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Parliament of Victoria, Australia Scrutiny of Acts and Regulations Committee Reports to Parliament Alert Digests 2016 ISBN 978-1-925345-18-6 ISSN 1440-2939
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## Ordered to be Published

By Authority. Government Printer for the State of Victoria.  
Parliamentary Paper No. 141, Session 2014-2016

## Useful information

### Role of the Committee

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

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

### Interpretive use of Parliamentary Committee reports

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

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

### When may human rights be limited

Section 7 of the *Charter* provides –

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

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

### Glossary and Symbols

'Assembly' refers to the Legislative Assembly of the Victorian Parliament

'Charter' refers to the Victorian *Charter of Human Rights and Responsibilities Act 2006*

'Council' refers to the Legislative Council of the Victorian Parliament

'DPP' refers to the Director of Public Prosecutions for the State of Victoria

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

'IBAC' refers to the Independent Broad-based Anti-corruption Commission

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act 2004* and published in the government gazette (as at 1 July 2015 one penalty unit equals \$151.67 )

'Statement of Compatibility' refers to a statement made by a member introducing a Bill in either the Council or the Assembly as to whether the provisions in a Bill are compatible with Charter rights

'VCAT' refers to the Victorian Civil and Administrative Tribunal

[ ] denotes clause numbers in a Bill

# Alert Digest No. 9 of 2016

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## Crimes Amendment (Sexual Offences) Bill 2016

<b>Introduced</b>	7 June 2016
<b>Second Reading Speech</b>	9 June 2016
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Martin Pakula MLA
<b>Minister responsible</b>	Hon. Martin Pakula MLA
<b>Portfolio responsibility</b>	Attorney-General

### Purpose

The Bill aims to modernise and simplify a wide range of sexual offences by legislating all of the elements of an offence and the applicable exceptions and defences (except for matters of general application), which are currently provided by the common law. For a number of offences, the Bill also expressly indicates what does not constitute a defence.

### *Amendment of the Crimes Act 1958*

The Bill would introduce a number of new and amended definitions (applicable to all sexual offences contained in Subdivisions 8A to 8FA of the Principal Act), including:

- ‘domestic partner’ — amended to apply regardless of gender identity to recognise transgender and intersex status (new section 35)
- ‘animal’ (new section 35)
- ‘sexual penetration’ (new section 35A)
- ‘touching’ (new section 35B)
- ‘sexual activity’ (new section 35D)
- ‘consent’ — inclusion of a new consent-negating circumstance that the person is so affected by alcohol or another drug that they were incapable of withdrawing consent to the act (new section 36)

The Bill would also add to the list of circumstances in which a person has a child under their ‘care, supervision or authority’ by:

- expanding the existing category of ‘a minister of religion with pastoral responsibility for the child’ to include a broader range of religious or spiritual guides and leaders or officials
- expressly including parents and step-parents
- providing that a step-parent includes the spouse or domestic partner of the person’s parent [5]

### ***Amendments to Division 1 of Part I of the Crimes Act***

#### New Subdivision 8B — Sexual offences against children

The new subdivision would replace the existing sexual offences against children in the Principal Act with a range of new offences covering penetrative and non-penetrative, contact and non-contact, preparatory and other offending against children (new Subdivision 8B).

Many of the new offences would largely replicate the offences in existing Subdivision 8C. However, the new provisions would include:

- an express fault element of intent that is currently implied
- new exception and defence provisions which would remove the element of consent (except for the defence of similarity in age in new section 49B)
- absolute liability elements in a number of the offences, such that the defence of mistaken or honest and reasonable belief of certain matters would not be available for those elements (see new section 49ZC) (***Refer to Content below***)

#### New Subdivision 8C — Incest

The new subdivision would replace the existing incest offences in the Principal Act with clearer, updated offences that clarify the elements of the offences and the relationships to which they apply, this includes an express fault element of intent.

It would clarify that stepchildren by marriage and by domestic partnership are given equal protection from sexual penetration by a step-parent or lineal ancestor (new section 50D).

#### New Subdivision 8D — Child abuse material

The new subdivision would replace the existing child pornography offences in the Principal Act with updated and redrafted offences. This would include replacement of the term ‘child pornography’ with ‘child abuse material’ (defined in section 51A(1) as material that depicts a child as a victim of ‘torture, cruelty or physical abuse’, whether or not in a sexual context). The Bill would also create two new offences, both of which would be subject to a maximum penalty of Level 5 imprisonment (10 years maximum):

- distributing child abuse material (new section 51D), which would include conduct that may occur using the internet
- accessing child abuse material, i.e., intentionally viewing or displaying such material (new section 51H).

#### New Subdivision 8E — Sexual offences against a person with a cognitive impairment or mental illness

The new subdivision would replace the existing offences against a person with a cognitive impairment or mental illness (in existing Subdivision (8D)). The new offences include an express fault element of intent, (which is implied in the existing offences in section 51 and 52) and are broadly consistent with sexual offences against a child aged 16 or 17 and under care, supervision and authority in Subdivision 8B. The offences have been updated to respond to the new service environments of the national disability insurance scheme and localised mental health care. The defences and exceptions have also been modernised and clarified. The subdivision includes two new offences, both of which would be subject to a maximum penalty of Level 6 imprisonment (5 years maximum):

- sexual activity in the presence of a person with a cognitive impairment or mental illness (new section 52D)
- causing a person with a cognitive impairment or mental illness to be present during sexual activity (new section 52E).

#### New Subdivision 8F — Sexual servitude

The new subdivision contains offences relating to sexual servitude, which will replace the existing sexual servitude offences in Subdivision 8EAA. The new offences largely replicate the existing offences but have been redrafted for consistency in structure and style. Some of the offences also introduce a new alternative limb where the victim is not free to leave the place where commercial sexual services are provided (new sections 53B, 53C and 53D).

#### ***Other sexual offences***

A number of other existing offences have also been redrafted, for consistency in structure and style:

- bestiality, in new section 54A (which would replace existing section 59)
- the offence of interference with the corpse of a human being (in existing section 34B) would be replaced with three new offences, which cover the same conduct as the existing offence as well as offensive conduct that is non-sexual (new sections 34B, 34BA, 34BB)
- procuring sexual act by threat (new section 44); procuring sexual act by fraud (new section 45).

The Bill would also introduce the new offence of sexual activity directed at another person (new section 48), which would apply where the person engaging in the activity intends that another person will see it and experience fear or distress. The offence would have a maximum penalty of 10 years imprisonment.

The Bill would also repeal the common law offence of wilful exposure (new section 54C), as the relevant conduct would be captured by new section 48 and a revised section 19 (sexual exposure).

#### ***Amendment of the Summary Offences Act 1966***

The Bill would:

- amend the summary offence of ‘obscene, indecent, threatening language and behaviour in public etc.’ (section 17) of the Act so that it would also apply to non-sexual genital exposure and exposure of the anal region
- replace the existing offence of obscene exposure in section 19 with a new offence of sexual exposure (new section 19).

#### ***Amendment of the Jury Directions Act 2015***

The Bill would introduce new jury directions on consent, such that trial judges would be able to inform the jury that:

- experience shows that there are many different circumstances in which people do not consent to a sexual act
- people react differently and there is no typical response to non-consensual sexual acts
- people can be involved in consensual sexual activity on other occasions but not consent to a particular act with a particular person.

The Bill would introduce new jury directions on reasonable belief, such that trial judges would be able to direct the jury that:

- it may take into account personal attributes or characteristics of the accused that they cannot control or that affect their perception (such as mental impairment)
- it should consider 'what the community should reasonably expect of the accused in the circumstances'
- a stereotypical belief in consent based solely on a general assumption about the circumstances in which people consent to sex is not reasonable.

## Content

### ***Delegation of legislative power — Delayed commencement — Whether justified***

Clause 2 provides that the Bill will come into operation on a day to be proclaimed or on 1 July 2017 if not proclaimed earlier. The Act may therefore not commence until more than 12 months after the date of the Bill's introduction.

The Explanatory Memorandum states that the reason for the possible delay in commencement is to allow adequate time for stakeholders to prepare for the substantial reforms involved in the Bill, including training and the updating of materials.

**The Committee is satisfied that the possible delay in the commencement of the Act is justified.**

### ***Application of absolute liability to elements of offences***

A number of offences in the Bill contain elements to which absolute liability applies, i.e., the defence of mistaken but honest and reasonable belief is not available in relation to that element.<sup>1</sup> The Statement of Compatibility provides the following explanations:

In the bill, absolute liability applies to several objective standard elements of offences.

...

These are objective standards to which it would be highly unusual to apply a fault element. The accused's state of mind is not relevant to considerations of whether, for example, conduct is contrary to community standards of acceptable conduct. All relevant offences in which these elements occur also require proof of fault elements in relation to other substantive elements of offences.

Specifying that absolute liability applies to these elements provides clarity in many areas in which it is currently unclear whether or not a fault element must be proven in relation to an element of an offence, or whether the common law defence of honest and reasonable mistake of fact applies. Currently, whether that defence applies would depend on the courts' interpretation of the element in the offence, unless this issue is clearly addressed in the offence. Clearly stating that absolute liability applies to these objective standards enhances the right to fair hearing by improving the accessibility of the law, and does not limit the right to the presumption of innocence.

The Statement of Compatibility also provides:

In the sexual offences against persons with a cognitive impairment or mental illness (subdivision (8E)) absolute liability applies to the circumstance element that a person is a 'worker for a service provider' or provides treatment or support services to the other person

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<sup>1</sup> See sections 34BE, 48B, 49ZC, 51U and 52K.

(the victim of the offence). ... The application of absolute liability to this element may limit the accused's right to be presumed innocent as it removes the availability of the common law defence of honest and reasonable mistake of fact which may otherwise be available, and does not require the prosecution to prove a fault element in relation to that element.

However, the limitation on that right must be balanced with the protective role of these offences, which are concerned with sexual abuse by persons in positions of power over vulnerable people.

...

A less restrictive mechanism, such as imposing a fault element of knowledge for these elements, would require the prosecution to prove that an individual knew their position as a worker or a direct provider of treatment or support services. This is likely to involve significant disputation about whether the accused knew the nature of their relationship with the other person, and undermines the policy of the offences which is to impose a standard of acceptable conduct on those with vulnerable people under their care. To the extent that the application of absolute liability to these elements limits section 25(1), it is demonstrably and reasonably justified by the role of the offences in protecting persons with a cognitive impairment or mental illness receiving treatment or support services from sexual abuse.

The Committee also notes that the Explanatory Memorandum identifies each of the new sections that would contain absolute liability elements and provides an explanation for each inclusion.<sup>2</sup>

**The Committee is satisfied that the specification of absolute liability elements in each of the identified sections is justified.**

## Charter report

### ***Discrimination on the grounds of disability, gender identity and sex – Sexual penetration – External and surgically constructed male genitalia – Surgically constructed anuses, breasts and labia***

*Summary: While clause 5 provides that the word 'vagina' includes external genitalia and a surgically constructed vagina, it does not provide similarly for penises, anuses, breasts and labia. The Committee will write to the Attorney-General seeking further information.*

The Committee notes that clause 5, inserting a new section 35A(2) into the *Crimes Act 1958*, provides that:

- A person (A) sexually penetrates another person (B) if—
- (a) A introduces (to any extent) a part of A's body or an object into B's vagina;
  - (b) A introduces (to any extent) a part of A's body or an object into B's anus; or
  - (c) A introduces (to any extent) their penis into B's mouth;...

Other provisions provide for penetration by others, continued penetration, self-penetration and penetration of or by animals.<sup>3</sup> The Bill uses these definitions to distinguish between different forms of non-consensual sexual offences, and to define the boundaries of incest and bestiality offences.<sup>4</sup>

<sup>2</sup> See the discussion in the Explanatory Memorandum in relation to sections 34BE, 48B, 49ZC, 51U and 52K.

<sup>3</sup> The definition of self-penetration does not cover a person introducing (to any extent) their own penis into their own mouth. The definition of penetration by an animal applies to the definition used for humans and provides that 'a reference to the vagina or anus includes a reference to any similar part', but does not provide similarly for references to a penis (e.g. a shark's claspers.)

<sup>4</sup> Existing s. 38, 39 and 43, and new sections 40A, 49B, 49C, 49D, 50C, 50D, 50E and 52B.

The Committee also notes that new section 35B provides that '[t]ouching may be sexual due to... the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female, or a person who identifies as female, the breasts.' This provision is used to assist in identifying the boundaries of non-consensual sexual offences.<sup>5</sup>

The Statement of Compatibility remarks:

A number of definitions and offences in the bill adopt terminology that recognise transgender and intersex status and promote anti-discrimination. For example, a number of offences in the bill contain an element that the accused touches another person and the touching is sexual. The definition of when touching is sexual in section 35B(2) refers to the breasts of a female or a person who identifies as female.

**However, the Committee observes that, while clause 5, substituting existing s. 35, provides that:**

**vagina includes—**

- (a) the external genitalia; and**
- (b) a surgically constructed vagina.**

**it does not provide similarly for penises, anuses, breasts and labia.** This may mean that the definition of sexual penetration (and, hence, the definitions of incest and bestiality, and the more serious forms of non-consensual sexual offences) does not extend to a person introducing his or her surgically constructed penis or external male genitalia (i.e. his or her scrotum) into someone's mouth or introducing any object into a surgically constructed anus (i.e. a colostomy). As well, the reference to external genitalia in the definition of vagina may not extend to surgically constructed external genitalia (e.g. surgically constructed labia majora) and the reference to breasts in the definition of touching may not extend to surgically constructed breasts. Clause 5 therefore may engage the Charter's right to equal protection of the law without discrimination on the grounds of disability, gender identity and sex.<sup>6</sup>

The Committee notes that South Australia's criminal law statute provides that 'a reference to a breast, vagina, labia majora, penis or other sexual organ includes a reference to a surgically constructed or altered breast, vagina, labia majora, penis or sexual organ (as the case may be).'<sup>7</sup> Statutes in the federal jurisdiction, the Australian Capital Territory, Queensland and Tasmania expressly provide for 'surgically constructed or altered genitalia', without reference to gender.<sup>8</sup>

**The Committee will write to the Attorney-General seeking further information as to whether the definition of sexual penetration inserted by clause 5 extends to the introduction of external or surgically constructed male genitalia into a person's mouth or an object or body part into a surgically constructed anus, and whether the references to external genitalia in the definition of sexual penetration and to breasts in the definition of touching include surgically constructed external genitalia and breasts.**

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<sup>5</sup> E.g. existing ss. 40 & 41 and new sections 45, 46, 47, 49D, 49E & 52C.

<sup>6</sup> Charter s. 8. See *Equal Opportunity Act 2010*, s. 6(d), (e) & (o).

<sup>7</sup> *Criminal Law Consolidation Act 1935 (SA)*, s. 5(3).

<sup>8</sup> *Crimes Act 1900 (ACT)*, s. 50. See also *Criminal Code (Cth)*, ss. 71.8, 268.14, 268.59, 268.82; *Crimes Act 1900 (ACT)*, s. 50; *Criminal Code (Qld)*, s. 1; *Criminal Code (Tas)*, s.1.

***Equality – Privacy – Consensual sex between adults who are not biologically related – Adoptive siblings – Lineal step-relationships – People with a mental illness***

Summary: *The Committee refers to Parliament for its consideration the question of whether or not clause 16, by prohibiting penetrative sex between adult siblings by adoption; (in some circumstances) penetrative sex between adults in a lineal step-relationship; and casual penetrative sex between a person with a mental illness and a person who provides him or her with personal care or support services in a professional capacity, is compatible with the Charter’s rights against disability discrimination and arbitrary interferences in privacy.*

The Committee notes that clause 16, inserting new sections 50D, 50E and 50F into the *Crimes Act 1958*, make it an offence for ancestors and descendants (including step-relationships) and siblings or half-siblings (including by siblings or half-siblings by adoption) to engage in sexual penetration. New sections 50H, 50I and 50J provide defences where:

- the accused did not consent to the penetration
- for sex with an ancestor, the accused was a child
- for sex with a step-ancestor, the accused had not at any time been under the step-ancestor’s care, supervision or authority.
- for sex with an adult step-descendant, the accused had never engaged in sexual activity with the step-descendant when he or she was a child and the step-descendant has not at any time been under the accused’s care, supervision or authority

New section 50K provides that consent is otherwise not a defence to any incest offence.

**The Committee observes that the effect of clause 16 is to prohibit consensual penetrative sex between adults who are not biologically related and are:**

- **adult siblings by adoption** (e.g. one party’s parents adopted the other party at any time, including after the first party was an adult)
- **adults in a lineal step-relationship where one has ever been in the other’s care, supervision or authority** (e.g. one party was in a relationship with a parent of the other party at any time when the other party was under 18<sup>9</sup>)
- **adults in a lineal step-relationship who had ever engaged in a sexual activity when one party was a child** (e.g. the parties had once engaged in lawful sexual activity when both were seventeen and one party later entered into a relationship with the other party’s parent.)

The Statement of Compatibility does not address new sections 50D, 50E and 50F. The European Court of Human Rights, when ruling that Germany’s prohibition on sex between biologically related opposite-sex siblings is compatible with the European Convention’s right to privacy, remarked:<sup>10</sup>

The Court observes that there is no consensus between the member States as to whether the consensual commitment of sexual acts between adult siblings should be criminally sanctioned... Still, a majority of altogether twenty-four out of the forty-four States reviewed provide for criminal liability. The Court further notes that all the legal systems, including those which do not impose criminal liability, prohibit siblings from getting married. Thus, a

<sup>9</sup> New section 37(1)(a) deems all children to be under the care, supervision or authority of their step-parents (as well as parents, teachers, employers, health professionals, etc.) The Committee notes that the definition of step-parent in new section 37(2) (‘includes the spouse or domestic partner of the person’s parent’) differs from the definition of step-parent in new section 50A (‘means the spouse or domestic partner of the person’s parent’).

<sup>10</sup> *Stübing v Germany* [2012] ECHR 656, [61].

broad consensus transpires that sexual relationships between siblings are neither accepted by the legal order nor by society as a whole. Conversely, there is no sufficient empirical support for the assumption of a general trend towards a decriminalisation of such acts. The Court further considers that the instant case concerns a question about the requirements of morals. It follows from the above principles that the domestic authorities enjoy a wide margin of appreciation in determining how to confront incestuous relationships between consenting adults, notwithstanding the fact that this decision concerns an intimate aspect of an individual's private life.

However, the Committee notes that Victoria is the only Australian jurisdiction that makes it an offence for adults in a step-relationship to have sex<sup>11</sup> and that South Australia expressly excludes adoptive relationships from its incest law.<sup>12</sup> The Committee also notes that federal law permits adults in step-relationships (but not siblings by adoption) to marry.<sup>13</sup>

The Committee also notes that clause 16, inserting new section 52B, makes it an offence for anyone who 'provides treatment or support services' to a person who 'has a cognitive impairment or mental illness' to engage in sexual penetration with that person.<sup>14</sup> New section 52A defines 'mental illness' to mean 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory' and 'treatment or support services' to mean 'personal care or support services' when 'delivered in a professional capacity'. The Explanatory Memorandum explains that:

This excludes those who may provide assistance on an informal basis, such as a family member who cares for a person with a cognitive impairment or mental illness in their home, or a community member who occasionally assists a person with a cognitive impairment or mental illness to catch the bus. This non-professional and ad hoc assistance is not intended to be captured by these offences.

New section 52G provides an exception where the participants are married or in a domestic relationship with each other.

**The Committee observes that the effect of clause 16 is to prohibit adults with a mental illness from having casual penetrative sex with someone who provides them with personal care or support services delivered in a professional capacity, whether or not the person's illness impairs their ability to consent to sex, the services are related to the person's illness or the sex is consensual.**<sup>15</sup>

By contrast, existing s. 51 is limited to sex between a person who has an 'impairment because of mental illness' and another person who provides 'medical or therapeutic services related to [that] impairment'.<sup>16</sup> The Statement of Compatibility remarks:

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<sup>11</sup> See *Crimes Act 1900* (ACT), s. 62(1)&(2) (which are limited to victims under 16); *Crimes Act 1900* (NSW), s. 78A (and see *R v Miller* [2001] NSWCCA 209); *Criminal Code* (NT), s. 134; *Criminal Code* (Qld), s. 222(8) (and see *R v Rose* [2009] QCA 83); *Criminal Law Consolidation Act 1930* (SA), s. 72; *Criminal Code* (Tas), s. 133. The ACT and WA laws only cover step-relationships if the victim is a child: *Crimes Act 1900* (ACT), s. 62; *Criminal Code* (WA), s. 329.

<sup>12</sup> *Criminal Law Consolidation Act 1930* (SA), s. 72(3). The ACT, NSW, NT and Tasmanian laws do not specify whether or not adoptive relationships are covered. Queensland and (probably) Western Australia do cover adoptive relationships: *Criminal Code* (Qld), s. 222(5); *Criminal Code* (WA), s. 329(1).

<sup>13</sup> *Marriage Act 1961* (Cth), s. 23B (and see *R v Rose* [2009] QCA 83; *R v AS* [2016] QDC 80.)

<sup>14</sup> New sections 52C, 52D and 52E regulate other sexual acts, but are subject to a requirement that the activity be contrary to community standards of acceptable conduct.

<sup>15</sup> The Explanatory Memorandum explains that '[t]he term mental illness is now defined separately as many forms of mental illness do not constitute a cognitive impairment as it is medically defined' and that, '[i]n line with existing offences, it is not an element of these offences that the complainant does not consent. That is because these offences are primarily intended to protect vulnerable persons from conduct that constitutes an abuse of a position of trust and an exploitation of the person's vulnerability.'

<sup>16</sup> See existing ss. 50(1) & 51(4) and *R v Patterson*, unreported, County Court of Victoria, 29 March 1999 (as described by Victorian Law Reform Commission, *Sexual Offences: Interim Report*, 2003, [8.44].)

These improvements recognise the particular vulnerability of persons with a cognitive impairment or mental illness, and promote their protection from sexual exploitation. The balancing of rights of persons with a cognitive impairment or mental illness to bodily privacy and freedom from cruel, inhuman or degrading treatment is prioritised over sexual autonomy in the limited circumstance of sexual conduct with workers or providers of treatment or support services. This is particularly important given the difficulties faced by persons with a cognitive impairment or mental illness in reporting sexual abuse within institutional contexts, and having that report proceed to prosecution.

However, the Committee notes that new section 52B is not limited to institutional contexts.

The Committee observes that no other Australian jurisdiction imposes a blanket prohibition on anyone with a mental illness having sex with a person who provides them with personal care or support services in a professional capacity. In New South Wales, the Northern Territory and Western Australia, the equivalent offence is limited to sex with a person with ‘a severe mental illness... that results in the person requiring supervision or social habilitation in connection with daily life activities’ or that makes him or her ‘incapable... of guarding himself or herself against sexual exploitation’.<sup>17</sup> The equivalent offences in South Australia, Tasmania and Queensland provide a defence for consensual sex where there is no ‘sexual exploitation or ‘undue influence’.<sup>18</sup>

**The Committee refers to Parliament for its consideration the question of whether or not clause 16, by prohibiting:**

- **penetrative sex between adult siblings by adoption**
- **penetrative sex between adults in a lineal step-relationship, where one party has ever been in the other’s care, supervision or authority, or where they had ever engaged in sexual activity when one party was under 18**
- **casual penetrative sex between a person with a mental illness and a person who provides him or her with personal care or support services delivered in a professional capacity**

**is compatible with the Charter’s rights against arbitrary interference in privacy and to equal enjoyment of human rights without discrimination on the ground of disability.**<sup>19</sup>

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***Expression – Child abuse material – False or misleading representations resulting in a sexual act – Sexual activity resulting in fear or distress – Exposing a person’s anal or genital region in public***

*Summary: The Committee observes that new section 51A’s definition of ‘child abuse materials’ is wider than Victoria’s existing definition of ‘child pornography’ in two respects and that the Statement of Compatibility does not address other provisions of the Bill that may engage the Charter’s right to freedom of expression. The Committee will write to the Attorney-General seeking further information.*

The Committee notes that clause 16, inserting new section 51A into the *Crimes Act 1958*, defines ‘child abuse material’ to mean ‘material that’

- (a) depicts or describes—
  - (i) a person who is, or who appears or is implied to be, a child—
    - (A) as a victim or torture, cruelty or physical abuse...; or
    - (B) as a victim of sexual abuse; or

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<sup>17</sup> *Crimes Act 1900* (NSW), s. 61H(1A); *Criminal Code* (NT), s126; *Criminal Code* (WA), s. 330(1).

<sup>18</sup> *Criminal Code* (Qld), s. 216(4)(b); *Criminal Law Consolidation Act 1935* (SA), s. 51; *Criminal Code* (Tas), s. 126(2);

<sup>19</sup> Charter ss. 8 & 13(a). See also *Human Rights (Sexual Conduct) Act 1994* (Cth).

- (C) engaged in, or apparently engaging in, a sexual pose or sexual activity...; or
  - (D) in the presence of another person who is engaged in, or apparently engaged in, a sexual pose or activity; or
  - (ii) the genital or anal region of a person who is, or who appears or is implied to be, a child; or
  - (iii) the breast area of a person who is, or who appears or is implied to be, a female child; and
- (b) reasonable people would regard as being, in the circumstances, offensive

The Statement of Compatibility remarks:

This definition replaces the unclear and outdated notion of ‘indecent’ contained in the current definition of child pornography, by more clearly specifying what is child abuse material. It brings Victoria's legislation into line with all other Australian jurisdictions, which have an ‘offensiveness’ standard in their definitions. Further, it contains an objective standard of the view of ‘reasonable persons’ and allows for the surrounding circumstances to be considered in determining ‘offensiveness’. The definition ensures that freedom of expression is only subject to such limits under the child abuse material offences as are lawfully necessary, in particular to respect the rights and reputation of other persons (being persons depicted in child abuse material) and for the protection of public morality.

While the child abuse material offences themselves provide limits to freedom of expression, there are several exceptions and defences which promote freedom of expression within acceptable lawful restrictions. These include exceptions and a defence applying to children, defences for an image of oneself, of a person within two years of the person's age, or of a person's spouse or domestic partner. There are also merit or purpose based defences, such as where material has artistic merit or a public benefit such as a medical, legal, scientific or educational purpose...

While the child abuse material offences create limits to the right to freedom of expression, these limits are such lawful restrictions as are reasonably necessary.

**However, the Committee observes that new section 51A's definition of 'child abuse materials' is wider than Victoria's existing definition of 'child pornography'<sup>20</sup> in two respects.**

First, the definition now incorporates any description or depiction of a person under 18's ‘genital or anal region’ or female breasts that reasonable people would regard as offensive, without any requirement that the description or depiction has a violent or sexual aspect. Apart from NSW,<sup>21</sup> all other Australian jurisdictions require proof that a description or depiction has a violent or sexual aspect before it can be classified as child abuse material.<sup>22</sup> For example, the equivalent federal definition only covers ‘material the dominant characteristic of which is the depiction, for a sexual purpose, of’ a genital or anal region or female breasts.<sup>23</sup> The effect of new section 51A is to potentially criminalise production, possession and other dealings with non-violent and non-sexual descriptions or depictions of child nudity that, apart from material that reasonable people would not

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<sup>20</sup> *Crimes Act 1958* (Vic), s. 67A.

<sup>21</sup> *Crimes Act 1900* (NSW), s. 91FB (‘child abuse material’). See also *Crimes Act 1900* (ACT), s. 64(5)(a) (‘child exploitation material’), which is limited to material ‘substantially for the sexual arousal or sexual gratification of someone other than the child.’

<sup>22</sup> *Criminal Code* (NT), s. 125A (‘child abuse material’); *Criminal Code* (Qld), s. 207A (‘child exploitation material’); *Criminal Law Consolidation Act 1935* (SA), s. 62 (‘child exploitation material’, and see the requirement of ‘pornographic nature’); *Criminal Code* (Tas), s. 1A (‘child exploitation material’); *Criminal Code* (WA), s. 217A (‘child exploitation material’).

<sup>23</sup> *Criminal Code* (Cth), s. 473.1.

consider offensive or that would satisfy a defence such as classification, artistic merit or public interest.

Second, new section 51A defines ‘material’ to mean ‘any film, audio, photograph, printed matter, image, computer game or text’, ‘any electronic material’ and ‘any other thing of any kind’. By contrast, the existing definition of ‘child pornography’ is limited to ‘a film, photograph, publication or computer game’. In 2004, the Supreme Court of Victoria ruled that, under the existing formulation:<sup>24</sup>

Written or pictorial matter comprising expressions of thought which are brought into existence privately by an individual for their exclusive private use and which are not intended or likely to be disseminated to others, does not constitute a publication... To construe the accused's private writings as a publication would fall outside Parliament's purpose, producing unintended consequences. It would involve a curtailment of the freedom of each individual to record their thoughts. The keeping of a diary or other record of a person's fantasies or the writings of a teenage child concerning themselves, where they describe or depict pornographic conduct would be criminalised.

In making this ruling, Victoria's Supreme Court followed a decision by the Supreme Court of Canada applying that nation's constitutional right to freedom of expression to read Canada's child pornography law as not applying to ‘[s]elf-created expressive material: i.e., any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use’.<sup>25</sup> The effect of new section 51A may be to criminalise the creation and possession of such self-expressive material (including teenage diaries or texts) in Victoria if reasonable people would regard the material as offensive.<sup>26</sup>

**The Committee also notes that the Statement of Compatibility does not address the following other provisions of the Bill that may engage the Charter's right to freedom of expression:<sup>27</sup>**

- **an offence of knowingly making ‘a false or misleading representation’ that results in (and is intended to result in) someone ‘taking part in a sexual act’.**<sup>28</sup> In contrast to existing s. 57, this provision is not limited to ‘fraudulent means’, a term that usually requires proof of conduct that reasonable people would regard as dishonest. Although similar provisions exist elsewhere in Australia, no provision criminalises sex obtained by ‘misleading’ statements.<sup>29</sup> New section 45 may make it a crime to tell lies or half-truths to a sexual partner, e.g. ‘I love you’, this means nothing’, ‘I'm single’, etc.
- **an offence of engaging in a sexual activity knowing that someone else ‘will probably experience fear or distress from seeing the activity’.**<sup>30</sup> The Explanatory Memorandum explains that ‘[f]or example, this offence may apply when someone jumps out in front of a lone jogger and masturbates or simulates a sexual activity while fully clothed, to cause that person fear or distress’. However, the Committee notes that the offence is not limited to non-consensual interactions. New section 48 may criminalise any visual communication of

<sup>24</sup> *R v Quick* [2004] VSC 270, [94]-[95].

<sup>25</sup> *R v Sharpe* [2001] 1 SCR 45, [115]. The Supreme Court also required an exception for ‘Private recordings of lawful sexual activity’, which is largely covered by new section 51N, 51O and 51P.

<sup>26</sup> The Committee notes that exceptions for classification and for children in new section 51K and 51M to 51Q may not apply to written material, and that much self-expressive material would fail to qualify for defences such as artistic merit or public interest.

<sup>27</sup> Charter s. 15(2).

<sup>28</sup> New section 45 of the *Crimes Act 1958*, inserted by clause 15.

<sup>29</sup> See also *Criminal Law Consolidation Act 1930* (SA), s. 60(b) (‘false pretences, false representations and other fraudulent means’), *Criminal Code* (Qld), s. 218 (‘false pretence’), *Criminal Code* (Tas), s. 129 (‘false pretence’); *Criminal Code* (WA), s. 192(1)(b) (‘false pretence’). NSW abolished a similar provision in 2003.

<sup>30</sup> New section 48 of the *Crimes Act 1958*, inserted by clause 15.

disturbing sexual events, such as a rape scene in a television drama or an artistic performance,<sup>31</sup> and also some elements of private, consensual sexual role-play.

- **a provision that ‘behaviour that is indecent offensive or insulting includes behaviour that involves a person exposing (to any extent) the person’s anal or genital region’, including ‘mooning’ and ‘streaking’.**<sup>32</sup> The effect clause 24’s amendment to existing s. 17 of the *Summary Offences Act 1966* is that, if such behaviour occurs ‘in or near a public place or within the view or hearing of any person being or passing therein or thereon’, then the person commits an offence punishable by two months imprisonment. In contrast to existing s. 17, the existing statutory offence of obscene exposure and the common law offence of wilful exposure, the prosecution is not required to prove that the exposure of a person’s anal or genital region ‘outrages public decency’, ‘is injurious to public morals’<sup>33</sup> or is either obscene, indecent, offensive or insulting. Clause 24 may therefore prohibit all public lower body nudity (except in prescribed nudist beaches<sup>34</sup>), regardless of context or surroundings, including where it is part of a play or political protest.<sup>35</sup> No other Australian jurisdiction prohibits the mere public exposure of a person’s ‘anal region’ or ‘genital region’,<sup>36</sup> let alone merely ‘exposing’ that ‘region’ ‘to any extent’. Depending on the precise meaning of ‘exposing’, ‘region’ and ‘extent’,<sup>37</sup> new subsection 17(1A) may criminalise the public wearing of revealing lower-body clothing, e.g. low-slung trousers or swimming clothes that reveal pubic hair, a genital bulge or a person’s buttocks.

The Committee observes that none of these provisions are subject to exceptions or defences for consent, political expression, artistic expression, public interest, reasonable excuse or lack of offensiveness.

**The Committee will write to the Attorney-General seeking further information as to:**

- **whether or not the definition of ‘child abuse material’ in new section 51A of the *Crimes Act 1958* extends to ‘written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use’**
- **the meaning of the terms ‘exposing (to any extent)’ and ‘anal or genital region’ in clause 24**
- **the compatibility of new sections 45 and 48 of the *Crimes Act 1958* and new sub-section 17(1A) of the *Summary Offences Act 1966* with the Charter’s right to freedom of expression.**

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<sup>31</sup> E.g. S Hewson, *untitled (are you ok bob?)*, at <<http://marsgallery.com.au/sophia-hewson-are-you-ok-bob-2016-2/>>.

<sup>32</sup> New sub-section 17(1a) of the *Summary Offences Act 1966*, inserted by clause 24.

<sup>33</sup> *R v Fonyodi* [1963] VR 86.

<sup>34</sup> *Nudity (Prescribed Areas) Act 1983*, s. 3.

<sup>35</sup> E.g. M Calligeros, ‘Melbourne University students get high, naked for environmental cause’, *The Age*, 19<sup>th</sup> April 2016, <<http://www.theage.com.au/victoria/melbourne-university-students-get-high-naked-for-environmental-cause-20160419-go9rxm.html>>. The Committee notes that, because s. 17 carries a potential prison sentence, the effect of clause 24 may be to make children who take photos of others mooning or streaking in public ineligible for the exceptions to child abuse material offences provided in new sections 51N, 51O and 51P (as each defence requires that an image ‘does not depict an act that is a criminal offence punishable by imprisonment’: new sections 51N(1)(d)(i), 51O(1)(c) and 51P(1)(c) of the *Crimes Act 1958*.) For example, a 17 year-old who takes a photo of another 17 year-old ‘mooning’ or ‘streaking’ may commit the offences of producing and possessing child abuse material if the photo would be offensive to reasonable people and does not qualify for the defences of classification, artistic merit or public interest.

<sup>36</sup> Queensland prohibits the mere exposure of ‘genitals’ (rather than a person’s ‘genital region’) but that offence only attracts a prison sentence if the prosecution proves that there was an intent to ‘offend or embarrass another person’ and is subject to a defence of ‘reasonable excuse’: *Summary Offences Act 2005* (Qld), s. 9.

<sup>37</sup> Existing s. 40 of the *Summary Offences Act 1966* partly defines ‘genital or anal region’, but only for the purposes of Division 4A of Part 1.

***Protection of children – Sex between similarly aged children – Causing a child to take part in a sexual performance***

Summary: *The Committee observes that the offences of sexual penetration of children and causing a child to take part in a sexual performance may be committed by children. The Committee will write to the Attorney-General seeking further information as to the compatibility of these offences with the Charter right of children to protection.*

The Committee notes that clause 16, inserting new sections 49A and 49B, makes it an offence for anyone ('A') to sexual penetrate, cause themselves to be sexually penetrated by, or cause self-penetration or sexual penetration by or of a third party, of a child ('B') under the ages, respectively, of 12 and 16. The Statement of Compatibility remarks:

The bill promotes a child's right to protection under section 17 of the charter by making significant improvements to Victoria's existing sexual offences against children. The bill simplifies the structure of offences, replaces outdated language, modernises offences to cover new ways of offending, including via technology, and broadens the range of inappropriate sexual conduct against children that is criminalised. The reforms will result in more effective prosecutions of sexual offences and enable appropriate punishment of those who breach a child's right to protection from sexual offending.

**However, the Committee observes that these offences may be committed by children (i.e., if A and B are both children.)** In contrast to the offences of incest in new sections 50C, 50D, 50E and 50F, there is no provision that 'it is a defence to a charge for an offence... if A did not consent to conduct constituting the offence.'<sup>38</sup> For example, a child may be guilty of a sexual offence if he or she passively submits to sex with another child or does not understand the sexual nature of the act.<sup>39</sup>

The Committee also notes that new section 49V provides that:

It is a defence to a charge for an offence against section 49B(1) if, at the time of the conduct constituting the offence—

- (a) A was not more than 2 years older than B; and
- (b) B was 12 years of age or more; and
- (c) B consented to the sexual penetration.

The Statement of Compatibility remarks:

The bill contains various exceptions and defences to sexual offences against a child under the age of 16 that apply where children of similar age engage in sexual activity. For example, it will be a defence to the offence of sexual penetration of a child under 16 if the accused is no more than two years older than the child, who must be aged 12 years or more, and consents (new section 49V.) These provisions protect children of a similar age from criminal sanction when engaging in non-exploitative sexual activity.

However, the Committee observes that:

- this defence is not available where B is under 12, even if A is close in age to (or even younger than) B.

<sup>38</sup> New section 50K.

<sup>39</sup> See substituted s. 36(2)(h) & (l). The Committee notes that the defence of duress in existing s. 322O requires that a 'threat of harm' is made to the accused and that the criminal conduct is a 'reasonable response' to that threat. However, only children over 10 can be criminally responsible and children under 14 must be shown to understand that their actions are wrong. There is no barrier to prosecution of children aged 14 or over.

- this defence is not available if B did not ‘consent’ to the sexual penetration. By contrast, a similar age defence is available for the offences of sexual assault and sexual activity in the presence of a child, even if B did not ‘consent’ to the touching or activity.<sup>40</sup> As well, a requirement of ‘consent’ in the case of, say, a 12 year-old is not equivalent to whether A engaged ‘in non-exploitative sexual activity’.
- new section 49V does not specify who bears the burden of proof with respect to this defence,<sup>41</sup> and nor is the burden of proof for this defence specified in the Explanatory Memorandum or Statement of Compatibility.<sup>42</sup>
- neither new section 49V nor 49ZC (which provides that various mistaken but honest and reasonable beliefs are not a defence to various charges) specify whether or not it is a defence if the accused believes (or reasonably believes) that A is 2 years older than B, and B is older than 12, and that B consented to sexual penetration.

The Committee further notes that new sections 49Q and 49R make it an offence for the accused (‘A’) to cause, allow, invite or offer for a child under 18 (‘B’) to ‘take part in a sexual performance’ if it ‘occurs in circumstances that involve any person receiving payment, reward or other benefit’. New sub-sections 49ZC(f) & (g) provide that it is not a defence to a charge under new section 49Q or 49R that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that ‘the sexual performance did not occur in circumstances that involved payment, reward or other benefit to any person in respect of the performance.’ There is no express exclusion of this defence in Victoria’s existing sexual performance offence.<sup>43</sup>

The Statement of Compatibility does not address new section 49ZC(f) & (g). The Explanatory Memorandum remarks:

This means that the element of these offences in section 49Q(1) and 49R(1) (that the sexual performance occurs in circumstances that involve, or the invitation or offer involves, payment, reward or other benefit) is an absolute liability element. This reflects the purpose of these offences, namely, to protect children and recognises that an adult should not involve a child in a sexual performance in any event.

**However, the Committee observes that the offences in new sections 49Q and 49R may be committed by a child.** Neither offence contains a defence for similarly aged children.

**The Committee will write to the Attorney-General seeking further information as to:**

- **whether or not an accused’s lack of consent is a defence to a charge against new sections 49A and 49B;**
- **who bears the burden of proof under new section 49V;**
- **whether an honest but reasonable mistake about the matters in section 49V is a defence to a charge under new section 49B; and**

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<sup>40</sup> New section 49U.

<sup>41</sup> By contrast, the existing s. 45(4A) of the *Crimes Act 1958* provides that, for the equivalent provision to new section 49B, ‘[i]f consent is relevant to a charge..., the prosecution bears the burden of proving lack of consent.’

<sup>42</sup> The Committee’s *Practice Note* states that: ‘the Statement of Compatibility (or explanatory material) for a provision that introduces or significantly alters an exception to a criminal offence should state whether or not the exception places a legal onus on the accused. Examples of such exceptions include provisions stating that ‘It is a defence to a prosecution for an offence if...’: Scrutiny of Acts and Regulations Committee, *Practice Note of 25 May 2014*, clause B.iii.

<sup>43</sup> *Crimes Act 1958*, s. 70AC.

- the compatibility of new sections 49V(b) & (c) and new sections 49ZC(f) & (g) with the Charter right of children to protection by the state.<sup>44</sup>

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***Presumption of innocence – Examination of witnesses – Presumptions about familial relationships***

Summary: *New section 50B, which provides for rebuttable presumptions about familial relationships, may engage the Charter right of people accused of incest to the presumption of innocence and to examine witnesses against them. The Committee will write to the Attorney-General seeking further information.*

The Committee notes that new section 50B (which is in the subdivision concerned with incest offences) provides that:

In a proceeding for an offence against a provision of this Subdivision, there is a rebuttable presumption that—

- (a) A knows that A is related to B in the way alleged; and
- (b) people who are reputed to be related to each other in a particular way are in fact related in that way.

Neither new section 50B nor the Explanatory Memorandum nor the Statement of Compatibility states how the presumption may be rebutted. The Committee observes that new sub-section 50B may allow the prosecution to prove part of the case against a person accused of a serious offence through hearsay evidence (allegations and repute), without conforming to the requirements for such evidence imposed by Part 3.2 of the *Evidence Act 2008*.<sup>45</sup> **New section 50B may therefore engage the Charter rights of people accused of incest to the presumption of innocence and to examine witnesses against them.**<sup>46</sup>

The Statement of Compatibility does not address this provision.<sup>47</sup> The Committee observes that sub-section 50B(b) is not a matter that is peculiarly in the personal knowledge of the accused and indeed may be an issue on which the accused is unable to adduce any evidence. The Committee notes that, while new section 50B applies to all incest offences, a similar provision in Victoria's existing incest offence does not apply to the offence of sexual penetration with a lineal step-descendant; the existing provision also specifies that the presumption can be rebutted by 'evidence to the contrary'.<sup>48</sup>

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<sup>44</sup> Charter s. 17(2).

<sup>45</sup> E.g. *Evidence Act 2008*, ss. 65 & 66, which bar prosecutors from adducing hearsay evidence unless the source of the evidence is first-hand and either unavailable or did not provide the evidence as part of the investigation of an offence, and s. 73(2)(b), which bars prosecutors from using the hearsay rule's exception for reputation evidence unless it contradicts similar evidence adduced by the accused.

<sup>46</sup> Charter ss. 25(1) & 25(2)(g).

<sup>47</sup> The Committee's *Practice Note* states that '[t]he Statement of Compatibility for any Bill that creates a provision that reduces the prosecution's burden to prove the accused's guilt or requires an accused to offer evidence of their innocence... should state whether and how that provision satisfies the Charter's test for reasonable limits on rights. Examples of such provisions include ones that... deem a fact to be proved in any circumstance; provide that proof of any fact is 'prima facie evidence' of a different fact; or place an evidential onus on an accused with respect to an essential element of an offence. The Committee would prefer that the analysis of reasonable limits assess the risk that the provision may allow an innocent person to be convicted of the offence and set out the demonstrable justification for allowing such a risk.': Scrutiny of Acts and Regulations Committee, *Practice Note of 25 May 2014*, clause B.iii.

<sup>48</sup> *Crimes Act 1958*, s. 44(7), exempting s. 44(2), the equivalent to new section 50D. There are similar provisions in the ACT and South Australia (for para (a) only) and Western Australia: *Crimes Act 1900* (ACT), s. 62(5); *Criminal Law Consolidation Act 1930* (SA), s. 72(2); *Criminal Code* (WA), s. 329(11).

The Committee will write to the Attorney-General seeking further information as to the compatibility of new section 50B with the Charter rights of people accused of incest to the presumption of innocence and to examine witnesses against them.

The Committee makes no further comment.

## Legal Profession Uniform Law Application Amendment Bill 2016

<b>Introduced</b>	7 June 2016
<b>Second Reading Speech</b>	8 June 2016
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Martin Pakula MLA
<b>Minister responsible</b>	Hon. Martin Pakula MLA
<b>Portfolio responsibility</b>	Attorney-General

### Purpose

The Bill would amend the *Legal Profession Uniform Law Application Act 2014* to require the Victorian Legal Services Board to maintain and publish a register of disciplinary action that has been taken against a lawyer who is or was admitted or practising in Victoria when the relevant conduct occurred. [5]

The Bill would also amend the Legal Profession Uniform Law (i.e., Schedule 1 to the *Legal Profession Uniform Law Application Act 2014*) in relation to:

- partnerships of Australian-registered foreign lawyers [7]
- the grounds on which Australian practising certificates and Australian registration certificates may be varied [8]
- duties to report suspected offences [9]
- financial reporting obligations of the Commissioner for Uniform Legal Services Regulation and the Legal Services Council. [10]

### Charter report

The Legal Profession Uniform Law Application Amendment Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment.**

## Melbourne College of Divinity Amendment Bill 2016

<b>Introduced</b>	7 June 2016
<b>Second Reading Speech</b>	7 June 2016
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. James Merlino MLA
<b>Minister responsible</b>	Hon. James Merlino MLA
<b>Portfolio responsibility</b>	Minister for Education

### Purpose

The Bill would amend the *Melbourne College of Divinity Act 1910* to change its title to the *University of Divinity Act 1910*. The Bill would also:

- make changes to reflect the fact that the Melbourne College of Divinity has changed its title and that its operation and status has changed to that of a university
- make transitional and consequential amendments to the Principal Act.

### Content

#### ***Delegation of legislative power — Delayed commencement — Whether justified***

Clause 2 provides that the Bill will come into operation on a day to be proclaimed or on 1 August 2017 if not proclaimed earlier.

The Committee notes that the Explanatory Memorandum does not contain an explanation for the possible delayed commencement of the Bill.

**The Committee will therefore write to the Minister to request further information as to the reasons for the possible delayed commencement date.**

### Charter report

The Melbourne College of Divinity Amendment Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment.**

## Powers of Attorney Amendment Bill 2016

<b>Introduced</b>	7 June 2016
<b>Second Reading Speech</b>	8 June 2016
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Martin Pakula MLA
<b>Minister responsible</b>	Hon. Martin Pakula MLA
<b>Portfolio responsibility</b>	Attorney-General

### Purpose

The Bill would amend the *Powers of Attorney Act 2014* to:

- clarify that an enduring power of attorney can be confined to financial matters or personal matters or to matters specified in the instrument of appointment
- clarify that more than one alternative attorney or alternative supportive attorney can be appointed for each attorney or supportive attorney respectively; and that an alternative attorney or alternative supportive attorney can be appointed for more than one attorney or supportive attorney respectively
- provide for the automatic revocation of an old enduring power of attorney, an old enduring power of guardianship or an enduring power of attorney under the Act, when a new enduring power of attorney is made, regardless of the matters covered by the new enduring power, unless the principal specifies otherwise.

The Bill would also amend the *Privacy and Data Protection Act 2014* to ensure that a supportive attorney can access information on behalf of the principal as part of their role to support the principal to make their own decisions.

### Charter report

The Powers of Attorney Amendment Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment.**

## Ridesharing Bill 2016

<b>Introduced</b>	7 June 2016
<b>Second Reading Speech</b>	8 June 2016
<b>House</b>	Legislative Council
<b>Member introducing Bill</b>	Ms Fiona Patten MLC
<b>Private Members Bill</b>	

### Purpose

The Bill would impose the following duties on rideshare facilitators (i.e., persons who own, operate or control a rideshare platform), which are aimed at setting standards for driver and vehicle safety:

- a duty to ensure that a rideshare application displays certain images and information (e.g. a rideshare driver's photograph and registration number), subject to a penalty of 240 penalty units for an individual and 1200 penalty units for a body corporate [5]
- prohibit a rideshare facilitator from entering into a rideshare driver arrangement with a person who fails to meet certain requirements or if the person's motor vehicle is more than 10 years old (also subject to a penalty of 240 penalty units for an individual and 1200 penalty units for a body corporate). The requirements that apply in relation to the rideshare driver are that the person must:
  - be 18 years of age or older,
  - have held a full driver's licence for at least one year,
  - not have been found guilty of various criminal offences within the preceding 10 years and must not be subject to a charge for a category 1 offence that has not yet been disposed of. [6]

The Bill would also amend:

- the *Transport (Compliance and Miscellaneous) Act 1983* in order to exempt ridesharing from those provisions of the Act that relate to commercial passenger vehicles
- the *Transport Integration Act 2010* to include rideshare journeys as a form of transport service.

### Charter report

The Ridesharing Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment.**

## Transport (Compliance and Miscellaneous) Amendment (Public Safety) Act 2016

<b>Introduced</b>	7 June 2016
<b>Second Reading Speech</b>	7 June 2016
<b>Royal Assent</b>	15 June 2016 <sup>49</sup>
<b>House</b>	Legislative Assembly
<b>Member introducing Bill</b>	Hon. Jacinta Allan MLA
<b>Minister responsible</b>	Hon. Jacinta Allan MLA
<b>Portfolio responsibility</b>	Minister for Public Transport

### Purpose

The Bill would repeal section 159 of the *Transport (Compliance and Miscellaneous) Act 1983*.

As noted in the Second Reading Speech, section 159 was the subject of a recent decision of the County Court, the effect of which is that:

it is a defence to any offence involving the carriage of multiple passengers [whether by a ridesharing service or by a taxi driver] to prove that a vehicle was not being used as a commercial passenger vehicle because passengers were not charged separate and distinct fares. Commercial passenger vehicles such as taxis and hire cars do not charge separate and distinct fares to each passenger so the effect of the decision, in construing section 159 as providing a defence, is significant and leads to perverse outcomes.

As noted in the Statement of Compatibility, the presence of section 159 in the Act since 1941 has been ‘a matter of drafting oversight’ because it refers to a situation (the carriage of passengers for reward at ‘separate and distinct fares’) which has not been an element of any offence under the Act since that time.

### Charter report

The Transport (Compliance and Miscellaneous) Amendment (Public Safety) Bill 2016 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

**The Committee makes no further comment.**

<sup>49</sup> The Act came into operation on the day after Royal Assent. The Committee did not report on the Bill but it is now exercising its power to report on the Act under the *Parliamentary Committees Act 2003*, s. 17(c)(ii).



# Ministerial Correspondence

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## Tobacco Amendment Bill 2016

The Bill was introduced into the Legislative Assembly on 24 May 2016 by Hon. Jill Hennessy MLA, Minister for Health. The Committee considered the Bill on 6 June 2016 and made the following comments in Alert Digest No. 8 of 2016 tabled in the Parliament on 7 June 2016.

### Committee comments

#### Charter report

#### **Expression – Prohibition of e-cigarette advertisements – Exemption for advertisements that discourage smoking**

*Summary:* Clause 9 makes it an offence for anyone, for any pecuniary benefit, to publicly display or distribute a message that gives publicity to the use or purchase of e-cigarettes. The Committee will write to the Minister seeking further information as to whether or not clause 9 permits an advertisement whose sole or principal purpose is to encourage users of tobacco products to switch to e-cigarettes.

**The Committee notes that clause 9, amending existing s. 6, makes it an offence for anyone, for any pecuniary benefit, to publicly display or distribute a written, visual or audible message or image that ‘gives publicity to, or otherwise promotes’ the use or purchase of e-cigarettes, or any words or designs closely associated with an e-cigarette product.** Existing s. 6(3) exempts the contents of all newspapers, magazines and books, as well as some point-of-sale advertisements and business documents.

The Statement of Compatibility remarks:

The use of e-cigarettes has the potential to undermine the work that has been done to date to denormalise smoking, particularly for children and young people, who are susceptible to tobacco advertising and marketing. E-cigarettes are currently being marketed in ways which mimic tobacco advertising and glamorise e-cigarette use. While the restrictions on the advertising and display of e-cigarette products engage the right to freedom of expression contained in section 15(2) of the charter, these lawful measures are reasonably necessary to protect public health. Accordingly, clause 9 of the bill is compatible with the charter.

The Committee observes that clause 9 is not limited to messages that ‘mimic tobacco advertising and glamorise e-cigarette use’ but also prohibits messages (when displayed or distributed for a pecuniary benefit) that merely provide information about e-cigarettes, such as their lawfulness, availability, nature, ingredients, prevalence and effects.<sup>i</sup>

The Committee notes that existing s. 3B(7), as amended, provides an exemption if ‘it is clear’ that a message’s ‘sole or principal purpose is to discourage smoking or the use of tobacco products or e-cigarette products’. The Committee observes that this exemption may not

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<sup>i</sup> See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, [164]-[167] and *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 SCR 610, [93].

apply to a message that encourages users of tobacco products to switch to e-cigarettes, for example by comparing their ingredients or effects.

**The Committee will write to the Minister seeking further information as to whether or not clause 9 permits an advertisement whose sole or principal purpose is to encourage users of tobacco products to switch to e-cigarettes.**

**The Committee thanks the Minister for the attached response.**

**20 June 2016  
Committee Room**



Hon Jill Hennessy MP

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Minister for Ambulance Services

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Lizzie Blandthorn MLA  
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Dear Ms Blandthorn

Lizzie

Thank you for your letter of 7 June 2016 regarding matters raised by the Scrutiny of Acts and Regulations Committee in relation to the amendments to the *Tobacco Act 1987* contained within the Tobacco Amendment Bill 2016.

You have asked me to respond to a question raised in the Committee's Charter report on the Bill in Alert Digest No. 8 of 2016, which was tabled in Parliament on 7 June 2016. My response to this question is set out in the attachment to this letter.

I trust this information is of assistance to the Committee. Should the Committee require any additional information or clarification of the effect of the amendments, please do not hesitate to contact my office on 9096 8561.

Thank you again for taking the time to write to me about this matter.

Yours sincerely

Hon Jill Hennessy MP  
Minister for Health  
Minister for Ambulance Services

6/6 / 2016

Encl.

## ATTACHMENT

### **Expression – Prohibition of e-cigarette advertisements – Exemption for advertisements that discourage smoking**

#### **Question to the Minister for Health: Does clause 9 permit an advertisement whose sole or principal purpose is to encourage users of tobacco products to switch to e-cigarettes?**

It is intended that clause 9 of the *Tobacco Amendment Bill 2016* (the Bill) would prohibit the display of an advertisement whose sole or principal purpose is to encourage the users of tobacco products to switch to e-cigarettes.

Such an advertisement would be considered an “e-cigarette advertisement” within the meaning of the amended legislation. Clause 9 of the Bill will amend section 3B of the *Tobacco Act 1987* (the Principal Act) to insert a definition for the term “e-cigarette advertisement”. An advertisement whose sole or principal purpose is to encourage tobacco product users to switch to the use of e-cigarettes would not fall within the exemption provided for in the amended section 3B(7) of the Principal Act, as such an advertisement would encourage the use of e-cigarette products.

The rationale for not extending the exemption to such advertisements is in line with the Government’s precautionary approach to mitigating the potential risks associated with the use of e-cigarette products. Evidence to date about the harms associated with e-cigarette use is limited and the Therapeutic Goods Administration has yet to approve an e-cigarette product as a smoking cessation aid. It would be premature to allow advertising that encourages smokers to switch to e-cigarettes in these circumstances.

Should the Therapeutic Goods Administration approve an e-cigarette product as a smoking cessation aid in the future, clause 9 of the Bill provides for regulations to be made to exclude that particular product from the definition of “e-cigarette”. An e-cigarette product which has been excluded by regulations would not be subject to the ban on advertising of e-cigarette products and could be lawfully advertised in the same way as other smoking cessation aids or quitting medications.

# Appendix 1

## Index of Bills in 2016

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Assisted Reproductive Treatment Amendment Bill 2015	1
Bail Amendment Bill 2015	1
Building Legislation Amendment (Consumer Protection) Bill 2015	1
Children Legislation Amendment Bill 2016	2
Confiscation and Other Matters Amendment Bill 2016	4, 5
Corrections Amendment (No body, no parole) Bill 2016	3, 4
Crimes Amendment (Sexual Offences) Bill 2016	9
Crimes Legislation Amendment Bill 2016	2
Crown Land Legislation Amendment Bill 2015	8
Education and Training Reform Amendment (Miscellaneous) Bill 2016	5, 6
Fines Reform and Infringements Acts Amendment Bill 2016	3
Gene Technology Amendment Bill 2015	1
Health Complaints Bill 2016	2, 3
House Contracts Guarantee Bill 2016	4
Infant Viability Bill 2015	6, 7
Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015	1
Judicial Commission of Victoria Bill 2015	1, 2
Justice legislation (Evidence and Other Acts) Amendment Bill 2016	6, 7
Land (Revocation of Reservations - Metropolitan Land) Bill 2016	6
Land (Revocation of Reservations - Regional Victoria Land) Bill 2016	7
Legal Profession Uniform Law Application Amendment Bill 2016	9
Livestock Disease Control Amendment Bill 2016	5
Local Government (Greater Geelong City Council) Act 2016	6, 7
Melbourne College of Divinity Amendment Bill 2016	9
National Electricity (Victoria) Further Amendment Bill 2015	1
National Parks and Victorian Environmental Assessment Council Acts Amendment Bill 2016	8
Owners Corporations Amendment (Short-stay Accommodation) Bill 2016	8
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Powers of Attorney Amendment Bill 2016	9
Primary Industries Legislation Amendment Bill 2016	7, 8
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Racing and Other Acts Amendment (Greyhound Racing and Welfare Reform) Bill 2015	1, 2
Ridesharing Bill 2016	9
Road Legislation Amendment Bill 2015	3
Road Management Amendment (Bus Stop Delivery Powers) Bill 2016	6
Rooming House Operators Bill 2015	1, 2
Rural Assistance Schemes Bill 2016	8
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016	5, 6
Sex Offenders Registration Amendment Bill 2016	3, 4
State Taxation and Other Acts Amendment Bill 2016	7
Tobacco Amendment Bill 2016	8, 9
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Transport (Compliance and Miscellaneous) Amendment (Public Safety) Bill 2016	9
Treasury and Finance Legislation Amendment Bill 2016	4
Victoria Police Amendment (Merit-based Transfer) Bill 2016	2
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Upholding Australian Values (Protecting Our Flags) Bill 2015	3
Witness Protection Amendment Bill 2016	5, 6

## Appendix 2

# Committee Comments classified by Terms of Reference

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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)**

**(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**

Judicial Commission of Victoria Bill 2015 1, 2

**(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**

Judicial Commission of Victoria Bill 2015 1, 2

**(vi) inappropriately delegates legislative power**

Melbourne College of Divinity Amendment Bill 2016 9

Owners Corporations Amendment (Short-stay Accommodation) Bill 2016 8

Victorian Funds Management Corporation Amendment Bill 2016 6, 8

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

Access to Medicinal Cannabis Bill 2015 1, 3

Assisted Reproductive Treatment Amendment Bill 2015 16 of 2015, 1

Bail Amendment Bill 2015 16 of 2015, 1

Confiscation and Other Matters Amendment Bill 2016 4, 5

Crimes Amendment (Sexual Offences) Bill 2016 9

Education and Training Reform Amendment (Miscellaneous) Bill 2016 5, 6

Health Complaints Bill 2016 2, 3

Infant Viability Bill 2015 6, 7

Justice legislation (Evidence and Other Acts) Amendment Bill 2016 6, 7

Local Government (Greater Geelong City Council) Act 2016 6, 7

Primary Industries Legislation Amendment Bill 2016 7, 8

Racing and Other Acts Amendment (Greyhound Racing and Welfare Reform) Bill 2015 1, 2

Road Legislation Amendment Bill 2015 14 of 2015, 3

Rooming House Operators Bill 2015 1, 2

Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016 5, 6

Tobacco Amendment Bill 2016 8, 9

Upholding Australian Values (Protecting Our Flags) Bill 2016 3

Witness Protection Amendment Bill 2016 5, 6



## Appendix 3

### Ministerial Correspondence 2016

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#### Table of correspondence between the Committee and Ministers or Members during 2016

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.

<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Road Legislation Amendment Bill 2015	Roads and Road Safety	10.11.15 23.02.16	14 of 2015 3 of 2016
Assisted Reproductive Treatment Amendment Bill 2015	Health	08.12.15 05.02.16	16 of 2015 1 of 2016
Bail Amendment Bill 2015	Attorney-General	08.12.15 24.12.15	16 of 2015 1 of 2016
Access to Medicinal Cannabis Bill 2015	Health	09.02.16 25.02.16	1 of 2016 3 of 2016
Judicial Commission of Victoria Bill 2015	Attorney-General	09.02.16 22.02.16	1 of 2016 2 of 2016
Racing and Other Acts Amendment (Greyhound Racing and Welfare Reform) Bill 2015	Racing	09.02.16 22.02.16	1 of 2016 2 of 2016
Rooming House Operators Bill 2015	Consumer Affairs, Gaming and Liquor Regulation	09.02.16 22.02.16	1 of 2016 2 of 2016
Health Complaints Bill 2016	Health	23.02.16 25.02.16	2 of 2016 3 of 2016
Corrections Amendment (No body, no parole) Bill 2016	Hon Edward O'Donohue MP	08.03.16 16.03.16	3 of 2016 4 of 2016
Sex Offenders Registration Amendment Bill 2016	Police	08.03.16 18.03.16	3 of 2016 4 of 2016
Upholding Australian Values (Protecting Our Flags) Bill 2015	Mr Daniel Young MP	08.03.16	3 of 2016
Confiscation and Other Matters Amendment Bill 2016	Attorney-General	22.03.16 06.04.16	4 of 2016 5 of 2016
Education and Training Reform Amendment (Miscellaneous) Bill 2016	Education	12.04.16 02.05.16	5 of 2016 6 of 2016
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016	Corrections	12.04.16 29.04.16	5 of 2016 6 of 2016
Witness Protection Amendment Bill 2016	Police	12.04.16 29.04.16	5 of 2016 6 of 2016

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<b>Bill Title</b>	<b>Minister/ Member</b>	<b>Date of Committee Letter / Minister's Response</b>	<b>Alert Digest No. Issue raised / Response Published</b>
Infant Viability Bill 2015	Dr Rachel Carling-Jenkins MP	03.05.16 23.05.16	6 of 2016 7 of 2016
Justice legislation (Evidence and Other Acts) Amendment Bill 2016	Attorney-General	03.05.16 20.05.16	6 of 2016 7 of 2016
Local Government (Greater Geelong City Council) Act 2016	Attorney-General	03.05.16 23.05.16	6 of 2016 7 of 2016
Victorian Funds Management Corporation Amendment Bill 2016	Treasurer	03.05.16 31.05.16	6 of 2016 8 of 2016
Primary Industries Legislation Amendment Bill 2016	Agriculture	24.05.16 06.06.16	7 of 2016 8 of 2016
Owners Corporations Amendment (Short-stay Accommodation) Bill 2016	Consumer Affairs, Gaming and Liquor Regulation	07.06.16	8 of 2016
Tobacco Amendment Bill 2016	Health	07.06.16 16.06.16	8 of 2016 9 of 2016
Crimes Amendment (Sexual Offences) Bill 2016	Attorney-General	21.06.16	9 of 2016
Melbourne College of Divinity Amendment Bill 2016	Education	21.06.16	9 of 2016

## **Appendix 4**

# Statutory Rules and Legislative Instruments considered

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The following Statutory Rules and legislative instruments were considered by the Regulation Review Subcommittee on 23 May 2016 and 20 June 2016.

### **Monday 23 May 2016**

#### ***Statutory Rules Series 2016***

- SR No. 1 – Wrongs (Part VBA Claims) Amendment Regulations 2016
- SR No. 2 – Children’s Services Amendment Regulations 2016
- SR No. 3 – Public Health and Wellbeing Amendment Regulations 2016
- SR No. 4 – Subordinate Legislation (Building Regulations 2006) Extension Regulations 2016
- SR No. 5 – Water Industry (Reservoir Parks Land) Amendment Regulations 2016
- SR No. 6 – Subordinate Legislation (Legislative Instruments) Amendment Regulations 2016
- SR No. 7 – Children, Youth and Families (Children’s Court Family Division)(Amendment No.5) Rules 2016
- SR No. 8 – Fisheries (Fees, Royalties and Levies) Amendment Regulations 2016
- SR No. 9 – Working With Children Regulations 2016
- SR No. 10 – Fisheries (Catch Limit) Amendment Regulations 2016
- SR No. 11 – Road Management (General) Regulations 2016
- SR No. 12 – Road Safety (General) Amendment Regulations 2015
- SR No. 13 – Trustee Companies Regulations 2016
- SR No. 14 – Supreme Court (Appeals to the Court of Appeal and Other Amendments) Rules 2016

#### ***Legislative Instruments 2016***

- Southern Metropolitan Cemeteries Trust’s Scale of Fees and Charges
- Victoria Racing Club Amendment Regulations 2016
- Order under Section 5(1)(b) of the Domestic Animals Act 1994

### **Monday 20 June 2016**

#### ***Statutory Rules Series 2016***

- SR No. 15 – Geothermal Energy Resources Regulations 2016
- SR No. 16 – Victorian Energy Efficiency Target Amendment (Ceiling Insulation and Incandescent Lighting) 2016
- SR No. 17 – Magistrates’ Court General Civil Procedure (Miscellaneous Amendments) Rules 2016
- SR No. 19 – Children, Youth And Families (Children’s Court Family Division)(Amendment No.6) Rules 2016

SR No. 20 – Drugs, Poisons and Controlled Substances Amendment (Administration of Schedule 3 and 4 Poisons by Pharmacists) Regulations 2016

SR No. 21 – Building Amendment (Brimbank and Wellington Siting Requirements) Regulations 2016

SR No. 22 – Marine (Drug, Alcohol and Pollution Control) Amendment Regulations 2016

SR No. 23 – Rail Safety (Local Operations) Amendment Regulations 2016

SR No. 24 – Road Safety (Drivers) and (General) Amendment Regulations 2016

SR No. 25 – Heavy Vehicle National Law Application (Infringements) Amendment Regulations 2016

SR No. 26 – Bail Amendment Regulations 2016

SR No. 27 – Children, Youth and Families Amendment (Bail) Regulations 2016

SR No. 29 – Transfer of Land (Fees) Regulations 2016

SR No. 30 – Subdivision (Registrar’s Fees) Regulations 2016

SR No. 31 – Plumbing Amendment Regulations 2016

SR No. 32 – Electricity Safety (Bushfire Mitigation) Amendment Regulations 2016

SR No. 36 – Eastlink Project Amendment 2016

***Legislative Instruments 2016***

Code of Practice for Management of Infrastructure in Road Reserves

## Appendix 5

### Practice Note

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The Committee has added the following section to its *Practice Note*, effective from 21 June 2016.

**iv. Compliance notices for suspected criminals (Charter s. 25(1)):**

The explanatory material for any Bill that creates a provision permitting a person suspected of a criminal offence to be given a notice that specifies actions the person must take must state whether or not the commission of the suspected offence must be proved in any proceedings for breach of the notice. If no such proof is required, then the Statement of Compatibility should examine whether the provision reasonably limits the right to the presumption of innocence in Charter s. 25(1). The discussion may consider whether expressly providing for a court to review the notice, before or after any alleged contravention, is a less restrictive alternative reasonably available to achieve the provision's purpose.

The full version of the Practice Note is available on the Committee's webpage at: <http://www.parliament.vic.gov.au/sarc/publications>