



Victorian Equal Opportunity  
& Human Rights Commission

# Criminal Organisations Control and Other Acts Amendment Bill 2014

Submission to the Scrutiny of Acts and Regulations  
Committee on human rights issues raised by the Bill

15 July 2014

## Introduction

1. The Commission makes this submission to the Scrutiny of Acts and Regulations Committee (the **Committee**) to draw the Committee's attention to human rights issues of concern to the Commission raised by amendments proposed in the Criminal Organisations Control and Other Acts Amendment Bill 2014 (the **Bill**) to:
  - a. the *Mental Health Act 2014*, which provides protective services officers with the power to apprehend a person at railway stations who "appears to have a mental illness" (below at paras 2-13),
  - b. the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, which enables a child found not guilty of an offence due to mental impairment to be committed to a youth justice centre or youth residential centre subject to a custodial supervision order (below at paras 14-23),
  - c. the *Major Crime (Investigative Powers) Act 2004*, which expressly removes a 'derivative use immunity' that had prevented evidence obtained as a consequence of an answer given or material produced during a coercive examination being admissible in evidence against the person in a criminal proceeding or proceeding for the imposition of a penalty (below at paras 24-35), and
  - d. the *Criminal Organisations Control Act 2012*, which broadens the circumstances in which declarations and control orders can be made under that Act (below at paras 36-45).

### **Amendment of Mental Health Act 2014 - PSO power to apprehend a person who "appears to have a mental illness"**

2. Clause 175 of the Bill amends section 351 of the *Mental Health Act 2014*<sup>1</sup> to expand the power currently vested in police officers to apprehend a person who "appears to have a mental illness" to include protective services officers (**PSOs**).
3. Section 351 of the *Mental Health Act 2014* currently allows a police officer to apprehend a person if the police officer is satisfied that the person appears to have a mental illness and because of the apparent mental illness, the person needs to be apprehended to prevent serious and imminent harm to the person or to another person.
4. Section 10 of the *Mental Health Act 1986* included a similar power for police officers and PSOs on duty at a designated place to apprehend a person who appeared to be mentally ill, where they had reasonable grounds for believing that the person had recently attempted suicide or attempted to cause serious bodily harm to herself or himself or to some other person; or the person was likely by act or neglect to attempt suicide or to cause serious bodily harm to herself or himself or to some other person.
5. The power in section 10 of the *Mental Health Act 1986* was extended from police officers to PSOs in 2011.<sup>2</sup> The amendment prompted widespread

---

<sup>1</sup> The *Mental Health Act 2014* commenced operation on 1 July 2014, replacing the *Mental Health Act 1986*, which was repealed on that day.

<sup>2</sup> Justice Legislation Amendment (Protective Services Officers) Bill 2011, clause 38.

concern in the community about the suitability of PSOs to apprehend people based on presumed mental illness because of a lack of targeted training, supervision and support for PSOs and a lack of consultation with the mental health sector.<sup>3</sup> These concerns were reflected in parliamentary debate on the proposed amendment and at a forum held at Parliament House on 23 August 2011.<sup>4</sup> These concerns are directly relevant to this amendment.

### ***Right not to be subjected to arbitrary detention***

6. The Statement of Compatibility identifies that the amendment engages the right ‘not to be subjected to arbitrary arrest and detention’ in section 21(2) of the Charter. It concludes that the power to detain is not arbitrary based on the reasons that: a PSO must transfer custody of the person to a police officer or a specified health professional ‘as soon as practicable’; the power is limited to a designated place (defined as railway premises); and the power is for the purpose of protecting the safety of the person and others in the community.
7. The Commission submits that these reasons are not sufficient to prevent the power to detain from being arbitrary. On both meanings of the term arbitrary<sup>5</sup> – the ‘dictionary’ meaning (where a decision or action is not based on any relevant identifiable criterion but stems from an act of caprice or whim)<sup>6</sup> or the ‘human rights’ meaning (where a decision or action is capricious, unpredictable or unjust or unreasonable in the circumstances in the sense of not being proportionate to the legitimate aim sought the power) – the power has elements of arbitrariness, namely:<sup>7</sup>
  - a. The power to determine whether a person “appears to have a mental illness” is not based on any specified criterion. The provision only specifies that a PSO is not required to make a clinical judgment in determining whether a person appears to have a mental illness.
  - b. The power is unpredictable being subject to the discretion of PSOs, who receive significantly less training than police officers (initially 12 weeks rather than 33 weeks)<sup>8</sup> and do not have the same level of targeted training, supervision or support.
  - c. The power is inherently discriminatory, restricted to people who “appear to have a mental illness” rather than any person who needs to be

---

<sup>3</sup> See Federation of Community Legal Centres and Mental Health Legal Centre, *Failing, not protecting the community – Armed PSOs apprehending people who “appear to be mentally ill”* (Media release, 17 August 2011); Peninsula Community Legal Centre, *Submission to the Minister for Public Transport and Roads on the Justice Legislation Amendment (Protective Services Officers) Act 2011* (5 October 2011).

<sup>4</sup> Victoria, *Parliamentary Debates*, Legislative Council, 30 August 2011, 47-51. During parliamentary debate, Ms Pennicuik noted that she convened a forum on the Justice Legislation Amendment (Protective Services Officers) Bill 2011 in which a number of stakeholders outlined their concerns with the Bill.

<sup>5</sup> The Supreme Court recently observed that, to date, judges in Victoria have taken two approaches to the interpretation of the term ‘arbitrary’: *DPP v JPH (No 2)* [2014] VSC 177 (16 April 2014), [121]. The human rights approach was preferred by Tate JA in *Victorian Police Toll Enforcement v Taha* [2013] VSCA 37.

<sup>6</sup> *WBM v Chief Commissioner of Police* [2010] VSC 219, [51].

<sup>7</sup> *PJB v Melbourne Health & Anor* [2011] VSC 327, [84].

<sup>8</sup> See <https://www.policecareer.vic.gov.au/ps0/about-the-role/becoming-a-ps0> and <http://www.policecareer.vic.gov.au/police/about-the-role>.

apprehended to prevent serious and imminent harm to the person or to another person.

### ***Freedom of movement and equality rights***

8. The Commission considers that the right to freedom of movement (section 12) and the equality rights (section 8) are also engaged by the extension of the power to PSOs, although neither right is addressed in the Statement of Compatibility.
9. Section 12(2) of the Charter protects the right of every person to move freely within Victoria. Giving PSOs the power to detain people at railway stations who “appear to have a mental illness” limits the rights of people to move freely within Victoria.
10. Further, it does so in a discriminatory way, based on a person’s presumed mental illness. This limits the right in section 8(2) of the Charter of every person to enjoy his or her human rights – including the right to freedom of movement – without discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of a protected attribute – including disability and presumed disability (in this case, mental illness).<sup>9</sup> It also limits the right of every person to equal protection of the law without discrimination in section 8(3) of the Charter. These rights are ‘of fundamental importance to individuals, society and democracy’ and ‘any limitations must be subject to a stringent standard of objective justification.’<sup>10</sup>
11. While the purpose of protecting community safety at railway stations is important, the Statement of Compatibility does not describe why the extension of these powers from police officers to PSOs is necessary or the least rights-restrictive means to achieve that purpose.
12. For these reasons, the Commission is concerned that clause 175 of the Bill limits the human rights protected in sections 21(2), 12 and 8 of the Charter and the limits are not reasonable or justified.
13. The Commission submits that the Committee should examine whether the limits on these rights described above can be ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’ in accordance with section 7(2) of the Charter.

### **Amendment of Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 – custodial supervision orders allowing a child not convicted of an offence to be committed to custody with children convicted of an offence**

14. The Commission welcomes the reform to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA)* conferring jurisdiction on the Children’s Court to determine whether a child is fit to stand trial.<sup>11</sup>

---

<sup>9</sup> *Equal Opportunity Act 2010* (Vic), sections 6 and 7(2)(d).

<sup>10</sup> *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, 106.

<sup>11</sup> The Commission expressed support for this in its submissions to the Victorian Law Reform Commission’s review of the CMIA. See VEOHRC, *Crimes (Mental Impairment) – Submission to the Victorian Law Reform Commission* (23 August 2013) at [http://www.lawreform.vic.gov.au/sites/default/files/Submission\\_CP\\_10\\_Victorian\\_Equal\\_Opportunity\\_and\\_Human\\_Rights\\_Commission\\_26.08.13.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Submission_CP_10_Victorian_Equal_Opportunity_and_Human_Rights_Commission_26.08.13.pdf), (Recommendation 8); and VEOHRC, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and the Children’s Court of Victoria – Submission to the Victorian Law Reform Commission* (31 December 2013) at

15. However, the Commission is concerned about amendments to the CMIA enabling a child who is found not guilty of an offence due to mental impairment to be detained in a youth justice centre or youth residential centre with children convicted and sentenced for criminal offences pursuant to a custodial supervision order (**CSO**).

### ***Right in detention to be segregated from persons convicted of offences***

16. Section 22 of the Charter protects the right to humane treatment when deprived of liberty. Under section 22(2) of the Charter, 'a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.'

17. A CSO committing a child not convicted of an offence to custody with children convicted and sentenced for criminal offences is a clear limit on this right. Section 22(2) only provides for an exception to the right "where reasonably necessary". Further, in accordance with section 7(2) of the Charter, the right may only be limited where it can be demonstrably justified as reasonable, necessary and proportionate.

### ***Right of every child to such protection as is in his or her best interests***

18. The amendments also engage section 17(2) of the Charter, which provides: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'

19. The best interests principle is reflected in Victorian legislation in the *Children, Youth and Families Act 2005 (CYFA)*, which provides that in determining whether a decision or action is in the best interests of the child, the need to protect his or her rights and to promote his or her development must always be considered (section 10(2)). The Supreme Court has considered that a child's human rights illuminate the concept of best interests and where any of the child's human rights are limited, limitations must be no more than are reasonably necessary and proportionate in the circumstances and must be the least restrictive means of achieving their purpose.<sup>12</sup>

### ***Are the limits reasonable and justified?***

20. While the Bill does include safeguards in relation to custodial supervision orders – including that the court must order a report specifying the services which are available and appropriate for the child before making a supervision order, time limits on supervision orders, and appeal rights against supervision orders – the amendments do not make express reference to the best interests of the child, a factor the Commission considers should be the paramount consideration in these circumstances.

21. The Statement of Compatibility does not refer to sections 22(2) or 17(2). It does refer to section 22(1),<sup>13</sup> in which it states that any limits are reasonable and justified on the basis that youth justice centres are currently the only secure facilities suitable for children who are a danger

---

[http://www.lawreform.vic.gov.au/sites/default/files/Submission\\_CP\\_29\\_Victorian\\_Equal\\_Opportunity\\_and\\_Human\\_Rights\\_Commission\\_31-12-13.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Submission_CP_29_Victorian_Equal_Opportunity_and_Human_Rights_Commission_31-12-13.pdf).

<sup>12</sup> *Re Beth* (No 3) [2014] VSC 121, [47].

<sup>13</sup> 'All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.'

due to criminal offending and it is the least restrictive means available to achieve the dual purpose of a CSO to provide a child with necessary treatment and support and to protect the child and community.

22. The Commission considers that the reason that youth justice centres may be the only secure facilities available for children is not sufficient justification for placing children in a facility that would amount to a breach of their human rights and is not in a child's best interests. The Commission highlights the recent observation of the Commission for Children and Young People that 'the provision of services through the Adolescent Forensic Health Service based at the Parkville Centre is simply insufficient to meet the needs of young people who are mentally ill....'<sup>14</sup>
23. The Commission submits that the Committee should examine the compatibility of this provision with sections 22(2) and 17(2) of the Charter. The reasons provided in the Statement of Compatibility do not address how the limitations on the rights set out above are reasonable and demonstrably justified.

### **Amendment of Major Crime (Investigative Powers) Act 2004 – removal of derivative use immunity**

24. Clause 162 of the Bill amends section 39 of the *Major Crime (Investigative Powers) Act 2004 (MCIP Act)* to expressly remove the derivative use immunity that was 'read in' to that provision by the Supreme Court in *DAS v Victorian Equal Opportunity and Human Rights Commission* (2009) 24 VR 415 (*DAS*).<sup>15</sup>
25. The MCIP Act provides a regime for the use of coercive powers to investigate organised crime offences. When the Act entered into force, section 39 abrogated the privilege against self-incrimination in relation to the examination of witnesses under the Act and replaced it with a 'direct use immunity', which prohibits evidence given or documents produced at such an examination from being used against the examinee in criminal proceedings or proceedings for the imposition of a penalty.
26. In *DAS*, Warren CJ held that section 39 was not a justified limitation on the privilege against self-incrimination that was guaranteed by both sections 24 and 25(2)(k) of the Charter. Her Honour applied section 32 of the Charter to imply into section 39 a 'derivative use immunity', which prohibits evidence obtained directly or indirectly as a result of the examination which could not otherwise have been obtained, or the significance of which could not otherwise have been appreciated, from being used in subsequent proceedings against the examinee.
27. Clause 162 removes derivative use immunity by stating that nothing in the provision prevents admission in a criminal proceeding or proceeding for the imposition of a penalty of any evidence obtained as a direct or indirect consequence of an answer or material given at an examination or in response to a summons.

---

<sup>14</sup> Commission for Children and Young People, *Submission to the VLRC: Review of the CMIA and the Children's Court of Victoria* at [http://www.lawreform.vic.gov.au/sites/default/files/Submission\\_CP\\_33\\_Commission\\_for\\_Children\\_and\\_Young\\_People\\_20-01-14\\_0.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Submission_CP_33_Commission_for_Children_and_Young_People_20-01-14_0.pdf), 14.

<sup>15</sup> The case is referred to in the Statement of Compatibility as *In the matter of Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415.

### ***Privilege against self-incrimination***

28. The Commission considers that amending section 39 of the MCIP Act to expressly remove derivative use immunity is not a justified limit on the privilege against self-incrimination that is guaranteed by both sections 24 and 25(2)(k) of the Charter. This is clear from *DAS*, where Warren CJ held that the absence of a derivative use immunity would limit these rights and could not be justified in accordance with section 7(2) of the Charter.
29. The Statement of Compatibility for the Bill states that the removal of derivative use immunity from the MCIP Act is a reasonable and justified limit on the privilege against self-incrimination.<sup>16</sup> The reasons provided include the ‘significant difficulties in detecting and prosecuting organised crime offences’.<sup>17</sup> The Statement concludes that while the use of derivative evidence ‘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 reasonably available’.<sup>18</sup>
30. In *DAS*, Warren CJ considered that the right to a fair hearing and privilege against self-incrimination ‘reflect the philosophy that the state must prove its case without recourse to the suspect. They are fundamental to the criminal justice system and their importance should not be underestimated’.<sup>19</sup>
31. Her Honour went on to consider that the important public policy interest in investigating organised crime could still be achieved while retaining a form of derivative use immunity protecting the fundamental privilege. Her Honour held that a derivative use immunity would not exclude the following types of evidence from being allowed:<sup>20</sup>
- a. evidence that was discovered as a result of the testimony, but that could have been discovered without such testimony;
  - b. evidence that would, or would probably, have been discovered even without the testimony; and
  - c. evidence that was discovered after the testimony was given, but independently of the testimony.
32. The test does however ‘prevent a person being compelled to incriminate themselves from their own testimony in circumstances where the evidence could only have been discovered as a result of that testimony’.<sup>21</sup> Her Honour considered that this form of a derivative use immunity was a less restrictive way of investigating organised crime and was a reasonable limit on the privilege against self-incrimination,<sup>22</sup> whereas in its absence ‘the relationship between the limitation and its purpose is more drastic than is justified’.<sup>23</sup> Her Honour noted that in Canada, ‘it has been possible to

---

<sup>16</sup> Assembly Proof, Page 26.

<sup>17</sup> Assembly Proof, Page 26.

<sup>18</sup> Assembly Proof, Page 26.

<sup>19</sup> (2009) 24 VR 415, [146].

<sup>20</sup> (2009) 24 VR 415 at [157] adopting the test set out in *S(RJ)* [1995] 1 SCR 451, 546.

<sup>21</sup> (2009) 24 VR 415, [158].

<sup>22</sup> (2009) 24 VR 415, [160].

<sup>23</sup> (2009) 24 VR 415, [155].

effectively investigate offences as serious as terrorism while respecting derivative use immunity.<sup>24</sup>

33. For these reasons the Commission considers that the amendment removing this form of derivative use immunity is not the least restrictive means reasonably available to achieve the purpose of the provision and limits the privilege against self-incrimination protected in sections 24(1) and 25(2)(k) of the Charter in a manner that is not reasonable or demonstrably justified.
34. The Commission submits that the Committee should take the above reasoning of Warren CJ in *DAS* into account in its consideration of whether clause 162 is compatible with sections 24(1) and 25(2)(k) of the Charter.
35. The Commission highlights that the Supreme Court in *DAS* had full regard to the important public policy interest in investigating organised crime in considering whether the limitation on the right against self-incrimination as guaranteed by sections 24(1) and 25(2)(k) of the Charter could be justified. Warren CJ was not satisfied that there was the required 'cogent and persuasive' evidence to justify the limit on these rights that would result from a construction of section 39 that did not contain a derivative use immunity.<sup>25</sup> Her Honour observed that the Applicant's submissions were 'insufficient to meet the very stringent threshold' of section 7(2).<sup>26</sup> The Commission observes that the Statement of Compatibility does not identify a new basis on which this limitation can now be justified under section 7(2).

#### **Amendment of Criminal Organisations Control Act 2012 – broadening circumstances in which declarations and control orders can be made**

36. Part 3 of the Bill amends the *Criminal Organisations Control Act 2012* to broaden the circumstances where the Supreme Court may make declarations and control orders in respect of individuals and organisations.
37. Under the Act, the Supreme Court may make a declaration about an organisation, or an individual who is a member, former member or prospective member of an organisation, based on findings about the organisation's connection to serious criminal activity and the threat its activities pose to public safety and order. Once a declaration is made, the Chief Commissioner can ask the Supreme Court to make a control order that applies to the organisation or the individual, imposing conditions the Court considers appropriate.
38. Control orders in respect of organisations may include conditions such as: prohibiting the organisation from operating, or from carrying on a business or taking on new members; requiring the exclusion of certain members; and prohibiting members from participating in activities of the organisation. Control orders in respect of individuals may impose conditions such as prohibiting a person from being a member of an organisation; prohibiting or restricting a person from associating with members of an organisation or participating in its activities; prohibiting a person from wearing the patches or insignia of the organisation, and prohibiting the use of property owned or used by an organisation.

---

<sup>24</sup> (2009) 24 VR 415, [160].

<sup>25</sup> (2009) 24 VR 415, [147].

<sup>26</sup> (2009) 24 VR 415, [164].

### ***Rights of people who associate together due to personal or communal attributes protected by the Charter***

39. The Statement of Compatibility identifies how control orders may restrict several Charter rights including freedom of expression (section 15), freedom of association (section 16(2)), right to privacy (section 13) and freedom of movement (section 12).
40. When the Act was introduced, the Committee also considered that the Act's broad definition of an organisation may permit declarations to be made 'about groups of people who associate together due to personal or communal attributes that are protected by the Charter'.<sup>27</sup> These include:
- a. The right of people in section 8(3) to equal protection of the law without discrimination, including on the basis of 'personal association' with a person who is identified by reference to the attributes listed in section 6 of the *Equal Opportunity Act 2010*,
  - b. The freedom to demonstrate religion or belief in worship, observance, practice and teaching... as part of a community (section 14(1)(b)),
  - c. The entitlement to protection of families as a fundamental group of society (section 17(1)),
  - d. The right of persons with a particular cultural, religious, racial or linguistic background to enjoy his or her culture, to declare and practise his or her religion or belief in worship, observance, practice and teaching as part of a community (section 19); and the specific cultural rights of Aboriginal persons 'with other members of their community' (section 19(2)).
41. The Committee observed that a declaration may be made about an entire organisation on the basis of activities by a small number of members, or even former members, of an organisation. It queried whether this was the least rights-restrictive means reasonably available to achieve the purpose of preventing and disrupting the activities of organisations involved in serious criminal activity. The Committee observed that:
- a. While there is a procedural safeguard that the Supreme Court (rather than a judge acting in their personal capacity) makes both declarations and control orders, the threshold for doing so is low. The provisions permit 'the imposition of significant restrictions on the Charter rights of any current, prospective or former member of a declared organisation on the basis of the possibility that the member will engage in or facilitate serious criminal activity *in the future*.'<sup>28</sup> No finding of previous or current criminal activity is needed.
  - b. There is no requirement that the control order's purpose or content relate to the member's association with the declared organisation.
  - c. A person can be convicted for associating with others in breach of a control order (punishable by up to five years imprisonment) without any proof that the association was for a criminal or other unreasonable purpose and with no exemption for reasonable personal associations

---

<sup>27</sup> Scrutiny of Acts and Regulations Committee, 'Charter report on the Criminal Organisations Control Bill 2012' in Alert Digest No 17 of 2012 tabled in the Parliament on 27 November 2012, p 7.

<sup>28</sup> Scrutiny of Acts and Regulations Committee, 'Charter report on the Criminal Organisations Control Bill 2012' in Alert Digest No 17 of 2012 tabled in the Parliament on 27 November 2012, p 10.

(such as family relationships) from restriction by control orders or for former members with no significant current involvement with the organisation.

42. Part 3 of the Bill extends the already broad circumstances in which a declaration and a control order against a person can be sought and granted under the Act by:
  - a. Broadening the range of criminal offences that may provide the basis for an application for a declaration (from offences involving substantial planning and organisation to all offences, and from offences punishable by at least 10 years to include offences punishable by at least 5 years) and removing the criteria that offences involve substantial planning and organisation.
  - b. Creating two categories of declarations that can be made, prohibitive declarations and restrictive declarations, and lowering the standard of proof in respect of restrictive declarations (enabling restrictions to be imposed on an organisation and individuals through a control order without needing to prove criminal activity beyond reasonable doubt).
43. The Commission is concerned that these amendments subject an even broader class of people to potentially serious restrictions on their human rights based on an association with a group, rather than based on any illegal act the individual or group have been or are currently involved in, without sufficient justification.
44. The Statement of Compatibility does not identify why such far-reaching and significant restrictions are necessary nor explain why the purpose cannot be achieved through less restrictive means.
45. The Commission submits that the Committee should take into account the same rights it considered in respect of the Bill introducing the Principal Act in considering whether these more extensive limits on human rights are reasonable and demonstrably justified in accordance with section 7(2) of the Charter.



Victorian Equal Opportunity  
& Human Rights Commission

*Contact us*

Enquiry Line 1300 292 153 or (03) 9032 3583  
Fax 1300 891 858  
Hearing impaired (TTY) 1300 289 621  
Interpreters 1300 152 494  
Email [information@veohrc.vic.gov.au](mailto:information@veohrc.vic.gov.au)  
Website [humanrightscommission.vic.gov.au](http://humanrightscommission.vic.gov.au)  
Follow us on Twitter @VEOHRC  
Find us at Facebook.com/VEOHRC