58th Parliament
Alert Digest

No. 14 of 2015

Tuesday, 10 November 2015
on the following Bills

Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015
Child Wellbeing and Safety Amendment (Child Safe Standards) Bill 2015
Crown Land Legislation Amendment (Canadian Regional Park and Other Matters) Bill 2015
Education Legislation Amendment (TAFE and University Governance Reform) Bill 2015
Fisheries Amendment Bill 2015
Justice Legislation Amendment (Police Custody Officers) Bill 2015
Justice Legislation Further Amendment Bill 2015
Land (Revocation of Reservations) Bill 2015
Local Government Amendment (Fair Go Rates) Bill 2015
Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015
Relationships Amendment Bill 2015
Road Legislation Amendment Bill 2015
State Taxation Acts Further Amendment Bill 2015
Terrorism (Community Protection) Amendment Bill 2015
Transport Accident Amendment Bill 2015
The functions of the Scrutiny of Acts and Regulations Committee are –

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

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

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the Charter provides –

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

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

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

Glossary and Symbols

‘Assembly’ refers to the Legislative Assembly of the Victorian Parliament


‘Council’ refers to the Legislative Council of the Victorian Parliament

‘DPP’ refers to the Director of Public Prosecutions for the State of Victoria

‘human rights’ refers to the rights set out in Part 2 of the Charter

‘IBAC’ refers to the Independent Broad-based Anti-corruption Commission

‘penalty units’ refers to the penalty unit fixed from time to time in accordance with the Monetary Units Act 2004 and published in the government gazette (as at 1 July 2014 one penalty unit equals $147.61)

‘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
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Child Wellbeing and Safety Amendment (Child Safe Standards) Bill 2015

Introduced 20 October 2015
Second Reading Speech 21 October 2015
House Legislative Assembly
Member introducing Bill Hon. Martin Foley MLA
Portfolio responsibility Minister for Families and Children

Purpose

The Bill would amend:

- the Child Wellbeing and Safety Act 2005 (the Principal Act) to facilitate the introduction of minimum compulsory child safe standards for organisations that provide services to children to better protect children from the risk of child abuse
- the definition of ‘child abuse’ in the Education and Training Reform Act 2006 so that it would have the same meaning as in the Principal Act
- the Commission for Children and Young People Act 2012 to update the reference to mental health legislation in the definition of a ‘health service’.

Charter report

The Child Wellbeing and Safety Amendment (Child Safe Standards) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Crown Land Legislation Amendment (Canadian Regional Park and Other Matters) Bill 2015

**Purpose**

The Bill would amend several Acts, including the *Crown Land (Reserves) Act 1978*, the *Land Act 1958* and the *National Parks Act 1975*, by:

- creating Canadian Regional Park, Hepburn Regional Park and Kerang State Game Reserve
- adding land to a number of existing parks
- reforming the legislation governing bee site licensing on Crown land by:
  - inserting a new set of licensing provisions into the *Land Act 1958* which would apply uniformly to Crown land (other than wilderness parks, wilderness zones, natural catchment areas and reference areas) irrespective of the act under which the land is managed
  - making consequential amendments to several other acts relating to apiary licences as a result of the new provisions
- introducing consequential and other, minor amendments.

**Charter report**

The Crown Land Legislation Amendment (Canadian Regional Park and Other Matters) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
### Education Legislation Amendment (TAFE and University Governance Reform) Bill 2015

- **Introduced**: 20 October 2015
- **Second Reading Speech**: 21 October 2015
- **House**: Legislative Assembly
- **Member introducing Bill**: Hon. James Merlino MLA
- **Portfolio responsibility**: Minister for Education

#### Purpose

The Bill would reform the governance arrangements for Victorian TAFE institutes and universities.

The Bill would amend the *Education and Training Reform Act 2006* to reform the governance of the 12 TAFE institutes operating in Victoria by:

- providing them with greater control of their boards and making them more self-governing
- changing the way in which TAFE institute board members are appointed, removed or suspended
- creating two new categories of membership on TAFE institute boards by providing for at least one “as of right” elected staff position and including each TAFE institute chief executive officer as a full board member with voting rights
- increasing the minimum size of TAFE institute boards from 9 members to 10 members.

The Bill would also amend the eight university Acts by:

- restoring elected staff and student members on university councils
- increasing the minimum size of each university council from 11 to 13 members
- making a number of other technical amendments.

#### Charter report

The Education Legislation Amendment (TAFE and University Governance Reform) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment.
Fisheries Amendment Bill 2015

Introduced: 22 October 2015
Second Reading Speech: 22 October 2015
House: Legislative Assembly
Member introducing Bill: Hon. Jacinta Allen MLA
Portfolio responsibility: Minister for Agriculture

Purpose

The Bill would amend the *Fisheries Act 1995* to:

- establish a scheme to phase out commercial net fishing in Port Phillip Bay
- provide for a limited non-net fishery to operate in Port Phillip Bay on and after 1 April 2022
- compensate persons whose fishery licences are surrendered under, or affected by, the scheme.

Charter report

The Fisheries Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Justice Legislation Further Amendment Bill 2015

Introduced
21 October 2015
Second Reading Speech
22 October 2015
House
Legislative Assembly
Member introducing Bill
Hon. Martin Pakula MLA
Portfolio responsibility
Attorney-General

Purpose

The Bill would amend various Acts to:

- substitute the Chief Executive Officer of Court Services Victoria as the person who may appoint a member of the Aboriginal community as an Aboriginal elder or respected person for the purpose of performing functions in relation to the Koori Court Division of the Magistrates’ Court, Children’s Court and County Court [3, 9, 11]
- authorise the electronic issue of warrants by the Magistrates’ Court and Children’s Court [4, 8]
- provide that a proceeding under the Residential Tenancies Act 1997 would no longer be subject to the presumption that fees will be reimbursed to a party who has substantially succeeded against another party [15]
- enable the President, Vice Presidents, Deputy Presidents and Senior Members of the Victorian Civil and Administrative Tribunal to hear appeals in relation to the expungement of historical homosexual convictions [17]
- validate superannuation contributions made to magistrates (other than the Chief Magistrate), reserve magistrates, coroners appointed under section 94 of the Coroners Act 2008, judicial registrars of the Magistrates’ Court, and any person who was an acting magistrate under section 9 of the Magistrates’ Court Act 1989 immediately before its repeal by the Courts Legislation Amendment (Reserve Judicial Officers) Act 2013 from 1 January 1994 until the commencement of clause 21 of the Bill [21]
- validate the making of superannuation contributions to certain judicial registrars of the Supreme Court from 1 January 2011 until the commencement of clause 22 of the Bill [22]
- expand the list of benefits for certain coroners that are based on the benefits for magistrates, to include superannuation contributions [23]
- make various amendments relating to:
  - the jurisdiction, salary, entitlements and other conditions of dual commission holders (i.e. a Chief Judge of the Supreme Court or a Chief Magistrate of the Magistrates’ Court)
  - appeals from the Magistrates’ Court when constituted by a Chief Magistrate who is a dual commission holder (i.e., appeals that would otherwise have been heard by the County Court would be heard by the Trial Division of the Supreme Court and provisions that would have applied to those appeals in the County Court would instead apply in the Trial Division of the Supreme Court
- make other minor amendments.
Content

Retrospective commencement of provisions

The effect of clauses 21 and 22 would be to validate superannuation contributions made to certain office holders of the Magistrates’ Court and to certain judicial registrars of the Supreme Court made from 1 January 1994 and 1 January 2011 respectively.

The Committee notes that the retrospective operation of the amendments in clauses 21 and 22 is beneficial to the office holders described in those clauses.

Charter report

The Justice Legislation Further Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Land (Revocation of Reservations) Bill 2015

Introduced 20 October 2015
Second Reading Speech 21 October 2015
House Legislative Assembly
Member introducing Bill Hon. Lisa Neville MLA
Portfolio responsibility Minister for Environment, Climate Change and Water

Purpose

The purpose of the Bill is to:

- revoke existing permanent reservations, and parts of permanent reservations, of certain areas of Crown land in Victoria and
- provide for the permanent or temporary reservation of certain areas of Crown land for other purposes.

Charter report

The Land (Revocation of Reservations) Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
Local Government Amendment (Fair Go Rates) Bill 2015

Introduced 20 October 2015
Second Reading Speech 21 October 2015
House Legislative Assembly
Member introducing Bill Hon. Natalie Hutchins MLA
Portfolio responsibility Minister for Local Government

Purpose

The Bill would amend the Local Government Act 1989 and the Essential Services Commission Act 2001 to implement the Fair Go rates system, which would commence in the 2016–17 financial year.

Under the new system:

- annual council rate increases will be capped by reference to increases in the consumer price index (CPI) unless a council has obtained approval for a higher increase from the Essential Services Commission (the ESC)
- non-compliance by councils with the average rate cap set by the Minister, or with a higher cap approved by the ESC, could be taken into account in setting or approving future caps
- in cases of repeated non-compliance by a council, the Minister may determine that rates or charges for a specified financial year are invalid or recommend to the Governor in Council that all the Councillors of a Council be suspended.

Charter report

The Local Government Amendment (Fair Go Rates) Bill 2015 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 (Safe Access Zones) Bill 2015

Introduced: 21 October 2015
Second Reading Speech: 22 October 2015
House: Legislative Assembly
Member introducing Bill: Hon. Jill Hennessy MLA
Portfolio responsibility: Minister for Health

Purpose

The Bill would amend the Public Health and Wellbeing Act 2008 (the Principal Act) to provide for safe access zones around premises where abortions are provided.

The Bill would make it an offence to engage in ‘prohibited behaviour’ within a ‘safe access zone’, i.e. an area within a radius of 150 metres from premises at which abortions are provided. The offence would be subject to 120 penalty units (currently approximately $18,200) or a maximum of 12 months imprisonment (new section 185D).

The term ‘prohibited behaviour’ would be defined in new section 185B(1) as:

- besetting, harassing, intimidating, interfering with, threatening, hindering, obstruction or impeding by any means, a person accessing, attempting to access or leaving premises at which abortions are provided; or
- communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access or leaving premises at which abortions are provided (unless the communication is by an employee or other person who provides services at the premises) and is reasonably likely to cause distress or anxiety; or
- interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or
- intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person’s consent; or
- any other prescribed behaviour.

The Bill would also make it an offence to publish or distribute a recording of a person accessing, attempting to access, or leaving premises at which abortions are provided, without the consent of the other person or without reasonable excuse, if the recording contains particulars likely to lead to the identification of:

- the other person; and
- the other person as someone accessing premises at which abortions are provided.

The offence would be subject to 120 penalty units (currently approximately $18,200) or a maximum of 12 months imprisonment (new section 185E).

The Bill would also authorise a police officer of or above the rank of sergeant to apply to a magistrate for the issue of a search warrant in relation to an offence against sections 185D or 185E (new section 185F). A police officer executing the warrant would also be authorised to seize things not mentioned in the warrant in defined circumstances (new section 185G).
Submissions received

The Committee received submissions on the Bill from the following organisations:

- Australian Christian Lobby
- Family Planning Victoria
- Fertility Control Clinic
- Human Rights Law Centre
- Women’s Health Victoria

Copies of the submissions from Family Planning Victoria, the Human Rights Law Centre and Women’s Health Victoria are reproduced at Appendix 5. The submissions are also available on the Committee’s website.

The Committee thanks the above organisations for their submissions on the Bill.

Content

**Whether Bill trespasses unduly upon rights or freedoms – freedom of political communication – prohibition on communicating in relation to abortions in a manner that is able to be seen or heard by a person who is accessing, attempting to access or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety**

The High Court has found that there is an implied freedom of political communication contained in the Constitution and has formulated, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, a two-step test for determining whether a law is compatible with the implied freedom.

The proposed prohibition in the Bill — on communicating in relation to abortions with a person who is accessing, attempting to access or leaving premises at which abortions are provided etc., — may effectively burden freedom of communication about government or political matters (the first limb of the *Lange* test).

The Committee also notes that even if a law is found to pursue a ‘legitimate’ objective, it is also important to consider whether it is ‘suitable, necessary and proportionate’ (the second limb of the *Lange* test). ¹

The Committee also notes the following extract from the Minister’s Second Reading Speech on the current Bill’s definition of the term ‘safe access zone’ (i.e., an area within a radius of 150 metres from premises at which abortions are provided):

> A zone of 150 metres was chosen after consultation with a wide range of stakeholders. Hospitals and clinics provided examples of the activities of anti-abortion groups and the places where they confronted patients and staff. This included waiting at places where patients parked their cars and at public transport stops. Some health services asked for a much larger zone, but after careful consideration it was determined that a zone of 150 metres would be sufficient to protect people accessing premises.

In addition, the Committee notes the following extract from the Minister’s Second Reading Speech on the effect of the provisions in the Bill as a whole:

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¹ See Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws, Interim Report, July 2015, p. 93. See also the recent High Court decision of *McCloy v New South Wales* [2015] HCA 34, [10].
Victoria has a proud history of activism and peaceful protests and this bill does not change that. The offence provisions have been carefully developed to target specific behaviours that are aimed at deterring people from accessing or providing legal medical services. Individuals can still protest and express their views about abortions outside safe access zones.

The Committee refers to Parliament for its consideration the question of whether or not proposed section 185B(1) — by prohibiting a person from communicating in relation to abortions in a manner that is able to be seen or heard by a person who is accessing, attempting to access or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety — is a suitable, necessary and proportionate limitation on the implied freedom of political communication.

Charter report

Charter does not affect laws applicable to abortion – Safe access to premises at which abortions are provided – Whether Charter’s provisions on interpretation, declarations and obligations of public authorities apply

Summary: The effect of the savings provision for laws applicable to abortion in Charter s. 48 may be that the Charter may not affect some or all of new Part 9A’s regulation of behaviour within 150m at which abortions are provided. The Committee will write to the Minister seeking further information.

Charter s. 48, a ‘savings provision’, provides:

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

The Committee notes that the meaning of ‘law applicable to abortion’ in Charter s. 48 has not yet been the subject of judicial interpretation. The Committee observes that Charter s. 48 may apply to a law that aims to provide safe access to premises at which abortions are provided.

The Statement of Compatibility does not address Charter s. 48. The Committee notes that the effect of Charter s. 48 may be that the Charter will not ‘affect’ some or all of Part 9A’s regulation of behaviour within 150m of premises at which abortions are provided. The Committee observes that the meaning of ‘affect’ in Charter s. 48 has not been the subject of judicial interpretation. Charter s. 48’s possible application to new Part 9A may mean that:

- the Charter’s provisions for interpretation and declarations of inconsistent interpretation may not apply to new Part 9A;  
- the Charter’s provisions for scrutiny of legislation, interpretation and declarations of inconsistent interpretation may not apply to regulations made under new Part 9A, including the provision in para (e) of the definition of ‘prohibited behaviour’ for regulations to ban further behaviour within 150m of premises at which abortions are provided; and/or
- the Charter provision for obligations for public authorities may not apply to enforcement of new Part 9A, including the issuing and exercised of search warrants and the seizure of items under new sections 185F and 185G.

The Committee will write to the Minister seeking further information as to whether or not the Charter’s provisions on scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities will apply to new Part 9A, regulations made under it and its enforcement.

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2 Charter ss. 32, 36.
4 Charter s. 38.
The Committee makes no further comment

Road Legislation Amendment Bill 2015

Introduced 20 October 2015
Second Reading Speech 21 October 2015
House Legislative Assembly
Member introducing Bill Hon. Luke Donnellan MLA
Portfolio responsibility Minister for Roads and Road Safety

Purpose

The Bill would amend the following legislation to permit an approved analyst to certify the result of an analysis (of a blood, urine or oral fluid test) conducted in an approved laboratory. Certification is currently limited to an analysis that has been conducted by an approved analyst. (See Charter report below)

- Road Safety Act 1986
- Marine (Drug, Alcohol and Pollution Control) Act 1988
- Rail Safety (Local Operations) Act 2006

The Bill would also amend section 42A of the Dangerous Goods Act 1985 to allow an approved analyst to certify the results of an analysis or examination — of the nature, quantity or identity of substances in dangerous goods prosecutions (explosives and high consequence dangerous goods) — conducted in an approved laboratory. (The section currently refers to the analysis or examination being made by the approved analyst.)

The Bill would also amend the Road Management Act 2004 to improve the process for adjusting the threshold amount regarding liability for property damage caused by the condition of a road or infrastructure.

The Bill would also amend the Road Safety Act 1986 to make various amendments in relation to the licensing of drivers, including the renewal of driver licences for persons of 75 years or older and learner permits.

Charter report

Fair hearing – Examination of witnesses – Admissibility of certification of analysis in an approved laboratory – No provision for accused to cross-examine person who performed the analysis

Summary: The effect of clauses 3 to 8 and 10 to 12 may be that a certificate signed by an approved analyst will be admissible as evidence of the results of any analysis conducted in an approved laboratory, even if the person who signed the certificate neither did that analysis nor saw it being done. The Committee will write to the Minister seeking further information.

The Committee notes that clauses 3 to 8 and 10 to 12, amending existing sub-ss. 57(4) & (4A), 57A(4) and 57B(4) of the Road Safety Act 1986, 32(4), 32A(4) and 32B(4) of the Marine (Drug, Alcohol and Pollution Control) Act 1988, 86l(6) & (7) and 86J(6) of the Rail Safety (Local Operations) Act 2006 and 42A(1) of the Dangerous Goods Act 1985, provide that:

- certificates ‘purporting to be signed by an approved analyst’ as to the concentration of alcohol in any sample of blood, the presence of a drug in any sample of blood, urine or oral fluid or the identity, quantity or nature of a substance
are admissible as evidence and, in the absence of evidence to the contrary, proof of the facts and matters contained in them (or ‘sufficient evidence of’ those facts) in various criminal proceedings relating to road, marine or rail safety, or explosives or high consequence dangerous goods

if the certificate ‘stat[es] that the sample...’ was analysed [or examined] in an approved [or accredited] laboratory.

The clauses remove existing requirements that the sample must be ‘analysed [or examined] by the analyst’ who signed the certificate.

The Explanatory Memorandum explains that the purpose of these amendments:

is to permit an approved analyst to certify the result of an analysis conducted in an approved laboratory. Currently under these sections an approved analyst may certify the results of an analysis of a blood, urine or oral fluid sample that has been conducted by the analyst. This certificate will be admissible in proceedings and, in the absence of evidence to the contrary, will be proof of the facts and matters contained in it. However, the usual practice in a toxicology laboratory is for the approved analyst to take responsibility for an analysis conducted by other staff members. The amendments being made by the Bill will reflect this practice by allowing an approved analyst to certify the results of an analysis conducted in an approved laboratory.

The Committee observes that the effect of clauses 3 to 8 and 10 to 12 may be that a certificate signed by an approved analyst will be admissible as evidence of the results of any analysis conducted in an approved laboratory, even if the person who signed the certificate neither did that analysis nor saw it being done.

The Committee notes that existing provisions permit an accused person in a matter where a certificate is to be used to, ‘with the leave of the court and not otherwise, require the person who has given [or signed] the certificate or any person employed, or engaged to provide services at, the place at which the sample’ was ‘taken’, ‘furnished’ or ‘provided’ to ‘attend at all subsequent proceedings for cross-examination’.\(^5\) The Committee observes that these existing provisions may not allow the accused person to require the attendance of the person who actually analysed the sample for cross-examination.

The Committee considers that clauses 3 to 8 and 10 to 12 may therefore engage the Charter rights of people charged with criminal offences to have those charges determined at a fair hearing and to the minimum guarantee ‘to examine, or have examined, witnesses against him or her, unless otherwise provided for by law’.\(^6\)

The Statement of Compatibility does not address clauses 3 to 8 and 10 to 12.\(^7\) The Committee notes that the Supreme Court of the United States has held that allowing a witness who is familiar with the

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\(^5\) Road Safety Act 1986, ss. 57(7), 57A(8) & 57B(8); Marine (Drug, Alcohol and Pollution Control) Act 1988, ss. 32(7), 32A(9) & 32B(8); Rail Safety (Local Operations) Act 2006, ss. 86I(12), & 86I(10); Dangerous Goods Act 1985, s. 42A(2)(b). The Committee notes that the comma in these provisions (other than the latter one) appears to be in the wrong place. It should be before, rather than after, the word ‘at’.

\(^6\) Charter ss. 24(1), 25(2)(g).

\(^7\) Compare Scrutiny of Acts and Regulations Committee, Alert Digest No. 15 of 2012, Ministerial Correspondence on the Transport Legislation Amendment (Marine Drug and Alcohol Standards Modernisation and Other Matters) Bill 2012, remarking that the clause that inserted ss. 32A and 32B into the Marine (Drug, Alcohol and Pollution Control) Act 1988 is based on ss. 57A and 57B of the Road Safety Act 1986 and ‘engage[s] the Charter, including the right to a fair hearing and the rights of persons in criminal proceedings’; and the Statement of Compatibility to the Transport Legislation Amendment (Rail Safety Local Operations and Other Matters) Bill 2013, remarking that the clauses that inserted ss. 86I and 86J into the Rail Safety (Local Operations) Act 2006 ‘engage a person’s rights in criminal
protocols in the relevant laboratory, but did not perform or observe the analysis in question, to testify as to the results of a particular analysis of alcohol in a blood sample in that laboratory, is a breach of that nation’s constitutional right of the accused ‘to be confronted with the witnesses against him’, unless the accused is given the opportunity to cross-examine the person who actually performed the particular analysis.\(^8\)

The Committee will write to the Minister seeking further information as to the compatibility of clauses 3 to 8 and 10 to 12 with the Charter rights of people charged with criminal offences to have those charges determined after a fair hearing and to examine witnesses against them and, in particular, as to whether or not permitting an accused person, with the leave of the court, to require that the person who actually performed the analysis attend for cross-examination is a less restrictive means reasonably available to achieve these clauses’ purpose.

The Committee makes no further comment
State Taxation Acts Further Amendment Bill 2015

Introduced 20 October 2015
Second Reading Speech 21 October 2015
House Legislative Assembly
Member introducing Bill Hon. Tim Pallas MLA
Portfolio responsibility Treasurer

Purpose

The Bill would amend:

- the Duties Act 2000 to include ‘bison’ in the definition of cattle
- the Payroll Tax Act 2007 in relation to the payroll tax exemption for wages paid or payable to ‘new entrant’ apprentices or trainees employed by approved group training organisations
- the Valuation of Land Act 1960 in relation to the process for the administration of land valuations used for assessing council rates, land tax and fire services property levy.

Content

Retrospective commencement of provisions

The Bill provides that clauses 8 and 9, which would amend the Valuation of Land Act 1960, would operate retrospectively, from 1 January 2014 and 1 January 2012 respectively.

The Committee notes the following extract from the Minister’s Statement of Compatibility in relation to clause 8:

The bill also addresses an anomaly in treatment of apportionment. Currently the provisions governing apportionment assume that the land will be at least partly leviable or rateable. However, there are some lands that are non-rateable and non-leviable, but nonetheless require assessment for land tax purposes. In the interests of consistency and fairness, valuations done for land tax purposes should adopt the same methodology. The bill accordingly amends the Valuation of Land Act 1960 to enable apportionment to occur in respect of non-rateable and non-leviable lands. This amendment is to operate retrospectively, so that valuations already made in 2014 on this basis — in the absence of any alternative basis for fairly calculating the value for tax purposes — can be relied upon for the whole of the valuation cycle, i.e. for the land tax assessments issued in 2015 and 2016.

The Committee notes the following extract from the Minister’s Statement of Compatibility in relation to clause 9:

The bill … also rectifies a drafting issue in the provisions authorising the valuer-general to give a valuation to a rating authority, such as the State Revenue Office. Consistent with the intention of the original amendments, it validates the provision of supplementary valuations made since 2012, to put beyond doubt the use made of supplementary valuations certified by the valuer-general.

The Committee accepts that the retrospective amendments are intended to rectify an anomaly and a drafting issue in the Valuation of Land Act 1960.
Charter report

The State Taxation Acts Further Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

The Committee makes no further comment
## Terrorism (Community Protection) Amendment Bill 2015

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### Purpose

The Bill would amend the *Terrorism (Community Protection) Act 2003* (the Principal Act) to:

- provide for the extension and repeal of sunset provisions in the Principal Act:
  - extension of the current sunset date for the entire Principal Act from 1 December 2016 to 1 December 2021 (amended section 41) [15]
  - repeal of the sunset provision that any preventative detention order (PDO) or prohibited contact order (PCO) that is in force on 9 March 2016 ceases to be in force on that date and that no order can be applied for from that date (repealed section 132V) [11]
- provide for the remote entry of premises by police for the purposes of covert search warrants. Remote entry is defined as the accessing of electronic equipment, such as a computer or other electronic device, from another location (amended section 9) [5]
- authorise the use of a name, for the purposes of a PDO, by which Victoria Police knows a person in circumstances where the person's identity is not clear or they are known by multiple aliases [7]
- enable an application by a police officer to revoke or vary a PDO or PCO based on new facts and circumstances [8]
- require that a police officer who is detaining a person under a PDO must release the person or arrange for their release if they are satisfied that the grounds on which the order was made have ceased to exist [9]
- provide immunity from prosecution for certain police officers in certain circumstances involving the transfer to a prison of a person who is subject to a PDO. [10]

### Content

The Committee commented on the Bill for the Principal Act in its *Alert Digest No. 1 of 2003* and published the related Ministerial response in its *Alert Digest No. 4 of 2003*.

The Committee has also commented on previous amendment Bills for the Principal Act, including in its *Alert Digest No. 1 of 2006*, on the Terrorism (Community Protection) (Amendment) Bill 2005, regarding a widening of the circumstances in which a covert search warrant may be obtained and the introduction of PDOs. The Committee published the related Ministerial response in its *Alert Digest No. 2 of 2006*.


The Committee also notes that one effect of the extension of the current sunset date for the Principal Act from 1 December 2016 to 1 December 2021 is to extend the existing provision limiting judicial review of interim special powers authorisations (section 21J). This provision was the subject
of a statement regarding section 85 of the Constitution Act 1975 in the Minister’s Second Reading Speech on the Terrorism (Community Protection) (Amendment) Bill 2005. The Committee, in its Alert Digest No. 1 of 2006 (at page 29), stated that it was of the view that the provision was appropriate and desirable in all the circumstances. The Committee notes that a section 85 statement has not been provided in relation to the current Bill.

The Committee has also previously considered (in Alert Digest No. 4 of 2006) section 4B of the Principal Act. (Refer to Charter report below)

Charter report

Statutory review of compatibility with the Charter – Offence provision

Summary: The Committee will write to the Attorney-General seeking further information as to whether or not there has been a statutory review under existing s. 38 of the offence in existing s. 4B, including its compatibility with the Charter.

The Committee notes that clauses 11 and 15, repealing the sunset provisions in existing s. 13ZV and amending existing s. 41, continue the operation of:

- Part 2A, providing for preventative detention orders, from 9 March 2016 to 1 December 2016
- All of the Act, from 1 December 2016 to 1 December 2021

The effect of clauses 11 and 15 is to extend the operation of the entirety of the Terrorism (Community Protection) Act 2003 for five additional years.

The Committee observes that existing s. 38 requires a review of the existing Act. The report of the statutory Review remarked:

The Charter of Human Rights and Responsibilities Act 2006 (the Charter) has been enacted since the Terrorism (Community Protection) Act 2003 (TCPA) was passed. Consequently, the compatibility of the TCPA with the Charter was not considered when the legislation was enacted. It has been necessary for this to be done as part of the Review.

However, the Committee notes that, while the Review addresses the compatibility of existing Parts 2, 2A, 3, 3A, 4 and 5 with the Charter, it does not expressly address the compatibility of Part 1 of the Act with the Charter.

The Committee observes that Part 1 includes an offence provision, existing s. 4B(1), which provides:

A person commits an offence if—

(a) the person has possession or control of a document or information; and

(b) the person intentionally provides the document or information to another person; and

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10. Department of Justice, Victorian Review of Counter-Terrorism Legislation (2014), pp. 48, 80-84, 104, 118, 131 & 135. The Review did not examine Part 6, which has since been repealed.
11. The second reading speech for the Bill that inserted existing s. 4B remarked that the section ‘specifies that persons who possess or control information or documentation and who intentionally provide information or documents with the intention of facilitating or facilitating a terrorist act commit an offence. Given the very serious potential implications of such actions it is appropriate that there is a significant penalty for persons who offer this sort of assistance to persons planning terrorist acts. As we are aware the furnishing of information, or documentation to terrorists is a tangible form of assistance that may have an impact on the potential lethality or seriousness of a terrorist act.’ Second Reading Speech for the Terrorism (Community Protection) (Further Amendment) Bill 2006.
(c) the person does so with the intention of facilitating preparation for, the engagement of a person in or assistance in a terrorist act.

Penalty: Level 5 imprisonment (10 years maximum.)

The Committee notes that there do not appear to be any similar offences to existing s. 4B in other state or territory legislation.

The Committee observes that existing s. 4B(1) is broader than similar Commonwealth offences because it does not require the prosecution to prove that:

- the accused possessed a thing or collected or made a document.\(^{12}\) Rather, it is enough that the accused ‘provides a document or information’ to another person, for example passing on things others have said.

- the information or document possessed by the accused be ‘connected with’ preparation for, the engagement of a person in or assistance in a terrorist act.\(^{13}\) Rather, it is enough that the accused merely intended to facilitate such preparation, engagement or assistance by providing the document or information, even if the provision is of little or no use, for example obvious or incorrect information.

- the accused wants a terrorist act to occur (or be prepared for), or is aware of a risk that it will occur.\(^{14}\) Rather, it is enough if the accused merely wanted to facilitate someone else’s possible preparation for such an act, for example general advice about the police’s counter-terrorism powers.

The Committee also notes that the Independent National Security Legislation Monitor, the Council of Australian Governments review committee and the United Kingdom Supreme Court have all recommended that the definition of ‘terrorist act’ in existing s. 4 be reviewed to ensure that it does not apply to acts committed by parties regulated by the law of armed conflict.\(^{15}\) For example, existing s. 4B may expose a person who provides information to a group planning lawful attacks (under international humanitarian law) on the military of any foreign government (including groups supported by the Australian government) to prosecution and punishment for up to 10 years in prison in Victoria.

The statutory Review remarked:\(^{16}\)

The COAG Committee’s Recommendations... although, in the Review Committee’s view, of merit, essentially relate to the offences in the Commonwealth legislation and do not bear upon the definition in the [Terrorism (Community Protection) Act 2003 (Vic)]. This legislation has a different purpose, relating to the exercise of particular powers, not the creation of offences. Consequently, it does not appear to the Review Committee that implementation of those recommendations would require amendment to the definition in the Victorian legislation.

Neither the statutory Review nor the Statement of Compatibility addresses existing s. 4B.

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\(^{12}\) Compare Criminal Code (Cth), ss. 101.4 & 101.5.

\(^{13}\) Compare Criminal Code (Cth), ss. 101.4(1)(b) & 101.5(1)(b).

\(^{14}\) Compare Criminal Code (Cth), ss. 80.2C & 101.6. See also s. 80.3, providing a defence of good faith.


\(^{16}\) Department of Justice, *Victorian Review of Counter-Terrorism Legislation* (2014), p. 27 (emphasis added).
The Committee will write to the Attorney-General seeking further information as to whether or not there has been a statutory review under existing s. 38 of the offence in existing s. 4B, including its compatibility with the Charter.

Privacy – Fair hearing – Covert search warrants – Statement of incompatibility

Summary: The Statement of Compatibility remarks that Part 2 and clause 5, which provide for the Supreme Court to authorise a police officer to enter and search premises (including by remote entry to any electronic equipment) without notice to the premises’ owner or occupier may be incompatible with human rights. The Committee refers to Parliament for its consideration the question of whether or not NSW and federal provisions for delayed notice to occupiers and expressly not authorising interferences with lawful uses of computers are less restrictive alternatives reasonably available to achieve the purpose of Part 2 and clause 5.

The Committee notes that Part 2 permits the Supreme Court to authorise a police officer ‘to enter, by force or impersonation if necessary’ a premises (and to search, seize, place, copy, operate or test items specified in the warrant) without any notice to the premises’ owner or occupier. Clause 5, amending existing s. 9, will permit the Supreme Court to authorise a police officer ‘to operate, by way of remote entry, any electronic equipment that is on the premises’ (and to copy, print or other record information held in, or accessible from, that equipment), also without notice to the premises’ owner or occupier.

The Statement of Compatibility remarks:

The covert search warrant provisions have implications for human rights. In particular, these powers significantly affect the right to privacy, given the fact that a person is not present during a search and may not find out about it afterwards. They also have implications for the right to a fair hearing, given the difficulties that may be associated with claiming legal privilege or challenging the lawfulness of evidence obtained during a search. In light of the above analysis, and in particular the potential limitation of the rights under sections 13 and 24 of the charter, I consider that, while there are strong grounds for concluding that extending the operation of the covert search warrant provisions is compatible with the charter, the bill may be partially incompatible with the charter.

Nevertheless, I consider that the object of the provisions justify their continued operation for the extended period set out in the new sunset provision. As set out in the review report, the covert search warrant powers have been used on very few occasions since their introduction, and have been an effective tool in investigating suspected terrorist activity. Given the numerous safeguards in place, and the necessity of supporting investigatory agencies in their efforts to combat terrorism, I therefore consider it is necessary to support these powers, even in the event that they are incompatible with charter rights.

The Committee observes that this may amount to a statement under Charter s. 28(3)(b) that ‘part of the Bill is incompatible with human rights’. Such a statement is not binding on any court of tribunal and does not affect the validity, operation or enforcement of the Terrorism (Community Protection) Act 2003 or any other statutory provision.

The Committee notes that similar provisions federally and in NSW are subject to requirements that the occupier of the premises where the covert search warrant is executed be notified of the

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17 Charter s. 28(3)(b) provides that: ‘A statement of compatibility must state... if, in the member’s opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.’

18 Charter ss. 28(4) & 29.
existence and execution of the warrant within 6 months of its execution, unless postponed by the judge who issued the warrant (for up to 12 or 18 months, or longer in “exceptional circumstances”). The statutory Review recommended introducing a similar provision in Victoria. However, the Statement of Compatibility remarks that existing Part 1A, which permits involvement of the Public Interest Monitor in applications for a covert search warrant, ‘distinguishes the Victorian provisions from the delayed notification search warrants available under commonwealth and NSW legislation’.

The Committee also notes that a similar federal provision to clause 5, allowing for the federal Attorney-General to permit the Australian Security and Intelligence Organisation to use a telecommunications facility or other electronic equipment to obtain access to data in a computer, is expressed to not permit:

the addition, deletion or alteration of data, or the doing of any thing, that is likely to:

(a) materially interfere with, interrupt or obstruct a communication in transit or the lawful use by other persons of a computer unless the addition or alteration, or the doing of the thing, is necessary to do one or more of the things specified in the warrant; or

(b) cause any other material loss or damage to other persons lawfully using a computer’.

The statutory Review identified the federal provision as a ‘possible precedent with appropriate modifications’ in Victoria.

The Committee refers to Parliament for its consideration the questions of whether or not including provisions, similar to those federally and in NSW:

• requiring delayed notice to occupiers (within six months, or longer, if extended by a judge) of the execution of the warrant; and/or

• expressly not authorising interference with the lawful use of a computer (unless necessary to do one or more things specified in the warrant, other than causing any other material loss or damage to other persons lawfully using a computer);

are less restrictive alternatives reasonably available to achieve the purpose of existing Part 2 and clause 5.

**Children – Humane treatment of detainees – Fair hearing – Preventative detention orders – Statement of incompatibility**

**Summary:** The Statement of Compatibility remarks that Part 2A, which provides for the Supreme Court to order the detention of people over 16 years of age for up to 14 days where the order would substantially assist in preserving evidence of a terrorist act or prevent a terrorist act occurring, may be incompatible with human rights. The Committee will write to the Attorney-General seeking further information. The Committee refers to Parliament for its consideration the question of whether or not the application of presently excluded provisions from the Children, Youth and Families Act 2005 to 16 and 17-year olds detained under a preventative detention order and/or the inclusion of protective provisions from the ACT’s legislation for preventative detention orders are less restrictive means reasonably available to achieve the purpose of Part 2A.

The Committee notes that existing Part 2A permits the Supreme Court to make an order to detain anyone over 16 years of age for up to 14 days where the order would substantially assist in

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19 Crimes Act 1914 (Cth), ss. 3ZZDA & 3ZZDC; Terrorism (Police Powers) Act 2002 (NSW), s. 27U.
21 Australian Security and Intelligence Organisation Act 1979 (Cth), s. 25A(4).
preserving evidence of a terrorist act that has occurred in the last 28 days or (if the person is reasonably suspected of being about to engage in, or possesses a thing in connection with, or has done an act in planning or preparation of, a terrorist act) preventing a terrorist act occurring in the next 14 days. Detainees are largely limited from communicating with others, other than notifying certain people that they are safe, consulting with lawyers about the detention order and (in the case of children and incapable persons) communicating with a parent or guardian.

The Committee observes that existing s. 13D(2) provides that an applicant’s obligation to include ‘a summary of the grounds on which the applicant considers that the order should be made’ does not require the inclusion of information that ‘is likely to prejudice national security’. The statutory Review remarked:\(^\text{23}\)

The Review Committee found this to be a rather unusual provision, in that it allows for the withholding of information from the summary required by subsection (1)(g), but provides for no similar limitation on the full suite of information required by subsection (1)(b). On the face of it, the withholding of evidence from the subject of the application engages the right to a fair hearing under section 24 of the Charter.

The Statement of Compatibility remarks that ‘information may be excluded from the summary of grounds if providing that information would prejudice national security’, but does not address existing s. 13D(2)(1)(b).

The Committee also observes that existing s. 13ZG provides that, unless the Supreme Court orders otherwise, any communication between a person who is being detained under a preventative detention order and his or her lawyer must be conducted in such a way that ‘the content and meaning of the communication... can be effectively monitored by a police officer exercising authority under the preventative detention order’. Existing s. 13ZG(5) provides that any permitted communication between a person who is being detained under a preventative detention order and a lawyer for the purpose of obtaining advice about the detention ‘is not admissible in evidence against the person in any proceedings in a court or tribunal.’ The statutory Review remarked:

This provision not only affects the right to privacy, but also:

- The right to a fair hearing under section 24 of the Charter, in that the police are privy to all communications between the detainee and his or her lawyer relating to the proceedings; and
- The privilege against self-incrimination under section 25(2)(k) of the Charter in respect of any criminal charges arising out of the investigation and any derivative evidence obtained as a result of information gleaned from the monitoring. Section 13ZG(5) does not specifically provide for a restriction on the use of derivative information in respect of monitored conversations.

The Statement of Compatibility remarks that ‘[u]nder section 13ZJ(10), no information can be disclosed for any purpose by a police office or interpreter monitoring such a communication unless the information was communicated in the context of the detainee or lawyer breaching the act by engaging in unauthorised communication.’ However, the Committee notes that existing s. 13ZJ(10) only applies to intentional disclosures and, where the police officer who monitors the communication is involved in any later criminal investigation of the detainee, may not prevent that police officer from making personal use of that information in the course of that investigation.

The Statement of Compatibility remarks:

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

Nevertheless, I consider that the object of the PDO provisions justify their continued operation for the extended period set out in the new sunset provision. In my view, the PDO scheme is fundamentally important for the protection of the Victorian community given the potentially devastating consequences of terrorist acts. I consider that adequate safeguards are in place to ensure that the powers under the scheme are not used inappropriately. The fact that only one PDO has been issued since the powers were introduced nearly a decade ago demonstrates the effectiveness of such safeguards. I therefore consider that any risks to human rights inherent in a scheme of this nature are adequately balanced by the importance of the objectives of the legislation.

The Committee observes that this may amount to a statement under Charter s. 28(3)(b) that ‘part of the Bill is incompatible with human rights’. 24 Such a statement is not binding on any court of tribunal and does not affect the validity, operation or enforcement of the Terrorism (Community Protection) Act 2003 or any other statutory provision. 25

The Committee notes that existing s. 13WA(5) provides that ‘[n]o provision of the Children, Youth and Families Act 2005 applies in respect of the detention of a person in a youth justice facility under a preventative detention order’ other than a list of specific provisions. Provisions of that Act that are excluded by existing s. 13WA(5) include:

- s. 487(f) of that Act, which prohibits ‘the adoption of any kind of discriminatory treatment’ (‘to the extent that that paragraph applies to discriminatory treatment that is reasonable and necessary having regard to the nature of the person’s detention’.) The Statement of Compatibility remarks that this would not permit discrimination ‘in a way that imposed an unreasonable limitation on the right’ to equality in Charter s. 8. 26
- s. 497 of that Act, which makes it an offence for ‘a person who has a duty of care with respect to a child’ to intentionally fail to protect that child from significant harm (including physical abuse and sexual abuse, damaging emotional or psychological harm or harm to physical development.) The Statement of Compatibility does not address the exclusion of s. 497.

The Committee also notes that similar legislation in the Australian Capital Territory provides that:

- a preventative detention order cannot be applied for, or made, for a child under 18 years old. 27 By contrast, existing s. 13J only prohibits the preventative detention of a child under 16 years old. A majority of the statutory Review were ‘not of the view than an amendment is necessary to the current provisions relating to young persons’. 28

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24 Charter s. 28(3)(b) provides that: ‘A statement of compatibility must state... if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.’

25 Charter ss. 28(4) & 29.

26 The Statement of Compatibility mistakenly refers to s. 478.

27 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT), s. 11(1).

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- the Supreme Court must be satisfied, on reasonable grounds, that making the order is the least restrictive way of preventing a terrorist act or the only effective way of preserving evidence of a terrorist act.\(^{29}\) There is no express requirement to this effect in existing Part 2A. The Statement of Compatibility remarks that, because of the Charter, ‘a court would be required to consider whether there are any less restrictive means of achieving the purpose of the order’.

- a detained person’s contact with a lawyer must not be monitored unless a senior police officer, after notifying the legal aid commission and the public interest monitor, finds on reasonable grounds that monitoring is necessary to prevent a defined list of consequences.\(^{30}\) By contrast, existing s. 132G automatically permits all monitoring of such communications unless the Supreme Court has directed otherwise.

The Committee will write to the Attorney-General seeking further information as to whether or not:

- an applicant for a preventative detention order can withhold or omit information that is prejudicial to national security when complying with the requirement to ‘set out the facts and other grounds on which the applicant considers the preventive detention order should be made’ under existing s. 13D(1)(b); and

- a police officer who monitors communication between a detainee and a lawyer under existing s. 132G may later take part in a criminal investigation of that detainee and, if so, whether or not that police officer can make use of information from the communication when investigating the detainee.

The Committee refers to Parliament for its consideration the questions of whether or not:

- the application of presently excluded provisions from the Children, Youth and Families Act 2005 (prohibiting ‘any type of discriminatory treatment’ against a detained child and criminalising the failure of anyone who has a duty of care with respect to such a child to prevent significant harm to that child) to 16 and 17 year olds subject to a preventative detention order; and

- the inclusion of protective provisions similar to those applicable in the ACT’s law for preventative detention orders (barring the preventative detention of children under 18; expressly barring any preventative detention unless a court finds that making the order is the least restrictive way of preventing a terrorist act or the only effective way of preserving evidence of a terrorist act; and prohibiting monitoring of conversations between a detainee and a lawyer unless, after notifying legal aid and the public interest monitor, a senior police officer finds on reasonable grounds that the monitoring is necessary); are less restrictive means reasonably available to achieve the purpose of Part 2A.

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\(^{29}\) **Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT),** s. 18(4)(c) & (6)(c).

\(^{30}\) **Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT),** s. 56. The listed consequences are: ‘(a) interference with or harm to evidence of, or relating to, a serious offence; (b) interference with or physical harm to a person; (c) the alerting of a person who is suspected of having committed a serious offence, but has not been arrested for it (d) interference with the gathering of information about the commission, preparation or instigation of a terrorist act; (e) making it more difficult to prevent a terrorist act because a person is alerted; (f) making it more difficult to secure a person’s apprehension for a terrorist act because a person is alerted.’
Medical treatment without consent – Decontamination directions

Summary: Existing s. 18(1)(d) permits a police officer to ‘direct a person to submit to decontamination procedures’. The Committee will write to the Attorney-General seeking further information as to whether or not existing s. 18(1)(d) permits a police officer to require a person to take antibiotics or other medical treatment.

The Committee notes that, where a senior police officer has authorised such action for the purpose of protecting people from chemical, biological or radiological contamination resulting from a possible terrorist act in a particular area, existing s. 18(1)(d) permits a police officer to ‘direct a person to submit to decontamination procedures’. It is an offence for a person to refuse or fail to comply with such a request ‘unless the person has a reasonable excuse’. Existing s. 21 provides that, ‘[i]f a person refuses to comply with a direction... an authorised police officer... may use reasonable and necessary force to ensure compliance with that direction’.

The statutory Review remarked:

[W]ith respect to any potential limitation of a person’s right not to be subject to medical treatment without full free and informed consent under section 10 of the Charter, the Review Committee are of the view that the decontamination procedures would not amount to medical treatment. On a proper construction of the decontamination powers, including in light of the right to request medical treatment in section 18A, the powers would not extend to matters such as requiring a person to take antibiotics or other medical treatment.

However, the Committee observes that the existing Act does not define ‘decontamination procedures’ or ‘reasonable excuse’. The Statement of Compatibility does not discuss the compatibility of existing s. 18(1)(d) with the Charter’s right not to be subject to medical treatment without full, free and informed consent.

The Committee will write to the Attorney-General seeking further information as to whether or not existing s. 18(1)(d) permits a police officer to require a person to take antibiotics or other medical treatment.

Privacy – Authorisation of special powers reasonably necessary to protect essential services from a terrorist act – Authorisation by Governor in Council for up to one year

Summary: The Committee refers to Parliament for its consideration the question of whether or not existing s. 21F, by permitting the Governor in Council to authorise the police’s use of identification, search and entry powers without warrant for up to one year in any area where a key part of an essential service is located if the authorisation is reasonably necessary to protect that service from a terrorist act, is compatible with the Charter’s right against arbitrary or unlawful interference with privacy.

The Committee notes that existing Part 3A provides for the Supreme Court or the Governor in Council to authorise police to use special powers, including powers to require people to disclose and

32 Compare Terrorism (Emergency Powers) Act 2003 (NT), s. 4, which provides that ‘decontamination procedure does not include the internal examination of a person’; and Public Safety Preservation Act 1986 (Qld), ss. 28 & 29, which distinguish between ‘decontaminat[ing] [a] person’ and ‘provid[ing] any reasonably necessary treatment for the person’ (including ‘tak[ing] any reasonably necessary samples and perform[ing] any reasonably necessary tests’). See also s. 30 of that Act, permitting a person to ‘refuse to undergo [medical] treatment’ unless ‘allowing the person to leave without medical treatment will pose a serious risk to the life or health of individuals not already affected’.
33 Charter s. 10(c).
prove their identity, to search people and vehicles, to enter and search premises, and to direct people to not enter, leave or not leave an area, without a warrant, whether or not the police officer has reasonable grounds to do so, in an area described in the authorisation.

The Statement of Compatibility remarks:

There is likely to be a limitation on charter rights, particularly the right to privacy, from the exercise of special powers in relation to ‘target’ areas, which allows the special powers to be exercised in relation to any person, any vehicle and any premises within the area described in the authorisation. Of particular relevance to my consideration is the statement of compatibility made to the Parliament in respect of the Summary Offences and Control of Weapons acts Amendment Bill 2009, which declared a partial incompatibility with the charter regarding the provision of stop, search and seize powers that could be exercised on all persons in designated areas to detect carriage of weapons, without need for reasonable suspicion on the part of officers exercising such powers. However, in contrast to those provisions, I am of the view that the seriousness and urgency of the objective of mitigating and preventing the risk of terrorist acts, and the existence of the embedded safeguards, judicial oversight and constrained authorisation processes, lends to the conclusion that any limitations arising from the exercise of the special powers would be reasonable and proportionate.

While the Committee considers that existing ss. 21B, 21D and 21E (which permit the Supreme Court to authorise the use of such powers for up to 14 days in respect of events that attract large numbers of people, the prevention of a terrorist act within the next 14 days and the aftermath of a terrorist act), are compatible with human rights, it notes that existing s. 21F differs significantly from those provisions.

The Committee observes that existing s. 21F permits the Governor-in-Council (on the recommendation of the Premier, the Minister responsible for an essential service and the Commissioner of Police) to authorise the use of special powers for up to one year in an area where ‘a key part of [an] essential service... is located’ if the authorisation ‘is reasonably necessary... to protect that part from a terrorist act’. Such authorisations must be published in the Government Gazette. Existing s. 21F neither requires judicial oversight, an imminent terrorist act nor a particular event that attracts large numbers of people, and permits authorisations for up to a year at a time. There is no express limit on the size of the area where the Governor in Council can authorise the use of special powers, so long as the area is where a ‘key part’ of an ‘essential service’ is located. The definition of ‘essential service’ means ‘transport’, ‘fuel (including gas)’, ‘light’, ‘power’, ‘water’, ‘sewerage’ and any other service ‘whether or of a type similar to the foregoing or not’ specified ‘from time to time’ by the Governor in Council.34

For example, if the Commissioner of Police, the Premier and Minister for Transport consider that doing so is reasonably necessary to prevent a terrorist attack on the Melbourne CBD’s public transportation facilities, existing s. 21F may permit the Governor in Council to authorise, for up to a year, any police officer (and anyone assisting a police officer) to require anyone in the CBD to disclose and prove their identity (and to detain them until that occurs); to search anyone in the CBD; (and to detain them while that occurs); to stop and search any vehicle in the CBD; and to enter and search any premises in the CBD. Neither the Governor in Council nor the police would require any further legal authority (judicial or otherwise) to perform such acts, other than publishing an order in the Government Gazette specifying what powers can be exercised and where their use is authorised. People who fail to comply with a request from a police officer pursuant to that order without reasonable excuse would commit an offence punishable by up to two years in prison.

34 See existing s. 3 (‘essential service’); Emergency Management Act 2013, ss. 74B, 74C; Essential Services Act 1958, s. 3.
The Committee notes that Tasmania is the only other Australian jurisdiction that permits anyone to authorise the use of random search and entry powers by the police to combat terrorism for up to a year. The remaining Australian jurisdictions permit the authorisation of such powers for either 7 days or, in the case of the Commonwealth and the Northern Territory, 28 days. The Committee observes that similar powers in the UK permitting the Commissioner of Police to authorise random searches of people or vehicles in an area for up to 28 days (but not requiring publication of the authorisation or that an essential service be located in that area) where the Commissioner considers the authorisation ‘expedient for the prevention of acts of terrorism’ were found by the European Court of Human Rights in 2010 to be incompatible with the right to respect to respect for private life.

The Committee notes that the Council of Australian Governments review committee remarked:

> Our primary recommendation is that there should be judicial approval across the jurisdictions for all authorisations. However, we accept that in the detail of the differing schemes a ‘compromise’ might be acceptable (such as the Victorian system where an interim authorisation is made by the Police Commissioner with the written approval of the Premier, but where the interim authorisation must then be scrutinised by the Supreme Court; or in South Australia, where a judicial officer has to sanction the Police Commissioner’s level of belief that an authorisation is warranted.) As we have said, there is room for the selection of local preferences but there should be, we consider, a general scheme of judicial oversight in relation to authorisations for these special powers.

The statutory Review did not specifically consider the compatibility of existing s. 21F with the Charter, but concluded that because ‘[t]he authorisation of the Supreme Court is ordinarily obtained’ under Part 3A and any ‘authorisation is subject to the written approval of the Premier’, ‘where the statutory test is met, and where it is considered appropriate to make an authorisation in relation to a specified area, it is reasonable and justifiable to exercise special powers in respect of any person, vehicle or premises in that area.’

The Committee refers to Parliament for its consideration the question of whether or not existing s. 21F, by permitting:

- the Governor in Council (rather than a court)
- to authorise (by order in the Government Gazette, on the advice of the Premier, the Minister responsible for an essential service and the Commissioner of Police)
- the use of random search powers (including requiring identification and searches of any people, vehicles and premises)

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35 Police Powers (Public Safety) Act 2005 (Tas), s. 14(2)(c) (applicable to transport interchanges, places where persons gather in large numbers, and places where part of an essential service is located.) The Tasmanian regime allows the Commissioner of Police (with the Premier’s approval) to permit random searches and cordons at such sites but requires authorisation from the Supreme Court for ‘additional powers’ (including strip searches and entry to premises without warrant.)

36 Crimes Act 1914 (Cth), s. 3UJ (28 days); Terrorism (Extraordinary Preventative Powers) Act 2005 (ACT), s. 68(2); Terrorism (Police Powers) Act 2002 (NSW), s. 11 (7 days); Terrorism (Emergency Powers) Act 2003 (NT), s. 200; Public Safety Preservation Act 1986 (Qld), s. 8G (7 days); Terrorism (Police Powers) Act 2005 (SA), s. 4 (7 days); Terrorism (Extraordinary Powers) Act 2005 (WA), s. 8(4) (7 days).

37 Gillan & Quinton v UK [2010] ECHR 28. The UK powers have since been replaced by a narrower power permitting an authorisation for up to 14 days if a senior police officer and the Secretary of State reasonably suspect a terrorist act will occur in an area and that the authorisation (and the specified area and duration of the authorisation is no greater than) is necessary to prevent such an act: Protection of Freedoms Act 2012 (UK), s. 61 & Schedule 6.

38 Council of Australian Governments, Review of Counter-Terrorism Legislation (2013), [358].

39 Sections 21B and 21D, Terrorism (Community Protection) Act 2003 (Vic).

40 Subsections 3(5) and 13(3), Terrorism (Police Powers) Act 2005 (SA).

Scrutiny of Acts and Regulations Committee

• for up to one year
• in any ‘area’ where a ‘key part’ of an essential service (including ‘transport’) is located
• if the authorisation is ‘reasonably necessary’ to protect that part from a terrorist act (whether or not such an act is imminent or likely),

is compatible with the Charter’s right against arbitrary or unlawful interference with privacy.\(^\text{42}\)

The Committee makes no further comment

\(^{42}\) Charter s. 13(a).
Transport Accident Amendment Bill 2015

Introduced: 20 October 2015
Second Reading Speech: 21 October 2015
House: Legislative Assembly
Member introducing Bill: Hon. Robin Scott MLA
Portfolio responsibility: Minister for Finance

Purpose

The Bill would amend the Transportation Act 1986 (the Primary Act) to:

- restore the right of a claimant to recover damages from the Transport Accident Commission (TAC) for mental injury or nervous shock caused by the injury or death of another person in a transport accident as a result of their suicide, attempted suicide or negligence (repeal of section 93(2A)) [5]
- remove the criteria that currently apply in relation to demonstrating a ‘severe long-term mental or severe long-term behavioural disturbance or disorder’ (one of four categories of ‘serious injury’ compensable under the Primary Act) (repeal of section 93(17A) [6]
- correct an omission regarding the indexation of a claimant’s maximum contribution towards daily living expenses to ensure that it is based on the consumer price index instead of average weekly earnings [4]
- remove the power of the TAC to publish, without parliamentary scrutiny, guidelines on the use and application of the American Medical Association (AMA) Guides for the assessment of the degree of a claimant’s permanent impairment (repeal of sections 46A(2C) and (2D). (As noted in the Second Reading Speech, those sections empower the TAC to potentially exclude any injury from compensation, other than those dealing specifically with a spinal injury arising from the Supreme Court decision of TAC v. Serwyla (2011.).) [3]

Content

Retrospective commencement of provisions

The Bill provides that clauses 4 and 5 would be taken to have commenced on 20 November 2013 and that clause 6 would be taken to have commenced on 16 October 2013. The remainder of the Bill would commence on the day after the day on which it receives the Royal Assent.

In relation to clauses 5 and 6, the Committee notes the Minister’s statement in the Second Reading Speech that the objective of the Bill is to:

implement the government’s commitment to reversing the provisions enacted under the Transport Accident Amendment Act 2013 that limit the right of families of people who die or are severely injured in transport accidents to seek compensation for mental injury or nervous shock.

In relation to clause 4, the Committee notes the following extract from the Minister’s statement in the Second Reading Speech:

The bill also includes a minor amendment to correct an omission in the Transportation Act 1986 regarding indexation of a claimant’s maximum contribution towards daily living expenses. The amendment is necessary to ensure indexation based on consumer price index, instead of average weekly earnings, is applied as originally intended. A claimant would generally pay less under a consumer price index.
The Committee accepts that the retrospective amendments in clauses 5 and 6 are beneficial to claimants under the Principal Act. The Committee also accepts that the retrospective amendment in clause 4 is a minor amendment to correct an omission in the *Transport Accident Act 1986* and is generally beneficial to claimants.

**Charter report**

The Transport Accident Amendment Bill 2015 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

*The Committee makes no further comment*
Ministerial Correspondence

Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015

The Bill was introduced into the Legislative Assembly on 6 October 2015 by Hon Martin Foley MLA, Minister for Equality. The Committee considered the Bill on 19 October 2015 and made the following comments in Alert Digest No. 13 of 2015 tabled in the Parliament on 20 October 2015.

Committee comments

Charter report

Marital status discrimination – Adoption requirements – Certain couples must have been living with each other for not less than two years

Summary: The Committee will write to the Attorney-General seeking further information as to the compatibility of clauses 7 and 9, to the extent that they require different living arrangements as preconditions for adoption, depending on whether applicants for adoption are married, in a registered domestic relationship or in an unregistered domestic relationship, with the Charter’s rights against discrimination on the basis of marital status.

The Committee notes that clause 7, amending existing s. 11, permits an adoption order to be made in favour of 2 persons ‘who are in a registered domestic relationship with each other and have been so for not less than 2 years’. By contrast, an adoption order can only be made in favour of people who are ‘living in a domestic relationship’, or a combination of a marriage and a domestic relationship, if they ‘have been so living for not less than two years’.

The Committee observes that the effect of clause 7 may be to permit people in registered domestic relationships for at least two year (but not people who are not in an unregistered relationship, or only registered within the previous two years), to adopt even if they have lived separately from their partners during part of those two years.

The Committee also notes that clause 9, amending existing s. 20A, bars people who are married to, in a registered domestic relationship with, or in a domestic relationship with either another applicant for adoption or a relative of the child, from being assessed for their suitability to adopt unless they ‘have been married to each other or living in that relationship with each other for not less than two years’.

The Committee observes that a possible effect of clause 9 is to bar people in domestic relationships (but not married people) from being assessed for their suitability to adopt if they have lived separately from their partners during part of the preceding two years.

The Committee considers that clauses 7 and 9, to the extent that require different living arrangements as preconditions for adoption depending on whether applicants for adoption are married, in a registered domestic relationship or in an unregistered domestic relationship, may engage the Charter’s rights against discrimination on the basis of marital status. Although the Statement of Compatibility addresses discrimination on the basis of gender identity, sex and sexual orientation, it does not address discrimination on the basis of marital status.

\(^{1}\) Charter s. 8. See Charter s. 3 (definition of ‘discrimination’) and Equal Opportunity Act 2010, s. 6(h).
The Committee notes that similar laws in the ACT and NSW impose identical conditions on all couples who seek to adopt, whether married, registered or unregistered.ii For example, the ACT’s statute provides:

An adoption order for a child or young person may be made in favour of 2 people jointly if— …

(b) they have lived together in a domestic partnership for at least 3 years (whether or not married or in a civil union); and

c) the court considers they have demonstrated the stability of, and their commitment to, the domestic partnership…

The Committee will write to the Minister for Equality seeking further information as to the compatibility of clauses 7 and 9, to the extent that they require different living arrangements as preconditions for adoption, depending on whether applicants for adoption are married, in a registered domestic relationship or in an unregistered domestic relationship, with the Charter’s rights against discrimination on the basis of marital status.

Minister’s response

The Committee thanks the Minister for the attached response.

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ii Adoption Act 1993 (ACT), s. 14(b), (c); Adoption Act 2000 (NSW), s. 28(4). In Tasmania, couples are only required to have lived together during the required period before (but not after) registration: Adoption Act 1988 (Tas), s. 20(2). See also Adoption Act 1994 (WA), s. 39(3).
Ms Lizzie Blandhorn MLA
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament of Victoria
Parliament House
Spring Street
East Melbourne 3002

Dear Ms Blandhorn,

Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015

I am writing in response to the Committee’s query on the above Bill made in Alert Digest No.13 of 2015 and tabled in Parliament on 20 October 2015.

The Committee sought further information as to the compatibility of clauses 7 and 9, to the extent that they require different living arrangements as preconditions for adoption, depending on whether applicants for adoption are married, in a registered domestic relationship or in an unregistered domestic relationship.

Married and de facto couples are treated differently in relation to living arrangements under the present Act. The legislative reforms were informed by a review of the Act by Mr Eamonn Moran PSM QC. In conducting the review, Mr Moran identified a number of adoption related matters considered to be beyond the scope of the review. One of these is achieving consistency in living arrangements.

The Minister for Families and Children is considering further opportunities for modernising the Adoption Act. I will refer matters considered outside the scope of the review, including whether consistency should be achieved in living arrangement requirements, to the Minister to consider as part of that modernisation process.

Yours sincerely,

Martin Foley MP
Minister for Equality
Justice Legislation Amendment (Police Custody Officers) Bill 2015

The Bill was introduced into the Legislative Assembly on 6 October 2015 by Hon Wade Noonan MLA, Minister for Police. The Committee considered the Bill on 19 October 2015 and made the following comments in Alert Digest No. 13 of 2015 tabled in the Parliament on 20 October 2015.

Committee comments

Charter report

Life – Degrading treatment – Movement – Privacy – Security of the person – Treatment of detainees – Police custody officers not liable for injury or damage from use of reasonable force

Summary: The Committee will write to the Minister seeking further information as to whether or not clauses 7 and 21 bar a Victorian court from hearing and determining an injured person’s claim for declarations that a police custody officer’s use of reasonable force to compel a person the police custody officer is managing, transporting or supervising to obey an order is contrary to the obligation in Charter s. 38 for police custody officers to act compatibly with and give proper consideration to human rights.

The Committee notes that clause 7, inserting a new section 200J into the Victoria Police Act 2013, and clause 21, inserting a new section 104DD into the Corrections Act 1986, provide that a ‘police custody office may, where necessary, use reasonable force to compel a person the police custody officer is’ supervising, transporting or (for new section 104DD) managing ‘to obey an order given by the police custody officer in the exercise of a function or power the police custody has under’ new Part 11A of the Victoria Police Act 2013 or new Division 5 of Part 9A of the Corrections Act 1986.

The Statement of Compatibility remarks:

The power to use reasonable force to compel an offender to obey a direction and apply instruments of restraints will necessarily involve the physical restraint or apprehension of a person, which may constitute an interference with an offender’s rights to life (s 9), freedom of movement (s 12), bodily privacy (s 13), security of person (s 21), humane treatment when deprived of liberty (s 21) and protection from cruel, inhuman or degrading treatment (s 10).

The use of force may reasonably limit these rights provided it occurs within the framework of the law and with the objective of protecting public order, people's lives or property. Human rights principles require that the law and policies governing the use of force protect life to the greatest extent possible and safeguard the circumstances in which force is used. Any use of force must be no more than absolutely necessary and strictly proportionate to achieving a clearly-defined lawful purpose.

Existing operational procedures for police officers exercising similar powers under the Corrections (Police Gaols) Regulations 2015 require that the use of force is always proportionate to the relevant safety risk and is a last resort. Officers are trained to appropriately assess security risks and must identify possible courses of action that involve the use of all other options before resorting to the use of force to manage risks to safety, such as verbal direction, communication or negotiation. PCOs will undergo similar training and be subject to similar operational procedures in how to manage difficult situations and how to use force safely when there are no other alternatives. I also note that PCOs are

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See also new section 200M, extending new section 200J to police custody officers directed by a court to supervise a person who the court has detained on court premises or who has surrendered to the court’s custody in answer to the person’s bail.
required to take all reasonable steps to ensure that a detained person’s safety and welfare is maintained.

However, the Committee notes that sub-section (2) of both new section 200J of the Victoria Police Act 2013 and new section 104DD of the Corrections Act 1986 provides that ‘[a] police custody officer who uses force in accordance with this section is not liable for injury or damage caused by that use of force.’

Speaking generally of the Bill’s provisions, the Statement of Compatibility remarks:

PCOs will be subject to a range of internal and external measures to ensure appropriate oversight, discipline and management, including being:

- subject to the obligations of public authorities under section 38 of the charter, including the requirement to act in a way that is compatible with human rights, and, in making a decision, to give proper consideration to relevant human rights.

However, the Committee observes that Victoria’s Court of Appeal has recently held that a statutory ‘privative clause’ may have the effect of preventing a Victorian court from hearing and determining an injured person’s claim for declarations that a use of reasonable force is contrary to the obligation in Charter s. 38 for public authorities to act compatibly with and give proper consideration to human rights.iv

The Committee will write to the Minister seeking further information as to whether or not clauses 7 and 9, inserting new section 200J(2) into the Victoria Police Act 2013 and new section 104DD(2) into the Corrections Act 1986, bar a Victorian court from hearing and determining an injured person’s claim for declarations that a police custody officer’s use of reasonable force to compel a person the police custody officer is managing, transporting or supervising to obey an order is contrary to the obligation in Charter s. 38 for police custody officers to act compatibly with and give proper consideration to human rights.

The Committee notes the very detailed and helpful statement of compatibility accompanying the Bill.

Minister’s response

The Committee thanks the Minister for the attached response.

iv Bare v IBAC [2015] VSCA 197, discussing s. 109(1) of the now repealed Police Integrity Act 2008.
Ms Lizzie Blandthorn MLA  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House, Spring St  
MELBOURNE 3000  

Dear Ms Blandthorn  

Justice Legislation (Police Custody Officers) Bill  

Thank you for the Scrutiny of Acts and Regulation Committee’s comments on the Justice Legislation (Police Custody Officers) Bill 2015. As outlined in the Bill’s Statement of Compatibility, several rights contained in the Charter of Human Rights and Responsibilities Act 2006 are relevant to the Bill. I welcome the Committee’s comments on the Bill’s compatibility with the Charter rights. 

As reported in the 15th Alert Digest of 2015, the Committee requests “further information as to whether or not clauses 7 and 9, inserting new section 200J(2) into the Victoria Police Act 2013 and new section 104DD(2) into the Corrections Act 1986, bar a Victorian court from hearing and determining an injured person’s claim for declarations that a police custody officer’s use of reasonable force to compel a person the police custody officer is managing, transporting or supervising to obey an order is contrary to the obligation in Charter section 38 for police custody officers to act compatibly with and give proper consideration to human rights”. 

I can advise that the Bill does not contain a privative clause. Its provisions are not intended to operate to prevent a court from hearing any actions. The Bill therefore provides no barrier to a court hearing and determining according to law any claim brought by a person injured in the course of a police custody officer’s duties. This includes claims for declarations that a police custody officer’s use of reasonable force is contrary to a person’s Charter rights. It would, of course, be a matter for a court to determine any matter according to law and the specific circumstances of any particular case. 

Should the Committee have any further queries about the Bill, I would be pleased to assist. 

Yours sincerely  

Hon Wade Noonan MP  
Minister for Police
Relationships Amendment Bill 2015

The Bill was introduced into the Legislative Assembly on 6 October 2015 by Hon Martin Pakula MLA, Attorney-General. The Committee considered the Bill on 19 October 2015 and made the following comments in Alert Digest No. 13 of 2015 tabled in the Parliament on 20 October 2015.

Committee comments

Charter report

Discrimination on the ground of gender identity, marital status, sex and sexuality – Recognition in Victoria of overseas same-sex and gender diverse marriages – No automatic recognition of overseas laws that permit some minors to marry – No local mechanism to end recognition

Summary: The Committee will write to the Minister seeking further information as to whether or not clause 6, by providing narrower rules for the recognition of overseas same-sex marriages and their end than those provided in Australian law for opposite-sex marriages, is compatible with the Charter’s rights against discrimination on the grounds of gender identity, marital status, sex and sexuality.

The Committee notes that clause 6, inserting a new section 33C, provides that a ‘[f]or the purposes of this Act, a corresponding law relationship, that is not a marriage within the meaning of the Marriage Act 1961 of the Commonwealth, is taken to be a registered domestic relationship’. New section 33A provides that a ‘corresponding law relationship’ includes a relationship registered or formally recognised under a law of another country that satisfies the ‘general requirements’ in new section 33B. The Marriage Act 1961 (Cth) presently defines a marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.

The Explanatory Memorandum remarks:

This means that a corresponding law relationship will be treated as if it were a registered domestic relationship for the purposes of Victorian law, even though it is not recorded in the Relationships Register.

It is not necessary for a corresponding law relationship to include marriages under the Marriage Act 1961 of the Commonwealth because these relationships are already recognised as marriages for the purposes of Victorian law.

However, the Committee notes that the opening words of new section 33C, ‘[f]or the purposes of this Act’, may prevent the section from applying to Victorian laws other than the Relationships Act 2008.

The Statement of Compatibility remarks:

The recognition of relationships formalised in corresponding jurisdictions in clause 6 of the bill will mean that a couple in Victoria that has formalised their relationship under a corresponding law, either before or after commencement of the bill, will not need to re-register their relationship under the Victorian registration scheme to enjoy the benefits of registration. This provides recognition under Victorian law for couples who have

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vi Marriage Act 1961 (Cth), s. 5[1].

vi The Committee also notes that corresponding law relationships that are not recorded in the Relationships Register may not be automatically recognised for the purposes of Commonwealth and Tasmanian law: see Acts Interpretation Act 1901 (Cth), s. 2E and Acts Interpretation Regulations 2008, reg 3(a) (recognising relationships that are ‘registered’ under the Relationships Act 2008 as a registered domestic relationship under the Act); and Relationships Act 2003 (Tas), s. 65A (recognising registered domestic relationships that are ‘registered’ under the Registration Act 2008.)
formalised their relationships under interstate registration schemes and overseas laws that allow for same-sex marriage and civil unions. Accordingly, the bill promotes the right to equality in the charter for people in couple relationships, regardless of their sex, sexual orientation or gender identity.

However, the Committee notes that new section 33B provides that a ‘corresponding law’ must provide that ‘a relationship must be between two adult persons’, defined in existing s. 3 to mean persons who are ‘18 years of age or more’. The Committee observes that the effect of clause 6 is therefore to only permit the automatic recognition in Victoria of same-sex or gender diverse marriages and civil unions made under laws that are only available to people aged 18 or over. By contrast, the Marriage Act 1961 (Cth) provides for the automatic recognition in Australia of overseas opposite-sex marriages of people aged 16 or over.\(^\text{vii}\) For example, same-sex or gender diverse marriages under Canadian or Scottish law (which permit marriage at 16\(^\text{viii}\)) will not be automatically recognised under clause 6,\(^\text{ix}\) even though opposite-sex marriages under those same laws are automatically recognised as valid marriages under Australian law. The Committee considers that new section 33B, in requiring that a ‘corresponding law’ must provide that a relationship be between two persons who are 18 years of age or older, may engage the right to equal and effective protection against discrimination under section 8 of the Charter.

The Committee also notes that, while the Relationships Act 2008 provides for the revocation of the ‘registration of a registered relationship’,\(^\text{x}\) it does not appear to provide for the cessation of the application of new section 33C to a corresponding law relationship. The Committee observes that the only apparent way for a party to such a relationship to prevent it from being treated as a registered domestic relationship under Victorian law is to end it in a way that is recognised by a corresponding law. However, while Australian law permits people in any opposite-sex marriage (whether Australian or overseas) to obtain an Australian court order dissolving that marriage (a dissolution which will in turn be automatically recognised under Victorian law), Australian law does not provide for the dissolution of same-sex or gender diverse marriages.\(^\text{xi}\) For example, a person who married under Irish law to a same-sex or gender diverse person and is now living in Victoria must obtain a divorce in an Irish court to prevent the recognition of that marriage in Victoria under new section 33C,\(^\text{xii}\) while a similarly placed person in an equivalent opposite-sex marriage can obtain a divorce in the Family Court of Australia.\(^\text{xiii}\)

The Committee will write to the Attorney-General seeking further information as to the effect of the opening words ‘[f]or the purposes of this Act’ in clause 6 and as to whether or not clause 6, by providing narrower rules for the recognition of overseas same-sex marriages and their end than those provided in Australian law for opposite-sex marriages, is compatible with the Charter’s rights against discrimination on the grounds of gender identity, marital status, sex and sexuality.

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\(\text{vii}\) Marriage Act 1961 (Cth), s. 88D(3).

\(\text{viii}\) Civil Marriage Act 2005 (Canada), s. 2.2 (although most provinces requires parental, but not court, consent for marriages under 18); Marriage (Scotland) Act 1977 (Scotland), s. 1(1).

\(\text{ix}\) Unless those laws are prescribed under new section 33A(a).

\(\text{x}\) Existing s. 11.

\(\text{xii}\) Family Law Act 1975 (Cth), s. 48(1) (and see Marriage Act 1961 (Cth), s. 88EA.)

\(\text{xiii}\) Irish law requires that the spouses must have been separated for four out of the past five years: Family Law (Divorce) Act 1996 (Ireland), s. 5(1). Alternatively, the party could seek a divorce in a third country, but that would only end the Irish divorce if one of the parties was domiciled in that country: Domicile and Recognition of Foreign Divorces Act 1986 (Ireland), s. 5(1).

\(\text{xiii}\) Australian law generally requires that the spouses have been separated for 12 months: Family Law Act 1975 (Cth), s. 48(2).
Minister’s response

The Committee thanks the Minister for the attached response.

Committee Room
9 November 2015
Ms Lizzie Blandthorn MLA  
Chairperson, Scrutiny of Acts and Regulations Committee  
Parliament of Victoria  
Spring Street  
EAST MELBOURNE VIC 3002

Dear Chairperson,

Thank you for the Committee’s letter of 20 October 2015 regarding the Relationships Amendment Bill 2015 (the Bill).

The Committee has queried whether:
- the operation of new section 33C, inserted by clause 6 of the Bill, is prevented from applying to Victorian laws other than the Relationships Act due to the opening words ‘[f]or the purposes of this Act’; and
- clause 6, by providing narrower rules for the recognition of overseas same-sex marriages and their end than those provided in Australian law for opposite-sex marriages, is compatible with the right to equal and effective protection against discrimination under section 8 of the Charter.

New section 33C – application to other laws

As noted in the Explanatory Memorandum, it is intended that section 33C allow a corresponding law relationship to be treated as if it were a registered domestic relationship for the purposes of Victorian law, even though it is not recorded in the Relationships Register.

Parliamentary Counsel has advised that the opening words, ‘[f]or the purposes of this Act’, are commonly used in drafting legislation to link a new provision to an existing definition (in this case, the definition of ‘registered domestic relationship’ in section 3 of the Relationships Act). In addition, the concept of a ‘registered domestic relationship’ is used across the statute book and is always defined as having the same meaning as in the Relationships Act, which, as I have mentioned, will be altered by the operation of new section 33C. I am therefore confident that section 33C will apply to any Victorian law that applies to a registered domestic relationship.

Clause 6 - right to equality

As I outlined in the second reading speech, the Victorian Government supports marriage equality and will continue to advocate for a change to Commonwealth laws to recognise same-sex marriages.
In the meantime, the Bill aims to alleviate this discrimination by formally recognising same-sex marriages from overseas jurisdictions within current constitutional limits. In the recognition scheme set out in clause 6 of the Bill, a range of formalised relationships, including same-sex marriages, are deemed to be registered domestic relationships and not marriages for the purposes of Victorian law, noting that a registered domestic relationship is different from a marriage.

As identified in your letter, the conditions in clause 6 for the recognition of overseas same-sex marriages under the Relationships Act will be different to the conditions for recognition of overseas opposite-sex marriages under Commonwealth law. One of those conditions is that the parties to the overseas same-sex marriage must be 18 years old or over while overseas opposite-sex marriages may be recognised even where the parties are 16 or 17 years old. For the purposes of Victorian law and the operation of the Relationships Register, it is important to ensure that the criteria for the recognition of relationships from other jurisdictions are consistent with and equal to the criteria that apply to Victorian domestic relationships.

The Relationships Act only provides for recognition of relationships where both parties are 18 years old or more. As noted in the Statement of Compatibility to the Relationships Bill 2007, this age requirement is a reasonable limitation on the right to equality in order to protect children who are vulnerable because of their age. It is considered that parties under the age of 18 would be less likely to have the maturity and capacity to make an informed decision about registering a relationship and to understand the consequences of registration. Although the Marriage Act 1961 (Cth) provides automatic recognition for 16 and 17 year olds in opposite-sex marriages, the marriage of persons under 18 is also restricted. In Australia, 16 and 17 year olds must, in the absence of parental consent, obtain an order from a Family Court judge or a magistrate to legally marry. There is no such protective court oversight for the registration of domestic relationships.

The Bill does not provide for the cessation of corresponding law relationships automatically recognised under the Bill. The Registrar of Births, Deaths and Marriages, who administers the Relationships Register, is not empowered to adjudicate regarding the termination of relationships formalised in other jurisdictions. In order to formally end a relationship, parties to a corresponding law relationship must do so in a way that is recognised under the corresponding law. While Australian law permits people in any opposite-sex marriage (whether Australian or overseas) to obtain an Australian court order dissolving that marriage, due to ongoing discrimination by the Australian Government against same-sex couples, there is no process in Australian law for the dissolution of same-sex or gender diverse marriages formalised overseas. This is a matter for the Federal Parliament.

I hope this information is of assistance and I thank the Committee for raising these issues.

Yours sincerely

[Signature]

THE HON MARTIN PAKULA MP
Attorney-General

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## Appendix 1

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Appendix 2
Committee Comments classified by Terms of Reference

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

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly on rights and freedoms

Wrong Amendment (Prisoner Related Compensation) Bill 2015 5, 6

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

Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 13, 14
Back to Work Bill 2014 1, 2
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Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015 14
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Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Bill 2015 11, 12
Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Bill 2015 11, 12
Terrorism (Community Protection) Amendment Bill 2015 14
Table of correspondence between the Committee and Ministers or Members during 2015

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

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Appendix 4
Statutory Rules and Legislative Instruments considered

The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 9 November 2015.

**Statutory Rules Series 2015**
SR No. 104 – Transfer of Land (Fees) Interim Regulations 2015
SR No. 105 – Subdivision (Registrar’s Fees) Interim Regulations 2015
SR No. 106 – Improving Cancer Outcomes (Screening Reporting) Regulations 2015
SR No. 107 – Improving Cancer Outcomes (Diagnosis Reporting) Regulations 2015
SR No. 108 – Agricultural and Veterinary Chemicals (Control of Use) (Fertilisers) Regulations 2015
SR No. 110 – Drugs, Poisons and Controlled Substances Amendment (Cultivation of a Narcotic Plant) Regulations 2015
SR No. 111 – Freedom of Information Amendment Regulations 2015
SR No. 112 – Victorian Civil and Administrative Tribunal (Amendment No.13) Rules 2015
SR No. 113 – Magistrates’ Court Criminal Procedure Amendment (Infringements Court and Other Matters) Rules 2015
SR No. 115 – Cemeteries and Crematoria Amendment Regulations 2015
SR No. 118 – Road Safety (Vehicles) Amendment (Declared Apprenticeships) Regulations 2015

**Legislative Instruments 2015**
Ministerial Order 860 – Fee for Temporary Approval to be Employed or Engaged as an Early Childhood Teacher 2015-16)
Electronic Conveyancing Participation Rules (Version 3)
Registrar’s Requirements for Paper Conveyancing (Version 1)
Nudity (Prescribed Areas) Act 1983 – Revocation of Area – Notice
Determination of Specifications for Taxi-Cabs
Electronic Conveyancing Operating Requirements (Version 3)
Industrial Waste – Classification for Drilling Mud
Industrial Waste – Classification for Unprocessed Used Cooking Fats and Oils
Approval of the Transfer of the King Valley Community Memorial Hall from the Whitfield RSL Sub-Branch Building Patriotic Fund to King Valley Community Memorial Hall Inc.
Order – Governor In Council VicRoads – Victorian Government Purchasing Board
Appendix 5

Submissions received concerning the Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015

The Committee received submissions on the Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015 from the following organisations:

- Australian Christian Lobby
- Family Planning Victoria
- Fertility Control Clinic
- Human Rights Law Centre
- Women’s Health Victoria

Copies of the submissions from Family Planning Victoria, the Human Rights Law Centre and Women’s Health Victoria are reproduced below. The submissions are also available on the Committee’s website. Publication of the submissions from the Australian Christian Lobby and the Fertility Control Clinic is pending.
Dear Ms Blandthorn,

Re: Public Health & Wellbeing Amendment (Safe Access Zones) Bill 2015.

Family Planning Victoria (FPV) makes a submission to the committee on the Public Health & Wellbeing Amendment (Safe Access Zones) Bill 2015, as referred to in the letter as ‘the Bill’.

The stated purpose of the Bill is to amend the Public Health and Wellbeing Act 2008:
   a) to provide for safe access zones around premises at which abortions are provided; and
   b) to prohibit publication and distribution of certain recordings, and;

After Part 9 of the current Public Health & Wellbeing Act insert-

Part 9A-Safe success to premises at which abortions are provided
The purpose of this part is-
   a) to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of-
      i. people accessing the services provided at those premises; and
      ii. employees and other persons who need access to those premises in the course of their duties and responsibilities; and
   b) to prohibit publication and distribution of certain recordings.

FPV considers the Bill does not directly or indirectly:
1. trespass unduly upon rights of freedoms
2. nor is it incompatible with the human rights set out in The Charter of Human Rights and Responsibilities'.

FPV considers the content of the Public Health & Wellbeing Amendment (Safe Access Zones) Bill 2015 supports the following rights as described in The Charter of Human Rights and Responsibilities.

i. Freedom of Movement - people have the right to enter Victoria, to move freely within it and freely choose their place of residence.

The Bill supports the principal to move freely which includes accessing premises at which abortions are legally provided without being met by behaviours also clearly described in The Bill. Prohibited behaviour means:
a) In relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting harassing, intimidating, interfering with, threatening, hindering, obstructing, or impending that person by any means; or
b) Subject to subsection (2), communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety; or
c) Interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or
d) Intentionally recording by any means. Without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person’s consent; or
e) any other prescribed behaviour;

*publish* has the same meaning as in the *Open Courts Act 2013*;

(2) Paragraph (b) of the definition of prohibited behaviour does not apply to an employee or other person who provides services at premises at which abortion services are provided.

A report release in September 2015 by Aston University titled ‘A Hard Enough Decision to Make’: Anti-Abortion Activism outside Clinics in the Eyes of Clinic Users, A report on the comments made by British Pregnancy Advisory Service services users, authored by Dr Graeme Hayes and Dr Pam Lowe, documents the analysis of 205 separate user comments, from 11 different abortion clinics recorded between 2011 and 2015. Hayes & Lowe conclude;

‘Actions outside these clinics account for the greatest number of responses by clinic users expressing stress, distress, anxiety and intimidation at the presence of anti-abortion activists… It is the presence of anti-abortion activists that emerges from the data as the central cause of distress for clinic users’ (Hayes & Lowe, 2015).

‘We can thus conclude that numerous clinic users considered anti-abortion actions outside clinics to be intrusive, and emotionally onerous, even where the conduct of the activists was in itself polite, and did not feature graphic imagery’ (Hayes & Lowe, 2015).

ii. Privacy & Reputation

a. A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with and the right to have his or her reputation unlawfully attacked.

Women in Victoria have the right to make a decision to have access to legal medical services delivering – abortion provision. ‘The presence of anti-abortion activists outside clinics effectively politicises the individual decisions to seek an abortion taken by individual women, and draws them into the wider public debate, whether or not they wish their reproductive choices to be part of the political conversation. This is experienced by many service users as a direct challenge to women’s legal right to access abortion, as well as a significant invasion of healthcare privacy’ (Hayes & Lowe, 2015).

The Bill also identifies the purpose of prohibiting publication and distribution of certain recordings; Hayes & Lowe have also commented in relation to this issue in their report. ‘Given that clinic users consider seeking an abortion to be a fundamentally private act, being filmed deliberately is experienced as what we might term a ‘paparazzi encounter’ – in other words, as a private moment photographed without consent and exploited by others for their own self-interest. We can reasonably assume that this experience is not something that the majority of
clinic users will have directly encountered before, and it consequently becomes a significant moment of anxiety and threat. Whilst the anti-abortion groups themselves may not have the intention of publicising the images, the women entering the clinics have no way of knowing what will happen to the footage, and accordingly experience being filmed as a deliberate act of intimidation, harassment, and violation’ (Hayes & Lowe, 2015).

The Bill’s purpose, content and definition of prohibited behaviour does not trespass unduly upon rights or freedoms, particularly those regarding:

i. Freedom of thought, conscience, relation and belief
ii. Freedom of Expression
iii. Peaceful assembly and freedom of association

If you wish to discuss our involvement further, please contact me on 03 9257 0100 or 0409 141 996.

Yours sincerely

LYNNE JORDAN
Chief Executive Officer

2 Dr Graeme Hayes and Dr Pam Lowe, September 2015, A Hard Enough Decision to Make’: Anti-Abortion Activism outside Clinics in the Eyes of Clinic Users, A report on the comments made by British Pregnancy Advisory Service by Aston University Birmingham.
Ms Lizzie Blandthorn MP  
Chair  
Scrutiny of Acts and Regulations Committee  
Parliament of Victoria  

By email: sarc@parliament.vic.gov.au

5 November 2015

Dear Chair

Public Health and Wellbeing (Safe Access Zones) Bill 2015

Thank you for the opportunity to make a submission concerning the Public Health and Wellbeing (Safe Access Zones) Bill 2015.

The Human Rights Law Centre strongly supports the bill.

Gap in legal protection of women accessing abortions

For the last five years we have acted for the Fertility Control Clinic in its efforts to stop anti-abortionists harassing and intimidating staff and patients as they attend the clinic. The clinic has experienced daily harassment for over two decades.

In 2014 the clinic brought a Supreme Court action seeking to compel the Melbourne City Council to exercise its powers under the Public Health and Wellbeing Act 2008 (Vic) to remedy the nuisance out the front of the clinic. The clinic put expert psychiatric evidence before the court about the daily harassment and intimidation of people attending the clinic and the psychological effects on staff of the anti-abortionists. The evidence was uncontested.

In August 2015 the Fertility Clinic lost its bid in the Supreme Court, despite the court finding that the anti-abortionists' behaviour may well constitute a nuisance. The disappointing court decision highlights the urgent need for law reform to protect the rights of women to safely and privately see their doctor.

Balancing human rights of patients, staff and anti-abortionists

The Human Rights Law Centre strongly supports the rights to freedom of opinion and expression, including the rights of anti-abortionists to hold and express those views. However those rights are not
absolute and must be balanced against the rights of women to safely and privately access health care, and their rights to non-discrimination.

We believe the bill strikes an appropriate balance between the competing sets of rights in the circumstances.

Similar access zones are in place in Canada and the United States. In those jurisdictions courts have found that sensible access zones can be a lawful restriction on free speech and protest rights. I attach a table that summarises the findings in the Canadian and US cases.

We also note that Tasmania created access zones in similar terms to the bill when they decriminalised abortion in 2013.

We would be happy to provide the Committee any further information or assistance.

Yours sincerely

Emily Howie

Director of Advocacy and Research
### Court decisions on legality of access zones in USA and Canada

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Law</th>
<th>Type and size of access zone</th>
<th>Prohibited action</th>
<th>Relevant cases</th>
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<tr>
<td>Colorado, USA</td>
<td>Colorado Rev. Stat. s 18-9-122(3) (1999)</td>
<td>Floating no approach zone of area within <strong>100 ft</strong> of a health care facility, in which it was unlawful to go within 8 ft of a non-consenting individual for purpose of prohibited action</td>
<td>knowingly approaching someone “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling”</td>
<td>Upheld by US Supreme Court in <em>Hill v. Colorado</em> (2000)</td>
</tr>
<tr>
<td>Massachusetts, USA</td>
<td>Reproductive Health Care Facilities Act (2000)</td>
<td>Floating no approach zone of area within <strong>18 ft</strong> of reproductive health care facilities in which it’s unlawful to go within 6 ft of a person for purpose of prohibited activity</td>
<td>knowingly approaching someone “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling”, knowingly obstructing, detaining, hindering or blocking someone’s entry or exit</td>
<td>Upheld by United States Court of Appeals for the First Circuit in <em>McGuire v. Reilly</em> (2002)</td>
</tr>
<tr>
<td>British Columbia, Canada</td>
<td>Access to Abortion Services Act (RSBC 1996)</td>
<td>Fixed buffer zone up to <strong>50m</strong> in which certain activity is prohibited</td>
<td>“sidewalk interference”, protest, beset, interfere with service provider or patient, intimidate</td>
<td>Upheld by British Columbia Court of Appeal <em>R. v. Watson, R. v. Spratt</em> (2008)</td>
</tr>
<tr>
<td>Massachusetts, USA</td>
<td>Amended Reproductive Health Care Facilities Act (2007)</td>
<td>Fixed buffer zone made it a crime to stand on a public road or sidewalk within <strong>35 ft</strong> of a reproductive health care facility</td>
<td>knowingly entering or remaining in the zone. With exceptions for those entering or leaving the clinic, clinic staff, emergency services and members of the public passing through zone to another destination</td>
<td>Struck down by US Supreme Court in <em>McCullen v Coakley</em> (2014)</td>
</tr>
<tr>
<td>City of Pittsburgh, USA</td>
<td>S 623.04 Pittsburgh Code of Ordinances</td>
<td>Fixed buffer zone in an area <strong>15 feet</strong> from any entrance to a hospital or health care facility in which it is unlawful to engage in prohibited action</td>
<td>knowingly congregating, patrolling, picketing or demonstrating</td>
<td>Upheld by United States District Court for the Western District of Pennsylvania in <em>Bruni v City of Pittsburgh</em> (March 2015)</td>
</tr>
</tbody>
</table>

*Human Rights Law Centre, 17 June 2015*
5 November 2015

Submission to the Scrutiny of Acts and Regulations Committee regarding the Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015

Women’s Health Victoria (WHV) strongly supports amending the Public Health and Wellbeing Act 2008 to provide safe access zones to ensure that staff and patients can safely access premises at which abortions are provided.

WHV is a statewide women’s health promotion, information and advocacy service. We work collaboratively with health professionals, policy makers and community organisations to influence and inform health policy and service delivery for women.

WHV supported abortion law reform in 2008, ensuring that women in Victoria have the right to a safe and legal abortion service. We now need to ensure that this is available to women without intimidation, obstruction or violation of medical privacy. We are therefore pleased to support further legislative reform to safeguard the rights of women to safely access essential health services.

WHV appreciates the opportunity to provide this submission to the Scrutiny of Acts and Regulations Committee and would be happy to provide further advice to the Committee as requested.

Yours sincerely,

Rita Butera
Executive Director
Why we need safe access zones legislation in Victoria

Safe access to abortion is good public health practice and plays an important role in supporting women’s broader health and wellbeing. The ability to access safe reproductive health and abortion services has lifelong impacts for women’s ability to participate equally in work and community life, earn an income and care for their families.

Inability to access sexual and reproductive health services, including abortion, contributes to social and economic disadvantage for women and their communities and further exacerbates health inequalities. Improving sexual and reproductive health is recognised as a health and wellbeing priority in the Victorian Government’s Public Health and Wellbeing Plan 2015-2019.

Safe Access Zones legislation enables women, and those accompanying them, to access premises that provide abortion in a safe and confidential manner, and without the threat of harassment or shaming. It also enables health professionals and staff to access their workplace without being verbally abused, obstructed or threatened.

Despite Abortion Law Reform in 2008 making abortion legal in Victoria, and broad community support for a woman’s right to choose, groups opposing abortion have continually attempted to obstruct and harass women accessing abortion-related services. The general aim of anti-abortion groups is to deter women from accessing abortion services.

Many women experiencing unplanned or unwanted pregnancies are already feeling distressed, isolated, anxious and fearful. Being confronted by anti-abortion groups at an already difficult, sensitive and personal time exacerbates these feelings. It is intimidating and demeaning for women to have to run the gauntlet of anti-abortion groups in order to access essential and legal health services.

Targeting health services in this way can also have impacts on women’s health and wellbeing. For example, health services have reported that some patients are too afraid to attend clinics when anti-abortion groups are out the front, or to return for follow-up appointments because of their experience when previously accessing the clinic.¹

There is evidence on the local and international level that encountering anti-abortion groups while attempting to access legal abortion services has significant impacts on the health and wellbeing of women.

A 2015 report from the United Kingdom analyses the comments made by women seeking an abortion who have encountered anti-abortion activists outside the clinic. The research shows that the presence of anti-abortion activists outside clinics is a significant source of distress for women seeking abortions.

The report found that many informants considered the presence of activists outside the clinic to be an inappropriate intrusion into a private medical decision. Even if not

approached directly, many women reported that being watched by the activists was very intimidating. The presence of activists was considered to draw public attention to the private medical decision they had made. Many service users reported significant levels of alarm and distress, suggesting that some service users experience the presence of activists outside the clinic as harassment.  

The Victorian Law Reform Commission Final Report on Abortion Law in Victorian in 2008 specified the following impacts on abortion service users and providers in the Victorian context:

- A woman, who wished to remain anonymous, described her own experience as one where she was in ‘no position to defend myself from such a cowardly attack at a vulnerable time in my life’. She felt there was a lack of protection for women and their friends, partners, families, and support people and said this was of ‘grave concern’. She submitted that the law should provide protection for workers at and clients of abortion services.
- The Victorian Women with Disabilities Network noted that women with disabilities use clinics for a variety of reproductive health services. It reported that women may be confronted by protestors regardless of their reasons for using the clinic.
- A medical practitioner, who claimed to have received a death threat in the past, said one of the reasons for local specialists in regional areas not performing abortions is the ‘concern about verbal or physical attacks’.  

While anti-abortion groups have targeted many women and clinics across Victoria before and since abortion law reform in 2008, their continued and harmful presence at the Fertility Control Clinic in East Melbourne has highlighted the need for specific legislation to finally address this longstanding problem for all abortion providers and their patients. The impacts of the continued anti-abortion presence at the Fertility Control Clinic means that patients and staff have to walk the gauntlet to access the centre on a daily basis and are often subjected to misinformation, offensive signs and photographs and unsolicited contact and advice.

As recently as 2001 an anti-abortion activist murdered the clinic’s security guard in an attempt to enter the clinic and commit further violence on staff and patients. The ongoing impacts on staff and patients of unwanted and unavoidable contact with anti-abortion groups at the clinic are significant given this context.

Reports have been made by the clinic staff to police on numerous occasions. However, police have been unwilling or unable to intervene due to a lack of clarity as to whose responsibility it is to address the longstanding nuisance posed by the groups. Police have

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2 Dr Graham Hayes and Dr Pam Lowe, 'A Hard Enough Decision to Make': Anti-Abortion Activism outside Clinics in the Eyes of Clinic Users. Aston University, 2015, p. 4.
tended to regard this issue as a matter between individuals, urging staff and patients to take names of individual anti-abortion group members and to pursue intervention orders.

This approach is impracticable and ineffective as it places the burden on individual patients and staff to manage their safety, rather than addressing the harassing and intimidating behaviour of anti-abortion activists. Given the daily presence of numbers of rotating anti-abortion group members and the sensitive nature of abortion, patients are extremely unlikely to be able to pursue individual legal action against anti-abortion groups.

The Victorian Law Reform Commission in 2008 commented that, during its consultations, several people and organisations raised the issue of protection outside abortion clinics, citing concerns that the safety and wellbeing of patients and staff were jeopardised because of the intimidation and harassment by anti-abortion protesters.

Although the commission did not make a formal recommendation on this issue, which fell outside its terms of reference, it encouraged the then Attorney-General to consider options for a legislative response.4

In the absence of a legislative response to safe access since 2008, the Fertility Control Clinic has sought to remedy the problem by urging Melbourne City Council to address the issue as a matter of public nuisance. However, in early 2015 the Supreme Court found that the Council was obliged only to assess the nuisance, not to remedy it.5

Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015

We note that the government has undertaken significant consultation with relevant stakeholders including WHV in order to draft the Bill. The terms proposed are consistent with World Health Organisation guidelines for abortion. The Bill reflects the scope and key principles that WHV and other expert organisations have advocated for, and is consistent with best practice.

According to the WHO’s technical and policy guidance for safe abortion, the fear that confidentiality will not be maintained deters many women – particularly adolescents and unmarried women – from seeking safe, legal abortion services, and may drive them to clandestine, unsafe abortion providers, or to self-induce abortion. Confidentiality is a key principle of medical ethics and an aspect of the right to privacy and must be guaranteed.6 Barriers contribute to unsafe abortion by deterring women from seeking care and providers from delivering services within the formal health system.7

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5 The judgment of Justice McDonald of the Supreme Court is available: http://www.austlii.edu.au/au/cases/vic/VSC/2015/424.html

6 World Health Organisation, Safe abortion: technical and policy guidance for health systems, 2012, p.68

WHV agrees freedom of speech means that anti-abortion protesters have the right to protest, however this does not mean they have the right to harass or obstruct women from exercising their legal right to medical services and to privacy. **Protesting should be done at a distance from health services so that it does not intimidate or harass patients.**

WHV believes that the proposed legislation **strikes the right balance** between allowing anti-abortion groups the right to protest and freedom of speech outside of access zones and allowing patients and staff to safely access abortion and reproductive health services.

**Safe Access Zones in other jurisdictions**

Safe access zones have been in place internationally since the 1990s and have been shown to work. This legislation would put Victoria on par with other jurisdictions that provide for safe access to medical services. Tasmania and the A.C.T have successfully introduced access zones legislation and similar legislation is being considered in N.S.W.

Although the Tasmanian legislation is relatively new, it has provided a clear precedent and framework that can be adapted to suit the Victorian context. The A.C.T legislation employs a different model of access zone specifying that anti-abortion protesters are not allowed to enter the 50 metre (minimum) zone at particular times of day. Furthermore, the A.C.T legislation requires the Heath Minister to declare each access zone around an approved medical facility on a case by case basis.

**The Tasmanian model sets a better precedent for Victoria** because it provides a wider safe access zone (150 metres) around all premises at which abortion is provided and does not require case by case approval from the Health Minister.

Similar access zones are already in operation in Victoria in relation to voting booths, logging and duck hunting and have been found not to infringe on freedom of expression.

**Distance encompassed by safe access zones**

The Bill would have the effect of prohibiting certain conduct within a safe access zone of 150 metres around premises where abortions are provided. However, section 185B does not provide a definition of “premises”. It is therefore unclear whether the zone begins a premises’ entrance, or from its perimeter. WHV believes that the zone should commence from the external perimeter of the premises, and not at the entrance.

WHV believes that a distance of 150 metres is necessary to enable women and their support people to access premises safely and in a manner that protects their dignity and privacy.

Although anti-abortion groups have been known to follow women and their support people to and from their cars, a distance of 150 metres will enable services to advise women of how to best access their premises in safety.
Prohibited conduct

It is unclear from the definition of prohibited behaviour in section 185B of the Bill if behaviours prohibited within safe access zones would include silent prayer or religious observance. As stated by the Victorian Minister for Health at the Bill’s second reading, ‘the fact that such communication occurs in the form of religious practice does not diminish the impact upon the rights of people accessing abortion services, nor their right to privacy and dignity’.\(^8\) WHV believes these behaviours should be included within the definition of prohibited behaviours.

Clarification of the role and jurisdiction of police

The bill provides that the new provisions of the Public Health and Wellbeing Act will be enforced by Victoria Police. WHV welcomes the clarification of the role and jurisdiction of police in protecting women’s emotional and physical safety when accessing abortion services, and in enforcing safe access zones. Victoria Police currently enforce the Summary Offences Act, which contains a range of similar offences, for example, relating to trespassing, public order and threatening behaviour. Given their experience, skills and capabilities, Victoria Police are best placed to enforce the new offences.

The bill prohibits communicating in relation to abortions in a manner that could possibly be seen or heard by a person accessing or leaving premises at which abortions are provided where the communication is reasonably likely to lead a person to suffer distress, upset or anxiety. **WHV supports an approach that does not require individual women patients to prove that they have suffered harm as a result of prohibited behaviours within a Safe Access Zone.**

Instead, the Bill will require Police to exercise their discretion as to whether behaviour constitutes a breach of a Safe Access Zone and enables them to issue warnings to move people to a location outside the safe access zone.

It is important that protocols or guidelines are put in place to support police to enforce these laws in a way that will protect women from all forms of harassing behaviour.

Premises and services protected by the Bill

One of the key concerns raised by WHV during consultation on the drafting of the Bill was that all services or premises that provide abortions should be protected by safe access zones. This was to **ensure that women accessing medical abortions (which may be provided in a GP clinic) as well as surgical abortions (more often provided in a hospital or specialist clinic setting) are equally covered by safe access zones.**

WHV supports the wording of the bill that specifies safe access zones “around premises where abortions are provided”, regardless of the setting or abortion type.

WHV welcomes the introduction of Public Health and Wellbeing Amendment (Safe Access Zones) Bill 2015 and considers it an important and long overdue step towards better sexual and reproductive health outcomes and a safer community for Victorian women.

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