Alert Digest No. 8 of 2019

Tuesday, 18 June 2019

on the following Bills

Assisted Reproductive Treatment Amendment (Consent) Bill 2019
Disability (National Disability Insurance Scheme Transition) Amendment Bill 2019
Firefighters’ Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2019
Legal Profession Uniform Law Application Amendment Bill 2019
Mineral Resources (Sustainable Development) Amendment Bill 2019
Superannuation Legislation Amendment Bill 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 2018 one penalty unit equals $158.57)

‘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
Bill Information

<table>
<thead>
<tr>
<th>Member</th>
<th>Hon Jenny Mikakos MP</th>
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<td>Portfolio</td>
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Summary

The Bill: -

- amends the Assisted Reproductive Treatment Act 2008 to provide that a married woman is not required to obtain the consent of her spouse to access a treatment procedure using donor sperm in circumstances where the woman is separated from her spouse.[4]

- Makes consequential amendments to the Status of Children Act 1974 to ensure consistency and clarify requirements for counsellors for the purposes of surrogacy arrangements.

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

Equality – Family – Married women who undergo treatment procedures while separated from their spouses

Summary: Clause 4 alters the existing definition of ‘partner’ throughout the Assisted Reproductive Treatment Act 2008 to exclude the separated spouses of married people. Clause 6 extends the parenting presumptions for women who have no partners to married women who have separated from their spouses. The Committee will write to the Minister seeking further information.

Relevant provisions

The Committee notes that clause 4, amending existing s. 3, alters the existing definition of ‘partner’ throughout the Assisted Reproductive Treatment Act 2008 as follows:

partner, in relation to a person, means—

(a) the person’s spouse (other than a spouse from whom the person has separated); or

(b) a person who lives with the first person as a couple on a genuine domestic basis, irrespective of gender.

The alteration removes a ‘separated’ married spouse from the definition of ‘partner’, but does not alter the definition’s application to an unmarried domestic partner.
The Committee observes that the word ‘partner’ appears in multiple provisions in the Assisted Reproductive Treatment Act 2008. The effect of clause 4 may be to:

- prevent a married woman from self-inseminating with the assistance of her separated spouse (unless the separated spouse is now a ‘friend’): s. 9(b)
- allow a married woman to undergo a treatment procedure without her separated spouse’s consent: s. 10(1)(a)
- prevent a fertile, married woman with no risk of passing on a genetic abnormality or disease from undergoing a treatment procedure without approval from the Patient Review Panel, where her separated spouse was at risk of passing on a genetic abnormality or disease: s. 10(2)(a)(iii)
- allow a married woman to undergo a treatment procedure without her separated spouse receiving counselling: s. 13
- prevent a presumption against treatment applying to a married woman due to her separated spouse’s criminal or child protection record: s. 14(1)
- allow an ART provider to carry out a treatment procedure on a married woman without giving her separated spouse written advice about his or her information privacy rights: s. 25
- allow a surrogacy arrangement to be entered into with a married woman as the surrogate without her separated spouse being counselled about the social, psychological, relationship and legal implications of the surrogacy arrangement: s. 34
- prevent an ART provider from using a deceased married person’s gametes or embryos to carry out a treatment procedure either on the deceased married person’s separated spouse or by the deceased married person’s separated husband commissioning a surrogacy arrangement: s. 46(a)
- no longer require an ART provider or doctor to record, keep or give to the Victorian Assisted Reproductive, Treatment Authority (or the Authority to give to the Registrar of Births, Deaths and Marriages) prescribed information about the separated spouse of a married woman on whom the provider carries out a treatment procedure: ss. 49(1)(d), 49A(b), 50(2)(c), 51(2)(c), 52(2)(c) & 52AA(b)
- no longer allow a donor to obtain information about the separated spouse of a married woman on whom a treatment procedure will be carried out: s. 55(2)(b)
- no longer prevent freedom of information laws applying to a document in the register that contains information provided by a person as the separated spouse of a married woman on whom a treatment procedure has been carried out: s. 68(a)(iii)
- no longer allow the separated spouse of a married woman who is undergoing a treatment procedure to obtain medical information about the donor of the gametes: s. 68B(1)(c)
- no longer allow the names or addresses of a separated spouse of a married woman who has undergone donor treatment procedures to be included in the Voluntary Registry: s. 71(1)(a)(iv)
- no longer allow the Victorian Assisted Reproductive Treatment Authority to provide donor-linking services to the separated spouse of a married woman who has undergone donor treatment: s. 73B(d)

The Committee notes that clause 4’s effect is not expressly limited to treatment procedures where the separated spouse is not involved (e.g. where any donor gamete is from a third party) and may apply to treatment procedures that involve the separated spouse (e.g. where the treatment uses a gamete, or an embryo created from a gamete, supplied by the separated spouse.) While the Act requires that
anyone who donates gametes or embryos for a treatment procedure (including a spouse or separated spouse) must have consented to their use ‘in a treatment procedure of that kind’\textsuperscript{1}, it does not express that any consent automatically lapses if the parties to a marriage have separated.\textsuperscript{2} So, the effect of clause 4 may be that a married woman may be able to use a gamete (or an embryo created from a gamete) donated by a separated spouse who has previously consented to that use, without the separated spouse being informed about the use or having an opportunity to withdraw that consent.

The Committee also notes that clause 6, amending existing s. 12 of the \textit{Status of Children Act 1974}, extends the parenting presumptions for women who have no partners to include married women who have separated from their spouses as follows:

(1) This Part applies in respect of a woman who undergoes a procedure and who, at the time of the procedure—

(a) has a female partner; or

(b) does not have a partner, whether female or male.

(2) For the purposes of subsection (1)(b), a woman does not have a partner if, at the time of the procedure, she was married to but had separated from her spouse.

New sub-section 12(2) is not expressed to affect the application of parenting presumptions for a woman who has a female partner (including a married woman who has separated from her female spouse.)

The Committee observes that the effect of clause 6 may be to change the applicable parenting presumptions where some married couples have separated. The relevant existing presumptions in the \textit{Status of Children Act 1974} are:

- a rebuttable presumption that a child born to a woman in an opposite sex marriage or within ten months of the dissolution of the marriage is the child of the woman’s husband or former husband: ss. 5
- an irrebuttable presumption that a male partner who consents to his partner undergoing a procedure that uses someone else’s semen (or an embryo created from someone else’s semen or ovum) is the sole father of any child born as the result of a pregnancy that results from that procedure: ss. 10C, 10D & 10E. (The male partner’s consent is rebuttably presumed.)
- an irrebuttable presumption that the female partner who consents to her partner undergoing a procedure is a legal parent of any child born as the result of a pregnancy that results from that procedure: ss. 13 & 14. (The female partner’s consent is rebuttably presumed.)
- an irrebuttable presumption that a single woman who becomes pregnant as the result of a procedure is the sole legal parent of any child born as the result of the pregnancy: ss. 15 & 16.

Clause 6’s effect is that a married woman who has separated from her partner may now fall within the fourth of these sets of presumptions (rather than the first or second.) However, because clause 6 is limited to existing s. 12(1)(b), a married woman who has separated from her female partner may still fall within the third of these sets. To the extent that clause 6 results in different parenting

\textsuperscript{1} \textit{Assisted Reproductive Treatment Act 2008}, s. 16.

\textsuperscript{2} Existing s. 20 permits the withdrawal of consent (in writing provided to the doctor or ART provider) at any time. Existing s. 21 provides that consent lapses either after 10 years or any lesser period specified by the donor.
presumptions applying to married women with separated male or female spouses, it may engage the Charter’s rights with respect to equality on the basis of sex.³

Charter analysis

The Statement of Compatibility remarks:

The Bill will:

• amend the ART Act so that a woman who is married and separated from her spouse does not need the consent of her spouse to access assisted reproductive treatment using donor sperm
• make consequential amendments to the SOC Act so that the presumptions of parentage in the Act operate consistently with the amendments to the ART Act. The amendments ensure that the provisions concerning parentage that apply to a child born to a woman who underwent assisted reproductive treatment and who does not have a partner, are the provisions that apply to a woman who underwent treatment and who is married to but separated from her spouse.

The amended definition of partner in the ART Act will also have an effect on whether a surrogate mother has a partner for the purposes of Part 4 of the ART Act, which deals with the use of assisted reproductive treatment in surrogacy arrangements. The ART Act requires the surrogate mother and her partner, if any, to undergo counselling and be provided with legal advice before a surrogacy arrangement is entered into. The effect of the amended definition of partner will be that a married surrogate mother who is separated from her spouse but not divorced at the time she enters into a surrogacy arrangement will be regarded as not having a partner for the purposes of the counselling and legal advice provisions relating to surrogacy arrangements. In effect this means a married but separated surrogate mother is treated the same as a surrogate mother who has recently separated from a domestic partner.

These amendments promote equality before the law for women who are married but separated from their spouse. They provide for women who are separated from their spouse and women who are separated from their domestic partner to be treated equally with respect to the consent, counselling and legal advice requirements under the ART Act, and with respect to the presumptions about the parentage of children born as a result of assisted reproductive treatment under the SOC Act.

This promotes the right to privacy by:

• allowing a married but separated woman to make the decision to access assisted reproductive treatment using donor sperm autonomously
• preventing the arbitrary interference with privacy that might result if the consent of the woman’s separated spouse is required and he or she is thus informed about the woman’s decision to access assisted reproductive treatment using donor sperm.

The amended definition of partner updates the ART Act so that it better reflects the make-up of modern families. The amendment to Part III of the SOC Act promotes the right to protection of families and children by providing certainty about the parentage of children born as a result of assisted reproductive treatment.
of assisted reproductive treatment to women who are married but separated from their spouse.

The Committee observes that the Statement of Compatibility does not expressly address:

- the possible impact of clause 4 on existing provisions other than existing ss. 10(1)(a), 13 and 34⁴
- the possible impact of clause 4 on separated spouses, including its application to treatment procedures that use the separated spouse’s gametes or embryos created from those gametes
- the possible differential impact of clause 6 on separated male and female spouse

Relevant comparisons

The Committee notes that, for the purposes of determining whether parties to a marriage have ‘separated and thereafter lived separately and apart for a continuous period of 12 months’ (a precondition for dissolution of the marriage), federal law provides:⁵

49(1) The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.

(2) The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

50(1) For the purposes of proceedings for a divorce order, where, after the parties to the marriage separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the filing of the application, the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart.

(2) For the purposes of subsection (1), a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial.

These provisions do not apply to parties to de facto relationships.

The Committee also notes that Victorian law provides a variety of tests for determining whether two people are or are not in a domestic relationship:

- whether or not the parties have registered their relationship under the Relationships Act 2008 and have not deregistered it.
- whether or not the parties ‘live’ together ‘as a couple, on a genuine domestic basis’.⁶
- the same, but ‘all the circumstances of their relationship are to be taken into account’ including the degree of mutual commitment to a shared life; the duration of the relationship; the nature and extent of common residence; whether or not a sexual relationship exists; the degree of financial dependence or interdependence, and any arrangements for financial

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⁴ See EHT18 v Melbourne IVF [2018] FCA 1421, [89].
⁵ Family Law Act 1975 (Cth), ss. 49 & 50.
support, between the parties; the ownership, use and acquisition of property; the care and support of children; and the reputation and public aspects of the relationship.\(^7\)

- whether the parties are ‘a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other… whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person for fee or reward; or on behalf of another person or an organisation’, taking into account the above factors.\(^8\)

The Committee observes that these tests may differ from the question of whether or not the parties to a relationship are or have ‘separated’. To the extent there is a difference, clauses 4 and 6 may engage the Charter’s equality rights with respect to marital status discrimination.\(^9\)

The Committee also observes that neither the Bill nor either Act define the word ‘separated’. Any uncertainty in the meaning of ‘separated’ may engage each spouse’s Charter right ‘not to have his or her… family… unlawfully or arbitrarily interfered with’.\(^10\)

**Conclusion**

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

- the compatibility of clause 4, when read with provisions other than ss. 10(1)(a), 13 and 34, with the Charter;
- the compatibility of clause 4, when read with existing s. 10(1)(a), with the Charter rights of separated spouses who, prior to separating, consented to the use of their gametes (or embryos produced from their gametes) in treatment procedures performed on their spouses;
- the compatibility of clause 6, to the extent that it applies differing parenting presumptions to married women who have separated from male partners or female partners, with the Charter’s right to equality on the basis of sex;
- the meaning of ‘separated’ in clauses 4 and 6 and those clauses’ compatibility with married people’s Charter rights to not have their family ‘unlawfully or arbitrarily interfered with’ (to the extent that the meaning is uncertain) and to equality on the basis of marital status (to the extent that clauses 4 and 6 apply a different test than the one used to determine the end of a de facto relationship.)

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\(^7\) E.g. Equal Opportunity Act 2010.
\(^8\) E.g. Relationships Act 2008.
\(^9\) Charter s. 8.
\(^10\) Charter s. 13(a).
Disability (National Disability Insurance Scheme Transition) Amendment Bill 2019

Bill Information

<table>
<thead>
<tr>
<th>Member</th>
<th>Hon Luke Donnellan MP</th>
<th>Introduction Date</th>
<th>29 May 2019</th>
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<tbody>
<tr>
<td>Portfolio</td>
<td>Disability, Ageing and Carers</td>
<td>Second Reading Date</td>
<td>4 June 2019</td>
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Summary

The Bill introduces a number of amendments to the Disability Act 2006 and the Residential Tenancies Act 1997 which are required in order for Victoria to transition of the National Disability Insurance Scheme (NDIS). It reflects the changes brought by the commencement of the full NDIS, including implementing the division of roles and responsibilities agreed through the National Quality and Safeguarding Framework. In particular, the Bill: -

- Provides a process by which the use of regulated restrictive practices is authorised; ‘Restrictive practice’ is defined to mean any practice or intervention that has the effect of restricting the rights or freedoms of movement of a person with a disability or of an NDIS participant.11 (The previous term ‘restrictive interventions’ is replaced with the term ‘restrictive practices’ throughout the Bill to ensure consistency with the NDIS.)[19]

- The Senior Practitioner (SP) may give directions to registered NDIS providers and develop guidelines.[28] The SP may visit and inspect any place (other than private residences that are not NDIS dwellings) where services are provided under the NDIS and may request an NDIS provider to provide information about any restrictive practices and compulsory treatment.12[30] It sets of the functions of a community visitor in respect of NDIS dwellings.[32] Note the Explanatory Memorandum: - ‘Previously, the special powers only related to disability service providers. The amendments are necessary given the SP’s new functions with respect to the use of regulated restrictive practices and compulsory treatment on NDIS participants by registered NDIS providers.’

- Expands the Disability Services Commissioner’s initiated investigation functions to include former disability service providers and former regulated service providers.[48-52] This is to ensure there is no gap in appropriate investigatory powers once providers transition to the NDIS given that the investigation powers of the NDIS Quality and Safeguards Commission will relate to matters occurring post transition to the NDIS. Community visitors may visit any Specialist Disability Accommodation (SDA) enrolled dwelling provided under an SDA residency agreement or short-term accommodation and assistance dwelling.[53-55] (Note the definition of SDA provider.13)[145]

- Sets out the process and requirement for registered NDIS providers to appoint an Authorised Program Officer. New Part 6A is part of the authorisation process which registered NDIS providers are required to comply with as a condition of registration under the NDIS Act before using regulated restrictive practices on NDIS participants. A registered NDIS provider

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12 Note this reflects existing section 27 which sets out the special powers of the Senior Practitioner.

13 See clause 145. SDA provider means a person ‘(a) who is a registered NDIS provider; and (b) who provides specialist disability accommodation; and (c) who is the owner or leaseholder of an SDA enrolled dwelling.’
that intends on using a restrictive practice or compulsory treatment is required to appoint one or more Authorised Program Officers. Approval is sought from the SP. VCAT may review a decision of the SP. New Part 6B governs the use of restrictive practices by registered NDIS providers.[64]

- Clause 74 amends section 140 of the Disability Act 2006 so that it relates to the use of regulated restrictive practices instead of restraint and seclusion. A regulated restrictive practice must not be used on a person to whom Part 7 applies by a disability service provider unless specified matters are met. The use of regulated restrictive practices are to be included in a behaviour support plan. [74-81] A disability service provider may use a regulated restrictive practice on a person who is an NDIS participant subject to a supervised treatment order obtained by a registered NDIS provider if certain conditions are satisfied. [85, 112] An Authorised Program Officer must prepare a treatment plan.[87] An Authorised Program Officer appointed under Part 6A by a registered NDIS provider may apply to VCAT for a supervised treatment order. [100, 104] Clause 121 inserts new Division 7 of Part 8 which makes provision for restrictive practices used by registered NDIS providers on NDIS participants subject to supervised treatment orders in certain circumstances.[121]

- Provides for the use, transfer and disclosure of information about registered NDIS providers and NDIS participants;
- Streamlines the process by which disability service providers intending to provide services under the NDIS may be deregistered[18, 125, 144]
- Provides further for the access and inspection rights of a community visitor in relation to NDIS dwellings;[53-55]
- Enables an Specialist Disability Accommodation (SDA) resident to seek relief from VCAT if the SDA resident has been coerced or deceived into entering a tenancy agreement;[147, 215]
- Provides further for regulatory oversight of residency agreements by the Director of Consumer Affairs Victoria. The Minister or Secretary in writing, may refer to the Commissioner for investigation any matter relating to the provision of disability services and other specified matter;[51]
- Provides protections[19] for persons with complex needs who require specialist disability accommodation against eviction into homelessness;[181, 182, 187]

14 Part 7 of the Disability Act 2006 governs restrictive interventions. Section 135 provides that a disability service provider, other than the Secretary, who proposes to use restrictive interventions in the provision of a disability service must apply to the Secretary for approval. The VCAT may review the Secretary’s decision.

15 Note that NDIS behaviour support plans may form a part of treatment plans.

16 See the Explanatory Memorandum: ‘The registered NDIS provider is required to comply with Division 7 in relation to the NDIS participant; the Secretary has granted approval for the disability service provider to use restrictive practices under section 135 (the Secretary’s ability to give approval is despite section 133 and sections 136, 137 and 138 will apply to that approval process); and provided that at the time the regulated restrictive practice is to be used, the disability service provider meets the requirements in section 201L(1)(other than paragraph (f)...’

17 Note Division 5 of Part 8 of the Disability Act 2006 makes provision for supervised treatment orders. Clauses 90-105 of the Bill now apply those provisions to registered NDIS providers. Registered NDIS providers are required to comply with the Division as a condition of registration under the NDIS Act before using regulated restrictive practices. Authorised Program Officers of registered NDIS providers may apply for supervised treatment orders for NDIS participants under new section 191(1).’

18 See the Explanatory Memorandum: ‘-‘New section 236 provides that a residential service declared to be a group home...ceases to be a group home if the specified criteria is met...The intent is to ensure that providers take steps to become registered SDA dwellings and meet the necessary requirements of the Residential Tenancies Act 1997 and to ensure that premises are not subject to dual regulatory regimes, without a requirement to individually degazette each property upon the criteria being met.’

19 See the Statement of Compatibility: ‘Clauses 181(2), 184(2) and 187(4) insert exculpatory considerations into the provisions for breach of duty notices, notices of temporary relocation and notices to vacate that take into account the special circumstances of SDA residents.’
• Generally aligns provisions for tenancy agreements and residential rental agreements with the *Residential Tenancies Act* 1997;

• Generally makes the penalty and offence provisions in the *Residential Tenancies Act* 1997 consistent with the amendment made by the *Residential Tenancies Amendment Act* 2018.

**Comments under the PCA**

*Delegation of legislative power – Delayed commencement (s.17(a)(vi), PCA)*

Clause 2 is the commencement provision. Subclause (1) provides that Part 1, Division 1 of Part 2, Divisions 1 and 2 of Part 4 and sections 259 and 269 of the Bill commence on the day after the day on which it receives Royal Assent. Subclause (2) provides that section 262(1) will commence on the later of the day section 17(7) of the *Guardianship and Administration Act* 2019 commences or the day section 293 of the *Disability Service Safeguards Act* 2018 commences. Subclauses (3) and (4) provide that the remaining provisions of the Bill will commence on a day or days to be proclaimed with a default commencement date of 1 July 2020. The Committee notes the Explanatory Memorandum: ‐ ‘The reason for the later than normal default commencement date is to allow additional time for residents in group homes to transition to SDA dwellings and the closures of residential institutions.’

The Committee is satisfied that the delayed commencement of section 262(1) and other provisions of the Bill pursuant to clause 2 is justified.

**Charter Issues**

The Disability (National Disability Insurance Scheme Transition) Amendment Bill 2019 is compatible with the rights set out in the *Charter of Human Rights and Responsibilities Act* 2006.
Firefighters’ Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2019

Summary

The Bill: -

- Provides a rebuttable presumption to claim compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* for career firefighters and volunteer firefighters who are suffering or will suffer from specified forms of cancer;[6, 9]

- Amends the *Metropolitan Fire Brigades Act 1958* to abolish the Metropolitan Fire and Emergency Services Board (MFESB) and establish Fire Rescue Victoria (FRV) to take on its functions;[24, 37, 38]

- Abolishes the positions of Chief Executive Officer and Chief Officer of the MFESB. It establishes the positions of Fire Rescue Commissioner and Deputy Fire Rescue Commissioner appointed by the Governor in Council;[26, 27, 38]

- Establishes the Strategic Advisory Committee to advise the Fire Rescue Commissioner. Members are appointed by the Minister;[55]

- Establishes a new mechanism for changing the boundaries of the FRV fire district. A Fire District Review Panel established by the Minister must review the FRV fire district and publish any determinations in the Government Gazette and on the Internet site of FRV;[60, 61]

- Establishes the Fire Services Implementation Monitor (the Monitor) appointed by the Governor in Council and the Firefighters Registration Board. The Monitor must prepare a report on its operations in respect of the financial year as soon as practicable after the end of that financial year. The report must be tabled in the Parliament and is privileged;[85]

- Amends the *County Fire Authority Act 1958* to make it an objective of the Country Fire Authority (CFA) to support the recruitment, development and retention of volunteer officers and members;[74]

- Recognises the CFA as a fully volunteer fire fighting service;[75]

- Allow some functions to be performed and powers to be exercised within the FRV fire district to support co-location of volunteer brigades with FRV units and provide operational and management support to the CFA.[50] FRV may second employees to be of assistance to the CFA[51] and contains transitional provisions. Provision is made for the transfer of staff and preservation of entitlements.[82] The Minister must table an Implementation Plan in the Parliament and it must be published in the Government Gazette. The Monitor must monitor and review the Implementation Plan.[21][82, 85]

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20 See clause 83 which inserts new Schedule 3 into the *Metropolitan Fire Brigades Act 1958*. Schedule 3 outlines the functions, premises address or location of the staff that will transfer from the Country Fire Authority to FRV under new section 102 in the *Metropolitan Fire Brigades Act 1958*.

21 See new clause 130 which provides that the Minister must table an Implementation Plan in the Parliament. The Implementation Plan must consider but is not limited to the following matters: staff, training, operational support, financial sustainability of FRV and the CFA, transfer of functions, resources, assets, long term funding etc.


**Comments under the PCA**

**Delegation of legislative power–Delayed commencement (s. 17(a)(vi), PCA)**

Clause 2 provides that: -

- Parts 1 and 2 (which relate to the rebuttable presumptive right entitlement) come into operation on the day after the day on which the Act receives Royal Assent;
- The remaining provisions (which relate to the modernisation of the fire services framework) come into operation on a day to be proclaimed.

The Committee notes that some provisions of the Act may commence more than 12 months after the Bill’s introduction. The Explanatory Memorandum notes: ‘There is no default commencement date for the remaining provisions of the Bill due to the need for various preparatory steps to be taken before the reforms relating to the establishment of Fire Rescue Victoria and proposed changes to the Fire Rescue Victoria fire district commence operation.’

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

**Retrospective application of provisions – Entitlement of career and volunteer firefighters to compensation under the Workplace Injury Rehabilitation and Compensation Act 2013 (s. 17(a)(i), PCA)**

Clauses 6 and 9 establish a presumed entitlement to compensation under the Workplace Injury Rehabilitation and Compensation Act 2013 for career and volunteer firefighters respectively if they are suffering from a cancer listed in the Table in Schedule 1 and meet certain qualifying entitlements. One requirement is that the injury (in this instance the cancer) must have occurred on or after 1 June 2016. The Committee notes the retrospective amendments are beneficial to claimants after 1 June 2016 and do not adversely affect other claimants under the Workplace Injury Rehabilitation and Compensation Act 2013.

The Committee is of the view the provisions are justified.

**Right to common law presumption of innocence – Reverse onus – Legal burden of proof (s. 17(a)(i), PCA)**

Clause 84 inserts new section 94A creates an offence of causing fire in the FRV fire district where the weather and environmental conditions as such that the fire is a danger to the life or property of others. The penalty is imprisonment for not less than three months and not more than 2 years. New section 94A(3) provides for a defence. The Committee notes the reverse onus provision requires the accused

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22 See the Second Reading Speech: ’There is now a significant body of evidence indicating that, because of the work they do, firefighters are more susceptible to these types of cancer. The presumptive right established by this Bill will mean that firefighters seeking compensation for these cancers will no longer have to prove that firefighting has caused their cancer. Instead, it will now be presumed that their cancer was caused by their firefighting and that they have an entitlement to compensation.’

23 See clauses 6 and 9. The injury must have occurred on or after 1 June 2016. The injury must occur while the worker is employed as a career or volunteer firefighter or within 10 years after they last served or were employed as a firefighter. The worker or volunteer must have been employed or served as a firefighter for at least the qualifying period listed for the relevant cancer in the Table in Schedule 1. See also clause 13 which establishes the operation of the presumption because of special consideration in circumstances where a worker or volunteer does not meet the relevant qualifying period requirements.

24 See new section 94A(3) ’It is a defence to a prosecution for an offence against subsection (1) if the accused proves—(a) that one or more of the following applies— (i) the danger was caused by the intervention or subsequent action of one or more persons acting without the knowledge or consent or contrary to the wishes or instructions of the accused; (ii) the fire was lit at a time when the circumstances of atmospheric temperature and wind velocity referred to in subsection
to prove particular matters to establish his or her innocence thereby imposing a legal as opposed to an evidential burden.

The Committee notes the comments in the Statement of Compatibility: ‘While the imposition of a legal burden on an accused will limit an accused’s right to the presumption of innocence... the matters required to be proven will be within the knowledge of the accused. In circumstances where the conduct of the accused has actually resulted in material harm to life or property, the accused is best placed to lead this evidence... Defences are available for the benefit of an accused to escape liability where they have taken reasonable steps to ensure compliance...’

The Committee notes the reverse onus provision. The Committee also notes the comments under the Charter Report.

**Charter Issues**

*Cruel punishment – Protection of children – Arbitrary detention – Fair hearing – Mandatory minimum sentences – Causing fire in circumstances that make a fire a danger to life or property – Doing an act to cause fire intending to destroy others’ property*

**Summary:** The effect of clause 84 is that anyone who is charged with causing fire in circumstances that make a fire a danger to life or property or doing an act to cause fire intending to destroy others’ property, is proved guilty beyond reasonable doubt and cannot establish a defence must be sentenced to prison for at least three or twelve months. The Committee will write to the Minister seeking further information.

**Relevant provision**

The Committee notes that clause 84, inserting new sections 94A and 94B, creates two new offences:

**94A Causing fire in the Fire Rescue Victoria fire district in extreme conditions of weather etc. an offence**

(1) A person must not light, spread or maintain a fire in the Fire Rescue Victoria fire district if the circumstances of location, atmospheric temperature, wind velocity and flammable vegetation or other combustible substance are such that lighting the fire causes, or is likely to cause, a fire that is a danger to the life or property of others.

Penalty: **Imprisonment for not less than 3 months** and not more than 2 years.

**94B Causing fire in the Fire Rescue Victoria fire district with intent to cause damage etc.**

(1) A person must not, without lawful excuse, do an act in the Fire Rescue Victoria fire district that causes a fire, or is for the purpose of causing a fire, intending to destroy any vegetation, produce, stock, crop, fodder or other property belonging to another person.

Penalty: **Imprisonment for not less than 12 months** and not more than 20 years.

Clause 60, amending existing s. 4(1), provides that the ‘Fire Rescue Victoria fire district’ consists of ‘the land specified in Schedule 2’. Clause 65, amending existing Schedule 2, provides that ‘The Fire Rescue Victoria fire district consist of the land delineated and coloured green on the plan lodged in the Central Plan Office and numbered LEGL./17-371.’

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(1) were not present and could not reasonably have been foreseen; (iii) at the time of the alleged offence the accused was the owner or occupier of the land upon which the fire was lit or was acting under the direction of that owner or occupier; and (b) that the accused— (i) took all precautions required by this Act... and (ii) did everything in the power of the accused that was reasonable in the circumstances to suppress or extinguish the fire.
New section 94A does not apply if the accused proves that one of three conditions existed (others’ interference, unforeseeable conditions or the accused owning, occupying or working on the land where the fire occurred), that all legal rules for lighting fires were complied with and that everything reasonable was done to suppress the fire. Neither offence applies if the accused was acting under official direction or control to build a firebreak.

The Explanatory Memorandum for new section 94A explains:

This section is intended to reflect the strong public interest in ensuring that people do not engage in conduct with respect to lighting fire that results in harm without strong justification.

The Explanatory Memorandum for new section 94B does not describe its purpose.25

The Committee observes that the words ‘Imprisonment for not less than’ impose mandatory minimum sentences of imprisonment for anyone charged and found guilty of the offence. So, the effect of clause 84 is that anyone who is –

• charged with causing fire in circumstances where fire is a danger to life or property or doing an act to cause fire intending to destroy others’ property;
• is proved guilty beyond reasonable doubt; and
• cannot establish a defence

must be sentenced to prison for at least three months (for new section 94A) or twelve months (for new section 94B.)

The Committee notes that, in sentencing an offender under section 94B, the sentencing judge may fix a non-parole period at least six months less than the sentence of imprisonment,26 potentially allowing a parole board to release an offender into the community at any point. As well, a drug court may allow an offender whose drug or alcohol dependency contributed to offending to remain out of prison subject to conditions imposed by the drug court.

Charter analysis

The Statement of Compatibility remarks:

New section 94A(1) creates an offence to cause fire in the FRV fire district where the weather and environmental conditions are such that the fire is a danger to the life or property of others. New section 94A(3) provides for a defence...

While the imposition of a legal burden on an accused will limit an accused’s right to the presumption of innocence, I consider that the limit is reasonably justified under section 7(2) of the Charter. This defence is consistent with a similar provision in section 39B of the CFA Act. The matters required to be proven will be within the knowledge of the accused. In circumstances where the conduct of the accused has actually resulted in material harm to life or property, the accused is best placed to lead this evidence. For example, it is appropriate to require the accused to provide evidence as to their wishes and instructions, if the danger was caused by another person acting without the accused’s knowledge or contrary to their instructions.

Further, these defences are available for the benefit of an accused to escape liability where they have taken reasonable steps to ensure compliance, in respect of what could otherwise be

25 The Explanatory Memorandum for new section 94B incorrectly states that ‘The penalty for this offence is 120 penalty units or imprisonment for 12 months or both.’ Rather, the penalty is 20 years imprisonment, and 12 months imprisonment is the minimum sentence for this offence. The Explanatory Memorandum also omits the requirement that the prosecution prove that the accused acted ‘without lawful excuse’.

26 Sentencing Act 1991, s. 11.
an absolute or strict liability offence. The consequences of lighting a fire in hazardous environmental circumstances can be extremely serious regardless of intention. In my view, a less restrictive measure (such as imposing only an evidential burden on the accused) would not be appropriate in light of the strong public interest in ensuring that people do not engage in conduct with respect to lighting fire that results in harm and, in order to escape liability for contravening the Bill, are expected to demonstrate to a legal standard that they have taken all measures required by the Bill to discharge this responsibility.

... Two provisions in the Bill create offences that contain excuse exceptions. New section 94B provides that a person must not, without lawful excuse, do an act in the FRV fire district that causes a fire intending to damage property belonging to another person. New section 94C makes it an offence for a person to fail to comply with a direction from FRV not to light a fire without reasonable excuse.

These excuse exceptions in new sections 94B and 94C may be viewed as placing an evidential burden on the accused, in that they require the accused to raise evidence as to a reasonable excuse or a lawful excuse. However, in doing so, these offences do not transfer the legal burden of proof. Evidential burdens are not considered to limit the right to be presumed innocent. The exception relates to matters that are peculiarly within the accused’s knowledge, which would be unduly onerous on the prosecution to investigate and disprove at first instance. Once the accused has pointed to evidence of the excuse, the burden shifts back to the prosecution to prove the essential elements of the offence to a legal standard. Whether a person had a lawful excuse to do an act which causes a fire in the FRV district intending to damage property, or whether a person had a reasonable excuse for failing to comply with a direction from FRV not to light a fire, would be information solely within the knowledge of that person. Once raised, the burden would then revert back to the prosecution to prove the elements of the offence.

The Committee notes that the Statement does not address the mandatory minimum sentences in new sections 94A and 94B.

The Committee observes that the Parliamentary Joint Committee on Human Rights has remarked: 27

Mandatory minimum sentences of imprisonment engage the right to be free from arbitrary detention. The notion of 'arbitrariness' under international human rights law includes elements of inappropriateness, injustice and lack of predictability. In order for detention not to be considered arbitrary in international human rights law it must be reasonable, necessary and proportionate in the individual case. Detention may be considered arbitrary where it is disproportionate to the crime that has been committed (for example, as a result of a blanket policy). As mandatory sentencing removes judicial discretion to take into account all of the relevant circumstances of a particular case, it may lead to the imposition of disproportionate or unduly harsh sentences of imprisonment.

The federal committee had previously concluded that the particular mandatory minimum sentences before it – a five year minimum for various firearms trafficking offences, except when the crime is committed by someone under 18 years of age – was 'likely to be incompatible with the right not to be arbitrarily detained and the right to a fair trial.' 28

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28 Parliamentary Joint Committee on Human Rights, Report 8 of 2016, reporting on the Criminal Code Amendment (Firearms Trafficking) Bill 2016, [1.114]. After the mandatory minimum sentences were removed in the Senate, the
The Committee also observes that the Supreme Court of Canada has held that several mandatory minimum sentences are incompatible with that jurisdiction’s constitutional right against cruel or unusual punishment, including a seven-year minimum for drug trafficking, three- and five-year minimums for firearms possession and a one-year minimum for recidivist drug trafficking. 29 Canadian courts apply the following test in such cases: 30

A mandatory minimum sentencing provision may be challenged on the basis that it imposes cruel and unusual punishment (i.e. a grossly disproportionate sentence) on the particular offender before the court, or failing this, on the basis that it is reasonably foreseeable that it will impose cruel and unusual punishment on other persons.

The inquiry into reasonably foreseeable situations the law may capture may take into account personal characteristics relevant to people who may be caught by the mandatory minimum, but must avoid characteristics that would produce remote or far-fetched examples.

The Committee notes that:

- The three-month mandatory minimum sentence in new section 94A only applies when the circumstances mean that lighting a fire is likely to create a danger. However, a mere ‘danger to... property’ (without any danger to life) may be enough, potentially including a danger to small items of property (e.g. papers) where there is no risk of the fire spreading beyond those items.

- The twelve-month mandatory minimum sentence in new section 94B only applies to someone who does an act to cause a fire ‘intending to destroy any vegetation, produce, stock, crop, fodder or other property belonging to another person.’ However, ‘any act’ (whether or not a fire is actually caused) may suffice (e.g. buying matches) and a mere intention to ‘destroy... property belonging to another person’ may suffice (e.g. an intention to destroy small items of someone’s property, such as papers.)

- The mandatory minimum sentences in new sections 94A and 94B may apply to children and the mentally ill, so long as they are criminally responsible for their actions.

For example, new sections 94A and 94B may impose mandatory sentences of imprisonment of three or twelve months on a teenager who deliberately sets (or tries to set) fire to small items belonging to anyone else even when there is no risk that the fire will spread beyond those items.

Relevant comparisons

The Committee notes that new sections 94A and 94B are similar to provisions that were added to the Country Fire Authority Act 1958 after the Ash Wednesday bushfires. 31 The (then) Minister for Emergency Services remarked: 32

Existing legislation contains a range of offences dealing with the deliberate lighting of fires in the open air. To strengthen that range, the Bill creates two new offences aimed specifically at the fire-bug and similarly irresponsible people; a summary offence of lighting a fire in the country area of Victoria in such circumstances of extreme weather and dry vegetation that a fire causing a danger to the life or property of others is likely to occur and an indictable offence

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30 R v Nur [2015] 1 SCR 773, [65], [76].
31 Country Fire Authority Act 1958, ss. 39A & 39B.
of lighting a fire in the country area with intent to destroy any vegetation, crop, stock or other property.

To reflect the seriousness with which the Government regards such actions, both offences will attract a mandatory minimum term of imprisonment. The penalty for the summary offence will be imprisonment for not less than three months and not more than two years and for the indictable offence, a minimum term of imprisonment of one year and a maximum term of twenty years.

In the future, any person who perpetrates a deed by fire which leads, or is likely to lead, to the widespread destruction of life and property such as we have experienced this past summer will sorely suffer the consequences of his actions.

However, while those provisions only applied in the ‘country area of Victoria’ (excluding metropolitan Melbourne), new sections 94A and 94B primarily apply in Melbourne. The Committee observes that neither the existing nor new offences require that there was a danger of ‘widespread destruction of life and property’, including the risk or occurrence of a bushfire.

Victoria otherwise presently has no offences that attract mandatory minimum terms of imprisonment. However, various offences are subject to presumptive minimum sentences as follows:

- 10-year minimum non-parole period for manslaughter in circumstances of gross violence or by a single punch or strike
- 4-year minimum non-parole period for causing serious injury in circumstances of gross violence
- 2-, 3- or 5-year minimum non-parole periods (or, for some young offenders for some offences, a 6-month non-parole period) for causing injury to an emergency, custodial or youth justice worker while on duty
- 12-month minimum non-parole period for contravening a restrictive condition of a supervision order under the Serious Offenders Act 2016
- 3-year minimum non-parole periods for aggravated home invasion or car-jacking
- 2-year minimum non-parole periods for intentionally exposing an emergency, custodial or youth justice officer to risk by driving, where the officer is injured

These minimum non-parole periods do not apply if the offender is under 18 years of age or a ‘special reason’ exists, i.e. law enforcement assistance, impaired mental functioning, the imposition of a residential or secure treatment order or where ‘there are substantial and compelling circumstances that are exceptional and rare and that justify’ not imposing the minimum.

Other mandatory or presumptive minimum prison sentences in Australia include:

- Federal: 5-year minimum sentence of imprisonment for aggravated people smuggling, unless the offender is under 18

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33 [Sentencing Act 1991, ss. 9B & 9C.](#)
34 [Sentencing Act 1991, s. 10.](#)
35 [Sentencing Act 1991, s. 10AA.](#)
36 [Sentencing Act 1991, s. 10AB.](#)
37 [Sentencing Act 1991, ss. 10AC & 10AD.](#)
38 [Sentencing Act 1991, s. 10AE.](#)
39 [Sentencing Act 1991, s. 10A.](#)
40 [Migration Act 1958 (Cth), s. 233C.](#)
• New South Wales: 8-year minimum non-parole period for assault causing death while intoxicated

• Northern Territory: 3- or 12-month minimum sentences of imprisonment for certain violent offences, unless the offender is under 18 or ‘the circumstances of the case are exceptional’

• Queensland: life imprisonment for a repeat child sex offence

• Western Australia: various minimum sentences of imprisonment (including 15-year minimum sentences for serious offences) for various violent or sexual crimes, 2-year minimum sentences for culpable driving of a boat causing death and repeat burglary; and a 9-month minimum sentence for serious assaults of emergency workers, but with reduced or discretionary minimum sentences for offenders under 18

Most Australian jurisdictions impose a mandatory minimum sentence of life imprisonment for murder, or some types of murder. However, Victoria does not.

Conclusion

The Committee will write to the Minister seeking further information as to the compatibility of the mandatory minimum sentences in new sections 94A and 94B with the Charter, including the Charter’s rights against cruel punishment, to protection of children, against arbitrary detention and to fair hearings.

41 Crimes Act 1900 (NSW), s. 25B
42 Sentencing Act 1995 (NT), Part 3, Division 6A.
43 Penalties and Sentences Act 1992 (Qld), s. 161E.
44 Criminal Code Compilation Act 1913 (WA), Appendix B, ss. 279(5A),(6A); 280(2),(3); 281(3),(4); 283(2),(3); 294(2),(3); 297(5),(6); 318(2),(4); 320(7),(8); 321(14),(15); 324(3),(4); 325(2),(3); 326(2),(3); 327(2),(3); 328(2),(3); 330(10),(11); 404(4).
Legal Profession Uniform Law Application Amendment Bill 2019

Bill Information

<table>
<thead>
<tr>
<th>Member</th>
<th>Hon Jill Hennessy MP</th>
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<tr>
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<tr>
<td>Portfolio</td>
<td>Attorney-General</td>
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<td>5 June 2019</td>
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Summary

The Bill amends the Legal Profession Uniform Law Application Act 2014 which provides for a uniform regulatory scheme for the legal profession (the Uniform Law Scheme). The Uniform Law Scheme commenced on 1 July 2015. Currently the participating jurisdictions are Victoria and New South Wales. Western Australia\(^{45}\) wishes to join the Uniform Law Scheme. The Bill facilitates this by providing flexibility in the governance arrangements.

In particular it:

- Increases the number of members of the Legal Services Council;
- Ensures that the Legal Services Council’s membership includes at least one member from each participating jurisdiction;
- Ensures that the Admissions Committee’s membership includes at least one current or former Supreme Court Judge from each participating jurisdiction;
- Retrospectively validates actions and decisions carried out or made by the Victorian Legal Services Commission, the Victorian Legal Services Board and courts or tribunals in relation to complaints and investigations under Chapter 4 of the Legal Profession Act 2004.

Comments under the PCA

Delegation of legislative power – Delayed commencement (s. 17(a)(vi), PCA)

Clause 2 is the commencement provision. The Committee notes that subclause (2) provides that Part 2 comes into operation on a day or days to be proclaimed. The Committee notes the Explanatory Memorandum: ‘There is no default commencement dates for this Part so as to enable the commencement of the amendments to the Uniform Law Scheme to align with Western Australia’s entry into the scheme.’ In addition, the Second Reading Speech clarifies that: ‘The Western Australian Attorney-General has announced that the Uniform Law will formally commence in Western Australia on 1 July 2020.’

The Committee is of the view that the operation of the commencement provision is justified.

Retrospective application of provisions (s. 17(a)(i), PCA)

Part 3 is taken to have come into operation on 5 June 2019. Note the Explanatory Memorandum: ‘Part 3 of the Bill will come into operation on the date of the second reading of the Bill. This is necessary to clarify the continuity of the regulatory scheme provided for by the Legal Profession Act 2004.’ Clause 10 of Part 3 inserts a new Division 11 in Part 12 of the Legal Profession Uniform Law Application Act 2015. New sections 185 and 186 operate retrospectively to clarify that the Victorian Legal Services

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\(^{45}\) Note the Explanatory Memorandum: ‘The current governance arrangements for the scheme reflect the fact that when the scheme commenced, there were only 2 participating jurisdictions. The Attorneys-General of Victoria, New South Wales and Western Australia have agreed to amend the Principal Act... The amendments in Part 2 of the Bill provide flexibility in the schemes’ governance arrangements, so that it can accommodate the entry of additional jurisdictions to the Uniform Law Scheme in the future.’
Commissioner is the entity with the power to deal with disciplinary complaints and investigations from 1 July 2015, the original commencement date of the Uniform Law Scheme.

The Committee notes the Second Reading Speech: - ‘The Bill also includes amendments to the Application Act, to retrospectively clarify that the Victorian Legal Services Commissioner (VLSC) is the responsible entity for continuing disciplinary complaints and investigations against legal practitioners that were commenced under the legislation that preceded the Application Act – that is, the Legal Profession Act 2004. Although it was clearly intended that the VLSC should have jurisdiction in respect of such earlier matters, the Bill will clearly prescribe that the VLSC is the correct body to deal with such complaints and investigations, and will provide that anything that the VLSC (or the Victorian Legal Services Board or any court or tribunal) has previously done in relation to such complaints and investigations has the effect as though the VLSC had been so prescribed.’

The Committee notes the retrospective application of the provision. The Committee also notes the Charter report.

Charter Issues

Obligations of public authorities – Victoria Legal Services Commissioner – Complaints or investigations under the Legal Profession Act 2004 – Override of the Charter

Summary: The effect of clause 10 may be that the Victorian Legal Services Commissioner, when dealing with complaints or investigations under Chapter 4 of the Legal Professions Act 2004, is no longer obliged to act compatibly with or give proper consideration to Charter rights. The Committee will write to the Attorney-General seeking further information.

Relevant provision

The Committee notes that clause 10, inserting a new section 185, provides that the Victorian Legal Services Commissioner ‘is to deal with a complaint or investigation referred to in clause 26(1) of Schedule 4 to the Legal Profession Uniform Law (Victoria). Existing clause 26 of Schedule 4 of the Legal Profession Uniform Law (Victoria) provides:

(1) This clause applies to—
(a) a complaint made under old Chapter 4 but not disposed of before the commencement day; or
(b) an investigation referred to in old Chapter 4 that had begun but had not been completed before the commencement day.

(2) On and after the commencement day—
(a) the complaint or investigation is to continue to be dealt with in accordance with the provisions of the old legislation; and
(b) for that purpose, the complaint or investigation is to continue to be dealt with by the entity responsible for dealing with it under those provisions (the current entity).

(3) Subclause (2)(b) does not apply if a local regulation or other legislation of this jurisdiction directs that another entity referred to in this Law (the substituted entity) is to deal with the complaint or investigation instead of the current entity.

Note the Explanatory Memorandum: - ‘Part 3 is retrospective in its operation. The Commissioner has operated on the basis that it is the correct body since the commencement of the Principal Act, and has concluded in excess of 200 complaints and investigations. It is necessary for the purposes of certainty to apply the Part retrospectively, to ensure that it also covers the concluded matters as well as any current or future matters.’
'old Chapter 4' means 'Chapter 4 of the' Legal Profession Act 2004.

The Committee also notes that existing s. 6(3) provides:

A body performing functions or exercising powers under the Legal Profession Uniform Law (Victoria) is not a public authority within the meaning of the Charter of Human Rights and Responsibilities Act 2006 in respect of its performance of those functions or exercise of those powers.

Charter s. 38 provides that a public authority must act compatibly with human rights and give proper consideration to human rights.

The Committee observes that clause 10 may change the status of the entity responsible for complaints or investigations under Chapter 4 of the Legal Professions Act 2004 from being a public authority under the Charter (the ‘current entity’ that is ‘responsible for dealing with [complaints or investigations] under’ the Legal Professions Act 2004) to not a public authority under the Charter (the ‘substituted entity’, exercising powers and functions under new section 185 and/or existing clause 26(3) of Schedule 4 of the Legal Professions Uniform Law (Victoria).) So, the effect of clause 10 may be that the Victorian Legal Services Commissioner, when dealing with complaints or investigations under Chapter 4 of the Legal Professions Act 2004, is no longer obliged to act compatibly with or give proper consideration to Charter rights.

Charter analysis

The Statement of Compatibility does not address whether or not existing s. 6(3) will apply to the Victorian Legal Services Commissioner when it is performing functions or exercising powers pursuant to new section 185.

The Override Statement for the Legal Profession Uniform Law Application Bill 2013 remarked:

If the charter act were only partly excluded, so that it continued to apply to Victorian regulatory authorities in respect of functions they perform under the uniform law, there is a risk that inconsistencies could arise in the implementation of the uniform law between Victoria and other participating states and territories. Regulatory authorities in Victoria would be required to act compatibly with the charter act when performing functions under the uniform law, whereas regulatory authorities in other participating states and territories would not be similarly obliged.

The features that distinguish the bill and constitute ‘exceptional circumstances’ that justify the inclusion of the override declaration are the prevailing objective of interjurisdictional consistency that applies to the uniform law, the ‘applied law’ model that is used to achieve that objective, the fact that the uniform law will be passed as a substantive law of Victoria, and the framework of interjurisdictional and local regulatory bodies that will each be performing elements of the uniform law.

... Subclause 6(3) is included for the avoidance of doubt and provides that a body performing functions under the uniform law is not a public authority when carrying out those functions. Victorian bodies established or continued by the bill will be subject to the charter act when carrying out non uniform law functions specific to Victoria.

The Committee notes that the Legal Profession Act 2004 was not subject to a Charter override and that the previous Legal Services Commissioner, which dealt complaints and investigations under that Act, may have been a public authority under the Charter.
Conclusion

The Committee will write to the Attorney-General seeking further information as to whether or not the Victorian Legal Services Commissioner is a public authority within the meaning of the Charter when it is dealing with complaints or investigations under Chapter 4 of the *Legal Professions Act* 2004.
Mineral Resources (Sustainable Development) Amendment Bill 2019

Bill Information

Member: Hon Jaclyn Symes MP
Portfolio: Resources
Introduction Date: 4 June 2019
Second Reading Date: 5 June 2019

Summary

The Bill amends the Mineral Resources (Sustainable Development) Act 1990 and various other Acts. More specifically it:

- establishes the Mine Land Rehabilitation Authority.\[12\]
  Note the Second Reading Speech: -
  'The Mine Land Rehabilitation Authority will be established on 1 July 2020. The Authority will take over the Latrobe Valley Mine Rehabilitation Commissioner’s current roles in relation to rehabilitation and the Latrobe Valley Regional Rehabilitation Strategy. The Authority’s rehabilitation role will extend to declared mines. The Authority will be engaged in monitoring, maintaining and managing registered declared mine land.\[21-43\]
- establishes the Board of the Mine Land Rehabilitation Authority;\[15\]
- provides for the rehabilitation of declared mine\[47\] land. Rehabilitation planning activity is amend to require declared mines to have declared mine rehabilitation plans.\[13, 44\] The holder of an authority may be issued with a notice (Notice requiring the authority holder to take action or stop work pursuant to section 110 of the Mineral Resources (Sustainable Development) Act 1990) if the holder has not complied with a declared mine rehabilitation plan. A former licensee or former holder of a mining licence may also be issued with a notice.\[45\] The VCAT may review the decision to issue such a notice;
- provides for the establishment of the declared mine land register;\[44\]
- establishes the Declared Mine Fund \[44\] and makes consequential amendments.

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 Mineral Resources (Sustainable Development) Amendment Bill 2019 is compatible with the rights set out in the Charter of Human Rights and Responsibilities Act 2006.

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\[47\] See section 7C(1) of the Mineral Resources (Sustainable Development) Act 1990 which provides that the Minister may by Order published in the Government Gazette declare that a specified mine or quarry is declared mine or quarry. Subsection (2) provides the Minister must not make a declaration under subsection (1) ... unless the Minister is satisfied that there are geotechnical or hydrogeological factors within the mine or quarry that pose a significant risk to— (a) public safety; or (b) the environment; or (c) infrastructure.
Superannuation Legislation Amendment Bill 2019

Bill Information

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<tr>
<th>Member</th>
<th>Hon Robin Scott MP</th>
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<tr>
<td>Portfolio</td>
<td>Assistant Treasurer</td>
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Summary

The Bill makes a number of amendments to the *Emergency Services Superannuation Act* 1986, the *State Employees Retirement Benefits Act* 1979, the *State Superannuation Act* 1988 and the *Transport Superannuation Act* 1988 to improve the operation of the superannuation schemes under those Acts for emergency services workers. In particular it:

- Provides that where a member of the Emergency Services Defined Benefit Scheme (ES DB Scheme) has reached their maximum benefit, the employer shall pay contributions to an accumulation account in respect of the employee at 3% in 2019–2020 rising to 12% by 2026–27;[5]
- Provides that a member’s superable salary is maintained following a salary reduction unless otherwise advised by the member;[3]
- Provide that contributions payable for the financial year will be fixed and based upon the superable salary at the start of the financial year;[4]
- Allow members to take a transition to retirement;[4]
- Provides a mechanism to allow members on unpaid parental and carer’s leave to choose their level of contribution (and therefore benefit accrual);[9]
- Provide members with the opportunity to make higher ‘catch up’ contributions;[4]
- Changes the method of calculating death benefits in respect of police recruits who do not have dependants so the death benefit is the same as if they had died with dependants;[8]
- Provides that the late payment of interest provisions apply for the date a member becomes entitled to a benefit.[13, 14]

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.

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48 See the Second Reading Speech: - 'In February 2017, the Government engaged Dr David Know of Mercer and Ms Robbie Campo of Circa Consulting to undertake a review of certain aspects of the Emergency Services Defined Benefit Scheme (ES DB Scheme). The terms of reference for this review were to: i. Review certain design elements of the ES DB Scheme such as the maximum multiple, the calculation of death and disability benefits, the calculation of the resignation benefit and the feasibility of introducing a transition to retirement pension; and ii. Also review gender equity... This Bill implements these reforms.'

49 See the Second Reading Speech: - 'The Bill contains an amendment to the Late Payment of Interest (LPI) provisions. Currently the Late Payment of Interest (LPI) provisions... allow the payment of interest if a benefit is paid more than 14 days after the member became entitled to the benefit. The current 14 day period is inconsistent with industry standards. The Bill therefore amends the LPI provisions in the schemes’ governing legislation to allow for the LPI to apply from the date a member becomes entitled to a benefit.'
Charter Issues

The Superannuation Legislation Amendment Bill 2019 is compatible with the rights set out in the *Charter of Human Rights and Responsibilities Act 2006.*
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Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Amendment Bill 2018 1
Sale of Land Amendment Bill 2019 5, 6
Spent Convictions Bill 2019 2, 3
State Taxation Acts Amendment Bill 2019 7
Statute Law Revision Bill 2018 3
Superannuation Legislation Amendment Bill 2019 8
Transport Legislation Amendment (Better Roads Victoria and Other Amendments) Bill 2018 2
Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Bill 2019 2, 3
Water and Catchment Legislation Amendment Bill 2019 5
West Gate Tunnel (Truck Bans and Traffic Management) Bill 2019 3, 5
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

Justice Legislation Miscellaneous Amendment Act 2018 (House Amendment) 1, 5
Primary Industries Legislation Amendment Bill 2019 4
Sale of Land Amendment Bill 2019 5, 6
Spent Convictions Bill 2019 2, 3
State Taxation Acts Amendment Bill 2019 7
West Gate Tunnel (Truck Bans and Traffic Management) Bill 2019 3, 5

(ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;

Professional Engineers Registration Bill 2019 4, 5

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

Assisted Reproductive Treatment Amendment (Consent) Bill 2019 8
Audit Amendment Bill 2018 1, 2
Firefighters’ Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2019 8
Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018 1, 2
Justice Legislation Miscellaneous Amendment Act 2018 (House Amendment) 1, 5
Legal Profession Uniform Law Application Amendment Bill 2019 8
Open Courts and Other Acts Amendment Bill 2019 3, 4
Primary Industries Legislation Amendment Bill 2019 4
Professional Engineers Registration Bill 2019 4, 5
Sale of Land Amendment Bill 2019 5, 6
Spent Convictions Bill 2019 2, 3
State Taxation Acts Amendment Bill 2019 7
Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Bill 2019 2, 3
West Gate Tunnel (Truck Bans and Traffic Management) Bill 2019 3, 5
Section 17(b)

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

Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Bill 2019 2, 3
# Appendix 3

## 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.

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<th>Date of Committee Letter / Minister’s Response</th>
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<tr>
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<tr>
<td>West Gate Tunnel (Truck Bans and Traffic Management) Bill 2019</td>
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<td>Primary Industries Legislation Amendment Bill 2019</td>
<td>Agriculture Fishing and Boating</td>
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<td>Professional Engineers Registration Bill 2019</td>
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<tr>
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<td>Consumer Affairs, Gaming and Liquor Regulation</td>
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<td>State Taxation Acts Amendment Bill 2019</td>
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<tr>
<td>Assisted Reproductive Treatment Amendment (Consent) Bill 2019</td>
<td>Health</td>
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<tr>
<td>Firefighters’ Presumptive Rights Compensation and Fire Services Legislation Amendment (Reform) Bill 2019</td>
<td>Police and Emergency Services</td>
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</tr>
<tr>
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<tr>
<td>Legal Profession Uniform Law Application Amendment Bill 2019</td>
<td>Attorney-General</td>
<td>18.06.19</td>
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</tbody>
</table>
Appendix 4
Statutory Rules and Legislative Instruments considered

The following Statutory Rules were considered by the Regulation Review Subcommittee on 17 June 2019.

Statutory Rules Series 2019

SR No. 8 – Adoption Regulations 2019
SR No. 9 – Coroners Amendment Regulations 2019
SR No. 11 – Fisheries and Fisheries (Fees, Royalties and Levies) Amendment Regulations 2019
SR No. 12 – Health Complaints Regulations 2019
SR No. 13 – Subordinate Legislation Amendment (Prescribed Bookshop) Regulations 2019
SR No. 14 – Residential Tenancies Regulations 2019
SR No. 15 – Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Amendment Regulations 2019
SR No. 16 – Fines Reform Amendment Regulations 2019
SR No. 17 – Electricity Safety (Equipment Safety Scheme) Regulations 2019
SR No. 18 – Victorian Civil and Administrative Tribunal Amendment Rules 2019
SR No. 19 – Supreme Court (Chapter II and III Miscellaneous Amendments) Rules 2019
SR No. 20 – Supreme Court Library Rules 2019
SR No. 21 – Supreme Court (E-filing in Criminal Proceedings and Other Matters Amendment) Rules 2019
SR No. 22 – Transport (Compliance and Miscellaneous)(Ticketing) Amendment Regulations 2019
SR No. 23 – Members of Parliament (Standards) Regulations 2019
SR No. 24 – Magistrates’ Court (Judicial Registrar) Amendment Rules 2019
SR No. 25 – Freedom of Information Regulations 2019
SR No. 26 – Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Regulations 2019
SR No. 27 – Corrections Regulations 2019
SR No. 28 – County Court Miscellaneous Rules 2019
SR No. 29 – County Court (Chapter I Miscellaneous Amendments) Rules 2019