new Act to function effectively.

Clause [5] lists the ‘core considerations’. The ‘core considerations’ are a consistent set of decision making criteria which apply to key decisions across the Bill. They expressly require consideration of the environmental impacts and the need to consider environmental values and other values (cultural). They also recognise that water which is not environmental water may have multiple benefits including preserving environmental values and the health of ecosystems.

Chapter 2 provides for resource assessment and planning. It gives an overview of the Minister’s responsibilities in relation to the availability, condition and use of the State’s water resources and the recording of how the resources are allocated and used. The Minister provide for assessment programs to be conducted in relation to water resources at both a State and Regional level. [14, 22]

The Committee notes the extract from the explanatory memorandum:

This resource assessment process will typically have 2 steps. The first step will be a Regional Resource Assessment, which will identify any issues relating to the reliability of supply or quality of water for both environmental and consumptive uses of water in a region. The Regional Resource Assessment will recommend whether the second step of a Strategic Review is necessary. The Strategic Review will comprehensively review options and measures to help improve management of the risks identified. This 2 step process will replace the requirement for the Minister to produce regional sustainable water strategies under the Water Act 1989. The staged process will be less resource intensive in that detailed analysis and planning to improve the reliability of supply or quality of water will be undertaken only if there are significant problems that need to be addressed.

The Committee also notes the extract from the second reading speech:

The Bill provides for a two-step staged process of regional resource assessments and strategic reviews to replace the requirement for the Minister to produce regional sustainable water strategies to replace the requirement for the Minister to produce regional sustainable water strategies... The Bill proposes that an assessment for each region must be completed at least every 15 years and that the first assessment must be completed by no later than 1 January 2020... The Bill provides that the Minister for Water may develop a whole of water cycle management planning framework to guide the preparation of whole of water cycle management plans for urban areas defined by the Minister... The Bill maintains the Minister’s ability to qualify rights to water, both temporarily and permanently

Chapter 3 sets out the various rights in relation to water. This includes crown rights to water and statutory rights to water. [39, 40] It preserves the rights of traditional land owner groups to use and take water. [44] Part 3.4 sets out matters relating to the taking and use of bulk entitlements. [45]

Chapter 4 provides for the taking and use of water. It sets out the main offences relating to the taking and use of water without appropriate authority. [65 to 75] It also sets out the procedure for the issuing or granting of various instruments (ie: a bulk entitlement, a water share, a take and use licence, a water use licence, a water use registration) under which a person may take or use
water.[81] Part 4.3 sets out those matters relating to bulk entitlements including who may apply for them (ie: a water corporation, an electricity generation company, the environment Minister, the Water Holder). [81] Part 4.4 provides for the issue of water shares. [99] Part 4.5 provides for take and use licences. [128] Part 4.6 and 4.7 makes provision for water use licences and water use registrations.

Part 4.8 makes provision for the making of water resource management orders by the Minister and system allocations by Authorities which must be published in the Government Gazette, tabled in the Parliament and are disallowable by Parliament. [219, 222, 235] The Committee notes the extract from the second reading speech:

The Bill proposed significant new ‘umbrella’ instruments called water resource management orders. These orders will consolidate, in one place, all the surface and groundwater system management rules and water resource management roles and responsibilities for a region... The Bill proposes to replace permissible consumptive volumes with maximum entitlement amounts... The Bill requires a licence issued by the Minister to be held for certain infrastructure or activities’

Restrictions on the use of water in relation to private dam are set out in clause [244]. Note the explanatory memorandum:

Under sub-clause 91) a person must not construct a private dam for collecting or storing water for domestic or stock use on a lot in a plan of subdivision in a specified area with a capacity greater than that area for such a dam in that area under a water resource management order. Under the Water Act 1989 similar restrictions on domestic and stock dams may be imposed by an approved management plan in relation to a water supply protection area (section 32A(3)(n)).

Chapter 5 sets out the provisions relating to the establishment, membership, objectives, functions, duties and powers of water corporations and the Victorian Environmental Water Holder. [246, 304] The objective of the Water Holder is to manage held environmental water for the purpose of protecting and improving the environmental values and health of water ecosystems including their biodiversity, ecological functioning and water quality. See Part 5.3. [307] The Water Holder must prepare a corporate plan. [328]

Chapter 6 provides for the establishment of four districts for Authorities; namely, water supply, sewerage, irrigation and waterway management. [335] They are made by Ministerial Order published in the Government Gazette. Chapter 7 sets out the functions and powers of Authorities to supply water meters, the carrying out of works, water supply or delivery etc. [348, 367] There are requirements to make emergency management plans and reconfiguration plans. [420, 425] Authorities must prepare regional waterway strategies which must be published in the Government Gazette. [493, 499] Clause [488] relates to the construction of sewerage infrastructure in respect of subdivisions. It sets out the circumstances in which compensation is not payable. Damage to buildings is compensable. [488(3)]

Presumption of innocence – Reverse legal onus of proof

Certain statutory office-holders, such as a director of a water corporation, commit an offence if he or she fails to disclose a relevant pecuniary interest or takes part in decisions in respect of which a disclosure has been made. It is defence for a director to prove that he or she did not know that he or she had a pecuniary interest in the matter or that the matter was considered or to be considered at the meeting. [284]

It is an offence for the holder of a works licence to engage a non-licensed or insufficiently licensed driller to carry work in relation to a bore. It is a defence for a licence-holder to prove that he or she
had reasonable grounds to believe that the person engaged was a licensed driller with the correct licence.

These clauses place a legal burden on an accused to prove certain matters in order to escape liability. [591]

In respect to these reverse legal onus provisions the Statement of Compatibility provides:

Accordingly, the clauses limit the right to be presumed innocent until proven guilty under s 25(1) of the Charter Act because they impose a legal burden on the accused to prove certain matters in order to avail himself or herself of a defence.

However, I consider that the limitations on the right to be presumed innocent in the above clauses are justified within the meaning of section 7(2) of the charter act. Firstly, the matters required to be proven in relation to the defences are only within the knowledge of the accused and it would therefore be very difficult for the prosecution to prove whether the accused knew or did not know. Second, these are strict liability offences, and the existence of the defences are beneficial to the accused. Third, the penalties are fines rather than a term of imprisonment. Further, directors of water corporations and holders of a works licence have chosen to work in a highly regulated environment and such persons may be taken to have accepted the statutory responsibilities that accompany this regulated activity and their enforcement. The clauses serve clear public purposes, namely to ensure that statutory office-holders are free from actual or apparent bias and to protect the integrity of public waterways by ensuring that only licenced drillers carry out work with respect to bores.

Compulsory acquisition of land

The Bill provides that an authority may compulsorily acquire land that is required for the performance of its functions under the Bill. The provisions of the Land Acquisition and Compensation Act 1986 will apply to the compulsory acquisition of land under the Bill. The Committee has noted previously that the Act provides safeguards relevant to such acquisition, including notice of intention to acquire and a right to compensation. [378-380] An officer exercising powers under the Land Acquisition and Compensation Act 1986 must comply with certain safeguards under part 12.2 of the Bill. [729, 732]

Entry to land and buildings without a warrant

The Bill contains a number of clauses which permit entry without a warrant to residential and non-residential land and, in some cases, buildings, for a range of purposes connected to authority functions and powers under the Bill and the maintenance of associated infrastructure. [367, 738, 740-742, 746]

These powers are only exercisable by officers (with the exception of the power of entry under clause 742 which must be exercised by an authorised water officer). The Bill defines an officer to include an employee of an authority and a person who is authorised in writing by an authority or the Minister to assist in performing its functions or exercising its powers. The entry powers authorise entry to, and in some cases authorise activities to be carried out on, private land. The Statement of Compatibility discusses safeguards included in the proposed legislation and provides reasons for the inclusion of these entry without warrant powers.

Chapter 8 provides for the regulation of infrastructure and activities. A licence must be issued by the Minister for certain infrastructure activities. The Minister may issue levee maintenance permits in respect of levees on Crown land. It sets out various offences relating to the licensing of infrastructure and activities. [517-518] It also provides for works and activities licences. [523] It provides that a
person may apply to the Minister for approval to dispose of, or inject any water or other matter underground by means of a bore. [572]

Chapter 9 consolidates in one place all matters relating to fees and charges. [604] It sets out the liability of owners to pay fees or charges levied by Authorities. Objection may be made to Authorities in respect of fees and charges. Decisions may be reviewed in VCAT. [628] Clause [643] sets out the circumstances in which the occupier of a property is liable to pay for any water usage charge for water supplied to and for any sewage disposal charge in respect of rented premises. The Committee notes the explanatory memorandum:

*Clauses 645-649 retain the same regulatory arrangements that are applicable to owners corporations and lot owners under sections 263A of the Water Act 1989; noting that for the service of water supply or sewage disposal, this Bill replaces tariffs set under section 260 of the Water Act 1989 and fees imposed under the tariff section under section 259(1)(a) of that Act with charges determined under clause 607(1) of the Bill and imposed under item 1 of the Table in clause 624(1) of the Bill.*

The Committee also notes the extract from the second reading speech:

*The Bill sets out the powers of the Minister, water corporations and catchment management authorities to determine and impose fees and charges and to require payment of contributions and other payments for the work they carry out, the services they provide and the infrastructure they construct or install... The Bill proposes that landholders may be compensated for damage caused to their land by water corporations and catchment management authorities that enter their land to carry out work...*

Chapter 10 provides for the economic regulation of the regulated water industry by the Essential Services Commission (ESC) through a water industry regulatory order, price determinations and codes. [702] Water industry regulatory orders may be made. [706] Chapter 11 contains provisions relating to liability. [714] It confers jurisdiction in respect of specified matters to VCAT. [726] The Committee notes the extract from the explanatory memorandum:

*Chapter 11 creates an exclusive statutory liability regime for injury, damage or economic loss arising out of the flow of water, the taking, using or polluting of water on the construction, installation, maintenance or operation of unauthorised infrastructure.*

*These provisions consolidate the existing statutory liability regime in sections 15 (civil liability for unauthorised taking etc), 16 (liability arising out of water flow), 155 (compensation for damage) and 157 (liability of authorities arising from the flow of water) of the Water Act 1989 with changes to reflect recent VCAT and Supreme Court decisions.*

Chapter 12 outlines the arrangements by which Authorities and persons authorised by the Minister may enter land for investigative and non-investigative purposes subject to certain conditions and restrictions. [727] It sets out the jurisdiction of VCAT for specified causes of action. [726] Identification cards must be carried by authorised officers and informed consent from occupiers must be obtained. [729, 730] It also makes provision for community agreements which must be capable of being recorded in the Register under the *Transfer of Land Act 1958.* [766, 767]

Chapter 13 relates to the enforcement of the legislation and regulations and the prosecutions of offences under the Bill. [70, 771] (*See Charter report*) It provides for remedial action notices [784] and the provision of penalty infringement notices. The penalty prescribed by regulations must not exceed 10 penalty units. [787, 789] Provision is made for entry to land and buildings for investigative purposes. [742-753] The power to prosecute is set out in clause. [797] The Committee notes the extract from the second reading speech:
The Bill provides for a modern enforcement toolbox that includes:

- the ability to apply Penalty Infringement Notices or on the spot fines to a broader range of offences. These are an alternative to the often time-consuming and costly pursuit of prosecution in court.
- the ability to issue Remedial Action Notices requiring a person to ‘make good’ a problem or repair damage their conduct has caused, where it poses a risk to public health and safety or to the environment. The issue of a Remedial Action Notice is subject to VCAT review.
- a moderate increase in penalties in line with current Victorian standards to reflect the seriousness of the offence and act as a suitable deterrent. The Bill proposes higher maximum penalties for a corporate or business entity, but directs the court to consider that the ability of a small farm body corporate to pay the fine will be less than that of a larger corporation.

Chapter 14 contains various provisions of a general nature which facilitate the operation of the Act. They include the making of various declarations, provisions relating to panels and advisory committees and regulation making powers. [820] It also sets out clearly in at table at Part 14.4 decisions which are reviewable by VCAT. [830] It continues the Victorian Water Register. [837] The regulation making powers are set out. [877] Clause [867] sets out the power of the Minister to delegate powers, discretions, functions, authorities or duties. Chapter 15 contains saving and transitional provisions. Chapter 16 sets out the repeal of various Water Acts and consequential amendments to various Acts.

Charter report

Presumption of innocence – Deemed interference with property of a water corporation or catchment management authority

Summary: The effect of clause 777 may be to conclusively deem the owner or sole occupier of land served by destroyed, removed, obstructed, altered or affected to be guilty of an offence of interfering with that property. The Committee will write to the Minister seeking further information.

The Committee notes that clause 777(1) makes it an offence to interfere with property owned, managed or controlled by a water corporation or catchment management authority. ‘Interfere’ includes ‘destroy, remove, obstruct or alter the property or affect the operation of the property’. ‘Property’ includes ‘a meter and other infrastructure’.

Clause 777(2) provides:

In a proceeding for an offence under subsection (1) relating to property other than a meter, evidence that the property—

(a) is situated on, or services only, land owned by a person; or
(b) is situated on, or services only, land of which a particular person is the sole occupier—

is proof that the interference was done by that person.

Clauses 777(3) and 777(4) set out similar rules for meters.

The existing provision in s.288(3) of the Water Act 1989 provides:

If in a proceeding for an offence under subsection (1) it is proved that works—

(a) situated on land owned or occupied by a person; or
(b) that service only land owned or occupied by a person; or

c) that record only the amount of water delivered to land owned or occupied by a person—

have been destroyed, damaged, removed, altered or in any way interfered with, the destruction, damage, removal, alteration or interference must be presumed, in the absence of evidence to the contrary, to have been done by that person.

By contrast, none of clauses 777(2), 777(3) and 777(4) makes express provision for the accused to adduce ‘evidence to the contrary’. Accordingly, the effect of clause 777 may be to conclusively deem the owner or sole occupier of land served by destroyed, removed, obstructed, altered or affected property to be guilty of an offence of interfering with that property. For example, if the prosecution proves that a water meter that exclusively serves a house has been vandalised, then the house’s owner may be deemed guilty of that vandalism and liable to a fine of up to $17,500.

The Statement of Compatibility remarks:

A number of clauses in the bill contain a presumption that, in the absence of evidence to the contrary, certain evidence amounts to proof of certain facts... They are contained in clauses 78, 79, 522(2) and (4), 773(2) and 777(2), (3) and (4).

However, the Committee observes that, while all the other clauses mentioned in the Statement expressly provide (like existing s.288(3)29) for ‘evidence to the contrary’, clauses 777(2), (3) and (4) do not.

The Committee notes that the explanatory memorandum for clause 777 states that the presumptions in that clause will be displaced ‘[o]nce a person has adduced some evidence to the contrary of the assumed fact’. However, the Committee observes that a person accused of interfering with property may not be aware of the explanatory memorandum.

The Committee will write to the Minister seeking further information as to the significance of the lack of reference to ‘evidence to the contrary’ in clauses 777(2), (3) and (4). To the extent that it is intended that the presumptions in those clauses may be rebutted by evidence to the contrary, the Committee seeks further information from the Minister as to whether making express provision to that effect in the text of clause 777 would be a less restrictive alternative reasonably available to achieve clause 777’s purpose.

**Exposure draft – Draft analysis of human rights impacts**

**Summary:** The Committee will write to the Minister seeking further information as to the criteria for publishing a draft analysis of human rights impacts during a public consultation on an exposure draft.

In its Review of the Charter of Human Rights and Responsibilities Act 2006, this Committee recommended.30

Recommendation 9

Publication of draft statements of compatibility

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29 See also Gas Industry Act 2001 (Vic), s. 152(4). Compare (providing for ‘proof to the contrary’) Hunter Water Act 1991 (NSW), s. 30(3); Water Supply and Sewerage Services Act 2000 (NT), 100(2); Water Industry Act 2012 (SA), s. 54(8); Water Management Act 1999 (Tas), s. 294.

If Charter s.28(1) is retained, then SARC recommends that consideration be given to publishing a draft statement of compatibility as appropriate, when drafts of bills are exposed for public comment.

In its response to the Review, the Government remarked:31

The Government agrees that when public consultation takes place on draft primary and secondary legislation it will often be appropriate to publish draft analyses of any human rights impacts. The Government therefore commits to considering, on a case-by-case basis, whether a draft statement of compatibility should be provided when releasing exposure draft Bills for public comment.

The second reading speech remarks:

In August 2012, I appointed an expert advisory panel comprising of members with extensive legal and water industry expertise to comprehensively review Victoria’s water legislation...

The panel led two rounds of public consultation. The first round in December 2012 was a call for submissions to inform the drafting of the new bill. A total of 26 submissions were received.

The second round followed the release of the Water Bill exposure draft and explanatory material on 18 December 2013 for an eight-week consultation period. The panel and department hosted eight public forums, six targeted forums and 12 stakeholder meetings, which were attended by about 700 people in total. The government received 151 written submissions on the exposure draft from a range of associations, environment groups, water corporations, catchment management authorities, legal firms, individuals and government agencies.

The Committee notes that the exposure draft Water Bill does not appear to have been accompanied by a draft statement addressing the compatibility of the exposure draft with human rights. However, the explanatory guide to the exposure draft remarked, with respect to Chapter 13 of the draft bill, that ‘[t]he proposed changes adhere to the Charter of Human Rights and Responsibilities Act 2006’.32

The Committee will write to the Minister seeking further information as to the criteria for publishing of a draft analysis of human rights impacts during a public consultation on an exposure draft.

The Committee makes no further comment
Working with Children Amendment (Ministers of Religion and Other Matters) Bill 2014

Introduced: 25 June 2014
Second Reading Speech: 26 June 2014
House: Legislative Council
Member introducing Bill: Hon Edward O’Donohue MLC
Portfolio responsibility: Attorney-General

Purpose

The Bill makes a number of amendments to the Working with Children Act 2005 to:

- provide that the protection of children is to be the paramount consideration when administering that Act;
- improve the operation of the assessment notice process and generally improve the operation of that Act.

Content

More specifically the Bill:

- requires ‘ministers of religion’ who have contact with children to obtain a working-with-children check; [6, 9]
- clarifies that a working-with-children check provides a ‘minimum’ check rather than a ‘suitability’ check, so as to avoid any suggestion that requiring working-with-children checks means an employer or other organisation has no further responsibility to assess or monitor the suitability of their staff or volunteers;
- clarifies the definition of ‘child-related work’; [9]
- adds accommodation services specifically provided for students in connection with the operation of a student exchange program under part 4.5A of the Education and Training Reform Act 2006 to the services, bodies and activities that comprise child-related work under the Act; [9]
- changes and expands the categories of offences, including making attempted murder and attempted rape category ‘A’ offences and relocating a number of offences in other categories, thereby affecting the test that the Secretary applies to people to determine whether they will be granted an assessment notice on application or reassessment. [11 to 13 and 43] The Committee notes the extract from the second reading speech:

  Revise the category application process

  Currently under the Act, an individual found to have a criminal history that may present a risk to the safety of children is assessed according to the severity of this criminal history. This assessment is categorised as either a category 1, 2, 3, or as an exceptional circumstances application.

  The Bill amends and simplifies the current category and exceptional circumstances provisions by replacing them with a revised three-category classification system.

  The key change to these categories is that pending charges for serious sexual or violent crimes will also be included in the assessments for an assessment notice.
The revised system will consist of three categories, A, B and C. Each category will be assessed against the current ‘unjustifiable risk’ and ‘reasonable person’ tests.

Category A will consist of applicants who have committed the most serious offences. This will include applicants who are subject to reporting obligations under the various sex offenders legislation, and adults who have on their record sex offences against children or child pornography offences.

This category will also include applicants with pending charges for these offences and applicants who have been convicted of the offences of murder, attempted murder, rape and attempted rape and those who have pending charges for these offences. The Secretary to the Department of Justice will be required to refuse applicants a working-with-children check.

Category B will consist of applicants who have committed serious sexual, drug and violent offences not coming within category A. This includes applicants who have committed serious offences including armed robbery, upskirting and child stealing as well as pending charges for an offence in this category. The test used in category B requires the secretary to refuse a working-with-children check unless satisfied that giving it would not pose an unjustifiable risk to the safety of children.

The Bill adds a final category, C, which consists of applicants with relevant disciplinary findings as well as charges, convictions or findings of guilt for any other offences that the secretary has notified to Victoria Police as offences relevant to the working-with-children check.

- provides the Secretary with a power to make enquiries or obtain information about an individual following the issuing of a negative notice and an appeal to VCAT; [41]
- removes the three month grace period following the expiration of an individual’s working with children check but retain the ability for an individual to renew the check during this period and thereby avoid the more complex new application process;
- allows the Secretary to notify an organisation when an individual requests the Secretary to remove this organisation from their record; [20]
- replaces the Secretary’s power to suspend an assessment notice with a power to revoke an assessment notice in situations where a request to an applicant for further information has been ignored. [25]

Charter report

The Working with Children Amendment (Ministers of Religion and Other Matters) Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Melbourne Market Authority Amendment Bill 2014

The Bill was introduced into the Legislative Council on 10 June 2014 by the Hon Gordon Rich-Phillips MLC. The Committee considered the Bill on 23 June 2014 and made the following comments in Alert Digest No. 8 tabled in the Parliament on 24 June 2014.

Committee Comments

Charter report

Property – Crown not liable for claims relating to West Melbourne Market relocation, changes to title, removal of common law rights or ending of interests – No compensation payable by the Crown

Summary: The Committee notes that clause 19 provides that the Crown is not liable for claims arising in connection with the relocation of the Melbourne wholesale fruit, vegetable or flower market. The Committee observes that the Bill does not address the rights of parties to existing litigation affected by the Bill.

The Committee notes that clause 19, inserting a new section 36B, provides that the Crown is not liable to any person for any claim arising in connection with:

- the relocation of the Melbourne wholesale fruit, vegetable or flower market (see clause 22, inserting a new Part IVA);
- the removal of the condition on the title to the West Melbourne Market land (see clause 26, substituting existing s. 26);
- the abrogation of any common law rights as to provision of a market (see clause 19, inserting a new section 36A); and
- any action referred to in section 38D(1)( see clause 22, inserting a new section 38D(1), ending leases, licences, interests or rights associated with the West Melbourne Market other than interests declared to be preserved by the Governor-in-Council under new section 38E).

The Statement of Compatibility remarks:

‘Property’ under section 20 of the Charter Act includes the property rights and interests of a person and may include a lease or licence granted to a person where there is a reasonable expectation of the lasting nature of the lease or licence. To the extent that clauses 19 and 22 may deprive certain persons of some form of proprietary right or interest in the West Melbourne market, any such deprivation will occur in accordance with the processes outlined clearly in the bill and consequently will be lawful. Additionally, new section 38E allows for legitimate interests to be preserved.

The Committee observes that the Bill does not address the rights of parties to existing litigation (if any) affected by the Bill.\(^1\) The Committee notes that, while new section 38D(3) provides that the nomination of a day for the relocation of the Melbourne wholesale fruit, vegetable or flower market ‘does not affect the status or continuity of any preserved

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\(^1\) Compare, e.g. Justice Legislation Amendment Act 2013, s. 10 (inserting Schedule 4, clause 5 into the Sentencing Act 1991).
interests’, the scope of ‘preserved interests’ (aside from a lease between Victorian Rail Track and the Melbourne Market Authority), including its application to rights that are the subject of current litigation, depends on a declaration by the Governor in Council under new section 38E.

The Committee notes that the Charter’s rights (including the rights to property and to a fair hearing\(^i\)) are limited to human beings.\(^{ii}\) The Committee will write to the Minister as outlined below.

**Correspondence**

The Committee will write to the Minister for Major Projects seeking further information as to the Bill’s effect on the rights of natural persons\(^v\) and body corporates\(^v\) who are parties to current legal proceedings (if any) relating to the West Melbourne market or its relocation. Pending the Minister’s response, the Committee draws attention to clause 19.

**Minister’s Response**

Thank you for your letter dated 24 June 2014 with respect to the above Bill.

The Committee has drawn attention to clause 19 of the Bill and sought further information as to the effect of the Bill on the rights of natural persons and bodies corporate who are parties to current legal proceedings (if any) relating to the West Melbourne Market or its relocation.

The Committee has observed that the Bill does not address the rights of parties to existing litigation (if any) affected by the Bill. The Committee has compared this with s 10 of the *Justice Legislation Amendment Act 2013* and the new Schedule 4, clause 5, which provided that the rights of parties in specified proceedings in the Supreme Court of Victoria were not affected.

I am advised that there are currently no relevant legal proceedings relating to the West Melbourne Market or its relocation. It is therefore not necessary for the Bill to address the rights of parties to existing litigation affected by the Bill in a fashion similar to the *Justice Legislation Amendment Act 2013*.

If the advisers to the Committee have any questions concerning the above, they should contact Ms Carmel Collins, Director, Cabinet and Legislative Services Branch, Department of State Development, Business and Innovation, on tel. 9092 1804.

**THE HON DAVID HODGETT MP**  
Minister for Major Projects

30 July 2014

The Committee thanks the Minister for the response.

**Committee Room**

4 August 2014

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\(^{i}\) Charter ss. 20 & 24(1).

\(^{ii}\) Charter s. 6(1).

\(^{iv}\) With respect to the Committee’s terms of references with respect to rights or freedoms ([Parliamentary Committees Act 2003](https://www.legislation.vic.gov.au/parlmentary-committees-act-2003/section-17)), and Charter rights (Charter s. 30).

\(^{v}\) With respect to the Committee’s term of reference with respect to rights or freedoms ([Parliamentary Committees Act 2003](https://www.legislation.vic.gov.au/parlmentary-committees-act-2003/section-17)).
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Appendix 2
Committee Comments classified by Terms of Reference

This Appendix lists Bills and Regulations under the relevant Committee terms of reference where the Committee has raised issues requiring further correspondence with the appropriate Minister or Member.

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Section 17(a)

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

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### Ministerial Correspondence 2014

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