Alert Digest No. 5 of 2020

Tuesday, 2 June 2020

On the following Bills

- Appropriation (Interim) Act 2020
- Appropriation (Parliament) (Interim) Act 2020
- Constitution Amendment (Fracking Ban) Bill 2020
- COVID-19 Omnibus (Emergency Measures) Act 2020
- Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020
- Justice Legislation Amendment (Drug Court and Other Matters) Bill 2020
- Local Government (Whittlesea City Council) Act 2020
- Petroleum Legislation Amendment Bill 2020
- Sentencing Amendment (Emergency Worker Harm) Bill 2020
- State Taxation Acts Amendment (Relief Measures) Act 2020
- Wage Theft Bill 2020

And Subordinate Legislation

- Practitioner Remuneration Order 2020
- SR No. 134/2019 – Education and Training Reform Amendment Regulations 2019
- SR No. 163/2019 – Fisheries Regulations 2019
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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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 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
‘PCA’ refers to the Parliamentary Committees Act 2003
‘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 2019 one penalty unit equals $165.22)
‘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
Appropriation (Interim) Act 2020

**Member**  
Hon. Tim Pallas MP

**Portfolio**  
Treasurer

**Introduction Date**  
23 April 2020

**Second Reading Date**  
23 April 2020

**Royal Assent**  
28 April 2020

**Summary**

Note: The Committee reports on this Act pursuant to section 17(c)(i) and (ii) of the *Parliamentary Committees Act 2003*.

The Act provides interim appropriation authority for payments from the Consolidated Fund for the ongoing operations of the Government¹ for the first six months of the 2020-21 financial year. [4] It also provides appropriation for an additional amount to be advanced to the Treasurer for the remainder of the 2019-2020 financial year. [5] It also provides appropriation for an amount to be advanced to the Treasurer to meet urgent claims in the period commencing 1 July 2020 and ending 31 December 2020. [6]

Note the Second Reading Speech: -

‘This Bill provides appropriation authority for the first six months of the 2020-21 financial year for the ongoing operations of Government and for additional measures responding to the COVID-19 emergency.’

**Comments under the PCA**

The Committee makes no comment with respect to its terms of reference under section 17 of the *Parliamentary Committees Act 2003*.

**Charter Issues**

The Act is compatible with the rights set out in the *Charter of Human Rights and Responsibilities Act 2006*.

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¹ This means appropriation for the Department of Courts, Department of Education and Training, Department of Environment, Land, Water and Planning, Department of Health and Human Services, Department of Jobs, Precincts and Regions, Department of Justice and Community Safety, Department of Premier and Cabinet, Department of Transport and Department of Treasury and Finance.
Appropriation (Parliament) (Interim) Act 2020

Member: Hon. Tim Pallas MP
Portfolio: Treasurer
Introduction Date: 23 April 2020
Second Reading Date: 23 April 2020
Royal Assent: 28 April 2020

Summary

Note: The Committee reports on this Act pursuant to section 17(c)(i) and (ii) of the Parliamentary Committees Act 2003.

The Act provides appropriation authority for payments from the Consolidated Fund to the Parliament for the first six months of the 2020-2021 financial year.

Comments under the PCA

The Committee makes no comment with respect to its terms of reference under section 17 of the Parliamentary Committees Act 2003.

Charter Issues

The Act is compatible with the rights set out in the Charter of Human Rights and Responsibilities Act 2006.
Constitution Amendment (Fracking Ban) Bill 2020

Member: Hon. Daniel Andrews MP  
Introduction Date: 17 March 2020  
Portfolio: Premier  
Second Reading Date: 18 March 2020

Summary

The Bill amends the Constitution Act 1975 to entrench the existing legislated bans on hydraulic fracturing and coal seam gas exploration and mining.

Note the Second Reading Speech:-

‘The purpose of the Bill is to insert existing legislated bans on fracking and coal seam gas activities in the Constitution Act... The existing legislated bans comprises two distinct prohibitions. The first is a ban on the carrying out of hydraulic fracturing (fracking). Fracking is a process to extract oil or gas by injecting fluids, including chemicals, down a well at high pressure to fracture the rock formation and help the oil or gas to flow out of the rock and into the well. Some chemicals used in fracking have been associated with environmental and health impacts and have been a significant driver of community concern...

...The second is a ban on the exploration for and mining of coal seam gas. Coal seam gas is a type of unconventional gas that occurs naturally in coal seams and is trapped underground by water pressure. Extraction of coal seam gas requires the dewatering of coal seams to release the gas and sometimes incorporates fracking to make the extraction more economic. Coal seam gas extraction presents significant environmental challenges associated with wastewater disposal, ground water contamination and ground subsidence.’

The Bill:-

• Inserts new paragraph (fab) into section 18(2) of the Constitution Act 1975. [3] It is unlawful to present to the Governor for Royal Assent any Bill by which the new Part VIII is repealed, altered or varied unless the third reading of the Bill is passed by a special majority, being three-fifths of each House. [3]

• Inserts a new Part VIII into the Constitution Act 1975 which maintains the existing prohibitions on hydraulic fracturing and coal seam gas exploration and mining. [4] Note the Second Reading Speech: - ‘The bans were introduced into the MRSDA and the Petroleum Act by the Petroleum Resources Legislation Amendment (Fracking Ban) Act 2017.’

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2 Amended section 18 provides that: ‘18(2) It shall not be lawful to present to the Governor for Her Majesty’s assent any Bill by which — ...(fab) Part VIII; ...may be repealed, altered or varied... unless the third reading of the Bill is passed by a special majority.’ A ‘special majority’ as defined in section 18(1A): ‘means 3/5ths of the whole number of the members of the Assembly and of the Council respectively.’

3 See section 16A of the Petroleum Act 1998 which prohibits hydraulic fracturing in the course of carrying out a petroleum operation. See section 8AD of the Mineral Resources (Sustainable Development) Act 1990 which prohibits hydraulic fracturing on land by the holder of an exploration licence, a mining licence, or a retention licence, in the course of carrying out exploration or mining under the licence. See section 8AC of the Mineral Resources (Sustainable Development) Act 1990 which prohibits carrying out of exploration for, or mining of, coal seam gas on land. See section 15(1BAA) of the Mineral Resources (Sustainable Development) Act 1990 which prohibits the Minister accepting an application for an exploration licence, a mining licence or a retention licence, to the extent that it specifies that the licence is to relate to coal seam gas.

4 Note the Committee considered the Resources Amendment (Fracking Ban) Bill 2016 in Alert Digest No. 17 of 2016 tabled on 6 December 2016. The Committee made the comment that: ‘The Committee is satisfied that the strict liability offences contained in the Bill do not trespass unduly on rights and freedoms.’
Comments under the PCA

Presumption of innocence – strict liability offences – (section 17(a)(i), PCA)


Note the Statement of Compatibility: -

‘...a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. Ordinarily, the presumption of innocence requires that the prosecution prove all matters beyond reasonable doubt... The Bill entrenches in the Constitution Act strict liability offences in the MRSDA and Petroleum Acts that prohibit fracking or coal seam gas activities. The offence in s 8AC of the MRSDA contains an exception which places the evidential burden of proof on the accused. The Bill may engage the Charter right to be presumed innocence, by including strict liability offences with a low standard of proof, to which the only exception reverses the burden of proof. However, the Bill is not considered to limit the right. As above, persons engaging in resource exploration and extraction for the purposes of the MRSDA and the Petroleum Act would likely be corporations...

Alternately, if the accused party were an individual, any limitation on the right is considered reasonable and justifiable as they would be a resource industry participant for whom compliance with the provisions would not be difficult. Resource industry participants must maintain significant expertise in the industry regulation, including the restrictions on fracking and coal seam gas activity. Furthermore, the penalty imposed (200 units) is lower than the penalties that would normally apply where a higher burden of proof is required. For example, under s 217 of the Petroleum Act, a failure to comply with a prohibition notice imposes a penalty of 600 units.

Finally, the evidential burden imposed by the exception in section 8AC(2) of the MRSDA is not considered to limit the right to be presumed innocent. The accused has only to prove that their discovery of coal seam gas was incidental, then the evidential burden will shift back to the prosecution.’

The Committee is of the view the provisions are justified.

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\(^5\) An offence is one of strict liability where it provides for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. Someone is held to be legally liable for their conduct irrespective of their intent. A person charged with a strict liability offence has recourse to the common law defence of mistake of fact.

\(^6\) See Section 8AC of the Mineral Resources (Sustainable Development) Act 1990 which prohibits carrying out exploration for, or mining or, coal seam gas on land. See section 8AD of the Mineral Resources (Sustainable Development) Act 1990 which prohibits hydraulic fracturing on land by the holder of an exploration licence; a mining licence or a retention licence in the course of carrying out exploration or mining under the licence. See section 16A of the Petroleum Act 1998 which prohibits hydraulic fracturing in the course of carrying out a petroleum operation.
Charter Issues

Participation in public affairs – Repeal or reduction of current laws on hydraulic fracturing and coal seam gas exploration and mining – Requirement of special majority of 3/5ths of members of each house

Summary: The effect of clause 3 be may be that a future law of the Parliament of Victoria to repeal or reduce current laws prohibiting hydraulic fracturing and coal seam gas exploration and mining will be of no force or effect unless it is supported by at least three-fifths of the members of each house.

Relevant provisions

The Committee notes that clause 3, amending existing sub-s. 18(2), provides that ‘It shall not be lawful to present to the Governor for Her Majesty’s assent any Bill by which... Part VIII... may be repealed, altered or varied... unless the third reading of the Bill is passed by a special majority.’ Existing sub-s. 18(1A) provides that a special majority ‘means 3/5ths of the whole number of the members of the Assembly and of the Council respectively.’ Existing s. 6 of the Australia Act 1986 (UK) provides that ‘a law made... by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament’.

New Part VIII, inserted by clause 4, provides that ‘the Parliament may not by any Act... repeal, alter or vary’ the following existing statutory provisions:

- s. 16A of the Petroleum Act 1998, which makes it an offence to carry out hydraulic fracturing in the course of any petroleum operation, punishable by a fine of 200 penalty units
- s. 8AC of the Mineral Resources (Sustainable Development) Act 1990, which makes it an offence to carry out exploration for or mine coal seam gas, punishable by a fine of 200 penalty units
- s. 8AD of the Mineral Resources (Sustainable Development) Act 1990, which makes it an offence for a licence holder to carry out hydraulic fracturing in the course of licenced exploration or mining, punishable by a fine of 200 penalty units
- s. 15(1BAA) of the Mineral Resources (Sustainable Development) Act 1990, which provides that a licence is ineffective and must not be accepted to the extent that it specifies that it relates to coal seam gas
- ‘a provision of an Act to the extent that the provision is necessary for the effective operation’ of those sections

except to make non-substantive changes, increase penalties or widen the class of persons affected by those provisions. New Clause 98 provides:

‘The purpose of this Part is to constrain the power of the Parliament to make laws repealing, altering or varying provisions that prohibit hydraulic fracturing and coal seam gas exploration and mining, in order to ensure that the prohibitions, or prohibitions that are no less onerous, remain in force at all times as part of the law of Victoria.’

7 The Committee notes that existing sub s. 18(1B) provides that existing sub ss. (1A) & (1B) cannot be altered unless by a Bill ‘approved by the majority of the electors voting at a referendum.’
8 But see West Lakes Limited v South Australia (1980) 25 SASR 389, 397 (King CJ): ‘There must be a point at which a special majority provision would appear as an attempt to deprive the parliament of powers rather than as a measure to prescribe the manner or form of their exercise. This point might be reached more quickly where the legislative topic which is the subject of the requirement is not a fundamental constitutional provision.’
The Committee observes that the effect of clause 3 may be that a future law of the Parliament of Victoria to repeal (or make less onerous) current laws prohibiting hydraulic fracturing and coal seam gas exploration and mining will be of no force or effect unless it is supported by at least three-fifths of the members of each house.

Charter analysis

Charter s. 18(1) provides:

Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

Charter s. 18(2)(a) provides that ‘Every eligible person has the right, and is to have the opportunity, without discrimination... to vote and be elected at periodic State... elections that guarantee the free expression of the will of the electors’.

The Committee notes that the combined effect of Charter ss. 18(1) and 18(2)(a) may be that every eligible Victorian has the right to participate in the conduct of public affairs either directly or through freely chosen representatives elected at periodic elections that guarantee the free expression of the will of the voters. This may include Victorian electors’ right to elect a representative who intends to vote with a majority of other elected representatives in each house to enact a law to repeal or reduce current laws prohibiting hydraulic fracturing or coal seam gas exploration or mining.

The Statement of Compatibility does not address Charter s. 18.

The Committee observes that the Constitution Act 1975 provides that:

- ‘The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly’: existing s. 15
- The Council is to consist of 40 members who are to be representatives of, and elected by, the electors of the respective regions.’: existing s. 26(2)
- ‘The Assembly shall consist of members who shall be representatives of and be elected by the electors of the respective districts.’: existing s. 34
- ‘The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.’: existing s. 16
- ‘the Parliament may by any Act repeal alter or vary all or any of the provisions of this Act and substitute others in lieu thereof’: existing s. 18(1).

However, the Parliament’s power to repeal, alter or vary the Constitution Act 1975 under existing s. 18(1) is subject to exceptions that prevent a Bill altering particular provisions from being presented for royal assent unless there has been compliance with a specified procedural requirement. Existing s. 18 specifies three types of procedural requirements:

- ‘the Bill has been passed by the Assembly and the Council and approved by the majority of the electors voting at a referendum’: sub-s. 18(1B)
- ‘the third reading of the Bill is passed by an absolute majority’: sub-ss. 18(2A) & (2A) 9
- ‘the third reading of the Bill is passed by a special majority’: sub-s. 18(2).

The Committee notes that the effect of requiring a referendum may be to require direct participation by Victorians in Parliamentary decision-making, while the effect of requiring an absolute majority may

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9 Existing s. 18(2A) requires that ‘the third reading of the Bill is... passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively’.
be to require the support of a majority of elected representatives in each house, before Parliament can repeal, alter or vary specified constitutional provisions. Accordingly, existing sub-ss. 18(1B), (2AA) & (2A) may advance Victorians’ Charter right to participate in public life either directly or through freely chosen representatives elected in periodic elections that guarantee the free expression of the will of the electors.

By contrast, the effect of requiring a special majority of 3/5ths of members of each house of Parliament may be to prevent future majorities of elected representatives in each house from repealing, altering or varying specified provisions, where those changes are opposed by at least a two-fifths minority of elected representatives in either house. Accordingly, to the extent that it otherwise prevents majorities of elected representatives in each house from changing current laws on a particular topic, existing sub-s. 18(2) may limit Victorians’ Charter right to participate in public life either directly or through freely chosen representatives elected in periodic elections that guarantee the free expression of the will of the electors.

The Committee observes that clause 3, to the extent that it prevents future majorities of elected members of the Assembly and Council from repealing or reducing current laws banning hydraulic fracturing or coal seam gas exploration or mining, may engage the Charter right of every Victorian to participate (by voting in future elections) in the conduct of public affairs (with respect to hydraulic fracturing and coal seam gas exploration and mining) either directly or through freely chosen representatives elected in periodic elections that guarantee the free expression of the will of the electors.

Comparable provisions

The Committee notes that existing s. 18(2) requires 3/5ths majorities of each house to alter provisions on: recognition of Aboriginal people; the Governor; Parliament’s powers and mandate; membership and qualification of electors of the Legislative Council and Legislative Assembly; the judiciary, and public delivery of water services.

The Committee observes that two other Australian jurisdictions require supermajorities of elected representatives to alter certain statutory provisions:

- the Australian Capital Territory, which requires a two-thirds majority of its Assembly (in addition to a referendum) to alter the Territory’s ‘Hare-Clark’ electoral system; and
- Tasmania, which requires a two-thirds majority of its Assembly to alter its four-year parliamentary terms.10

None of the remaining Australian jurisdictions require supermajorities for the passage of any statutory provision.

Conclusion

The Committee notes that clause 3 may engage the Charter’s right to participate in public affairs and observes that clause 3 may be a reasonable limit on that right for the purpose of protecting the environment and the rights of landholders. The Committee considers that the Bill is compatible with human rights.

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10 Proportional Representation (Hare-Clark) Entrenchment Act 1994 (ACT); s. 5; Constitution Act 1834 (Tas), s. 41A.
COVID-19 Omnibus (Emergency Measures) Act 2020

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Summary

Note: The Committee reports on this Act pursuant to section 17(c)(i) and (ii) of the Parliamentary Committees Act 2003.

The purposes of the Act are to:

- Temporarily amend certain Acts;
- Temporarily empower the making of regulations to modify the application of the law of Victoria in certain respects for the purpose of responding to the COVID-19 pandemic. Note the Second Reading Speech: - ‘The impact of the coronavirus (COVID-19) pandemic is without rival... To that effect, this Bill includes urgent measures to enact a number of policies across a range of portfolios... The Bill provides flexibility to adjust processes and adopt different ways of delivering critical services. These reforms will minimise the risk of transmission of COVID-19 and revise procedures and practices to ensure critical services can continue operating safely. The majority of reforms will sunset six months after their commencement and cannot be extended.’

Chapter 2 – Part 2.1 – Modification of Justice Acts by regulation

Chapter 2 provides generally for the temporary modification of the law by regulation. Part 2.1 governs the making of regulations which temporarily modify ‘Justice Acts’ and laws. Section 4 is a broad regulation making power. It sets out how regulations can be made and their scope. Regulations can only be made in certain circumstances, in respect of certain specified matters and subject to complying with various requirements as set out in sections 4 to 9. [4] (See comments below under the PCA and Charter issues.) Part 2.1 is repealed on the day that is six months after its commencement. [11]

Chapter 2 – Part 2.2 – Modification of the law relating to retail leases and non-retail commercial leases and licences by regulation

Part 2.2 makes provision for regulations which temporarily modify the law relating to retail leases and non-retail commercial leases and licences. [15] Section 15 is a broad regulation making power. It sets out how regulations can be made and their scope. Section 12 defines to whom the regulations apply. Part 2.1 is repealed on the day that is 6 months after its commencement. (See comments below under the PCA and Charter issues.)

Note the Statement of Compatibility: -

‘The Bill enables the making of regulations to implement the principles of a mandatory code of conduct announced by National Cabinet on 7 April 2020 (the Code) in relation to commercial tenants experiencing financial hardship due to the impact of COVID-19.’ Note the Second Reading Speech: - ‘Specifically, the regulation-making power will permit the Minister to prohibit termination of leases and recovery of possession of leased premises; to modify certain rights and liabilities arising under leases; to extend eligible lease periods and to require landlords and tenants to participate in mediation facilitated by the Small Business Commission.’
**Chapter 3 – Temporary amendments to Justice legislation**


- **Part 3.2** amends the Bail Act 1977 to provide that a person may appear before a court personally or by a legal practitioner by audio link or audio visual link. This amendment expires after six months. [24]

- **Part 3.3** amends the Children, Youth and Families Act 2005 to make further provision for the procedures and conduct of meetings at the Youth Parole Board. Pre-sentence reports may be given by audio link or audio visual link. It sets out the circumstances under which an oral report can occur. [25] It makes provision for isolation for the purposes of detection, prevention or mitigation of COVID-19 or other infectious diseases in respect of a person in a remand centre, youth residential centre or youth justice centre. (Note new section 600M(9) provides that infectious disease has the same meaning as in the Public Health and Wellbeing Act 2008.) [25] Divisions 3, 4 and 5 of the Part[11] are repealed after 6 months. The remainder of the Part is repealed after 12 months. [26] (See comments below under Charter issues.)

- **Part 3.4** amends the Corrections Act 1986 to place restrictions on persons who can visit a prisoner and to allow the issuing of quarantine directions in corrections and youth custodial facilities to enable the testing, assessment, treatment, care and quarantine of prisoners. It provides for the mandatory quarantine of prisoners entering prison for a period of up to 14 days. The amendment is repealed after 6 months after its commencement. [26] (See comments below under Charter issues.)

- **Part 3.5** amends the County Court Act 1958 to provide that the Court may decide an issue (other than a prescribed matter) without a hearing entirely on the basis of written submissions if the court is satisfied that it is in the interests of justice to do so and whether or not the parties consent to the court doing so. Note subsection (2) of new section 79C provides that it does not apply to a criminal proceeding or an issue in a criminal proceeding. [27] The Part is repealed after 6 months after its commencement.

- **Part 3.6** inserts new section 7A into the Court Security Act 1980 to temporarily change the purpose of the operation of the Act in response to the COVID-19 pandemic. Authorised officers may take into account various factors to direct persons or refuse entry to or remove persons from court premises during the COVID-19 pandemic. The amendments are repealed 6 months after commencement. [29]

- **Part 3.7** makes a number of amendments to the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA) to deal with matters arising from the COVID-19 pandemic. It makes provision for fitness to stand trial to be determined by a judge alone. It makes provision for special hearings by judge alone in certain circumstances. [30] There is a right of

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11 Division 3 make provision for oral pre-sentence reports and the hearing of them to be given by audio link or audio visual link. Division 4 makes provision for arrangements with respect to isolation and quarantine of persons in a remand centre, a youth residential centre or a youth justice centre. Division 5 makes provision for other measures including conciliation conferences and counselling and attendance requirements by person to a youth justice unit to be conducted by audio link or audio visual link.

12 This includes Division 1 which contains preliminary provisions. Division 2 makes provision for alternative members and the conduct of meetings at the Youth Parole Board.

13 Note the Second Reading Speech: ‘With respect to fitness to stand trial, this replicates an amendment included in the Crimes (Mental Impairment and Unfitness to be Tried) Bill 2020, which is currently before Parliament.’
appeal to the Court of Appeal against a decision regarding the special hearing by judge alone. Division 6\(^{14}\) makes provision for certain matters to be conducted without a hearing. The amendments are repealed 6 months after commencement. [30]

Note the Statement of Compatibility:

‘The Bill will make a number of amendments to the CMIA to allow proceedings to be conducted with greater flexibility throughout the COVID-19 pandemic. The Bill will require fitness to stand trial investigations under the CMIA to be heard by a judge rather than a jury and make amendments to allow a special hearing to be heard by a judge alone if it is in the interests of justice to do so. These amendments are necessary to ensure that certain CMIA proceedings can continue throughout the COVID-19 pandemic. Avoiding unreasonably delay is particularly important in CMIA matters as proceedings often involve vulnerable accused persons... The Bill will also amend the CMIA to extend the timeframe for a special hearing to be conducted from three months to as soon as practicable but not later than six months after a finding that an accused is unfit and not likely to become fit within 12 months.’ (See comments below under Charter issues.)

- **Part 3.8** amends the **Criminal Procedure Act 2009**. New Part 9.2 provides the court may order that one or more charges in an indictment under Victorian law be tried by the trial judge alone without a jury.\(^{15}\) A person before the court may appear by audio link or audio visual link. New section 420ZL provides that the court may decide an issue without a hearing, subject to other provisions, on the basis of written submissions and without the appearance of the parties. New Division 4 makes provision for appeals to the Court of Appeal regarding decisions for trials by judge alone. New Part 9.3 provides for procedural measures. New Part 4 provides for the repeal of the amendments 6 months after commencement. [32] (See comments below under the PCA and Charter issues.)

- **Part 3.9** amends the **Evidence (Miscellaneous Provisions) Act 1958**. It provides for temporary amendments to the operation of Part IIA and makes further provision to enable greater use of an audio link or audio visual link in court proceedings during the COVID-19 pandemic. ‘Court point’ means the courtroom or other place where the court is sitting. The amendments are repealed 6 months after commencement. [34]

- **Part 3.10** amends the **Family Violence Protection Act 2008**. New Division 2 contains a new section 207B which provides for the extension of interim extension orders under that Act from 28 days to three months. The amendments are repealed 6 months after commencement. [36]

- **Part 3.11** amends the **Fines Reform Act 2014** to make temporary amendments for two purposes. [37] Note the Explanatory memorandum: - ‘Firstly, to ensure that prisoners who would otherwise be eligible to apply for a time served order or an order under section 171C of the Fines Reform Act 2014, are not prevented from doing so as a result of temporary measures introduced to combat the COVID-19 pandemic. And secondly, to provide enforcement agencies with the flexibility they need to give fine recipients additional time to pay their fines during the COVID-19 crisis.’ The amendments are repealed 6 months after commencement.

- **Part 3.12** amends the **Magistrates’ Court Act 1989**. It enables the court to specify a remand period greater than eight days without the consent of the accused and the informant in

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\(^{14}\) See new section 120 of the CMIA. For example, a review of a custodial supervision order, an application for a variation or revocation of a custodial supervision order, a major review of a supervision order, a further review of a custodial supervision order etc.

\(^{15}\) Note the Explanatory Memorandum: - ‘Presently, indictable charges under Victorian law are tried by juries. This clause will allow courts the option to hear such charges by judge alone. Under section 80 of the Commonwealth Constitution, Commonwealth indictable offences are tried by jury. This will continue to be the case. These new provisions will not apply to charges for Commonwealth offences.’
specified circumstances.\textsuperscript{16} Note the Statement of Compatibility: - ‘This temporary exception to the eight-day remand rule will provide the courts with greater flexibility in how they list criminal proceedings during the COVID-19 crisis, while also providing appropriate safeguards.’ The amendments are repealed 6 months after commencement.\textsuperscript{[38]}

- **Part 3.13** amends the *Oath and Affirmations Act* 1989 to provide flexibility with regard to the witnessing of documents, affidavits, electronic signatures requirements if a thing is done electronically or by means of audio link or audio visual link.\textsuperscript{[39]} The amendments are repealed 6 months after commencement.

- **Part 3.14** amends the *Open Courts Act* 2013 to give courts and tribunals greater ability to put health measures in place for court or tribunal proceedings and hearings to reduce the risk of transmission of COVID-19 and ensure the administration of justice. It provides for ‘MAP’ (modified access and procedure) orders.\textsuperscript{[40]} It confers on the presiding judicial officer or member discretion about listing of matters or make specific arrangements. The amendments are repealed 6 months after commencement.

- **Part 3.15** amends the *Personal Safety Intervention Orders Act* 2010. It inserts new section 181B which provides for the extension of interim extension orders under the *Personal Safety Intervention Orders Act* 2010 from 28 days to 3 months to ensure that there is no gap in protection before the respondent is located for service and a hearing date is set. (Note this will also alleviate the need for affected persons to return to court frequently if the order has not yet been served.) The amendments are repealed 6 months after commencement.\textsuperscript{[41]}

- **Part 3.16** amends the *Sentencing Act* 1991. It enables the Magistrates Court to attach electronic monitoring requirements to a monitored condition of a community corrections order when sentencing a person for an offence.\textsuperscript{17} New section 174 sets out the application of the Division in relation to young offenders. The amendments are repealed 6 months after commencement.\textsuperscript{[42]}

- **Part 3.17** amends the *Supreme Court Act* 1986. It inserts a transitional provision to ensure that any part heard issue or proceeding that the Court determined to decide or determine on the basis of written submissions will, continue to be heard in accordance with the repealed provisions.\textsuperscript{[44]}

- **Part 3.18** amends the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act) to provide for new procedures in respect of quorum requirements and meetings held remotely. The amendments are repealed 6 months after commencement.\textsuperscript{[45]}

*Chapter 4 – Temporary measures relating to residential tenancies – Amendment of Residential Tenancies Act 1997 (RT Act) – Amendments brought forward from Residential Tenancies Amendment Act 2018*

Chapter 4 generally amends the *Residential Tenancies Act* 1997.\textsuperscript{[46]}

\textsuperscript{16} Note the Explanatory Memorandum: - ‘New section 153(2) provides that the Court must not remand an accused in custody for a period of more than eight clear days unless certain circumstances exist. The provision sets out those circumstances— • both the accused and the informant consent; or • the accused does not consent, but — • the accused is not a child or Aboriginal person within the meaning of the *Bail Act* 1977; and • the Court does not consider that the person is a vulnerable adult within the meaning of the *Bail Act* 1977; and • the Court is satisfied that it is not reasonably practicable to have the matter return to Court within eight days; and • the Court is satisfied that the longer period remand is consistent with the interests of justice.’

\textsuperscript{17} Note the Second Reading Speech: - ‘The Supreme and County Courts already have the power to order electronic monitoring as a condition on CCOs. Existing requirements and considerations for the imposition of electronic monitoring will apply.’
Note the Statement of Compatibility:

‘The Bill provides for amendments to the Residential Tenancies Act 1997 (RT Act) and related legislation to give effect to the decision by the National Cabinet, announced on 29 March 2020, to declare a temporary moratorium intended to prevent eviction for non-payment of rent where residential tenancies are impacted by severe rental distress due to the COVID-19 pandemic.’

The Bill:

- Introduces an alternative termination process and ensures tenancy agreements are only terminated in specified circumstances during the operation of the declared moratorium;
- Suspends rent increases, permits orders for the reduction of rent or payment plans for a specified period, and provides for tenants to end tenancy agreements early without incurring lease break fees and other compensation in certain circumstances;
- Inserts an emergency regulation-making power into the RT Act to enable the prescription of a scheme for the purposes of resolving disputes during the moratorium (the Residential Tenancies Dispute Resolution Scheme);
- Clarifies the powers of VCAT and the Chief Dispute Resolution Officer (CDRO) in relation to the mediation or conciliation of disputes under the RT Act and the ability to make binding orders on parties to eligible disputes.

It is convenient to consider the following Divisions within the Part:

- Division 2 – Tenancy agreements – New section 539 suspends rent increases under a tenancy agreement. A tenant may make application to the VCAT to reduce the rent. New section 537 sets out the circumstances when a person is unable to comply with a term or provision of an agreement for a COVID-19 reason. The landlord must allow payment of the rent by Centrepay. There is no breach of duty or terms by either the tenant or landlord if there is a COVID-19 reason. There can be no notice to vacate by the landlord. A tenant cannot give notice to vacate unless there are specified circumstances such as the tenant requires temporary crisis accommodation etc. Tenants are not liable to compensate landlords for an early termination of a tenancy agreement if notice has been given in specified conditions including whether the tenant is a protected person under a family violence intervention order. New section 548 provides the landlord may make application to the VCAT for an order to terminate the tenancy agreement in certain circumstances. If the VCAT is satisfied of certain matters it may make an order to terminate the agreement. For example if the tenant or the tenant’s visitor is intentionally or recklessly causing serious damage, the VCAT may make a possession order on the application of the landlord or mortgagee.

- Division 3 – Residency rights in rooming houses – New section 552 suspends rent increases by a rooming house owner in respect of a room. A resident may make application to the VCAT for a reduction in rent and payment plans. New section 555 provides there is no breach of a duty provision if the resident or rooming house owner is unable to comply or it is not reasonably practical to comply with a term or provision because of COVID-19 reasons. Application may be made to the VCAT for an order to end a residency right in respect of a room. New section 561 provides the VCAT may make possession order requiring a resident to vacate a room if satisfied of various matters.

- Division 4 – Residency rights in caravan parks – New section 562 suspends rent or hiring charge increase by a caravan park owner or caravan owner. A resident of a caravan park may make application for a reduction in rent or hiring charge or payment plan. New section 565 provides there is no breach of a duty or term if the resident, caravan park owner or caravan owner is unable to comply with or it is not reasonably practical because of a COVID-19 reason.
Application may be made to the tribunal for an order to end a residency right in respect of a caravan park or a possession order. The VCAT may make such orders if satisfied of various matters.

- **Division 5 – Site agreements** – New section 572 suspends rent increases payable under a site agreement. A tenant may make application to the VCAT for a reduction in rent and payment plans in respect of site agreements. New section 575 provides there is no breach of a duty or term in respect of a site agreement by a site tenant or site owner if they are unable to comply or it is not reasonably practical because of a COVID-19 reason. Application may be made to the VCAT for an order to terminate a site agreement or a possession order. The VCAT may make such orders if satisfied of various matters.

- **Division 6 – SDA\(^{18}\) residency agreements** – New section 585 suspends rent increases payable under an SDA agreement. An SDA resident may make application to the VCAT for a reduction in rent and payment plans. New section 588 provides there is no breach of a duty or term in respect of a site agreement by an SDA resident or SDA provider if they are unable to comply or it is not reasonably practical because of a COVID-19 reason. Application may be made to the VCAT for an order to terminate an SDA residency agreement or possession. The VCAT may make such orders if satisfied of various matters.

- **Division 7 – Residential tenancies databases** – New section 596 prohibits landlords and database operators from listing personal information about a person in a residential tenancy database under section 439E of the RT Act, even if they would be otherwise entitled to do so where a person has breached the tenancy agreement only because of non-payment of rent and the non-payment is because of a COVID-19 reason.

- **Division 7A – Further matters to be considered by the VCAT** New section 596A provides for further matters the VCAT must take into account when calculating compensation payable for early termination of a residential tenancy agreement by the tenant or of a site agreement by the site tenant.

- **Division 8 – Residential Tenancies Dispute Resolution Scheme** [46] This division establishes the office of the CDRO for resolving disputes arising out of the declared moratorium. It provides for the Director of Consumer Affairs Victoria to appoint an individual to that office. The functions are to administer the Residential Tenancies Dispute Resolution Scheme. The CDRO may delegate powers and functions to a prescribed person and give general directions to a delegate regarding those delegated powers. New section 603 provides for the Governor in Council to make emergency regulations to prescribe a scheme for the purposes of resolving disputes during the declared moratorium and to confer and clarify relevant powers of VCAT and the CDRO. This includes matters in relation to mediation or conciliation of disputes under the RT ACT and the ability to make binding orders on parties to eligible disputes. (See new section 597) (See comments below under the PCA and Charter issues.)

- **Division 9 – Regulations under the Act** [46] This division provides for further regulation making powers in respect of eligible agreements (a tenancy agreement, an SDA agreement and a site agreement) for the purposes of responding to the COVID-19 pandemic. (See new sections 608-10) (See comments below under the PCA and Charter issues.)

- **Divisions 10 and 11** Division 10 contains transitional provisions. Division 11 repeals the Part six months after its commencement.

\(^{18}\)"Specialist Disability Accommodation (SDA) refers to accommodation for people who require specialist housing solutions, including to assist with the delivery of supports that cater for their extreme functional impairment or very high support needs," See: <https://www.ndis.gov.au/providers/housing-and-living-supports-and-services/housing/specialist-disability-accommodation>
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- Parts 4.2-4.3 – Amendments brought forward from Residential Tenancies Amendment Act 2018 – It brings forward amendments to that Act to provide a new process for the termination of tenancy agreements and creation of new tenancy agreements due to family violence. [47-49] The default commencement date of 1 July 2020 is replaced with the new date of 1 January 2021. The repeal date is delayed by 6 months from 1 July 2021 with 1 January 2022. [50-51] Note the Statement of Compatibility: - ‘In light of the COVID-19 crisis, the Bill will defer the general commencement of the Residential Tenancies Amendment Act 2018 (RT Amendment Act) to allow sufficient time for rental stakeholders to prepare for and deal with the implementation of those reforms, but will also bring forward a crucial amendment contained in that Act to protect victims of family violence.’

Chapter 5 – Temporary amendment of other Acts

Chapter 5 temporarily amends a number of Acts and introduces temporary measures in response to the COVID-19 pandemic. It is convenient to consider each Division in turn.

- Division 1 – Education and Training Reform Act 2006 (ETR Act) – It inserts new Chapter 5A into that Act. The provisions temporarily empower the regulators of the ETR Act, the Victorian Registration and Qualifications Authority (the Authority) and the Victorian Institute of Teaching (the Institute) to regulate education and training providers and teachers in response to the COVID-19 pandemic. It will temporarily enable the Authority and the Institute to respond to the COVID-19 pandemic by extending various registrations as a way of maintaining continuity of registrations and to minimise disruptions.19 It enables the Institute to deliver notices using electronic means for the purposes of its investigations or disciplinary proceedings. The amendments are repealed 6 months after commencement. [52]

- Part 5.2 – Amendment of Environment Protection Amendment Act 2018 – It inserts a new commencement date. [54] Note the Second Reading Speech: - ‘The Bill will delay commencement of Victoria’s once in a generation reforms to the environment protection framework to enable duty holders to focus on immediate challenges posed by the COVID-19 pandemic. This will give businesses and other duty holders more time to prepare for and understand their new rights and responsibilities, with the support of the EPA. The proclamation previously made will be revoked. Reforms will now commence on 1 December 2021 or earlier by proclamation. The Government’s intention is to proclaim an earlier commencement date of 1 July 2021. The existing framework under the Environment Protection Act 1970 will continue to apply.’

- Part 5.3 – Amendment of Local Government Act 2020 – It inserts new Part 12 into that Act to provide for temporary measures in response to the COVID-19 pandemic. New Part 12 provides an alternative way for members of a Council or other persons to attend meetings by enabling meetings to be conducted by electronic means. The Part is repealed on 2 November 2020. [56]

- Part 5.4 – Amendment of Parliamentary Committees Act 2003 – It inserts new Part 7 into that Act to enable members to attend and participate in a meeting of Joint Investigatory Committee by audio link or audio visual link. A member attending by audio link or audio visual link is present for the purposes of determining a quorum and voting on any question arising at a meeting. The amendments are repealed 6 months from the date of commencement. [57]

19 Note the Explanatory Memorandum: - ‘The COVID-19 pandemic has disrupted the completion of course and professional practice requirements which affects many holders of provisional registrations or permissions to teach. Further, the disruption to the supply of graduate teachers (who initially take out provisional registration) may lead to increased demand by schools or early childhood services for temporary teaching staff who use permissions to teach. New section 5A.4.1 empowers the Institute to extend the period of provisional registration of a school teacher for the purpose of responding to the COVID-19 emergency.’
• Part 5.5 – Amendment of Planning and Environment Act 1987 – It inserts new Part 10A into that Act to enable requirements to make planning scheme amendments, planning permit applications and other documents physically available for inspection to be satisfied by displaying these documents on the designated entity’s Internet site. Note the Explanatory memorandum: - ‘The purpose of the provision is to ensure the public can continue to access such documents for the period in which many (if not all) of the offices where these documents would ordinarily be displayed are inaccessible to the public due to the COVID-19 pandemic.’ It also sets out modified rules relating to panel hearings to facilitate the use of remote technology whilst ensuring panel hearings remain publicly accessible and panels continue to provide a reasonable opportunity to those entitled to be heard. The amendments are repealed 6 months after commencement. [58]

• Part 5.6 – Amendment of Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015 – It inserts new Part 5A into that Act to provide flexibility in dealing with the workforce in the COVID-19 pandemic. The amendments are repealed 6 months from the date of commencement. [59] Note the Second Reading Speech: - ‘The Bill will... establish a new limited power for the Minister of Health to temporarily suspend the operation of the enforcement provisions of the Act should it become impracticable for health services to meet the nurse to patient ratios.’

• Part 5.7 – Amendment of Workplace Injury Rehabilitation and Compensation Act 2013 and the Accident Compensation Act 1985 – It inserts new Division 1 and New Part X into the Acts respectively. The provisions give an additional six months notice of termination to workers. The amendments are repealed 6 months from the date of commencement. [60,61] Note the Second Reading Speech: - ‘The Bill give(s) these long-term injured workers who are unable to return to work or find employment an additional six months notice of termination to provide a longer transition period to return to work or find employment. These measures will have a positive impact for this group of long-term injured workers by reducing financial hardship due to COVID-19 and supporting a sustainable transition from the WorkCover scheme back onto the work force.’

Chapter 6 – Other matters – transitional provisions

Chapter 6 contains transitional provisions. [62] The Governor in Council may make regulations which contain provisions of a transitional nature including matters of an application or savings nature, arising as a result of the repeal of any provision inserted into an Act by Chapter 3, 4 or 5 of this Act. It disapplies the provisions of the Subordinate Legislation Act 1994. A section 6 certificate of consultation and the preparation of a regulatory impact statement are not required for regulations made under this section. Regulations made under this section are disallowable in whole or in part by either House of Parliament. Such regulations are in force six months immediately before the repeal of section 62 and continue in force for 6 months until 25 April 2021. [62-64] (See comments below under the PCA and Charter issues.)

Comments under the PCA

The making of regulations which temporarily modify ‘Justice Acts’ and laws – inappropriate delegation of legislative power – Henry VIII clauses (section 17(a)(vi), PCA)

Broad delegation power

Section 4 is a broad regulation20 making power. [4] It provides the Governor in Council, on the recommendation of the Attorney-General, may make regulations that disapply, or modify the

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20 Note SR No 39/2020 – COVID-19 Omnibus (Emergency Measures)(Integrity Entities) Regulations 2020 came into operation on 19 May 2020. [The objective of these Regulations is to modify the application of various provisions of the
application of, a Justice Act provision, a provision of a subordinate instrument made under a Justice Act provision, a relevant applied law or a subordinate instrument made under a relevant applied law\textsuperscript{21} (other than a temporary emergency provision) that provides for or regulates any of the following matters—

(a) Arrangements for or with respect to any proceeding in a court or tribunal, including a pre-trial proceeding;
(b) The conduct of a proceeding in a court or tribunal;
(c) Arrangements for or with respect to any proceeding, inquiry or investigation being conducted or being carried out by an integrity entity;
(d) A specified date or time frame that must be met;
(e) The process applying to applications for bail;
(f) The method or processes by which conditions of bail are monitored or enforced;
(g) The method or processes by which a specified order or instrument is administered, monitored or enforced;
(h) The process by which orders, judgments, rulings, reasons, determinations, decisions or findings of a court or tribunal are issued (including their certification and transmission);
(i) The process by which a warrant is issued (including its certification and transmission);
(j) The methods or processes by which a warrant is enforced;
(k) The process by which family violence intervention orders (including family violence interim orders) or family violence safety notices are issued (including their certification and transmission), and the method or processes by which they are monitored or enforced;
(l) The witnessing, execution or signing of legal documents such as affidavits, statutory declarations, deeds, powers of attorney, contracts or agreements, undertakings and wills;
(m) The process by which a document is given or issued;
(n) The service of documents;
(o) The certification of documents;
(p) The lodgement, submission or filing, or inspection, of documents.

Section 3 defines a ‘Justice Act provision’ as a provision of an Act (other than the Charter of Human Rights and Responsibilities) that is a provision administered by any of the following Ministers, solely or jointly with another Minister: the Attorney-General; the Minister for Corrections; the Minister for Police and Emergency Services; the Minister for Victim Support and the Minister for Youth Justice.

\textsuperscript{21} Note the Explanatory Memorandum: - ‘A relevant applied law refers to applied laws under a Justice Act provision. This will ensure that regulations may be made in relation to relevant national schemes, such as the Legal Profession Uniform Law (Victoria) under the Legal Profession Uniform Law Application Act 2014.’
Effect

The effect of clause 4 is that a regulation may **disapply or modify a provision of any Justice Act provision, a provision of a subordinate instrument made under a Justice Act provision or a subordinate instrument made under a relevant applied law that provides for or regulates any of the matters listed above from (a) to (p).** It applies in relation to any provision of an Act administered by any of the Ministers listed above from (a) to (d) either solely or jointly with respect to the matters listed in (a) to (p). 

Section 5 provides that regulations made under section 4 have effect despite anything to the contrary in any Act, (other than this Act, the Constitution Act 1975 or the Charter of Human Rights and Responsibilities or any subordinate instrument or any other law. [5][6]

Limitations with respect to regulation making powers

There are particular limitations with respect to the regulation making powers set out in section 4.[4]

(a) Regulations may only be made with respect to the particular matters listed from (a) to (p) in section 4 above.

(b) Regulations may only be made with respect to a ‘Justice Act’ as defined.

(c) The Attorney-General may only recommend regulations be made if the Attorney-General is of the opinion that the regulations to be made are consistent: -

   • With any relevant advice given by the Chief Health Officer to the Minister administering the Public Health and Wellbeing Act 2008 in relation to managing or responding to the COVID-19 pandemic; or

   • Any relevant directions made by an authorised officer under Part 10 of the Public Health and Wellbeing Act 2008 in relation to the COVID-19 pandemic;

(d) Part 2.1 which provides for the making of regulations temporarily modifying Justice Acts and laws is repealed on the day that is six months after its commencement. [11] The Note at the foot of the section states that regulations in force immediately before the day that Part 2.1 is repealed are impliedly revoked on that day.

Parliamentary oversight – disallowable – consultation – consent of heads and integrity entity heads required

The Act disapplies certain requirements under the Subordinate Legislation Act 1994. A proposed statutory rule under section 4 does not require a certificate of consultation under section 6 or the preparation of a regulatory impact statement under section 7 of that Act. [6]

If the Attorney-General is proposing to recommend the making of a regulation under section 4 which will disapply or modify the application of a Justice Act provision or a provision of a subordinate instrument made under a Justice Act provision that the Attorney-General does not administer, the Attorney-General must consult with the Minister who administers the Justice Act provision or the Minister with whom the Attorney-General jointly administers the Justice Act provision. [7]

The consent of heads and tribunals is required in relation to regulations that relate to courts and tribunals.[8] The consent of integrity entities and integrity entity heads is **required** in relation to

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22 Subclause (2) of section 4 provides that the regulations may be of general or limited application, differ according to differences in time, place or circumstances, confer a discretionary authority or impose a duty on a specified person or body or class of persons or bodies. They may adopt or incorporate any matter contained in any document whether wholly or partially or as amended by the regulations or in force at a particular time or in force from time to time.

23 Note the Explanatory Memorandum: - ‘This will allow regulations to override any Victorian Act, other than the Constitution Act 1975, the Charter, a law under a National Scheme, or the common law.’
regulations that relate to integrity entities. A regulation made under section 4 may be disallowed in whole or in part by either House of Parliament. [10]

Henry VIII clauses

Professor Pearce described a ‘Henry VIII’ clause as: ‘the inclusion in an Act of power to amend either that Act or other Acts by regulation.’ There are differing views on the precise definition or formulation of a Henry VIII clause. A Henry VIII clause has also been defined as ‘a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.’ Or alternately, ‘A Henry VIII clause is a provision of an Act that enables the Act (or another Act) to be amended by subordinate legislation.’ (Briefly, Henry VIII clauses are so named for historical reasons because of their use by the monarch King Henry VIII in England during his reign from 1509 to 1547. [The High Court of Australia has also considered the validity of a transitional regulation made under a Henry VIII clause.] Henry VIII clauses may be regarded as having insufficient regard for the separation of powers doctrine. The power of the Executive by means of subordinate legislation to override the intention of Parliament as expressed in an Act may be a matter for Parliament’s consideration. A provision in a Bill or an Act that permits subordinate legislation to amend an Act may constitute an inappropriate delegation of power.

Committee comments

The Committee considers that sections 4 and 5 which constitute broad regulation making powers may be characterised as Henry VIII clauses. The delegation of powers in such a manner engage the Committee’s terms of reference in section 17(a)(vi) of the PCA. However, the Committee has considered Henry VIII clauses over the years and previously accepted that in special limited circumstances such provisions may be justifiable; for example, where the power to modify primary legislation is for a limited time to facilitate transitional arrangements, or in necessitous circumstances to accommodate rapidly evolving technologies or developments where frequent amendments to

25 Ibid at p. 17.
26 Ibid at p. 56.
27 Ibid at p. 21. See the Office of Parliamentary Counsel (Queensland): ‘It is objectionable to the institution of Parliament because it allows a provision of a law made by Parliament to be amended by a law made by a subordinate law-making authority, usually the Executive Government.’
28 Ibid at p. 2. ‘Henry VIII clauses’ appear to be so named because that King is regarded popularly as the impersonation of executive autonomy and because of its actual use by that monarch. [Fn 5, Report by the Committee on Ministers’ Powers (the Donoughmore Committee), His Majesty’s Stationary Office, London, 1932, p.36.]
1.10 One of the first instances in which Parliament delegated power to legislate in general, and effectually unlimited terms, was in an enactment concerning the Staple in 1385. The next three examples occurred during the reign of King Henry VIII: the Statute of Sewers in 1531; the Statute of Proclamations in 1539 and the Statute of Wales in 1542-3... Henry VIII’s Statute of Proclamations allowed the King to issue proclamations which had the force of an Act of Parliament.’
29 ADCO Constructions Pty Limited v Goudappel [2014] HCA 18 (The High Court unanimously upheld the validity of a transitional regulation made under the Workers Compensation Act 1987 (NSW) extinguishing the respondent’s entitlement to permanent impairment compensation.)
30 Scrutiny of Legislation Committee, above fn 24 at p.7. ‘In theory there is to be a separation of powers in the sense that the legislature has the power to make law, the judiciary has the power to declare the (already made) law, the Executive has the power to carry out the (already made and, if necessary, declared) law. Neither the judiciary nor the Executive makes the law of the land; the legislature does. Neither the legislature nor the Executive declares innocence or guilt under the law of the land; the judiciary does. Neither the legislature nor the judiciary executes and maintains the law of the land; the Executive does. In practice, however, the separation of powers doctrine as between the legislature and the Executive breaks down to the extent that the Executive does engage in a kind of law-making’ [See fn 20, P.H. Lane, A Manual of Australian Constitutional Law, 5th ed., Butterworths, Sydney, 1991, p. 248]
primary legislation may be considered to be impracticable. Henry VIII clauses have been used by various Parliaments over the years in response to natural disasters. It has also been recognised there may be exceptional unforeseen circumstances which necessitate the use of such clauses.

The Committee notes the Explanatory Memorandum: -

‘Enabling urgent changes to be made will allow the justice system to continue operating as effectively and safely as possible during the COVID-19 pandemic. However, the regulation power is limited and will not be able to be used to make changes to laws outside the justice portfolios or in respect of substantive policy matters beyond the specific process-related matters set out in clause 1.’ Further comment is made in the Second Reading Speech: - ‘To allow emergency COVID-19 reforms to be implemented efficiently, the Bill will allow the making of emergency regulations by the Governor in Counsel on the recommendation of the Attorney-General to override certain justice related legislation, including in relation to the State’s integrity bodies. This power will permit reforms to be implemented in key critical areas quickly. It is not intended that the power will allow substantive orders, such as prison sentences, to be altered. The regulation-making power will be focused on process changes and limited to particular subject matters. This includes:

• Arrangements relating to court proceedings, such as pre-trial proceedings;
• The conduct of a proceeding in a court or tribunal;
• Statutory time frames;
• Process matters relating to bail and sentencing;
• The issuing, certification or transmission of court orders or warrants;
• The signing, witnessing, executing or service of documents; and
• The issuing of family violence intervention orders or safety notices.

Appropriate safeguards will limit the regulation-making power. For example, the Attorney-General may only recommend regulations to the Governor in Council if the provisions are consistent with the advice of the Chief Health Officer and reasonable to provide for the effective or efficient administration of justice or law, or the conduct or carrying out of a proceeding, inquiry or investigation by an integrity entity or to protect the health, safety or welfare of persons in relation to the administration of justice or law. The regulations also cannot override the Bill, the Constitution Act 1975 or the Charter of Human Rights and Responsibilities Act 2006. The regulations must cease operation within six months of the Act commencing or if otherwise revoked earlier and are disallowable by either House of Parliament.’

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33 Scrutiny of Legislation Committee, above fn 24, p. 38. The Minister for Health, the Honourable M Horan MLA, ‘As a general principles, I am opposed to Henry VIII clauses in health legislation and would suggest that the frequently cited rationale for these clauses could be otherwise adequately addressed through appropriate subordinate legislation making powers and access to a timely and efficient legislative amendment process. However, I recognise that there may be unforeseen and extraordinary circumstances which occasionally warrant a provision of this kind…’
The Committee notes the broad regulation making provisions engage section 17(a)(vi) of the terms of reference. The Committee also notes that the COVID-19 pandemic is an unprecedented challenge for all Parliaments and that the regulation making provisions are repealed six months after commencement. The Committee notes that these clauses have been used from time to time by various Parliaments to respond to natural disasters and other unexpected situations. The Committee notes the above.

The making of regulations which modify existing rights and obligations in relation to certain retail leases and non-retail commercial leases and licences — retrospection — rights and freedoms (s. 17(a)(i), PCA) — inappropriate delegation of legislative power — Henry VIII clauses (s. 17(a)(vi), PCA)

Broad delegation power

Section 15 is a broad regulation\(^{34}\) making power. It provides the Governor in Council, on the recommendation of the Minister for Small Business may make regulations for or with respect to—

(a) prohibiting the termination of an eligible lease;

(b) changing any period under—

(i) an eligible lease;

(ii) the Crown Land (Reserves) Act 1978, the Land Act 1958, the Property Law Act 1958, the Retail Leases Act 2003, the Settled Land Act 1958 or the Transfer of Land Act 1958 in relation to an eligible lease;

(iii) regulations made under the Crown Land (Reserves) Act 1978, the Land Act 1958, the Property Law Act 1958, the Retail Leases Act 2003, the Settled Land Act 1958 or the Transfer of Land Act 1958 in relation to an eligible lease—

in which someone must or may do something;

(c) changing or limiting any other right of a landlord under an eligible lease under—

(i) that lease;

(ii) the Crown Land (Reserves) Act 1978, the Land Act 1958, the Property Law Act 1958, the Retail Leases Act 2003, the Settled Land Act 1958 or the Transfer of Land Act 1958;

(iii) regulations made under the Crown Land (Reserves) Act 1978, the Land Act 1958, the Property Law Act 1958, the Retail Leases Act 2003, the Settled Land Act 1958 or the Transfer of Land Act 1958;

(d) changing or limiting any other right a person who is a landlord under an eligible lease has under an agreement related to that eligible lease;

(e) exempting a landlord or tenant under an eligible lease from having to comply with—

(i) an eligible lease;

(ii) the Crown Land (Reserves) Act 1978, the Land Act 1958, the Property Law Act 1958, the Retail Leases Act 2003, the Settled Land Act 1958 or the Transfer of Land Act 1958;

\(^{34}\) Note SR No 31/2020 – COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 came into force on 1 May 2020. [The objectives of these Regulations are— (a) to implement temporary measures to apply to tenants and landlords under certain eligible leases to mitigate the effect of measures taken in response to the COVID-19 pandemic; and (b) to implement mechanisms to resolve disputes concerning eligible leases.]
(iii) regulations made under the *Crown Land (Reserves) Act* 1978, the *Land Act* 1958, the *Property Law Act* 1958, the *Retail Leases Act* 2003, the *Settled Land Act* 1958 or the *Transfer of Land Act* 1958;

(iv) an agreement related to an eligible lease;

(f) modifying the operation of an eligible lease or an agreement related to the eligible lease;

(g) modifying the application, in relation to an eligible lease, of—

(i) the *Crown Land (Reserves) Act* 1978, the *Land Act* 1958, the *Property Law Act* 1958, the *Retail Leases Act* 2003, the *Settled Land Act* 1958 or the *Transfer of Land Act* 1958;

(ii) regulations made under the *Crown Land (Reserves) Act* 1978, the *Land Act* 1958, the *Property Law Act* 1958, the *Retail Leases Act* 2003, the *Settled Land Act* 1958 or the *Transfer of Land Act* 1958;

(iii) the common law;

(h) extending the period during which an eligible lease is in effect;

(i) deeming a provision of the regulations as forming part of an eligible lease;

(j) imposing new obligations on landlords or tenants under an eligible lease, including requiring them to negotiate amendments to an eligible lease;

(k) requiring landlords and tenants under an eligible lease who are in dispute about the terms of an eligible lease to participate in mediation arranged by the Small Business Commission;

(l) requiring landlords and tenants under an eligible lease who are in dispute about the terms of an eligible lease to have a mediation certificate before commencing proceedings in VCAT or a court in relation to the dispute;

(m) requiring a landlord or tenant under an eligible lease who are in dispute about the terms of an eligible lease to get leave of a court to commence a proceeding in relation to the dispute in the court;

(n) the conduct of a mediation referred to in paragraph (k), including the payment of fees and expenses for the conduct of a mediation;

(o) conferring jurisdiction on VCAT to hear and determine disputes about the terms of an eligible lease that is a retail lease;

(p) any matter or thing required or permitted to be prescribed or necessary to be prescribed to give effect to this Part.

(2) Regulations made under subsection (1)(k) or (l) must not—

(a) require a landlord or tenant who are in dispute about the terms of an eligible lease to participate in mediation if either the landlord or tenant has commenced proceedings in VCAT or a court in relation to that dispute; or

(b) have the effect of preventing a landlord and tenant who are in dispute about the terms of an eligible lease from commencing proceedings in a court in relation to that dispute at any time.

(3) Regulations under this section may—

(a) be of general or limited application;

(b) differ according to differences in time, place or circumstances;
(c) confer a function or power or impose a duty on a specified person or body or class of persons or bodies;

(d) apply, adopt or incorporate any matter contained in any document whether—
   (i) wholly or partially or as amended by the regulations; or
   (ii) as in force at a particular time; or
   (iii) as in force from time to time;

(e) impose a penalty not exceeding 20 penalty units for a contravention of the regulations.

(4) Regulations made under this section may have retrospective effect to a day not earlier than 29 March 2020.

(5) The Minister for Small Business may only recommend that regulations be made under this section if the Minister is of the opinion that the regulations to be made on the recommendation are reasonably necessary for responding to the COVID-19 pandemic.

Effect

The effect of section 15 is that regulations may modify and affect existing rights and obligations of landlords and tenants in respect of eligible leases, ie: retail leases and non-retail commercial leases and licences. The regulations may modify the application of certain Acts and the common law in respect of eligible leases.

Note the Statement of Compatibility:

‘The provisions will apply in respect of all eligible leases, which includes retail leases and non-retail commercial leases and licences for premises located in Victoria, where the tenant is an employer who qualifies for and is a participant in the Commonwealth Jobkeeper scheme, and an SME Entity (that is, a small or medium-sized enterprise, including a not-for-profit enterprise or sole trader, with an annual turnover of up to $50 million). The definition of ‘eligible lease’ is subject to certain exclusions in relation to groups of entities and related entities with an aggregate turnover that exceeds the prescribed amount, and may be subject to additional limitations imposed by the relevant Minister under regulation.’

No compensation is payable by the State in respect of loss, damage or injury of any kind suffered by any person as a result of or arising out of, the making of a regulation under section 15. [18] Part 2.2 is repealed on the day that is 6 months after its commencement. The note at the foot of the section is that regulations in force immediately before the day Part 2.2 is repealed are impliedly revoked on that day. [22] Regulations made under section 15 may have a retrospective effect to a day not earlier than 29 March 2020. [15(4)]

Limitations with respect to regulation making powers

There are particular limitations with respect to the regulation making powers set out in section 15. [15] The Minister for Small Business must consult with the Minister for Jobs, Innovation and Trade before making a recommendation to the Governor in Council under section 15(1).

Note the Statement of Compatibility:

‘The Minister for Small Business may only recommend that regulations be made under these provisions if the Minister is of the opinion that the regulations are reasonably necessary for responding to the COVID-19 pandemic… Finally in line with normal Subordinate Legislation Act 1994 requirements, the responsible Minister will be required to consider the impact of the regulations on Charter rights when making recommendations to the Governor in Council.’
Parliamentary oversight – disallowance

The Act disapplies certain requirements under the Subordinate Legislation Act 1994. A proposed statutory rule under section 15 does not require a certificate of consultation under section 6 or the preparation of a regulatory impact statement under section 7 of that Act. [20] A regulation made under section 15 may be disallowed in whole or in part by either House of Parliament. [21]

Committee comment

The Committee notes that section 15 is a broad regulation making power. Regulations may be made which affect existing rights and obligations of landlord and tenants, disapply various property statutes and modify the application of the common law in relation to eligible leases. The Committee also refers to its previous comments in relation to Henry VIII clauses. The Committee considers that section 15 may be characterised as a Henry VIII clause. The Committee notes that the regulations made under section 15 may have retrospective effect from 29 March 2020.

Note the Second Reading Speech: -

‘The Bill will... implement the principles on commercial tenancies agreed to by National Cabinet. Specifically, the regulation-making power will permit the Minister to prohibit termination of leases and recovery of leased premises; to modify certain rights and liabilities arising under leases; to extend eligible lease periods and to require landlords and tenants to participate in mediation facilitated by the Small Business Commission... where a tenant is suffering economic hardship due to COVID-19, landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period or a reasonable recovery period, and tenants must remain committed to the terms of their lease...

...There will be a freeze on rent increases for eligible leases, except for retail leases that are based on turnover rent, and tenants should be provided with the opportunity to extend their lease for an equivalent period of the rent waiver or deferral to enable them additional time to trade on their existing lease terms during the recovery period. In Victoria, these provisions will apply from 29 March 2020 to 29 September 2020, to support Victorian small businesses that had rental payments due on 1 April 2020.’

The Committee notes the broad regulation making provisions engage section 17(a)(vi) of the terms of reference. The Committee also notes that the COVID-19 pandemic is an unprecedented challenge for all Parliaments and that the regulation making provisions are repealed six months after commencement. The Committee notes that these clauses have been used from time to time by various Parliaments to respond to natural disasters and other unexpected situations. The Committee notes the above.

The making of regulations which provide for an alternative termination process for tenancy agreements – modify existing rights and freedoms – retrospectivity (s. 17(a)(i), PCA); inappropriate delegation of legislative power – Henry VIII clauses (s. 17(a)(iv), PCA)

New section 603 as inserted by section 46 is broad regulation making power. [46] It generally provides for the Governor in Council to make emergency regulations to prescribe a scheme for the purposes of resolving disputes during the declared moratorium and to confer and clarify relevant

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35 Note SR No 35/2020 – Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 came into operation on 12 May 2020. [The objective of these Regulations is— (a) to prescribe the Residential Tenancies Dispute Resolution Scheme in relation to resolving eligible disputes for the purposes of responding to the COVID-19 pandemic; and (b) to modify the operation of certain provisions of the Act.]
powers of VCAT and the CDRO. New section 604 provides that the regulations may prescribe the functions of the CDRO including but not limited to:

- conduct a mediation or conciliation in relation to eligible disputes
- make orders, specify processes for dealing with and deciding applications
- providing for the separation or combination of applications, issuing guidelines and rules relating to practice and procedure
- require parties to undertake an assessment by the Director or the CDRO or participate in a mediation or conciliation before an application may be made to VCAT
- confer a right to make an application for an order in relation to an eligible dispute to the CDRO or VCAT;
- prescribe procedures to be followed and the manner in which applications are to be made to VCAT and the CDRO and require specified persons to refer eligible disputes to the CDRO or VCAT.

Effect

The Governor in Council may make emergency regulations to prescribe a scheme for the purposes of resolving disputes during the declared moratorium and to confer and clarify relevant powers of VCAT and the CDRO.36 It includes matters in relation to mediation or conciliation of disputes under the RT ACT, the functions37 of the CDRO, matters relating to eligible disputes and the making of binding orders on parties to eligible disputes.38 The regulations may modify39 the application of the Residential Tenancies Act 1997 by changing, limiting or preventing the exercise of owners under eligible agreements or under the common law and modify the application of the Victorian Civil and Administrative Act 1998 in so far as it relates to eligible agreements. They have effect40 despite anything in the Residential Tenancies Act 1997, the VCAT Act, an eligible agreement or at common law.

There are additional regulation making powers41 in respect of eligible agreements (a tenancy agreement, an SDA agreement and a site agreement) for the purposes of responding to the COVID-19 pandemic.42 The regulations have effect43 despite anything in the Residential Tenancies Act 1997, the VCAT Act, an eligible agreement or at common law.

Limitations with respect to regulations making powers

There are particular limitations with respect to the regulation making powers set out in new sections 603, 604 and 605, 608-10. The Minister proposing to recommend the making of a regulation under section 603(1) that will disapply or modify the application of the VCAT Act or a provision of a subordinate instrument made under that Act must consult the Minister who administers the VCAT Act.44 The Minister making the regulations for the purposes of responding to the COVID-19 pandemic may only make a recommendation if consistent with the relevant advice given by the Chief Health Officer under that subsection (4)(a), (b), (c) or (d) if the Premier has consented to the making of the recommendation.45

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36 See new section 603.
37 See new section 604.
38 See new section 605.
39 See new section 605(h).
40 See new section 606.
41 See new sections 608-10.
42 See new sections 608-10.
43 See new section 610(2).
44 See new section 607A.
45 See new section 609(3).
Parliamentary oversight – disallowance

The Act disapplies certain requirements under the *Subordinate Legislation Act* 1994. A proposed statutory rule that is to be made under sections 603(1) and 609 does not require a section 6 certificate of consultation or the preparation of a regulatory impact statement. The regulations may be disallowed in whole or in part by either House of Parliament.

Committee comment

The Committee notes that section 46 inserts provisions which contain broad legislative powers to make regulations. Regulations may be made which affect existing rights and obligations of landlords, rooming house owners, caravan owners, caravan park owners, tenants and SDAs under various tenancy agreements. An alternative termination process in respect of tenancy arrangements is established and administered under the office of the CDRO. The Committee also refers to its previous comments on Henry VIII clauses. The Committee considers that the regulation making provisions inserted by section 46 may be characterised as Henry VIII clauses. The amendments may have a retrospective effect from 29 March 2020. The amendments are repealed six months from the date of commencement.

The Committee notes the comments in the Statement of Compatibility: -

> ‘These short term amendments will affect the proprietary rights and interests of parties to existing agreements. In particular, it is anticipated that the amendments may result in the reduction of rental income for landlords, rooming house owners, caravan and caravan-park owners, site owners and specialist disability providers. They will also be prevented from taking certain steps in VCAT to enforce otherwise valid contractual and statutory causes of action to recover possession of their property in the case of non-payment of rent... Because the declared moratorium commenced on 29 March 2020, these provisions have a limited retrospective operation... The power to make regulations only arises for certain specified purposes directly relevant to the operation of the declared moratorium and the resolution of resulting disputes, and may only be exercised during that time. Further, in line with normal Subordinate Legislation Act 1994 requirements, the responsible Minister will be required to consider the impact of the regulations on Charter rights when making recommendations to the Governor in Council... Nothing in the Bill will limit the Supreme Court’s jurisdiction to consider residential tenancies matters, including in relation to matters arising from the operation of the Residential Tenancies Dispute Resolution Scheme.’

The Committee notes the broad regulation making provisions engage section 17(a)(vi) of the terms of reference. The Committee also notes that the COVID-19 pandemic is an unprecedented challenge for all Parliaments and that the regulation making provisions are repealed six months after commencement. The Committee notes that these clauses have been used from time to time by various Parliaments to respond to natural disasters and other unexpected situations. The Committee notes the above.

*Transitional regulations – inappropriate delegation of legislative power – Henry VIII clause (section 17(a)(iv), PCA)*

Section 62 provides the Governor in Council may make regulations which contain provisions of a transitional nature including matters of an application or savings nature, arising as a result of the repeal of any provision inserted into an Act by Chapter 3, 4 or 5 of this Act. It disapplies the provisions of the *Subordinate Legislation Act* 1994. [62] A section 6 certificate of consultation and the preparation of a regulatory impact statement are not required for regulations made under this section. Regulations made under this section are disallowable in whole or in part by either House of Parliament. Such regulations are in force six months immediately before the repeal of section 62 and continue in force
for 6 months until 25 April 2021. Pursuant to section 62(4) The regulations have effect despite anything to the contrary in any Act or subordinate instrument. The Committee notes the broad power to make regulations and their transitional nature. The Committee also refers to its previous comments in relation to Henry VIII clauses.

The Committee notes the broad regulation making provisions engage section 17(a)(vi) of the terms of reference. The Committee also notes that the COVID-19 pandemic is an unprecedented challenge for all Parliaments and that the regulation making provisions are repealed six months after commencement. The Committee notes that these clauses have been used from time to time by various Parliaments to respond to natural disasters and other unexpected situations. The Committee notes the above.

Trial by judge alone of any Victorian indictable offences – rights and freedoms – (s. 17(a)(i), PCA)

Section 31 inserts new Chapter 9 into the Criminal Procedure Act 2009. [32] New Part 9.2 provides the court may order that one or more charges in an indictment under Victorian law be tried by the trial judge alone without a jury. A person before the court may appear by audio link or audio visual link. New section 420ZL provides that the court may decide an issue without a hearing, subject to other provisions, on the basis of written submission and without the appearance of the parties. New Division 4 makes provision for appeals to the Court of Appeal regarding decisions for trials by judge alone. New Part 9.3 provides for procedural measures. New Part 4 provides for the repeal of the amendments 6 months after commencement. [32]

Note the Second Reading Speech:

‘Currently, criminal trials in Victoria must be heard by a jury, reflecting the longstanding and fundamental roles of juries in the criminal justice system. However, both the Supreme and County Courts have suspended new jury trials due to the COVID-19 pandemic. This raises significant issues for the justice system, particularly for accused persons facing indictable charges who are on remand, and victims of crime, who may experience further trauma due to delays. As a temporary measure, the Bill will allow judge alone trials for any Victorian indictable offence, if the court considers it is in the interest of justice to do so and the accused person has obtained legal advice and provided consent. While the prosecution’s consent will not be required, the court must consider any prosecution submissions before deciding whether to hear a matter by judge alone. This model is broadly based on the NSW provisions, and will give the courts the discretion and flexibility to continue hearing indictable charges during the COVID-19 pandemic.’

The Committee notes the above.

46 See section 62(4).
47 Note the Explanatory Memorandum: - ‘Presently indictable charges under Victorian law are tried by juries. This clause will allow the courts the option to hear such charges by judge alone. Under section 80 of the Commonwealth Constitution, Commonwealth indictable offences are tried by jury. This will continue to be the case. These new provisions will not apply to charges for Commonwealth offences.’
Charter Issues

Operation of the Charter – Human rights certificate – Regulations modifying administration of justice laws – Regulations that only relate to a court or tribunal

Summary: The effect of sections 4, 15, 46 and 62 was to allow the Governor-in-Council, on a Minister’s recommendation, to override various existing laws relating to the administration of justice until 25th October 2020.

Relevant provisions

The Committee notes that the Act authorised the Governor-in-Council to make regulations that override various existing Victorian laws relating to courts or tribunals if the responsible Minister is of the opinion that doing so is ‘reasonable to protect the health, safety or welfare of persons in relation to the administration of justice or for the effective and efficient administration of justice’:

- Section 4 allowed regulations modifying nearly every statutory provision administered by the Attorney-General or the Ministers for Corrections, Police and Emergency Services, Victim Support or Youth Justice that provides for or regulates (amongst other things) ‘arrangements for or with respect to any proceeding in a court or tribunal’, ‘the conduct of a proceeding in a court or tribunal’ or ‘the process by which orders, judgments, rulings, reasons, determinations, decisions or findings of a court or tribunal are issued’. (Some regulations require the consent of the head of a court, tribunal or integrity entity.)

- Section 15 allowed regulations disapplying various property statutes (and the common law) for certain retail or commercial leases or licences; requiring parties to such contracts to mediate or obtain leave before commencing proceedings in a court or tribunal; and giving VCAT jurisdiction to determine disputes about the terms of some retail leases.

- Section 46, which inserted new sections into the Residential Tenancies Act 1997, allowed regulations overriding that Act, the Victorian Civil and Administrative Tribunal Act 1988 and the common law in order to:
  - prescribe a residential tenancies dispute residential scheme, including preventing, permitting or requiring, and specifying the process for, parties to a residential tenancies dispute applying to VCAT; empower the chief dispute resolution officer to change, limit or prevent the exercise of residential tenancy rights, or exempt or modify the application of one of those laws to a tenant or agreement; and prescribe matters relating to VCAT’s enforcement of orders: new sections 603 and 604.
  - change, limit or prevent the exercise or enforcement of a right or duty under the Residential Tenancies Act 1997 or disapply or modify the application of any provision of that Act to a tenant, resident, SDA tenant or site tenant; and require parties to a residential tenancy dispute to mediate or conciliate before applying to VCAT: new section 609. (Some regulations require the Premier’s consent.)

- Section 62 allowed regulations, having effect despite nearly any other Act, of a transitional nature arising from the repeal of provisions inserted by the Act.

Regulations made under sections 4, 15 and 46 will be implicitly revoked on 25th October 2020, while regulations made under new section 62 will expire on 25th April 2021.

The Committee observes that the effect of sections 4, 15, 46 and 62 was to allow the Governor-in-Council, on a Minister’s recommendation, to override various existing laws relating to the administration of justice until 25th October 2020 (and for a transitional purpose until 25th April 2021.)
Charter analysis

The Statement of Compatibility for the Bill remarked, in relation to clause 4:

‘To reduce unnecessary pressure on justice and integrity agencies and ensure the effective administration of justice and law in Victoria during the COVID-19 pandemic, the Bill will allow the Governor in Council to make regulations that modify or disapply the application of certain justice related Acts. These emergency regulations may only be made in relation to specific procedural matters, such as statutory timeframes and the conduct of court or tribunal proceedings, and in limited, defined circumstances.

While a number of important limits and safeguards will apply, regulations made under these powers could nevertheless engage Charter rights including the right to a fair hearing and accused’s rights in criminal proceedings in sections 24 and 25 of the Charter. However, it is necessary to introduce flexibility in these matters during the COVID-19 pandemic to ensure that matters can continue to proceed without unreasonable delay.

Further, in line with normal Subordinate Legislation Act 1994 requirements, the Attorney-General will be required to consider the impact of the regulations on Charter rights when making recommendations to the Governor in Council.

The Attorney-General will only be able to recommend that the Governor in Council make these emergency regulations if the Attorney-General considers that the regulations are consistent with Chief Health Officer advice and reasonable, in managing or responding to the COVID-19 pandemic, to protect the health, safety or welfare of persons in relation to administration of justice or law, or to provide for the effective or efficient administration of justice or law, or conduct of integrity agencies. These safeguards ensure the emergency regulations are only made where there is an appropriate nexus to COVID-19 and will be directed at enabling the justice system to operate safely and effectively, in a way that promotes the rights to life and security of persons.

A less restrictive means of achieving these goals could be to make any necessary changes to the principal legislation itself. However, that approach is not reasonably available given the evolving nature of the COVID-19 emergency and the potential need to act quickly to respond to emerging risks to the health, safety or welfare of persons. In these circumstances, and noting the broader impacts of the pandemic, it may not be possible or practical to convene Parliament to consider legislation to respond to urgent and emerging issues.’

In relation to clause 15:

‘The Bill authorises the making of regulations that require landlords or tenants who are in dispute about the terms of an eligible lease to participate in mediation arranged by the Small Business Commission, before commencing proceedings before VCAT or a court. However, any such regulations must not require landlords or tenants who have already commenced relevant court or VCAT proceedings to participate in mediation, or prevent parties from commencing court proceedings in relation to that dispute at any time. The right to a fair hearing is therefore not limited by these provisions...

Finally, in line with normal Subordinate Legislation Act 1994 requirements, the responsible Minister will be required to consider the impact of the regulations on Charter rights when making recommendations to the Governor in Council.’
In relation to clause 46:

‘The power to make regulations only arises for certain specified purposes directly relevant to the effective operation of the declared moratorium and the resolution of resulting disputes, and may only be exercised during that time. Further, in line with normal Subordinate Legislation Act 1994 requirements, the responsible Minister will be required to consider the impact of the regulations on Charter rights when making recommendations to the Governor in Council.’

The Committee notes that, although the Act exempted regulations made under sections 4, 15, 46 and 62 from existing ss. 6 and 7 of the Subordinate Legislation Act 1994 (which require consultation and regulatory impact statements before non-exempt regulations are made), it did not exempt them from existing s. 12A (which requires the responsible Minister to ensure that a human rights certificate is prepared.)

However, the Committee observes that existing para 12A(3)(a) of the Subordinate Legislation Act 1994 provides for an exception to the requirement for a human rights certificate if the responsible Minister certifies that the statutory rule is ‘a rule which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal’. In 2007, a previous Attorney-General informed this Committee that:

‘[t]he reason for the exemption is that the Government was of the view that the exemptions should mirror the exemptions in section 8(1) of the Subordinate Legislation Act with respect to the requirement to prepare a regulatory impact statement in respect of statutory rules.’

A number of past regulations made by the Governor-in-Council have been properly exempted under para 8(1)(b) and some have also been properly exempted under para 12A(3)(a).

The Committee notes that in 2014 the full court of the Federal Court of Australia held that the Charter’s own provision obliging public authorities (including Ministers) to act compatibly with and give proper consideration to human rights does not apply to the making of subordinate legislation.

Conclusion

The Committee notes that s12A(3)(a) of the Subordinate Legislation Act 1994 may exempt regulations made under new sections 4, 15, 46 or 62 from the requirement that the responsible Minister prepare a human rights certificate, where those regulations relate only to a court or tribunal or the practice or rules of a tribunal. The Committee observes that the Statement of Compatibility remarks that the human rights impact of regulations made under those sections will be considered under the Subordinate Legislation Act 1994.

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49 E.g. Bail Amendment Regulations 2009; Children, Youth and Families Amendment Regulations 2009; Children, Youth and Families Amendment Regulations 2010; Children, Youth and Families Further Amendment Regulations 2010; Children, Youth and Families Amendment Regulations 2013; Court Security (Amendment) Regulations 2007; Court Security Amendment Regulations 2016; Crimes (Search Warrant) Regulations 2004; Criminal Procedure Amendment (Recorded Evidence-In-Chief) Regulations 2011; Criminal Procedure Regulations 2009; Crown Proceedings Regulations 2011; Evidence (Examination of Witnesses Outside the State) Regulations 2011; Magistrates’ Court (General) Regulations 2014; Magistrates’ Court General Amendment Regulations 2018; Sentencing Amendment Regulations 2013; Subordinate Legislation (Victims of Crime Assistance (Special Financial Assistance) Regulations 2000 - Extension of Operation) Regulations 2010; Victims of Crime Assistance (Delegation) Regulations 2013. Each of these regulations – as well as numerous regulations relating to court fees or revocations of earlier regulations – are identified in the Committee’s Annual Reviews of regulations as having s. 8(1)(b) exemptions.
50 E.g. Magistrates’ Court (General) Regulations 2014; Magistrates’ Court (Fees) Amendment Regulations 2013; Sentencing Amendment Regulations 2013. The majority of human rights certificates are now only available in the Public Records Office of Victoria, which is currently closed.
51 Kerrison v Melbourne City Council [2014] FCAFC 130, [178]–[209].
Right not to be treated in a cruel, inhuman or degrading way – Detainees’ right to be treated with humanity and respect – Child offenders’ right to be treated in an age-appropriate way – Isolation of youth detainees to detect, prevent or mitigate an infectious disease for up to 14 days – Further periods of isolation – Denial of entitlements

Summary: The effect of section 25 may have been to authorise placing a youth detainee in a locked room separate from others for up to 14 days in order to detect, prevent or mitigate any illness or condition due to a specific infectious agent, and to be isolated for further periods or denied entitlements. The Committee will write to the Premier seeking further information.

Relevant provisions

The Committee notes that section 25, which inserted a new section 600M into the Children, Youth and Families Act 2005, provided that the Secretary of the Department of Human Services or the officer-in-charge of a youth detention centre may authorise placing a youth detainee in a locked room separate from others to detect, prevent or mitigate the transmission within the centre of any infectious disease, (whether or not the detainee is suspected of having, or has been diagnosed with, that disease) provided that he or she is closely supervised and observed every 15 minutes and receives medical and mental health treatment that he or she reasonably requires. New sub-section 600M(9) provided that an ‘infectious disease’:

includes a human illness or condition due to a specific infectious agent or its toxic products that arises through transmission of that agent or its products from an infected person, animal or reservoir to a susceptible person, either directly or indirectly through an intermediate plant or animal host, vector or the inanimate environment.

New sub-section 600M(3) provided that the Secretary must determine ‘a period of isolation, not exceeding 14 consecutive days, being the minimum period required to’ detect, prevent or mitigate the transmission of the disease, having regard to relevant medical or mental health advice relating to the infectious disease. However, new sub-section 600M(8) provided that the Secretary may authorise isolation on more than one occasion and may determine a ‘further minimum period of isolation in accordance with sub-section 3 for each occasion’. The Explanatory Memorandum for the Bill did not address new sub-section 600M(8) and, in particular, whether or not it permitted isolating a youth detainee for more than 14 consecutive days.

New sub-sections 600N(1) & (2) provided that isolated detainees are entitled to: access the outdoors and undertake outdoor recreational activities at least once per day for a reasonable time; have their developmental needs cared for; visits; have reasonable efforts made to meet their medical, religious and cultural needs; receive information on the centre’s rules; complain to the Secretary and Ombudsman; and be advised of these entitlements. However, new sub-section 600N(3) provided that the Secretary may determine to not give effect to these entitlements if it would not be reasonably safe to do so, or if the Secretary was not reasonably able to do so.

The Committee observes that the effect of section 25 may have been to authorise placing a youth detainee in a locked room separate from others for up to 14 days in order to detect, prevent or mitigate any human illness or condition due to a specific infectious agent, and (if the Secretary considers that doing so is necessary for health, safety or resources reasons) to be isolated for further periods or denied daily access to the outdoors or entitlements to have developmental needs cared for and medical, religious or cultural needs met, to visits, or to complain.
Charter analysis

The Statement of Compatibility for the Bill remarked:

‘The amendments to the Children, Youth and Families Act allow the Secretary or officer in charge of a relevant facility to authorise the isolation of a child or young person for a specific time for the purpose of detecting COVID-19 or another infectious disease or preventing or mitigating their transmission within the facility. Any period of isolation may be informed by current health advice and the period authorised must not exceed 14 consecutive days. This is to reduce the risk of a COVID-19 outbreak in our prisons and youth justice facilities, and in the broader community, and is in line with current public health advice to practice social distancing. It also ensures the government meets its obligation to use all means reasonably necessary to protect the health and life of persons in closed environments, particularly where such persons are deprived of their liberty and cannot act to protect themselves or separate themselves from other individuals who pose a risk.

This amendment engages section 10(b) of the Charter which provides that a person must not be treated or punished in a cruel, inhuman or degrading way. This includes actions that affect a person’s physical or mental well-being, including reforms that allow for prolonged periods of segregation or other crisis intervention strategies. A limitation on the right in section 10(b) will generally involve deliberate mistreatment that reaches a minimum standard of severity.

I do not consider the amendments will limit the rights protected by section 10(b) of the Charter, as it is not a deliberate mistreatment, being protective rather than punitive. The purpose of isolation under these provisions is very clear, which includes protecting the health of the child or young person, and people within those facilities. The amendments include a range of safeguards to ensure the child or young person is engaged in meaningful contact throughout any period of isolation, and is allowed to leave their room each day for time outdoors and recreation (unless the Secretary determines otherwise). These safeguards will ensure that the inherent dignity of children and young people in the youth justice system is respected.’

However, the Committee observes that the Supreme Court of Victoria has held:52

‘Most cases of breach will involve on the part of the offender deliberate imposition of severe suffering or intentional conduct to harm, humiliate or debase a victim. The purpose of the offender’s conduct will, at the very least, be a factor to be taken into account, though the absence of such a purpose does not conclusively rule out a violation of the right.’

The Committee notes that the Statement of Compatibility did not address new sub-section 600M(8).

In relation to new sub-section 600M(9), the Statement of Compatibility remarked:

‘[T]he definition of “infectious diseases” does include many diseases that may not have significant health impacts (including when contracted at the same time as COVID-19). Being isolated as a result of having a more minor infectious disease, may not be necessary and if not, could be said to impose an unnecessary additional hardship on a detained person. This would limit the right in s 22(1) of the Charter and further limit other Charter rights such the right to freedom of movement in section 12 and the right to liberty in section 21.

To the extent that any Charter rights are limited by the extension of the isolation requirements to mitigating other infectious diseases, I consider that any potential limit is justified and proportionate for the following reasons. First, other infectious diseases like influenza have very similar symptoms as COVID-19…. Second, the health risk posed by COVID-19 is worsened if a child or young person simultaneously contracts both COVID-19 and another infectious disease, especially influenza… Third, the most vulnerable young people in youth justice facilities often

52 Certain Children v Minister for Families and Children (No 2) [2017] VSC 251, [250].
have co-morbidities that increase their risk to becoming seriously ill if they contract COVID-19 and/or another infectious disease...

Because Victoria is facing a public health emergency, these provisions must be inserted as a matter of urgency. In the time available during the current state of emergency, it is not possible to appropriately narrow the scope and specificity of this definition while being confident that the definition is broad enough to enable it to be used in all the circumstances in which it will be necessary during this public emergency.’

The Committee notes that section 26, which inserted new section 112O into the Corrections Act 1986, authorised the Secretary or Governor to order the separation, quarantine or isolation of a prisoner from some or all other prisoners ‘for the purposes of preventing, detecting or mitigating the risk of COVID-19 and related health risks’, where ‘related health risks’ were defined to mean ‘any medical or psychiatric conditions or other health conditions of a prisoner that may contribute to, result from, or be connected to (whether directly or indirectly), a risk in relation to COVID-19 or any other infectious disease’.

In relation to new sub-section 600N(3), the Statement of Compatibility remarked:

‘The amendment to provide for the isolation of children and young people engages section 22 of the Charter, the right to humane treatment when deprived of liberty. This right complements the right to be free from torture and cruel, inhuman or degrading treatment in sections 10(a) and 10(b) of the Charter, however it is engaged by much less serious mistreatment or punishment. This right recognises that detained individuals must be provided with services that satisfy their essential needs...

[T]he Secretary can only determine not to give effect to an entitlement if the Secretary considers that it would not be reasonably safe to do so or that the Secretary would not be reasonably able to provide the entitlement, having regard to specified public health matters, or the security of the centre. Further, the removal of entitlements only applies to isolation under this new provision.

Together, these protections ensure that a child or young person’s wellbeing and developmental needs will continue to be met during any period of isolation to detect, prevent or mitigate the transmission of COVID-19, and limitation placed on those entitlements is demonstrably justified based on health advice and for the purpose of supporting public health efforts in response to COVID-19.

I consider this amendment to also support the right under section 22(1) to be treated with humanity and with respect for the inherent dignity of the human person by reducing the risk that a child or young person contracts COVID-19, as well the health of frontline staff whose work is vital to support children’s and young people’s enjoyment of the right under section 22(1). Without the amendments, staff may become infected with COVID-19, which would make them unavailable to work in these important frontline roles.

I do not consider that alternative options, such as reducing the number of persons in youth justice facilities, are reasonably available or sufficient to effectively respond to a potential COVID-19 outbreak in a facility or to reduce any resultant transmission from a facility to the Victorian community. To the extent that there is a limit on the right to humane treatment, I consider that any potential limit is demonstrably justified under section 7(2) of the Charter.’

The Committee observes that Charter s. 7(2) provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Committee notes that the Statement of Compatibility did not address the compatibility of new sections 600M and 600N with the Charter right of a child offender to be ‘treated in a way that is appropriate for his or her age.’

Conclusion

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

- the operation of section 600M(8), specifically whether it permits the Secretary to authorise the isolation of youth detainees for more than 14 consecutive days.
- the compatibility of new sections 600M and 600N with the Charter right of a child offender to be treated in a way that is appropriate for his or her age.

The Committee notes that the purpose of new-subsections 600M(9) and 600N(3) are to enhance child detainees’ Charter rights to life and to such protection as are in their best interests. The Committee considers that these sections are compatible with human rights.

Retrospective criminal law – Validation of orders to visitors – Offence of disobeying an order

Summary: The effect of new section 112T of the Corrections Act 1986 may have been that visitors can be prosecuted and punished for disobeying orders purportedly made for security or safety reasons under existing ss. 37, 39 and 43 between 20 March 2020 and 24 April 2020 as if those orders had been made for health reasons. The Committee will write to the Premier seeking further information.

Relevant provisions

The Committee notes that section 26, inserting new sub-sections 112T(1) & (2) into the Corrections Act 1986, provided:

1. In this section--

   relevant period means—

   (a) in relation to a purported exercise of a power or function under Division 2 of Part 6, the period starting on 20 March 2020 and ending on the day this Part comes into operation...

   (2) An... order... purporting to be made by the Secretary [or] the Governor... in the purported exercise of a power or function under a provision referred to in the definition of relevant period in subsection (1) during the relevant period has and is taken always to have had, the same force and effect as it would have had if this Part had been in operation when the... order was... purported to be made.

53 Charter s. 23(3).
The relevant period ran from 20 March 2020 to 24 April 2020. Existing Division 2 of Part 6 of the *Corrections Act* 1986 authorises the following orders for management, good order, security or safety:

- Existing sub-s. 37(3): A Governor may give a prisoner’s relative or friend who has been permitted to visit a prisoner ‘such orders as are necessary for the management and good order and security of the prison.’
- Existing sub-s. 39(1): A Governor may prohibit a prisoner’s relative or friend from entering or remaining in the prison if ‘the person’s entry into the prison or visit to the prisoner might endanger the good order or security of the prison or the safety of the prisoners.’
- Existing sub-s. 39(2)(c): A Governor may order a prisoner’s relative or friend to leave the prison if the person has disobeyed an order under sub-s. 39(1).
- Existing sub-s. 43(1): A Governor may prohibit a person from entering a prison as a visitor or order a visitor to leave a prison immediately if ‘the security of the prison or the safety of a visitor is threatened’.
- Existing sub-s. 43(1A): The Secretary may prohibit a person from entering all or any prisons in Victoria as a visitor if ‘the good order or security of prisons or the safety of prisoners or visitors to prisons is threatened’.

New sub-sections 112G(1)(b) & (2) permitted the Secretary or Governor to prohibit a person from entering a prison, or to restrict the manner of entry or visiting, or to order a visitor to leave ‘for the health or safety of any person’. Accordingly, new sub-section 112T(2) may have given orders purportedly made for security reasons or the safety of prisoners or visitors between 20 March 2020 and 24 April 2020 ‘the same force and effect’ they would have had if they had been made for the health of any person.

New sub-sections 112T(3) & (4) provided:

- (3) Any act or thing done or omitted to be done, whether under a power conferred by or under an enactment or otherwise, during or after the relevant period in reliance on or in relation to an... order referred to in subsection (2)... gives rise to the same consequences, and is to be regarded as always... having given rise to the same consequences, as if this Part had been in operation when... the... order was... purported to be made.
- (4) A... liability... imposed in relation to, or affected by an... order referred to in subsection (2) is... enforceable, and is to be regarded as always having been... enforceable, as if this Part had been in operation when the... order was... purported to be made.

Existing Division 2 of Part 6 of the *Corrections Act* 1986 provides for offences of disobeying an order under existing ss. 37 (sub-s. 37(4): 5 penalty units), 39 (sub-s. 39(3): 10 penalty units) and 43 (sub-s. 43(2): 5 penalty units.) New sub-section 112G(3) made it an offence to disobey an order made to a visitor for health reasons, punishable by 10 penalty units. Accordingly, new sub-sections 112T(3) & (4) may have allowed orders purportedly made for security reasons or the safety of prisoners or visitors between 20 March 2020 and 24 April 2020 to be enforced, and for liability to be imposed on visitors who disobey them, as if the orders had been made under the subsequently enacted new section 112G.

The Committee observes that the effect of new section 112T of the *Corrections Act* 1986 may have been that visitors could be prosecuted and punished for disobeying orders purportedly made for security or safety reasons under existing ss. 37, 39 and 43 between 20 March 2020 and 24 April 2020 as if those orders had been made for health reasons under the subsequently enacted new section 112G.

34
Charter analysis

Charter s. 27 provides:

1. A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

2. A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

The Statement of Compatibility for the Bill did not discuss the compatibility of new section 112T of the Corrections Act 1986 with Charter s. 27.

Conclusion

The Committee will write to the Premier seeking further information as to whether or not new section 112T of the Corrections Act 1986 was compatible with the Charter’s rights against retrospective criminal law.

Equality – Fair hearing – Special hearing to determine guilt or innocence of a person who is not fit to be tried – Judge can order hearing by judge alone

Summary: The effect of new section 101 may have been to allow a judge to order that a person who is unfit to be tried must have his or her guilt or innocence of an offence determined without a jury, without the court being satisfied that he or she or his or her legal representative has consented. The Committee will write to the Premier seeking further information.

Relevant provisions

The Committee notes that section 30 inserted a new section 101 into the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, which provided:

1. At any time before the commencement of a special hearing, the court may order that the special hearing be conducted by the judge alone, without a jury, if—
   (a) the offence for which the special hearing is to be conducted is an offence under the law of Victoria; and
   (b) the court considers that it is in the interests of justice to make the order.

2. The court may make an order under subsection (1)—
   (a) on its own motion; or
   (b) on application by the prosecution or an accused.

3. In determining whether to make an order under subsection (1), the court must have regard to the submissions, if any, of the prosecution.

4. However, the court may make an order under subsection (1) whether or not the prosecution consents to the making of the order.

A ‘special hearing’ must be ordered if a court finds that an accused is not (and will not within the next 12 months be) fit to stand trial. The purpose of a special hearing is to determine whether, on the evidence available, the accused is either: not guilty of the offence; not guilty because of mental impairment; or committed the offence charged or an alternative. Existing s. 16 provides: ‘A special hearing is to be conducted as nearly as possible as if it was a criminal trial’, where the accused is taken to have pled not guilty, can raise any defence (including mental impairment) and the rules of evidence
apply. Not guilty findings at special hearings are equivalent to such findings at criminal trials while a guilty finding permits the accused to be declared liable to supervision.

The Committee also notes that section 32, which inserted a new section 420D into the Criminal Procedure Act 2009, provided for accused persons who are fit to be tried as follows:

(1) At any time except during trial, the court may order that one or more charges in an indictment be tried by the trial judge alone, without a jury, if—
   (a) each charge is for an offence under the law of Victoria; and
   (b) each accused consents to the making of the order; and
   (c) the court is satisfied that each accused has obtained legal advice on whether to give that consent, including legal advice on the effect of the order; and
   (d) the court considers that it is in the interests of justice to make the order.

(2) The court may make an order under subsection (1)—
   (a) on its own motion; or
   (b) on application by the prosecution or an accused.

(3) In determining whether to make an order under subsection (1), the court must have regard to the submissions, if any, of the prosecution.

(4) However, the court may make an order under subsection (1) whether or not the prosecution consents to the making of the order.

New section 101 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 lacks an equivalent to new paras 420D(1)(b) & (c) of the Criminal Procedure Act 2009.

The Committee observes that the effect of new section 101 may have been to allow a judge to order that a person who is unfit to be tried must have his or her guilt or innocence of an offence determined without a jury, without the court being satisfied that he or she or his or her legal representative consented to a hearing by judge alone.

Charter analysis

The Statement of Compatibility for the Bill remarked:

‘The Bill will make a number of amendments to the CMIA to allow proceedings to be conducted with greater flexibility throughout the COVID-19 pandemic. The Bill will require fitness to stand trial investigations under the CMIA to be heard by a judge rather than a jury and make amendments to allow a special hearing to be heard by a judge alone if it is in the interests of justice to do so.

These amendments are necessary to ensure that certain CMIA proceedings can continue throughout the COVID-19 pandemic. Avoiding unreasonable delay is particularly important in CMIA matters as proceedings often involve vulnerable accused persons. As with amendments to allow judge alone criminal trials, these amendments engage the right to a fair hearing in section 24 of the Charter and rights in criminal proceedings in section 25 of the Charter. I consider that any limitations on these rights are reasonable and justified in the circumstances’
However, the Statement of Compatibility did not address the differences between new section 101’s provision for special hearings by judge alone and the equivalent provision for trials by judge alone in new section 420D of the **Criminal Procedure Act 2009**.\(^\text{54}\)

The Committee observes that different approaches to determining the guilt of people who aren’t and are fit to be tried may engage the Charter’s rights against disability discrimination.\(^\text{55}\)

### Comparable provisions

The Committee notes that:\(^\text{56}\)

- in the Australian Capital Territory, a special hearing must be determined by a jury unless either the accused elects for a hearing before a single judge or, if the court is not satisfied that the accused is capable of making an election, his or her guardian informs the court that such a hearing would be in the accused’s best interests.

- in New South Wales, a special hearing must be determined by judge alone unless an election to have the special hearing determined by the jury is made by ‘the accused person [if] the Court is satisfied that the person sought and received advice in relation to the election from an Australian legal practitioner and understood the advice’, ‘an Australian legal practitioner representing the accused person’ or ‘the prosecutor’.

- in South Australia, an investigation into whether the elements of an offence have been established in relation to a potentially mentally impaired or unfit accused ‘is to be conducted before a jury unless the defendant has elected to have the matter dealt with by a judge sitting alone.’

The Committee also notes that, in 2014, the Victorian Law Reform Commission recommended against permitting special hearings to be decided without a jury.\(^\text{57}\)

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54 In relation to new section 420D, the Statement of Compatibility remarked:

‘the Bill will permit the Courts to order a judge alone trial only if it is in the interests of justice to do so and if all the accused persons consent to their trial being heard by judge alone. This will ensure that accused persons retain their ability to have their case heard by jury, should they wish to do so.’

55 Charter ss 8 & 25(2).

56 Crimes Act 1900 (ACT), s. 316(2); Mental Health (Forensic Provisions) Act 1990 (NSW), s. 21A(1); Criminal Law Consolidation Act 1935 (SA), s. 269B(1). In the remaining jurisdictions that hold special hearings, they must be determined by a jury: Criminal Code 1983 (NT), Schedule 1, s. 43V; Criminal Justice (Mental Impairment) Act 1999 (Tas), s. 15(3).


‘As with the determination of the defence of mental impairment in ordinary trials, the Commission is of the view that the same considerations apply in the determination of criminal responsibility of people found unfit to stand trial. Determinations of criminal responsibility in these circumstances should also be conducted by a judge.

In addition, the Commission notes the difficulty in lawyers obtaining instructions from a client who is unfit to stand trial to agree to a matter being determined by a judge. Although an accused will have to go through a special hearing, despite the parties involved thinking that the best course of action is a judge-alone procedure, the Commission considers that this is necessary to protect the rights of the accused. As Justice Bell noted in *DPP v Watson*:

it is a very serious thing to conclude that counsel can exercise decision-making capacity on behalf of an accused without instructions, especially where the consequence would be that the accused would thereby lose the opportunity to test the prosecution case and obtain an acquittal.’

The Commission’s recommendation was proposed to be implemented in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020, which provides for a judge to decide fitness to be tried, but not criminal responsibility. Its Statement of Compatibility remarked:

‘The Bill amends the CMIA so that a judge, rather than a jury, determines the question of a person’s fitness to stand trial. This amendment aims to expedite fitness investigations and increase the efficiency of court processes. This amendment is relevant to, and enhances, the right to be tried without unreasonable delay under section 25(2)(c)
Conclusion

The Committee will write to the Premier seeking further information as to the compatibility of new section 101 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 with the Charter’s rights against disability discrimination.

Movement – Property – VCAT may order rent reduction – Restrictions on notices of intent to vacate

Summary: The effect of section 46 may have been that VCAT could reduce the rent payable in any residential tenancy; and that some tenants could only give 28 days’ notice of an intent to vacate in specified circumstances. The Committee will write to the Premier seeking further information.

Relevant provisions

The Committee notes that section 46, inserted a new section 540(1)(a) into the Residential Tenancies Act 1997, which provided:

(1) On an application of a tenant under a tenancy agreement, the Tribunal may make an order—

(a) reducing the rent payable under the tenancy agreement for a period specified in the order...

New sections 553(1)(a), 563(1)(a), 573(1)(a) and 586(1)(a) provided similarly for rent payable for a room in a rooming house; rent or hiring charge payable for a site or caravan in a caravan park; rent payable under a site agreement; and rent payable under an SDA residency agreement. These sections did not include any express criteria concerning whether or not, by what amount and for how long VCAT may order a rent reduction.58

The Committee also notes that new section 545(1) provided:

A tenant must not give a landlord a notice of intention to vacate rented premises under Subdivision 3 of Division 1 of Part 6 unless—

(a) the tenant requires special or personal care and needs to vacate the rented premises in order to obtain that care; or

(b) the tenant has received a written offer of public housing from the Director of Housing; or

(c) the tenant requires temporary crisis accommodation and needs to vacate the rented premises in order to obtain that accommodation; or

(d) the tenant, who is an SDA resident, has been given a notice under section 498DA; or

(e) the tenant is suffering severe hardship.

New section 578(1) provided similarly for a site tenant of a site in a caravan park that is available for occupancy under a site agreement. Existing s. 235 provides that ‘A tenant may give a landlord a notice of intention to vacate rented premises’ that ‘must specify a termination date that is not less than 28 days after the date on which the notice is given’, and that such notices are only of no effect if the notice of the Charter. As the jury will still make the ultimate determination of criminal responsibility this amendment is consistent with the right to a fair hearing under section 24 of the Charter.’

58 Compare, e.g. new sections 543(2) and 576(2), which provided that VCAT may only reduce the term of an agreement ‘if it is satisfied that the severe hardship which the applicant would suffer if the term of the agreement were not reduced would be greater than the severe hardship which the other party to the agreement would suffer if the term were reduced’.
is in respect of a fixed-term agreement and is either less than any agreed period of notice or specifies a date before the termination of the agreement. Existing s. 317R provides similarly for site tenants.

**The Committee observes that the effect of:**

- new sections 540(1)(a), 553(1)(a), 563(1)(a) 573(1)(a) and 586(1)(a) may have been that VCAT could reduce the rent payable in a residential tenancy for a specified period, without regard to any statutory criteria; and

- new sections 545(1) and 578(1) may have been that some tenants could only give 28 days’ notice of an intent to vacate in specified circumstances.

The Committee notes that reg 7 of the Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 provides that the Director of Consumer Affairs Victoria must refer any disputes that he or she becomes aware of relating to new sections 540(1)(a), 553(1)(a), 563(1)(a), 573(1)(a) and 586(1)(a) to the chief dispute resolution officer for assessment relating to its suitability for alternative dispute resolution, and that reg 16 empowers the chief dispute resolution officer to determine the dispute if satisfied that he or she is satisfied that it is fair and reasonable to do so in all the circumstance, including by reducing the rent payable for a specified period.

The Committee also notes that new section 545(1) has since been modified by reg 39(1) of the Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 to read as follows:

In addition to giving a notice of intention to vacate in accordance with Subdivision 3 of Division 1 of Part 6, a tenant may give a landlord a notice of intention to vacate if:

(e) the tenant is suffering severe hardship; or

(f) the tenant has been given notice of an application to terminate a tenancy agreement made to the Tribunal under section 548(1) by:

(i) the landlord under the tenancy agreement; or

(ii) a mortgagee in respect of the rented premises.

New section 578(1) has been similarly modified by reg 49(1).

The Committee observes that the latter changes may be in effect from 12 May 2020 to 26 September 2020.

**Charter analysis**

The Statement of Compatibility for the Bill remarked:

‘As a result of the declared moratorium, the Bill provides for an alternative termination process for tenancy agreements (as well as the other tenure types regulated under the RT Act including residency rights and site agreements). It is now intended that tenancies etc. may only be terminated by VCAT order in certain limited circumstances as specified in the Bill (including where matters of public safety, violence or danger are established, or if a tenant fails to comply with their obligations, such as by not paying rent, in circumstances where they could comply with the obligations without suffering severe hardship). A tenancy may also be terminated by mutual consent, or in certain circumstances following notice by a tenant. The existing provisions under the RT Act that provide for termination in circumstances of rental arrears will not apply and breaches of agreements or statutory duties, if caused by reasons connected with COVID-19, will not be taken to be breaches during the declared moratorium.

These short-term amendments will affect the proprietary rights and interests of parties to existing agreements. In particular, it is anticipated that the amendments may result in the reduction of rental income for landlords, roaming house owners, caravan and caravan-park
owners, site owners and specialist disability accommodation providers. They will also be prevented from taking certain steps in VCAT to enforce otherwise valid contractual and statutory causes of action to recover possession of their property in the case of non-payment of rent.

I consider any deprivation of property resulting from these amendments to be in accordance with law. These temporary changes to an already significantly regulated sector are provided for by statute, and are clearly and precisely set out in the Bill. Even though the provisions have a narrow field of retrospective operation, I consider that any deprivation they affect is nevertheless in accordance with law.

I note also that these amendments are being implemented in the context of an unprecedented public health emergency, in order to mitigate the effects of large-scale rental stress. The scope of the proprietary interests affected by the Bill (being highly specific statutory limitations on the operation of contractual rights and existing statutory mechanisms) is limited and of a temporary duration.’

The Committee notes that the Statement of Compatibility did not specifically address the provision for rent reduction by VCAT in new sections 540(1)(a), 553(1)(a), 563(1)(a) 573(1)(a) and 586(1)(a). The Committee observes that the lack of express statutory criteria for ordering such reductions may have engaged the Charter’s right against deprivation of property ‘otherwise than in accordance with law’.59

The Committee also notes the Statement of Compatibility did not specifically address the provision limiting notices of intent to vacate in period tenancy agreements and site agreements in new sections 545(1) and 578(1). The Committee observes that, to the extent that these provisions prevented a tenant from moving to another residence, they may have engaged their Charter right to ‘freedom to choose where to live.’60

Conclusion

The Committee will write to the Premier seeking further information as to whether or not:

- new sections 540(1)(a), 553(1)(a), 563(1)(a) 573(1)(a) and 586(1)(a) were compatible with landlords’ Charter right not to be deprived of property other than in accordance with law; and
- new sections 545(1) and 578(1) (prior to their modification by the Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020) were compatible with tenants’ Charter right to freedom to choose where to live.

59 Charter s. 20.
60 Charter s. 12.
Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020

Member Hon. Jill Hennessy MP
Portfolio Attorney-General

Introduction Date 17 March 2020
Second Reading Date 18 March 2020

Summary

The Bill generally amends the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (the CMIA) and makes a number of reforms to implement recommendations of the Victorian Law Reform Commission (VLRC) from its review of that Act.\textsuperscript{61} The Bill:

- Modernises the law relating to unfitness to be tried and includes statutory principles applying to adults and children; [4,6,8]
- Streamlines proceedings under the CMIA and removes from juries the decision as to whether a person is fit to stand trial. A judge will make that decision; [9]\textsuperscript{62}
- Better provides for the distinct needs of people with cognitive impairment under the CMIA; [5]
- Improves the system for review of supervision orders made under the CMIA; [4,14,29]
- Reframes the roles under the CMIA of the Attorney-General, the Director of Public Prosecutions and the Secretary to the Department of Health and Human Services; Note the Second Reading Speech: 'the Bill transfers the function of appearing at supervision order reviews and extended leave hearings from the Attorney-General to the DPP. The Director is well placed to take on this role, being independent from government and having expertise in dealing with victims; as well as, in most cases, having familiarity with the facts and circumstances of each supervised person’s case through involvement in the prosecution.’
- Amends the CMIA and the Mental Health Act 2014 to transfer the functions of the Forensic Leave Panel to the Mental Health Tribunal. The Forensic Leave Panel will cease to operate; [104]
- Amends the Sentencing Act 1991, the Confiscation Act 1997 and the Road Safety Act 1986 to allow ancillary orders to be made in relation to findings under the CMIA;
- Amends the Disability Act 2006 to expand the provision of treatment plans to persons in a residential treatment facility subject to custodial supervision orders under the CMIA.

\textsuperscript{61} Note the Second Reading Speech: 'The CMIA was introduced in 1997 and commenced full operation on 18 April 1998. It… established new procedures to deal with people whose mental impairment means they are either unfit to stand trial, or have been found not guilty because of mental impairment... The CMIA scheme applies to the Supreme and County Courts and, since 2014, the Children’s Court... In 2012, after nearly fifteen years of operation, the previous government asked the VLRC to review the CMIA to ensure that the legislation ‘operates justly, effectively and consistently with the principles that underlie it’. The VLRC’s report was tabled in Parliament on 21 August 2014, and responded comprehensively to its detailed Terms of Reference. I thank the VLRC for its thorough and considered review. The reforms in this Bill will help ensure that the CMIA operates consistently with its underlying principles, as identified by the VLRC.’

\textsuperscript{62} Note that Section 30 of the COVID-19 Omnibus (Emergency Measures) Act 2020 which received Royal Assent on 24 April 2020 inserted new Part 11 into the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997. New Division 2 as inserted provides for fitness to stand trial to be determined by a judge alone. Note the Statement of Compatibility for the COVID-19 Omnibus (Emergency Measures) Act 2020: 'The Bill will amend the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA) to allow fitness to stand trial to be determined by a judge rather than a jury, and a special hearing to be heard by a judge alone. With respect to fitness to stand trial, this replicates an amendment included in the Crimes (Mental Impairment and Unfitness to be Tried) Bill 2020, which is currently before Parliament.'
Comments under the PCA

Delayed commencement – delegation of legislative power – (section 17(a)(vi), PCA)

Clause 2 is the commencement provision. Subclause (2) provides that if a provision of the Act does not come into operation before 1 July 2021, it comes into operation on that day. Note the Explanatory Memorandum: ‘The longer-than-usual forced commencement period will provide time for the Director of Public Prosecutions and the Mental Health Tribunal to prepare for and assume their new functions, and allow time for affected agencies to undertake the planning necessary to transition all current supervision orders to the new regime of 5-yearly reviews.’

The Committee is of the view the provision is justified.

Charter Issues

The Bill is compatible with the rights set out in the Charter of Human Rights and Responsibilities Act 2006.
Justice Legislation Amendment (Drug Court and Other Matters) Bill 2020

Member
Hon. Jill Hennessy MP

Portfolio
Attorney-General

Introduction Date
18 March 2020

Second Reading Date
19 March 2020

Summary

The Bill amends the County Court Act 1958 and makes miscellaneous amendments to various other Acts. The Bill:

- Amends the County Court Act 1958 to establish a Drug Court Division of the County Court. [3-35] It amends the Sentencing Act 1991 to make consequential amendments in relation to the new Drug Court Division of the County Court.
- Amends the Charities Act 1978 to allow the Attorney-General to delegate any of her powers or functions under that Act. [43] (See comments below under the PCA.)
- Amends the Limitation of Actions Act 1958 in relation to previously barred causes of action relating to child abuse. [44] (See comments below.)
- Amends the Victorian Civil and Administrative Tribunal Act 1998 to protect the privacy of parties to Voluntary Assisted Dying Act 2017 (VAD) proceedings. [48] Note the Second Reading Speech: - ‘An applicant under the VAD Act may apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of certain decisions. Despite the highly personal and sensitive nature of such proceedings, the VCAT Act does not currently provide for the confidentiality of those proceedings... The Bill will ensure that no publication or broadcast of VCAT proceedings relating to VAD matters may occur, where such publication or broadcast could lead to the identification of a party, unless VCAT is satisfied that it is in the public interest.’
- Amends the Children, Youth and Families Act 2005 to provide for the appointment of an additional or alternate chair person or chair persons in respect of the Youth Parole Board to alleviate workload pressure. [49-51]

Comments under the PCA

Delegation of legislative power – (section 17(a)(vi), PCA)

Clause 42 inserts a new heading into existing section 14 which sets out the inspector’s power to delegate. [42] Note the Explanatory Memorandum: - ‘Clause 42... distinguish[es] between the powers to delegate of an inspector appointed under that Act, and the new power to delegate of the Attorney-General.’ Clause 43 inserts new Part III into the Charities Act 1978. It provides that the Attorney-General, by instrument, may delegate to any person any powers or functions of the Attorney-General under that Act and the regulations, other than the power of delegation. [43] The current powers of the Attorney-General under the Charities Act 1978 include those set out in sections 4, 5, 7F, 7H, 9A and 9C of that Act. [64]

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[63] Note the Second Reading Speech: - ‘This significant initiative will build on the success of the Magistrates’ Court Drug Court by expanding the availability of specialised drug courts to a wider cohort of offenders. Drug Courts facilitate a therapeutic approach to sentencing of offenders with complex needs associated with drug and alcohol dependency.’

[64] Note the Explanatory Memorandum: - ‘Under the Charities Act 1978, the current powers of the Attorney-General include- approving a cy pres scheme (section 4 of the Charities Act 1978); giving opinions or advice on the performance of the duties of trustees (section 5 of the Charities Act 1978), approving an application for trustees to invest property
Note the Statement of Compatibility:

‘The Attorney-General will be able to delegate the power to approve an application for a cy pres scheme where the terms of a charitable trust can be amended in certain circumstances (such as where its original purposes cannot be fulfilled), to prevent the trust from failing. While trust property may be distributed in a different way from that originally envisaged, I do not consider that this limits the right to property as this will be in accordance with the legislative regime established by the Charities Act 1978.’

**The Committee is of the view the provisions are justified.**

**Retrospectivity – set aside past judgments – (section 17(a)(i), PCA)**

Clause 44 amends section 27QA of the Limitations of Actions Act 1958 to extend the period a cause of action was settled and given effect by settlement agreement from ‘before 1 July 2015’ to ‘before 1 July 2018.’ [44-46] Division 5 of Part IIA of that Act makes provision for actions for personal injury resulting from child abuse.65 Applications may be made under section 27QD of the Limitation of Actions Act 1958 to set aside settlement agreements and any judgment or order giving effect to the settlement of the previously settled cause of actions in personal injury matters resulting from child abuse up to the date of 1 July 2018.

The Committee notes Second Reading Speech: -

‘On 18 September 2019, the Children Legislation Amendment Act 2019 became law. That Act contained landmark Victorian Government reforms enabling survivors of institutional child abuse to apply to the courts to overturn unfair historical compensation agreements entered into before 1 July 2015. Since this time, the Government has listened to victim survivors, who raised concerns that these reforms did not apply to those who entered into agreements due to the existence of the Ellis defence, which was abolished on 1 July 2018. The reforms in this Bill will give those survivors the same access to justice.’

**The Committee is of the view the provisions are justified.**

**Charter Issues**

The Bill is compatible with the rights set out in the Charter of Human Rights and Responsibilities Act 2006.

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65 Note the Committee report in respect of the Children Legislation Amendment Act 2019 in Alert Digest No 10 of 2019.
Local Government (Whittlesea City Council) Act 2020

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Summary

Note: The Committee reports on this Act pursuant to section 17(c)(i) and (ii) of the Parliamentary Committees Act 2003.

The purposes of the Act are to:

- Dismiss the Whittlesea City Council.67
- Provide for the appointment of an administrator or a panel of administrators for the Whittlesea City Council by way of Order in Council published in the Government Gazette.
- Provide for a general election of Councillors for the Whittlesea City Council on the fourth Saturday in October 2024 and the expiry of the Order in Council.

Comments under the PCA

The Committee makes no comment with respect to its terms of reference under section 17 of the Parliamentary Committees Act 2003.

Charter Issues

Periodic municipal elections – Whittlesea City Council election postponed for four years

Summary: The Committee notes that s. 10(1) may have engaged the Charter’s right to periodic municipal elections and observes that the Statement of Compatibility and the Parliament have addressed the matters required to be considered by the Charter’s test for reasonable limits on rights.

Relevant provisions

The Committee notes that s. 10(1) provided:

Despite section 31(1) of the Local Government Act 1989 or section 257(1) of the Local Government Act 2020, a general election of Councillors for the Whittlesea City Council is to be held on the fourth Saturday in October 2024.

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66 The Act came into operation on the day after the day on which it received Royal Assent.

67 Note Section 74B(2) of the Constitution Act 1975 which provides: ‘A Council cannot be dismissed except by an Act of Parliament relating to the Council.’ See also the Second Reading Speech: ‘The Municipal Monitor, Yehudi Blacher, was appointed on 13 December 2019 under section 223CA of the Local Government Act 1989 (the Local Government Act) to monitor the Whittlesea City Council’s governance functioning, processes and practices. This appointment was in light of concerns raised by the Chief Municipal Inspector about the activities and actions of councillors at the council and their ability to provide leadership and good governance for their community. In accordance with the municipal monitor’s terms of reference, Yehudi Blacher was required to provide an interim report by 27 March 2020 and a final report by 30 June 2020. However, due to the urgency... I have accepted and tabled the monitor’s final report to ensure full transparency of the monitor’s findings and processes. The monitor’s report raises serious concerns about governance at the council... the monitor recommends the dismissal of the council and the appointment of administrators for a period ending no sooner than the October 2024 general elections for local government.’
Existing s. 31(1) of the *Local Government Act 1989* provides that ‘a general election of Councillors for all Councils must be held on the fourth Saturday in October 2012 and thereafter on the fourth Saturday in October in the fourth year after the last general election of Councillors for all Councils was held.’ Existing s. 257(1) of the *Local Government Act 2020* provides that ‘a general election of Councillors for all Councils must be held (a) on the fourth Saturday in October 2020; and (b) thereafter on the fourth Saturday in October in the fourth year after the last general election of Councillors for all Councils was held.’

The Committee observes that the effect of s. 10(1) was to postpone the next scheduled election of Councillors for the Whittlesea City Council by over four years, from 24th October 2020 to 26th October 2024.

**Charter analysis**

The Statement of Compatibility for the Bill for this Act remarked:

‘Section 18 of the Charter establishes a right for an individual to, without discrimination, participate in the conduct of public affairs, to vote and be elected at periodic State and municipal elections, and to have access to the Victorian public service and public office.

Clause 5 of the Bill clearly engages and purports to restrict the right under section 18 of the Charter.

The limitation appears to be reasonable and demonstrably justified in a free and democratic society under section 7(2) of the Charter Act.

...

Under the Local Government Act, general elections for local government occur every four years in October. Despite this, the period of administration under the Bill is considered reasonable. This is in order to give effect to the monitor’s recommendation in relation to the period of dismissal to enable administrators to effectively address the governance failings identified by the monitor.

Importantly, the period of administration enables the council to return to democracy in line with the statutory timing of the next general elections for local government after October 2020, provides a full four-year term for the next group of elected councillors and is balanced against the community interest in having democratically elected representatives.’

The Committee agrees that s. 10(1) may have limited the Charter right of eligible people in the City of Whittlesea to vote and be elected at periodic municipal elections.68

The Committee notes that the *Municipal Monitor’s Report on the Governance and Operations of the Whittlesea City Council* remarked:

‘The present Council cannot deliver the good governance needed by the City and its administration. There needs to be an extended period of administration to enable good governance to be restored.

I therefore recommend that:

a) the Council is dismissed;

b) administrators are appointed for a period ending no sooner than the 2024 Council elections; and

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68 Charter s. 18(2).
c) administrators develop, implement and publicly report on an action plan to embed good governance at the Council taking into account the reform opportunities in the Local Government Bill 2019.’

The Committee observes that Charter s. 7(2) provides for limits on Charter rights as follows:

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.

Conclusion

The Committee notes that s. 10(1) may have engaged the Charter’s right to periodic municipal elections and observes that the Statement of Compatibility and the Parliament have addressed the matters required to be considered by the Charter’s test for reasonable limits on rights. The Committee considers that the Act was compatible with human rights.
Petroleum Legislation Amendment Bill 2020

Member          Hon. Jaclyn Symes MP   Introduction Date   17 March 2020
Portfolio        Resources             Second Reading Date 18 March 2020

Summary

The Bill amends the Petroleum Act 1998. The Bill: -

- Provides for the end of the moratorium on the carrying out of petroleum exploration and petroleum production under that Act on 1 July 2021.\^[6] Note the Second Reading Speech: - ‘The introduction of this Bill is supported by the scientific evidence presented by the Victorian Gas Program (the Program). The $40 million science-led Program has assessed the potential for onshore conventional and offshore gas in the Otway and Gippsland geological basins. The Program’s geoscience studies have concluded that there are likely to be onshore conventional gas resources of commercial interest in south-west Victoria and Gippsland, with potential to support regional jobs and enhance economic development over a number of years... the State has a robust framework for managing environmental and safety risks. This ensures an onshore conventional gas industry can operate safely... the Bill does not relate to hydraulic fracturing (fracking) of unconventional gas or exploration and mining of coal seam gas.’

- Provides for written submissions from the Victorian community to be taken into account by the Minister in the making of decisions under the Act; \^[4,7]

- Enables prescribed social, environmental and economic factors to be taken into account by the Minister in the making of decisions under the Act; \^[8,9,11] It contains transitional provisions. \^[27]

- Amends the Offshore Petroleum and Greenhouse Gas Storage Act 2010 to require the holder of a petroleum production licence under that Act to provide domestic consumers with the first opportunity to purchase petroleum recovered under that licence on reasonable terms. \^[30,31]

Comments under the PCA

Delayed commencement – delegation of legislative power – (section 17(a)(vi), PCA)

Clause 6 is the commencement provision. Clauses 3, 5, 24, 26 and 27, Part 1 and Part 3 come into operation on the day after the day after the Bill receives Royal Assent. If clause 28 is not proclaimed to come into operation before 1 January 2021, it comes into operation on that day. The remaining provisions come into operation on a day or days to be proclaimed. If they do not come into operation before 1 July 2021 they come into operation on that date. Note the Explanatory memorandum: - ‘Clause 6 will have the effect that the moratorium on petroleum exploration and petroleum production will end on July 2021. Commencement of the remaining provisions of the Bill on or by July 2021 will facilitate the orderly restart of petroleum exploration and petroleum production on that date.’

The Committee is of the view the provision is justified.

\^[69] Note the Second Reading Speech: - ‘The moratorium on onshore conventional gas in the Petroleum Act 1998 sunsets on 30 June 2020. Legislation about the future of onshore conventional gas must be passed before 30 June 2020 to prevent reputational and legal risks from allowing the moratorium to sunset without legislative provisions.’
Charter Issues

The Bill is compatible with the rights set out in the *Charter of Human Rights and Responsibilities Act 2006*. 
State Taxation Acts Amendment (Relief Measures) Act 2020

Member: Hon. Tim Pallas MP
Introduction Date: 23 April 2020
Portfolio: Treasurer
Second Reading Date: 23 April 2020
Royal Assent: 28 April 2020

Summary

Note: The Committee reports on this Act pursuant to section 17(c)(i) and (ii) of the Parliamentary Committees Act 2003.

The Act amends the Duties Act 2000, the First Home Owner Grant Act 2000, the Payroll Tax Act 2007 and the Taxation Administration Act 1997 to generally implement emergency relief measures. The Act:

- Amends the Duties Act 2000 to provide a 50% concession on transfers of commercial and industrial land in specified municipal districts and alpine resorts. [3-5] Note the Second Reading Speech: - ‘The Bill will also bring forward the stamp duty concession for regional commercial and industrial properties in regional Victoria announced as part of the 2019-2020 Budget. The full 50 per cent discount for bushfire affected areas will be brought forward from 1 July 2023 to 27 January 2020 for properties in the State of Disaster.’

- Amends the First Home Owner Grant Act 2000 to extend the period of operation of the $20,000 first home owner grant for purchasers of new homes in regional Victoria until 1 July 2021.

- Amends the Payroll Tax Act 2007. It reduces the payroll tax rate for regional employers in certain areas affected by a state of disaster to 1.215% effective from 1 July 2019. Note the Second Reading Speech: - ‘For Victorian regional businesses in affected areas, this halves the current payroll tax rate of 2.425 per cent and will be backdated to apply from 1 July 2019.’

- Amends the Taxation Administration Act 1997 to give the Commissioner of State Revenue (Commissioner) statutory authority to implement emergency tax relief measures at the direction of the Treasurer including the ability to defer, waive or refund a tax liability under a taxation law in full or in part. [11] (See comments below under the PCA and Charter issues.)

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70 See Parliamentary Debates (Hansard), Legislative Council, Thursday 23 April 2020.

‘Mr RICH-PHILLIPS: Minister, I would just like to firstly ask you for clarifications in respect of the tax relief measures contained in this bill... The first one is in relation to the 50 per cent concession on land transfer duty— stamp duty. In the second-reading speech the indication is that the cost, the tax expenditure, is $34 million over five years. In the letter from Mr Martine he indicates it is over four years. So could we first just get a clarification on that, please?
Ms SYMES: Yes, thank you, Mr RICH-PHILLIPS. I can confirm it is over five years.
Mr RICH-PHILLIPS: Thank you, Minister. The next issue, again from the letter, is in relation to the payroll tax relief. Mr Martine in his letter indicates that it is the Treasury’s estimate that there are about 500 regional businesses that will benefit from that, and I think the second-reading speech referred to only 400 regional employers. So there is a 20 per cent difference between those two figures.
Ms SYMES: Mr RICH-PHILLIPS, initial modelling indicated 400 and has been updated. It is estimated to now be 500.
Mr RICH-PHILLIPS: So the second-reading speech is the one that needs to be updated?
Ms SYMES: That would have been prepared first.
Mr RICH-PHILLIPS: So we can take it that the minister is correcting the second-reading speech, changing it from 400 to 500, for the purposes of the record?
Ms SYMES: That is the advice.’
Comments under the PCA

Rights and freedoms – (section 17(a)(i), PCA)

Section 11 inserts new Part 9A into the Taxation Administration Act 1997. It gives the Commissioner statutory authority to implement emergency tax relief measures at the direction of the Treasurer. Note a ‘tax relief measure’ means (a) a waiver of tax, (b) a deferral of a tax liability, (c) a refund of tax paid and (d) a combination of any of these things. New section 95D provides that there is no cause of action against the State, the Treasurer or the Commissioner in respect of the public announcement of tax relief measures, the giving of directions by the Treasurer or anything done by the Commissioner.

Note the Second Reading Speech: -

‘The changes give the Commissioner of State Revenue the statutory authority to take any action that is necessary to give effect to tax relief schemes announced by the Victorian Government in response to emergencies, such as health epidemics or natural disasters. These powers can only be exercised at the direction of the Treasurer, and can only be favourable to the taxpayer. Emergency tax relief measures include the ability to defer, waive or refund all or part of a taxpayer’s liability under a taxation law, including penalties and interest, or employ a combination of measures.’

The Committee notes the above and refers to the Charter report.

Charter Issues

Operation of the Charter – Legal proceedings – No action against State, Treasurer or Commissioner arising out of tax relief measures

Summary: The effect of new section 95D may have been to bar the application of the Charter’s remedies provision to a public announcement, direction or decision relating to tax relief measures. The Committee will write to the Treasurer seeking further information.

Relevant provisions

The Committee notes that s. 11 introduced a new Part 9A into the Taxation Administration Act 1997, which provided that the Treasurer may direct the Commissioner of State Revenue to take any action necessary to give effect to a tax waiver, deferral of tax liability or tax refund announced by the State. New sub-section 95B(3) provided that such measures may be subject to conditions specified by the State, the Treasurer or the Commissioner. New section 95D provided:

No action lies against the State, the Treasurer or the Commissioner in relation to anything arising out of—

(a) the public announcement of tax relief measures; or
(b) the giving of a direction by the Treasurer under section 95B; or
(c) anything done or omitted to be done by or on behalf of the Commissioner to give effect to a direction; or
(d) anything else done or omitted to be done to give effect to this Part.

The Committee observes that the effect of new section 95D may have been to bar the application of Charter s. 39(1), which provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful,
that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

to a public announcement, direction or decision relating to tax relief measures under Part 9A, including conditions imposed on those measures under new section 95B(3).

Charter analysis

The Statement of Compatibility for the Bill remarked:

‘Proposed section 95D provides that no cause of action shall accrue in respect of any matter arising out of Part 9A. To the extent that proposed section 95D precludes a natural person from commencing litigation as a result of anything done or omitted to be done in respect of taxation relief under Part 9A, the right to a fair hearing is engaged and may be limited.

However, any limitation on the right to a fair hearing is reasonable and necessary to ensure the efficient administration of Part 9A, where powers will be exercised in extraordinary circumstances to give effect to emergency tax relief measures that operate beneficially for affected taxpayers.

No cause of action must arise in respect of the exercise of powers under Part 9A because the decisions made under this Part are made, or will be made, in response to significant emergencies, requiring the immediate action of the State, the Treasurer and the Commissioner to respond to urgent needs. The decisions made will operate for the benefit of recipients of emergency taxation relief. Providing a cause of action in relation to such decisions adds a level of formality and revision that is unsuited and inappropriate to the context in which such decisions are made. Decisions made under Part 9A are also likely to be iterative in nature and there may be sequence of decisions with a cumulative effect. The effects of the decisions made under Part 9A are intended to be beneficial in relation to recipients of emergency taxation relief.

Finally, providing no cause of action will ensure that taxpayers cannot attempt to exploit Part 9A as a way of circumventing the exclusive code for the resolution of taxation disputes in Parts 4 and 10 of the Taxation Administration Act.’

The Committee notes that the Statement of Compatibility did not address whether or not new section 95D barred actions under Charter s. 39(1).71

The Committee observes that Victoria’s Court of Appeal has held that a provision that ‘No action or proceeding can be brought against a person... in respect of any act, matter or thing done by that person in the course of his or her duties in accordance with’ the Witness Protection Act 1991 did not prevent a court reviewing the validity of such acts:72

‘In our view, the phrase “action or proceeding ... against any person” means a proceeding in which the person is exposed to liability. The phrase is not apt to encompass a proceeding which challenges the validity of a decision made (or refused to be made) by that person. Such a proceeding, of which the present is an instance, is not as a matter of ordinary language an action “against” the person. Rather, the action is in respect of the person’s official act, that is, the decision or refusal.’

However, the Committee notes that new section 95D differed from that provision because it also barred actions ‘against the State’.

71 See Bare v IBAC [2015] VSCA 197, which held that a privative clause that bars judicial review also bars a remedy under Charter s. 39(1).
72 Applicants A1 & A2 v Brouwer [2007] VSCA 139, [80].
Conclusion

The Committee will write to the Treasurer seeking further information as to whether or not new section 95D barred the application of Charter s. 39(1) to a public announcement, direction or decision relating to tax relief measures under Part 9A, including conditions imposed on those measures under new section 95B(3).
Wage Theft Bill 2020

Member        Hon. Jill Hennessy MP
Portfolio      Attorney-General

Summary

The Bill introduces criminal offences to target wage theft. Note the Second Reading Speech:

‘The Bill will provide that employers and their officers may be held criminally liable for employee entitlement offences. Employers, and officers of employers, can be held criminally liable: where they dishonestly withhold the whole or part of an entitlement owed to an employee, or dishonestly permit or authorise another person to do so; where they falsify employee entitlement records to dishonestly obtain a financial advantage or prevent its exposure, or dishonestly permit or authorise another to do so; and where they fail to keep an employee entitlement records to dishonestly obtain a financial advantage or prevent its exposure, or dishonestly permit or authorise another to do so.

The maximum penalties for these offences will be nearly $1 million ($991,320) for bodies corporate and 10 years imprisonment for individuals. These penalties are consistent with the penalty for theft under section 74 of the Crimes Act 1958 (Vic). They are designed to help prevent theft of employee entitlements by deterring organisations and individual officers from not paying what is owed to their employees or falsifying or failing to keep employee entitlement records... The Bill is not intended to punish employers who have made genuine mistakes. A defence is available to employers and officers who can prove that they exercised due diligence to pay or attribute employee entitlements... The offences will not apply to employees who are not ‘officers’. This is consistent with the Bill’s objective, which is to hold organisations and high level officers to account for ensuring appropriate systems are in place and entitlements are paid...’

The Bill:

- Creates new wage theft offences of dishonestly withholding employee entitlements, falsifying employee entitlement records and failing to keep employee entitlement records; New Part 2 sets out wage theft offences. [6][73] (‘Officer’ is defined in section 3(1)) [3] The body corporate is liable for officers’ offending. [10] Offences may be committed by partnerships and partners, and unincorporated associations. [14,15]


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73 Note the Second Reading Speech: - ‘The offences will apply to employers, and officers of employers, of all types and sizes, including corporations, individuals and the Crown, to ensure that prosecutions may be brought in all appropriate cases. ‘Employment’ is not defined in the Bill so that the common law will apply, meaning the law developed through judgements in cases heard by courts, including the High Court. Under the common law, the court considers each case against a list of factors indicative of an employment relationship.’

74 Note the Second Reading Speech: - ‘To ensure that the new wage theft laws are effectively enforced, offences will be investigated and prosecuted by the independent statutory body, the Wage Inspectorate Victoria (Inspectorate). The Inspectorate will have expertise in industrial relations laws as well as a dedicated criminal law enforcement arm. The Bill provides the Inspectorate with functions and powers related to the enforcement and prosecution of the employee entitlement offences, as well as information and evidence gathering powers necessary to support the investigation of potential offences. The Inspectorate will be led by a Commissioner, appointed by the Governor in Council on the recommendation of the Minister for Industrial Relations. Investigative and prosecutorial functions of the Inspectorate will be independent and not subject to Ministerial direction or control. The Victorian Inspectorate (VI) will be responsible for oversight of the Inspectorate and the exercise of its coercive powers.’
Provides for the functions and powers of the Wage Inspectorate Victoria in relation to investigating and enforcing employee entitlement offences and related matters. New Part 4 provides for investigations by the Wage Inspectorate Victoria. [32] New Part 5 provides for general matters. [63] The Wage Inspectorate Victoria may refer matters to the Office of Public Prosecutions. [71] It amends the Victorian Inspectorate Act 2011 to provide for further matters to be included in its annual report. This includes details of the results of the Victorian Inspectorate’s monitoring of the exercise of coercive powers by the Wage Inspectorate Victoria; the comprehensiveness and adequacy of reports made by the Wage Inspectorate Victoria and details of the extent to which action recommended by the Victorian Inspectorate has been taken by the Wage Inspectorate Victoria. [97]

Comments under the PCA

Delayed commencement – delegation of legislative power – (section 17(a)(vi), PCA)

Clause 2 is the commencement provision. It provides for the Bill to come into operation on a day or days to be proclaimed or on 1 July 2021 if not proclaimed before that date. Note the Explanatory Memorandum: - ‘The default commencement date is intended to allow for a reasonable implementation period for the establishment of the Wage Inspectorate Victoria of approximately 12 months from the estimated date of passage of the Bill.’

The Committee is of the view the provision is justified.

Entry, search and seizure without consent or warrant – (section 17(a)(i), PCA)

Clause 40 provides for a limited power of entry, search and seizure without consent or search warrant. An inspector may enter premises without consent and without a search warrant in certain circumstances. [75] [40,43] This includes the inspector’s reasonable belief there are documents, things or persons at the premises relevant to the commission or possible commission of an employee entitlement offence; the inspector’s reasonable belief that the owner or occupier has not consented or would not consent to entry; five business days notice of entry or the inspector’s reasonable belief that delay is likely to result in the commission of an employee entitlement offence or concealment, loss or destruction of evidence of an employee entitlement offence and entry at a reasonable time.

Note the Statement of Compatibility: -

‘The power to enter premises without consent may limit the right to privacy and reputation. However, I consider any limitation of the rights is reasonable and justifiable where consent to enter is not provided as the coercive power has the following restrictions:

• Before it exercises the power, the inspector must hold a reasonable belief that there are documents, persons or other things at the premises that are relevant to the commission or possible commission of an employee entitlement offence, and must reasonably believe that the owner or occupier has not or would not consent to the inspector entering the premises;

• The power is restricted to premises that are a workplace, the registered office of a body corporate or at which work is carried out or records are kept that the inspector reasonably believes may be relevant to the commission or possible commission of an employee entitlement offence. A workplace will include residential premises where work is carried out, but does not include a part of any premises that is the domestic home of a person, and;

• A notice has been given to the owner or occupier at least five business days before entry, with immediate access only permitted where the inspector believes on reasonable grounds

75 See new section 40 – Limited power of entry, search and seizure without consent or search warrant.
that the entry is necessary to prevent evidence being concealed, lost or destroyed, or the commission of an offence.’

The Committee is of the view the provision is justified.

**Abrogation of the privilege against self-incrimination – (section 17(a)(i), PCA)**

Clause 48 sets out the power to require production of documents and answer questions including specified warning requirements.\(^\text{76}\) [48] Clause 49 provides that a person is not excused from producing a document as and when required by or under subclause 48(2) on the ground that the production of the document might incriminate the person.\(^\text{77}\) [49] Clause 52 provides that the Wage Inspectorate Victoria may compel production of documents and other things or attendance by giving written notice.\(^\text{78}\) [52] Clause 55 provides that the privilege against self-incrimination is abrogated in respect of the production of documents. Subclause (1) provides that a person is not excused from producing a document as and when required by or under clause 52 on the ground that the production of the document might incriminate the person.\(^\text{79}\) [55]

Note the Statement of Compatibility: -

‘Clauses 49 and 55 of the Bill limits this right to the extent that it abrogates the privilege against self-incrimination for natural persons in relation to a request for documents by the Inspectorate, with a direct use immunity provided for any documents obtained that are not required to be kept by law. Those documents cannot be used as evidence against the person who produced them in a criminal proceeding for an employee entitlement offence. The exercise of coercive powers under the Bill will be subject to oversight by the Victorian Inspectorate. In my opinion, any limitation on the privilege against self-incrimination for natural persons is justified because:

- The abrogation of the privilege against self-incrimination is necessary to enable the Inspectorate to effectively obtain information and fulfil its functions given the offences are document-based offences and the Inspectorate would face great difficulties investigating the offences if the privilege against self-incrimination was maintained in relation to the documents. It is in the public interest to successfully prosecute these offences and protect exploited employees;

- A document, and any information, document or thing obtained as a direct consequence of producing the document, that is not required to be kept by law will not be admissible in evidence against the person for any offence, and documents not required to be kept by law will be admissible in evidence against the person for offences other than employee entitlement offences;

- Other Victorian statutes provide for such an abrogation in relation to documents particularly regulatory integrity bodies;

- At common law the protection accorded to the compelled production of pre-existing documents is considerably weaker than the protection accorded to oral testimony or to documents brought into existence to comply with a request for information; and

- In the context of a regulated scheme such as the Fair Work Scheme, it is the expectation that documents or records are required to be produced during the course of a person’s participation in that scheme and exist for the dominant purpose of demonstrating that person’s compliance with his or her relevant duties or obligations. The duty to provide

\(^{76}\) See new section 48.

\(^{77}\) See new section 49.

\(^{78}\) See new section 49.

\(^{79}\) See new section 52.
documents in this context is consistent with the reasonable expectations of these individuals as persons who operate within a regulated scheme.

The Committee is of the view the provisions are justified.

**Charter Issues**

The Bill is compatible with the rights set out in the *Charter of Human Rights and Responsibilities Act* 2006.
The Committee received responses on the Bills listed below.

Responses are reproduced here – please refer to Appendix 3 for additional information.

*Sentencing Amendment (Emergency Worker Harm) Bill 2020*
Ms Sonya Kilkenny MP  
Acting Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House, Spring Street  
EAST MELBOURNE VIC 3002

By email: helen.mason@parliament.vic.gov.au

Dear Ms Kilkenny,

I refer to your letter of 17 March 2020 regarding the Sentencing Amendment (Emergency Worker Harm) Bill 2020 (the Bill). In your letter you request further information regarding some Charter of Human Rights and Responsibilities Act 2006 (Charter) issues raised by the Scrutiny of Acts and Regulations Committee (SARC) in relation to the Bill. Please find below further information as requested in your letter responding to the issues identified by SARC.

I note the comments from SARC suggest that aspects of the Bill might be incompatible with section 27(2) of the Charter, which protects against the retrospective application of criminal penalties.

The issues raised by SARC were largely addressed by the Statement of Compatibility for the Bill. As I outlined in the Statement of Compatibility, I consider that any limitation of the right relating to the imposition of retrospective criminal penalties is reasonable and justified in the circumstances.

Special reason test – impaired mental function relating to intoxication (Bill clauses 3(3), 3(5), and 5(1))

As SARC notes, the Bill narrows the special reason test to exclude impaired mental functioning that is caused “substantially” (rather than just “solely”) by self-induced intoxication.

The Bill also includes amendments to make clear that the courts must have regard to Parliament's intention that a sentence of at least the statutory minimum should ordinarily be imposed in all cases, including where a 'special reason' is found to exist (and therefore the statutory minimum does not apply).

It should be noted that the finding of a special reason under the current law does not relieve a judicial officer from the requirement to impose a custodial sentence, irrespective of that finding, except in a very limited number of circumstances. The requirement to impose a custodial sentence, notwithstanding the existence of a special reason, may already, under the current law, see a sentence of up to the maximum applicable penalty imposed if the circumstances of the case warrant such a penalty.
It should also be noted that the Bill does not change any elements of the relevant offences, or any other matters which affect the assessment of an accused person's guilt. Their right to be presumed innocent is therefore preserved. Similarly, the Bill does not alter the maximum penalties to which a person convicted of any relevant crime may be liable.

I note that SARC has questioned why the amendments made by the Bill are retrospective, while the 2018 changes were not. By introducing a requirement to sentence an offender to a custodial sentence, even where a special reason not to impose a statutory minimum sentence existed, the 2018 amendments exposed offenders to the imposition of a custodial sentence, where they had not previously faced such a sanction. This Bill does not create any such new custodial requirement. Thus, the amendments made by this Bill are materially different than the 2018 reforms.

It is correct to say that the amendments made by the Bill will apply to all sentencing hearings that occur from the date on which the relevant parts of the Bill commence, irrespective of when that offence occurs. While that means the laws have a limited retrospective application, it is important to note that the amendments only alter the way in which the sentencing scheme applies to offenders who have already been found guilty of an offence. It does not, as I have noted, affect the assessment of an accused person's guilt or the maximum penalty to which they may be liable if found guilty.

The relevant offences are narrow and well-defined, and appropriately target serious and violent crimes against emergency workers, who are exposed to unique risks when performing their duties protecting Victorians from harm. The prescribed minimum non-parole periods for these offences range from six months to five years and are not, on their face, grossly disproportionate to the seriousness of the offending. These sentences are within the normal range for such offences.

The amendments made by the Bill are intended to provide clarified and enhanced guidance to judicial officers regarding how the existing legislative scheme is intended to apply. Providing what amounts to clarification and extension of sentencing guidance, within an existing sentencing scheme and existing penalty ranges, and without exposing a new cohort of offenders to necessarily harsher penalties, is not likely, in my opinion, to lead to an unjustified disadvantage to any individual.

For these reasons, I do not consider that the retrospective application of these reforms contained in the Bill constitute an unjustifiable limitation on the rights contained in the Charter, particularly the right contained in section 27(2) of the Charter.

Complicit offenders (Bill clause (4)(1))

Offenders found guilty on the basis of being involved in the commission of the offence (otherwise known as 'complicit offenders' or offenders who 'aid and abet') have been excluded from most statutory minimum sentences that apply to injury offences since they were first introduced. This is because violent offences can often involve offenders who are only involved in a minor way, such as encouraging someone to resist arrest during an affray.
However, this carve out does not align with the general criminal law where a complicit offender is treated the same as the principal offender — that is, they are taken to have committed the offence in the same manner as a principal offender, and are liable to the maximum penalty for that offence.

In cases where emergency workers are attacked by multiple offenders, there may not be sufficient evidence to prove beyond reasonable doubt that any one offender was the 'principal offender'. We have seen this precise issue play out in a number of recent cases. This raises the possibility of an outcome in a group attack situation where the statutory minimum sentence cannot be shown to apply to any offender, despite the fact that an emergency worker has been injured on duty. This is inconsistent with the intent of Parliament that these laws provide a strong deterrent against offending against emergency workers.

The Bill changes the treatment of complicit offenders by implementing a reverse onus, to ensure that offenders in a group attack are only able to avoid a statutory minimum sentence where their involvement is minor, and not merely because of the difficulty in proving beyond reasonable doubt that they were a principal offender. The changes will require offenders to prove on the balance of probabilities that their involvement in the offending was minimal in order to access this exception. This is arguably more in line with how complicit offenders are generally treated under the criminal law.

While this change arguably places a legal burden on an offender to rebut a presumption that they were a principal offender in the commission on an offence against an emergency worker, in my view it is appropriate for the legal burden to rest with the offender. This is because the exception is a beneficial provision that enables an offender to avoid the application of a statutory minimum sentence in circumstances where one would otherwise apply. The evidential burden of providing the elements of the offence would, appropriately, remain with the prosecution.

But for the specific statutory exception, any complicit offender would, under the general law, be liable on conviction to the statutory minimum sentence. It is notable that this statutory exception does not exist at all in respect of other offences to which a statutory minimum sentence applies — it only applies to offences against emergency workers to which a statutory minimum sentence applies. It is therefore correct to characterise the existing exception as a beneficial provision, and not a right.

It is also important to note that, notwithstanding the exception, under the current law, a complicit offender who is exempt from the statutory minimum is still required to be sentenced to a custodial sentence. That sentence may, if the circumstances demand it, be anywhere up to the maximum available penalty.

The amendments relating to complicit offenders will only apply to court proceedings that begin after the date on which those reforms commence. It is appropriate to treat these reforms differently to the other reforms made by the Bill. This is because the reforms to the way in which complicit offenders are treated under the laws could affect the way in which an accused chooses to defend their case, including in relation to decisions as to whether to plead guilty or proceed to trial.
It would be unfair to accused persons for these provisions to apply to proceedings that are already on foot. For this reason, these amendments will only apply to proceedings commencing after the commencement date for the reforms.

As I have already observed, the relevant offences to which these reforms apply are narrow and well-defined and target serious and violent crimes against exposed emergency workers. The relevant prescribed minimum non-parole periods for these offences range from six months to five years and are not, on their face, grossly disproportionate. These sentences are within the normal range for such offences.

Responding to SARC regarding the final paragraph of the Statement of Compatibility

I note SARC’s comments regarding the final paragraph of the Statement of Compatibility and acknowledge that this could have been more clearly expressed. This paragraph is intended to apply only to the exception for complicit offenders, as the preceding paragraph of the Statement of Compatibility notes.

The government expects that the number of offenders impacted by the retrospectivity of these reforms will be very few, as it is anticipated that there will not be many (if any) proceedings that are not already on foot (for reforms affecting complicit offenders). It is even less likely that there will be sentencing hearings that have not yet commenced (for reforms regarding special reasons). It should also be noted that, in respect of the narrowing of the special reason test to exclude impaired mental functioning that is caused "substantially" (rather than just "solely") by self-induced intoxication, this reform will only apply to offences committed after 28 October 2018. This is because that exception to impaired mental functioning was only introduced by the 2018 Bill.

Overall, I consider that the reforms contained in the Bill strike an appropriate balance between protecting emergency workers and sending a strong and clear message that attacks against emergency workers will not be tolerated, while at the same time maintaining necessary exceptions to statutory sentencing requirements to avoid unjust outcomes for offenders with lower culpability or particular vulnerabilities.

I trust this information has been of assistance to SARC. If further information is required, I would be pleased to assist.

Yours sincerely,

[Signature]

Hon Jill Hennessy MP
Attorney-General
Minister for Workplace Safety

19/4/2020
Report on Subordinate Legislation

Practitioner Remuneration Order 2020


SR No. 134/2019 – Education and Training Reform Amendment Regulations 2019

SR No. 163/2019 – Fisheries Regulations 2019

The Committee received correspondence from Ministers in relation to the above subordinate legislation.

The Committee thanks the Ministers for the attached information.
18 February 2020

The Hon. Jill Hennessy
Attorney-General
Level 26
121 Exhibition Street
Melbourne VIC 3000

By email: Attorney-General@justice.vic.gov.au

Dear Attorney-General

Practitioner Remuneration Order 2020

The Regulation Review Subcommittee (the Subcommittee) considered the Practitioner Remuneration Order 2020 (the Order) at a meeting on 17 February 2020. The Order has been approved by the Subcommittee. However, the Subcommittee wishes to draw to your attention to matters of regulatory compliance in relation to the Subordinate Legislation Act 1994.

Pursuant to section 96 of the Legal Profession Uniform Law Application Act 2014 (the Act), the following sections of the Subordinate Legislation Act 1994 apply to practitioner remuneration orders:

- Section 16B – Legislative instruments and related documents to be laid before Parliament
- Section 16C – Legislative instruments and accompanying documents to be sent to Scrutiny Committee
- Part 5A – Scrutiny, Suspension and Disallowance of Statutory Rules

For the purposes of the Subordinate Legislation Act 1994, the date that a copy of the order was given to the Attorney-General under section 95(1) of the Act is the date to be taken as the date the order was published in the Government Gazette. We have been advised by the Department that this date was 9 September 2019.

Late tabling

Pursuant to section 16B of the Subordinate Legislation Act 1994, the Order was required to be tabled in both Houses of Parliament. The Order was required to be tabled by 17 October 2019, on or before the sixth sitting day after it was given to the Attorney-General. However, due to an administrative oversight, the Order was tabled on 28 November 2019, 15 sitting days after the LI was given to the Attorney-General (nine sitting days late).

It is noted that this is the second year in a row the Practitioner Remuneration Order was not tabled within the legislative timeframe. The 2019 Practitioner Remuneration Order was tabled seven sitting days after the LI was given to the Attorney-General, one day outside the legislative requirement.
Late provision of documents to the Subcommittee

Pursuant to section 16C of the Subordinate Legislation Act 1994, a copy of the Order was required to be given to SARC within ten working days after the making of the Order.

Accordingly, a copy of the Order was required to be given to the Subcommittee by 23 September 2019. The LI was received by the Subcommittee on 27 November 2019, 65 working days after the LI was given to the Attorney-General (55 days late).

Failure to provide documentation to the Subcommittee

As previously stated, pursuant to section 96 of the Act, there is a requirement send each Practitioner Remuneration Order and accompanying documents to the Subcommittee for scrutiny.

It has been identified that the following Orders were not provided to the Subcommittee for scrutiny:

- Practitioner Remuneration Order 2018 – Tabled on 1 November 2017
- Practitioner Remuneration Order 2017 – Tabled on 26 October 2016

As a result, the Subcommittee did not have the opportunity to scrutinise the above Orders in accordance with section 25A of the Subordinate Legislation Act 1994.

Request for information

Pursuant to sections 16B(3) and 16C(3) of the Subordinate Legislation Act 1994, a failure to comply with the above requirements does not affect the operation or effect of the Order. However, the Subcommittee has concerns in relation to ongoing compliance issues.

The Subcommittee requests information on the processes in place to ensure future Practitioner Remuneration Orders comply with the Subordinate Legislation Act 1994.

The Subcommittee would appreciate your response by no later than Tuesday 3 March 2020, so that it can consider your response at its next meeting.

Please contact Ms Lauren Cook, the Subcommittee’s senior research officer, in the first instance if you require any further information.

Yours sincerely

[Signature]

Mr Mark Gepp MP
Chairperson
Regulations Review Subcommittee
Mr Mark Gepp MP
Chairperson
Regulations Review Subcommittee
Scrutiny of Acts and Regulations Committee

By email: simon.dinsbergs@parliament.vic.gov.au

Dear Mr Gepp

Thank you for your letter of 18 February 2020 regarding practitioner remuneration orders (Orders).

The Orders are made by the Legal Costs Committee (LCC) and provided to the Attorney-General for tabling and providing to the Scrutiny of Acts and Regulations Committee (SARC).

Your letter noted that:

- the 2017 and 2018 Orders were not provided to SARC, although they were tabled in Parliament; and
- the 2019 and 2020 Orders were tabled late and provided to the SARC late.

In order to ensure that Orders are reviewed and provided to SARC in a timely manner, the Department of Justice and Community Safety (the department) has requested that, in future, the LCC's covering letter for the Orders refer to the requirement to provide the Orders to SARC. This process will ensure that the obligation to provide the Order to SARC is identified as soon as the letter is received by my office. The department has also requested that the LCC provide them with a copy of the Order simultaneously to providing it to my office, in order to expedite the provision of the Orders to SARC.

Should you wish to discuss this matter further, please contact Ms Anna Faithfull, Deputy Secretary, Justice Policy and Data Reform at the Department of Justice and Community Safety on (03) 9915 3782 or by email by email at Anna.Faithfull@justice.vic.gov.au.
I trust this information has been of assistance to you and thank you again for taking the time to write to me about this matter.

Yours sincerely

Hon Jill Hennessy MP
Attorney-General
Minister for Workplace Safety

16 / 3 / 2020
4 March 2020

The Hon. Lily D’Ambrosio
Minister for Energy, Environment and Climate Change
Level 16
8 Nicholson Street
East Melbourne VIC 3002

By email: lily.dambrosio@parliament.vic.gov.au

Dear Minister


The Regulation Review Subcommittee (the Subcommittee) considered the Wildlife (Marine Mammals) Regulations 2019 (the Regulations) at a meeting on 2 March 2020.

The Regulations have not yet been approved by the Subcommittee.

Human rights compatibility

Regulations 27, 28 and 31 prescribe licence conditions for whale watching tour permits (aircraft); whale watching tour permits (tour vessel) and whale swim permits; and seal tour permits. Most of the conditions are directly related to ensuring compliance with the Regulations and the conditions of the permit, including measures to ensure compliance by customers. In particular, there are conditions requiring permit holders to inform customers of the Regulations and the conditions of the permit via websites, verbal advice and signage. These provisions do not engage the Charter’s right to freedom of expression, as they are clearly lawful restrictions reasonably necessary to protect ‘public order’ (e.g. compliance with the Regulations and conditions).

However, regulations 27(a), 28(c) and 31(c) each impose additional licence conditions that:

- the permit holder must, for each tour conducted, provide each person [all persons] on the tour, who is [are] not an employee of the permit holder, with clear and accurate information on the biology and conservation status of and threats facing each species of marine mammal encountered on the tour;

  Examples

  Information on the biology of marine mammals includes information on their morphology, behaviour, distribution and reproductive cycle.

The effect of these conditions is to oblige permit holders to inform each customer about the morphology, behaviour, distribution, reproductive cycle, conservation status of and threats facing every ‘marine mammal encountered’ on each tour. The maximum penalty for breaching any licence condition is 100 penalty units (currently $16,522) and, for whale tours, 6 months imprisonment.

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1 ‘Marine mammals’ are Mysteceti (baleen whales), Odontoceti (toothed whales), Otariidae (eared seals) and Phocidae (earless seals). There are 89 species of whales, including sperm whales, dolphins, porpoises and orcas. There are over 30 species of seal, including elephant seals, sea lions and walruses.
Regulations 27(a), 28(c) and 31(c) engage the right to freedom of expression in Charter section 15:

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

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
(a) to respect the rights and reputation of other persons; or
(b) for the protection of national security, public order, public health or public morality.

Charter section 15(2) includes a right not to impart or receive information. Charter section 15(3) exempts speech limits from this right, but the laws it describes don’t seem to cover regulations 27(a), 28(c) and 31(c). In particular, they don’t cover laws designed to educate people about marine mammals, or to protect the health or safety of animals.

Further, the Australian National Guidelines for Whale and Dolphin Watching 2017 do not appear to require that watchers be educated about the biology and conservation status of whale species. There also do not appear to be similar requirements in other Australian State or Territory laws, although they may be included in non-statutory licence conditions instead.

The Human Rights Certificate does not discuss regulations 27(a), 28(c) and 31(c).

Section 8 certificate

The Regulations were accompanied by a section 8 exemption certificate, which stated that the Regulations do not impose a significant economic or social burden on a sector of the public for the following reasons:

- the quantifiable costs of the Regulations are incurred by marine mammal tourism operators only, and not members of the general public;
- the unquantifiable costs are likely to impose only a minor burden on the industry and members of the public; and
- the monetary value of the annual regulatory cost to the industry, including the increase to permit fees, are low in the context of estimated operator revenue.

The Subordinate Legislation Act 1994 Guidelines state that an exemption certificate should contain detailed reasons justifying the exemption (paragraph 136, page 35).

On review, the exemption certificate did not provide adequate information to make a determination on whether a section 8(1)(a) exemption was appropriate, particularly in relation to the quantifiable costs of the fees and the social burden of the multiple offences prescribed in the Regulations.

Upon request, the Department of Environment, Land, Water and Planning provided additional information regarding the exemption, including an independent analysis of the regulatory costs.

The following additional information was provided:

- compliance with the Regulations by tour permit holders and the general public is achieved primarily by modifying activity around marine mammals (e.g. adhering to minimum approach distances), not by incurring monetary or time costs;
- quantifiable regulatory costs for permit holders are estimated at around $1,127 per permit per annum, and $12,397 total per annum;
• the unquantifiable impact of restrictions on how permit holders and the general public may interact with marine mammals (e.g. minimum approach distances) is likely minor, particularly since many people are supportive of such restrictions when they understand the conservation rationale;
• the quantifiable regulatory costs are minor relative to estimated industry revenue of around $2 million or more; and
• while the estimated regulatory burden is well below the indicative threshold of $2 million annum for a significant burden, the number of affected parties is also small.

With the additional information provided by the Department, the Subcommittee had adequate information to determine that the section 8(1)(a) exemption certificate was correctly issued.

The Subcommittee wishes to draw your attention to this issue, and would appreciate further information be provided in section 8 exemption certificates in the future.

Request for information

The Subcommittee requests further information about the compatibility of regulations 27(a), 28(c) and 31(c) with the Charter’s right to freedom of expression.

The Subcommittee would appreciate your response by no later than Tuesday 1 April 2020 in order for the Regulations to be considered by the Subcommittee.

Please contact Ms Lauren Cook, the Subcommittee’s senior research officer, in the first instance if you require any further information.

Yours sincerely

Mr Neale Burgess MP
Deputy Chair
Regulation Review Subcommittee
Dear Mr Burgess

SR NO. 109/2019 - WILDLIFE (MARINE MAMMALS) REGULATIONS 2019


Your letter requests more information regarding the compatibility of regulations 27(a), 28(c) and 31(c) with the right to freedom of expression under the Charter of Human Rights and Responsibilities. The regulations in question are all permit conditions requiring marine mammal permit holders to provide customers on marine mammal tours with information about the biology, conservation status of and threats to marine mammals encountered on the tour.

My response considers relevant factors set out in section 7 of the Charter:

The nature of the right
The right to freedom of expression provides every person with the right to hold an opinion without interference, and the freedom to seek, receive and impart information and ideas of all kinds. The right may be subject to lawful restrictions reasonably necessary to respect the rights and reputations of other persons, or for the protection of national security, public order, public health or public morality.

The importance of the purpose of the limitation
The purpose of requiring permit holders to provide information about marine mammal species encountered on a tour is to increase tour customers’ knowledge and appreciation of the species they see, at a time when they may be particularly open to receiving such information. One of the purposes of the Wildlife Act 1975 is to “establish procedures in order to promote the protection and conservation of wildlife” (section 1A(a)). Marine mammal tour permit holders are provided with privileges in relation to marine mammals, including approaching closer to marine mammals than others, in part because of the recognised contribution of such experiences for broader conservation goals.

Education is considered an integral component of ecotourism operations, including by ecotourism peak bodies and by permit holders themselves. Research at both a local and global scale has highlighted the benefits of education and interpretation components of marine mammal tours, with evidence that it can influence visitor attitudes and promote greater environmental awareness and care, as well as increase tourists’ enjoyment of their experience.

The nature and extent of the limitation
The right to freedom of expression is engaged by regulations 27(a), 28(c) and 31(c). These regulations are prescribed permit conditions that require marine mammal permit holders to provide customers with information about the marine mammal species that they encounter on their tour.
This limitation does not restrict the right of permit holders to hold or express an opinion or to not express that opinion, rather it requires them to provide factual information that is directly pertinent to the circumstances of their operation at the time. The regulations in question do not prescribe the information to be provided, beyond a general direction to provide information about “the biology and conservation status of and threats facing” the species encountered on the tour. Permit holders remain free to select the information to be shared. While examples of information on the biology of marine mammals are provided, this is intended as guidance only. Permit holders remain free to also express their own opinions on the information they are providing; on the other hand, they are not required to disclose opinions if they choose not to.

On any one tour it is likely that no more than one or two marine mammal species will be encountered. Therefore, the provision of the information should not be particularly onerous.

The relationship between the limitation and its purpose

The requirement to provide information regarding marine mammals encountered on a tour is directly related to the purpose of increasing appreciation of and knowledge about marine mammals, and thus improving conservation outcomes from the experience.

Any less restrictive means available to achieve the purpose

Rather than mandating the provision of this information via prescribed permit condition, tour operators could be advised or requested to provide information about the species encountered via tour operator guidelines. It is possible in this case that tour operators would fail to provide this information. An alternative, more restrictive limitation was considered when preparing the regulations, including providing more prescriptive requirements about the information to be provided, and specifying the timing of the information provision. The current form of the regulations were chosen to provide a balance between the permit holders’ right to freedom of expression, and ensuring the purpose is achieved.

I note your recommendation that section 8 exemption certificates provide more detail in future.

If you require more information about this matter, please call Liz Coluccio, Senior Policy Officer, Biodiversity Policy and Regulation, on (03) 9637 9030 or email elizabeth.coluccio@delwp.vic.gov.au.

Thank you again for writing to me and I trust this information will address the Regulation Review Subcommittee’s concerns.

Yours sincerely

Hon Lily D’Ambrosio MP
Minister for Energy, Environment and Climate Change
Minister for Solar Homes

04 / 05 / 2020
4 March 2020

The Hon. James Merlino
Minister for Education
Level 3
1 Treasury Place
East Melbourne VIC 3002

By email: james.merlino@parliament.vic.gov.au

Dear Minister

SR No. 134/2019 – Education and Training Reform Amendment Regulations 2019

The Regulation Review Subcommittee (the Subcommittee) considered the Education and Training Reform Amendment Regulations (the Regulations) at a meeting on 2 March 2020. The Order has been approved by the Subcommittee. However, the Subcommittee wishes to draw to your attention to a matter of regulatory compliance in relation to the Subordinate Legislation Act 1994.

Pursuant to section 15A of the Subordinate Legislation Act 1994, documents regarding a statutory rule must be sent to the Scrutiny Committee no later than 10 working days after the making of the statutory rule. This requirement ensures the Subcommittee has ample time to review the Regulations and associated documentation prior to the expiry of the disallowance period.

The Regulations were made on 10 December 2019. Accordingly, the documents were due to be provided to the Subcommittee by 24 December 2019. The documents were provided to the Subcommittee on 10 January 2020, 20 working days after the making of the statutory rule (10 days late).

Pursuant to section 15A(2), failure to provide the documentation within 10 working days does not affect the operation or effect of the statutory rule but the Scrutiny Committee may report the failure to each House of the Parliament.

In this instance, the Subcommittee resolved not to report the failure to each House of the Parliament, and writes to you to draw this issue to your attention.

Yours sincerely,

Mr Neale Burgess MP
Deputy Chair
Regulation Review Subcommittee
COR 2043161

Mr Neale Burgess MP  
Deputy Chair  
Regulation Review Subcommittee  
SARC@parliament.vic.gov.au

Dear Deputy Chair

Thank you for your correspondence regarding the lodgement of the Education and Training Reform Amendment Regulations 2019 (Regulations) with the Scrutiny of Acts and Regulations Committee (SARC). I apologise for the delay in responding.

I was concerned to read that the Regulations were lodged with SARC 10 days late.

I have reminded the Department of the importance of complying with the procedures in the Subordinate Legislation Act 1994, including to give SARC sufficient time to properly scrutinise subordinate legislation, and have obtained assurances that systems will be reviewed to ensure compliance going forward.

If you would like further information, please contact Mr Burton Reynolds, A/Director, Commercial and Legislation, Legal Division, Department of Education and Training, on 03 7022 0952 or by email: burton.reynolds@education.vic.gov.au.

Yours sincerely

The Hon James Merlino MP  
Deputy Premier  
Minister for Education
4 March 2020

The Hon. Jaala Pulford
Minister for Fishing and Boating
Level 20
1 Spring Street
Melbourne VIC 3000

By email: jaala.pulford@parliament.vic.gov.au

Dear Minister

SR No. 163/2019 – Fisheries Regulations 2019

The Regulation Review Subcommittee (the Subcommittee) considered the Fisheries Regulations 2019 (the Regulations) at a meeting on 2 March 2020.

The Regulations have not yet been approved by the Subcommittee.

Human rights compatibility

Under section 44 of the Fisheries Act 1995 (the Act), it is an offence to take or attempt to take fish from Victorian waters (other than private property) or to use or possess recreational fishing equipment in or near Victorian waters, without a recreational fishing licence or authorisation under the Act, punishable by a maximum penalty of 5 penalty units (currently $830.) A licence costs approximately $35 per year.

Section 11A exempts a member of a traditional owner group from most of the Act, including section 44, if they are carrying out an agreed activity under a traditional owner agreement on land subject to the agreement. Section 47 permits people under 18 to fish for any purpose other than sale.

Regulation 98(1) provides:

A person is exempt from the requirement to hold a recreational fishery licence under section 44 of the Act if the person—

(a) receives an aged or invalid pension under the laws of the Commonwealth for the time being in force in relation to social services; or
(b) is a totally and permanently incapacitated pensioner or service pensioner under the laws of the Commonwealth for the time being in force in relation to the repatriation of discharged servicemen or servicewomen; or
(c) holds a Senior’s Card; or
(d) has attained the age of 70 years; or
(e) holds a current pensioner concession card or equivalent as a result of receiving a carer payment under the laws of the Commonwealth for the time being in force in relation to social services; or
(f) identifies as an Aboriginal or Torres Strait Islander person.
In contrast to regulations 98(1)(a)-(c) & (e)'s exemptions based on financial criteria (with the Senior's card based on a combination of age and employment status), regulations 98(1)(d) and (f) exempt people according to age or race.

Charter section 8 provides:

\[(3) \quad \text{Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.}\]

\[(4) \quad \text{Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.}\]

Discrimination is defined to include discrimination on the basis of age or race. Charter section 8(4) allows positive discrimination to assist groups disadvantaged because of discrimination, including many people who identify as Indigenous. This may include measures designed to avoid excessive policing or penalties or financial burdens for disadvantaged groups.

The Human Rights Certificate does not discuss regulation 98.

**Request for information**

The Subcommittee requests further information about the compatibility of regulation 98 with the Charter’s right to equal protection of the law without discrimination.

The Subcommittee would appreciate your response by no later than **Tuesday 1 April 2020** in order for the Regulations to be considered by the Subcommittee.

Please contact Ms Lauren Cook, the Subcommittee’s senior research officer, in the first instance if you require any further information.

Yours sincerely

Mr Neale Burgess MP  
Deputy Chair  
Regulation Review Subcommittee
Dear Mr Burgess MP


The Victorian Fisheries Authority and the Department of Transport consulted closely with the Human Rights Unit of the Department of Justice and Community Safety (DJCS) when considering whether the Fisheries Regulations 2019 limited any human rights as set out in the Charter of Human Rights and Responsibilities Act 2006 (the Charter).

The implications of the recreational fishing licence exemption for those who identify as an Aboriginal and Torres Strait Islanders person and the exemption for persons over the age of 70 years, as provided by regulation 98 of the Fisheries Regulations 2019, were considered as part of this work.

In consultation with the DJCS Human Rights Unit, it was determined that these exemptions engaged but did not limit the right to equality before the law protected by section 8 of the Charter. Section 12A of the Subordinate Legislation Act 1994 only requires that a human rights certificate issued with respect to regulations address human rights that have been limited (not merely engaged). It was for this reason that the right to equality before the law was not discussed in the human rights certificate that I issued in respect of the Fisheries Regulations 2019.

Regulation 98 of the Fisheries Regulations 2019 does include a special concession for specific age groups and races of people but this is consistent with section 8(4) of the Charter which provides that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

I continue to be of the view that regulation 98 of the Fisheries Regulations 2019 does not limit any human rights as set out in the Charter.
Thank you for raising this matter with me. If you would like any further information please contact Dallas D’Silva, Director of Policy, Licensing, Management and Science of the Victorian Fisheries Authority on 0407 439 992.

Yours sincerely

Jaala Pulford MP
Minister for Fishing and Boating

01/04/2020
### Appendix 1

**Index of Bills and Subordinate Legislation in 2020**

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<td><strong>Health Services Amendment (Mandatory Vaccination of Healthcare Workers) Bill 2020</strong></td>
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<td>1</td>
<td><strong>Justice Legislation Miscellaneous Amendments Bill 2019</strong></td>
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<td>5</td>
<td><strong>Justice Legislation Amendment (Drug Court and Other Matters) Bill 2020</strong></td>
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<tr>
<td><strong>15 of 2019, 1</strong></td>
<td><strong>Local Government Bill 2019</strong></td>
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<tr>
<td>3</td>
<td><strong>Local Government (Casey City Council) Act 2020</strong></td>
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<td>5</td>
<td><strong>Local Government (Whittlesea City Council) Act 2020</strong></td>
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<tr>
<td>3</td>
<td><strong>National Electricity (Victoria) Amendment Bill 2020</strong></td>
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<td>4</td>
<td><strong>North East Link Bill 2020</strong></td>
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<tr>
<td>5</td>
<td><strong>Petroleum Legislation Amendment Bill 2020</strong></td>
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<tr>
<td>2</td>
<td><strong>Project Development and Construction Management Amendment Bill 2020</strong></td>
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<tr>
<td>1</td>
<td><strong>Road Safety and Other Legislation Amendment Bill 2019</strong></td>
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<tr>
<td>4</td>
<td><strong>Sentencing Amendment (Emergency Worker Harm) Bill 2020</strong></td>
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<tr>
<td>5</td>
<td><strong>State Taxation Acts Amendment (Relief Measures) Act 2020</strong></td>
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<tr>
<td>3</td>
<td><strong>Summary Offences Amendment (Move-on Laws) Bill 2019</strong></td>
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<tr>
<td><strong>1, 2</strong></td>
<td><strong>Transport Legislation Amendment Act 2019 (House Amendment)</strong></td>
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<tr>
<td><strong>14 of 2019, 1</strong></td>
<td><strong>Transport Legislation Amendment Bill 2019</strong></td>
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<tr>
<td>5</td>
<td><strong>Wage Theft Bill 2020</strong></td>
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<tr>
<td><strong>SUBORDINATE LEGISLATION</strong></td>
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<td>5</td>
<td><strong>Practitioner Remuneration Order 2020</strong></td>
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<td>1</td>
<td><strong>SR No. 88/2019 – Road Safety (General) Regulations 2019</strong></td>
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<td><strong>SR No. 93/2019 – Road Safety (Traffic Management) Regulations 2019</strong></td>
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<td>5</td>
<td><strong>SR No. 134/2019 – Education and Training Reform Amendment Regulations 2019</strong></td>
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<td>5</td>
<td><strong>SR No. 163/2019 – Fisheries Regulations 2019</strong></td>
</tr>
</tbody>
</table>
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 upon rights or freedoms

<table>
<thead>
<tr>
<th>Bill</th>
<th>Alert Digest Nos.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forests Legislation Amendment (Compliance and Enforcement) Bill 2019</td>
<td>15 of 2019, 2</td>
</tr>
<tr>
<td>Local Government Bill 2019</td>
<td>15 of 2019, 1</td>
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<tr>
<td>Sentencing Amendment (Emergency Worker Harm) Bill 2020</td>
<td>4, 5</td>
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</table>

(vi) inappropriately delegates legislative power

<table>
<thead>
<tr>
<th>Bill</th>
<th>Alert Digest Nos.</th>
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<tbody>
<tr>
<td>Gender Equality Bill 2019</td>
<td>1, 3</td>
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</table>

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

<table>
<thead>
<tr>
<th>Bill</th>
<th>Alert Digest Nos.</th>
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<tbody>
<tr>
<td>COVID-19 Omnibus (Emergency Measures) Act 2020</td>
<td>5</td>
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<tr>
<td>Health Services Amendment (Mandatory Vaccination of Healthcare Workers) Bill 2020</td>
<td>3, 4</td>
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<tr>
<td>North East Link Bill</td>
<td>4</td>
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<tr>
<td>Sentencing Amendment (Emergency Worker Harm) Bill 2020</td>
<td>4, 5</td>
</tr>
<tr>
<td>State Taxation Acts Amendment (Relief Measures) Act 2020</td>
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<td>Summary Offences Amendment (Move-on Laws) Bill 2019</td>
<td>3</td>
</tr>
<tr>
<td>Transport Legislation Amendment Act 2019 (House Amendment)</td>
<td>1, 2</td>
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<tr>
<td>Transport Legislation Amendment Bill 2019</td>
<td>14 of 2019, 1</td>
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</tbody>
</table>
### Table of Ministerial Correspondence

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

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

<table>
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<tr>
<th>Bill Title</th>
<th>Minister/ Member</th>
<th>Date of Committee Letter / Minister’s Response</th>
<th>Alert Digest No. Issue raised / Response Published</th>
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</thead>
<tbody>
<tr>
<td>Forests Legislation Amendment (Compliance and Enforcement) Bill 2019</td>
<td>Energy, Environment and Climate Change</td>
<td>26.11.19 06.02.20</td>
<td>15 of 2019 2 of 2020</td>
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<tr>
<td>Local Government Bill 2019</td>
<td>Local Government</td>
<td>26.11.19 31.01.20</td>
<td>15 of 2019 1 of 2020</td>
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<tr>
<td>Gender Equality Bill 2019</td>
<td>Women</td>
<td>04.02.20 18.02.20</td>
<td>1 of 2020 3 of 2020</td>
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<tr>
<td>Transport Legislation Amendment Act 2019</td>
<td>Roads</td>
<td>04.02.20 13.02.20</td>
<td>1 of 2020 2 of 2020</td>
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<td>Health Services Amendment (Mandatory Vaccination of Healthcare Workers) Bill 2020</td>
<td>Health</td>
<td>03.03.20 15.03.20</td>
<td>3 of 2020 4 of 2020</td>
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<td>Summary Offences Amendment (Move-on Laws) Bill 2019</td>
<td>Hon. Edward O’Donohue, MP</td>
<td>03.03.20</td>
<td>3 of 2020</td>
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<tr>
<td>North East Link Bill</td>
<td>Treasurer</td>
<td>17.03.20</td>
<td>4 of 2020</td>
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<tr>
<td>Sentencing Amendment (Emergency Worker Harm) Bill 2020</td>
<td>Attorney-General</td>
<td>17.03.20 29.04.20</td>
<td>4 of 2020 5 of 2020</td>
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<tr>
<td>COVID-19 Omnibus (Emergency Measures) Act 2020</td>
<td>Premier</td>
<td>02.06.20</td>
<td>5 of 2020</td>
</tr>
<tr>
<td>State Taxation Acts Amendment (Relief Measures) Act 2020</td>
<td>Treasurer</td>
<td>02.06.20</td>
<td>5 of 2020</td>
</tr>
</tbody>
</table>
Appendix 4
Statutory Rules and Legislative Instruments considered

The following subordinate legislation were considered by the Regulation Review Subcommittee on 7 May 2020.

Statutory Rules Series 2019

SR No. 109 – Wildlife (Marine Mammals) Regulations 2019
SR No. 116 – Building Amendment (Swimming Pool and Spa) Regulations 2019
SR No. 135 – Public Health and Wellbeing Regulations 2019
SR No. 139 – Accident Towing Services Regulations 2019
SR No. 150 – Melbourne City Link Amendment Regulations 2019
SR No. 151 – Road Management (General) Amendment Regulations 2019
SR No. 152 – Road Management (Transport Legislation Amendment Act 2019) Transitional Regulations 2019
SR No. 153 – Road Safety Road Rules Further Amendment Rules 2019
SR No. 155 – Freedom of Information Amendment Regulations 2019
SR No. 156 – Local Government (General) Amendment Regulations 2019
SR No. 157 – Ombudsman Regulations 2019
SR No. 158 – Independent Broad-based Anti-Corruption Commission Amendment Regulations 2019
SR No. 159 – Public Interest Disclosures Regulations 2019
SR No. 160 – Victorian Inspectorate Amendment Regulations 2019
SR No. 161 – Children’s Court Criminal Procedure Rules 2019
SR No. 163 – Fisheries Regulations 2019
SR No. 164 – Fisheries (Fees, Royalties and Levies) Amendment Regulations 2019
SR No. 165 – Bus Safety Amendment Regulations 2019
SR No. 166 – Commercial Passenger Vehicle Industry Amendment Regulations 2019
SR No. 167 – Tourist and Heritage Amendment Regulations 2019
SR No. 168 – Transport (Compliance and Miscellaneous) (Conduct on Public Transport) and (Ticketing) Further Amendment Regulations 2019
SR No. 169 – Accident Towing Services (Transport Legislation Amendment Act 2019) Transitional Regulations 2019
SR No. 172 – Road Safety (Automated Vehicles), (Drivers), (General), (Traffic Management) and (Vehicles) Amendment Regulations 2019

Legislative Instruments 2019

Order Approving the Variation of Compliance Codes
Order Approving the Variation of Compliance Codes – Return to Work
Temporary Qualification of Rights in the Broken System 2019

Statutory Rules 2020

SR No. 1 – Livestock Disease Control Amendment Regulations 2020
SR No. 2 – Conservation, Forests and Lands (Infringement Notice) Amendment (Wildlife (Marine Mammals)) Regulations 2020
SR No. 3 – Conservation, Forests and Lands (Fisheries Infringement Notices) Regulations 2020
SR No. 4 – Public Health and Wellbeing Amendment (Coronavirus) Regulations 2020
SR No. 5 – Public Health and Wellbeing Amendment Regulations 2020
SR No. 6 – Transport (Compliance and Miscellaneous) (Ticketing) Amendment Regulations 2020
SR No. 7 – Road Safety (Driving Instructors) Regulations 2020
SR No. 8 – National Parks Amendment (Fisheries) Regulations 2020
SR No. 9 – Mental Health Amendment Regulations 2020
SR No. 10 – Children’s Court (Family Violence Protection) and (Personal Safety Intervention Orders) Amendment Rules 2020
SR No. 11 – Guardianship and Administration (Fees) Transitional Regulations 2020
SR No. 12 – Child Wellbeing and Safety Amendment Regulations 2020
SR No. 13 – Sale of Land (Exemption) Regulations 2020
SR No. 14 – Tobacco (Victorian Health Promotion Foundation) Amendment Regulations 2020

Legislative Instruments 2020

Determination of specifications for wheelchair accessible commercial passenger vehicles
Order approving the Managing exposure to crystalline silica: Engineered stone compliance code
Revocation of the Declaration of Common Wombats to be Unprotected Wildlife
Victorian Passenger Vehicle Code of Practice Part 2: Meeting your safety duties