

## STATEMENT OF COMPATIBILITY

### *Charter of Human Rights and Responsibilities Act 2006*

#### COVID-19 Omnibus (Emergency Measures) Bill 2020

In accordance with section 28 of the *Charter of Human Rights and Responsibilities Act 2006*, (the Charter), I make this Statement of Compatibility with respect to the COVID-19 Omnibus (Emergency Measures) Bill 2020 (the Bill).

In my opinion, the Bill, as introduced to the Legislative Assembly, is compatible with human rights as set out in the Charter. I base my opinion on the reasons outlined in this statement.

#### Overview

The Bill represents an important part of the Government's response to the novel coronavirus (COVID-19) emergency, by introducing reforms that will remove significant legal issues associated with implementing the State's emergency response and allowing the State to deliver public services to the best extent possible in the circumstances.

The Bill amends laws across a range of Ministerial portfolios, including:

- the *Local Government Act 2020* to permit local councils, joint meetings of councils, delegated committee meetings and regional library meetings to be held virtually or to stream their meetings live online;
- the *Planning and Environment Act 1987* to allow Panels to remotely hold hearings using technology and allow documents to be made available online;
- the *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015* to establish a mechanism for the suspension of provisions related to enforcement of staff to patient ratios in hospitals;
- several Acts to provide courts and justice system entities the flexibility to temporarily modify practices to manage or respond to COVID-19, for example, changes focusing on reducing person-to-person interactions, increased use of electronic filing and execution of affidavits and documents, changes to statutory timeframes for non-critical cases, and the use of technology for proceedings;
- the *Children, Youth and Families Act 2005* to authorise the isolation of children and young people in a youth justice facility to mitigate the spread of COVID-19 in the facility;
- the *Sentencing Act 1991* to allow the Magistrates' Court to impose electronic monitoring conditions as part of a community correction order (CCO). This will provide an additional mechanism to ensure that offenders can be safely and effectively monitored in the community during the COVID-19 pandemic;

- the *Corrections Act 1986* to place restrictions on persons who can visit a prisoner and to allow the issuing of quarantine directions in corrections and youth justice custodial facilities to enable the testing, treatment, care and quarantine of prisoners;
- the *Fines Reform Act 2014* to extend the registration periods for infringement fines issued during COVID-19 from six months to 12 months so as to permit some fine recipients to have longer than usual to pay their fines;
- the *Workplace Injury Rehabilitation and Compensation Act 2013* and the *Accident Compensation Act 1985* to extend the notice of termination period for second entitlement determinations from 13 weeks to 39 weeks;
- commercial tenancy laws to provide temporary measures to protect commercial tenants experiencing financial hardship related to the economic impacts of COVID-19; and
- residential tenancy laws to only allow the termination of a tenancy in exceptional circumstances and introduce a streamlined dispute resolution process.

### **Human Rights Issues**

The Bill engages the following human rights under the Charter:

- the right to life (section 9)
- the protection from torture and cruel, inhuman or degrading treatment (section 10)
- freedom of movement (section 12)
- privacy and reputation (section 13)
- freedom of thought, conscience, religion and belief (section 14)
- freedom of expression (section 15)
- peaceful assembly and freedom of association (section 16)
- protection of families and children (section 17)
- taking part in public life (section 18)
- cultural rights (section 19)
- property rights (section 20)
- right to liberty and security of person (section 21)
- humane treatment when deprived of liberty (section 22)
- children in the criminal process (section 23)
- fair hearing (section 24), and
- rights in criminal proceedings (section 25).

For the following reasons, I am satisfied that the Bill is compatible with the Charter and, if any rights are limited, those limitations are reasonable and demonstrably justified having regard to the factors in section 7(2) of the Charter.

The measures in the Bill are designed to better deliver critical services while effectively managing public health risks. Current public health advice is to practice social distancing and to minimise face-to-face interactions to reduce the risk of transmission of this potentially fatal virus, and to ensure that health services are not overwhelmed. The government is obliged to use all means necessary to protect the health and life of all persons in Victoria, including those in closed environments such as prisons and those who work in or use Victoria's courts and tribunals. Doing so promotes the right to life in section 9 of the Charter.

The initiatives in the Bill seek to achieve that purpose. Some may have additional purposes, for example, some initiatives seek to ensure that courts can continue operating and administering justice in Victoria and that tenants are not evicted if they are unable to pay rent because of financial distress due to COVID-19. Ultimately, however, these reforms seek to protect the health and safety of those residing in Victoria. There is no more important purpose.

Moreover, most of the proposed reforms are short-term measures that will sunset after six months and are only intended to be used to support the response to the COVID-19 pandemic.

### **Judge alone trials in criminal cases**

The Bill will allow trials for Victorian indictable offences to be heard by judge alone in certain circumstances. The Bill recognises that jury trials have been temporarily suspended due to the COVID-19 pandemic, and that this causes delays in the justice system, particularly for people on remand facing indictable charges, raising significant fair trial issues.

The Bill will allow the Supreme and County Courts to order that a trial be heard by judge alone if it is in the interests of justice to do so and if the accused consents. This will engage the right to a fair hearing in section 24 of the Charter and rights in criminal proceedings in section 25 of the Charter. I consider that any limitations on these rights are reasonable and justified in the circumstances and given other procedures and protections are included in the Bill.

First, allowing judge alone trials is a temporary measure to enable appropriate criminal trials to be heard while jury trials are suspended as a response to COVID-19. Current public health advice is to practice social distancing and to minimise face-to-face interactions. Allowing trials to proceed without a jury will reduce the number of people attending court buildings, consistent with this advice. This is consistent with the fundamental right of all people to life, as protected under section 9 of the Charter.

Second, the Bill does not remove jury trials from the criminal justice system. Rather, it will give the Courts another option to hear indictable matters.

Third, the Bill will permit the Courts to order a judge alone trial only if it is in the interests of justice to do so and if all the accused persons consent to their trial being heard by judge alone. This will ensure that accused persons retain their ability to have their case heard by jury, should they wish to do so. As with any other trial, the court will have broad discretion to conduct the trial in a manner that is fair to the parties. The Bill also includes key safeguards, such as rights of appeal against conviction, sentence, or a decision to order, or refuse to order, a judge alone trial, and requiring accused persons to obtain legal advice on whether to consent to a judge alone trial.

For these reasons, I consider that any limitations to the right to a fair hearing and rights in criminal proceedings occasioned by provisions allowing for judge alone trials are reasonable and justified.

### **Procedural amendments to the *Magistrates' Court Act 1989***

The Bill engages the right to liberty in section 21 of the Charter by allowing the Magistrates' Court to extend the intervals of time before which certain remandees must be brought back before the court.

Currently, the *Magistrates' Court Act 1989* provides that a court must not remand an accused in custody for a period exceeding eight days unless both the accused and the informant consent to a longer period. This is referred to in the Act as the eight-day remand rule, and is intended to ensure that accused persons who have not made an application for bail are not at risk of being 'lost in the system' and remanded for significant periods of time with limited court oversight.

The Bill will allow a court to specify a remand period of greater than eight days without the consent of the accused and the informant. This temporary exception to the eight-day remand rule will provide the courts with greater flexibility in how they list criminal proceedings during the COVID-19 crisis, while also providing appropriate safeguards. The longer specified period of remand can only be imposed if: it is consistent with the interests of justice; it is not reasonably practicable to have the matter return to court within eight days, and; the accused is not a child, an Aboriginal person, or a 'vulnerable adult' as defined in the *Bail Act 1977*. This differential approach to children, Aboriginal people and vulnerable adults will ensure that their remand will be subject to frequent oversight by the court.

Given the temporary nature of the exception, and the safeguards for vulnerable people, I consider that any limitations on the right to liberty are reasonable and justified.

### **Restrictions on prison visits**

The Bill amends the *Corrections Act 1986* to allow the Secretary or Governor of a prison to make an order prohibiting or restricting any person from visiting a prisoner for the safety, security and good order of a prison, or for the health and safety of any person. The order may restrict the manner in which the person enters the prison, or the manner in which the visit is conducted. An order may also be made requiring a person to leave the prison.

The Bill also enables the Secretary or the Governor to permit communication between a visitor and prisoner by telephone, video conference, letters or parcels and any other means approved by the Governor or prescribed in the regulations. This allows visits to be conducted by remote audio and visual communication. Lawyers and their assistants as a class of visitor may only enter a prison to visit a prisoner if the Governor has permitted the visit to be conducted using physical barriers that prevent touching, or modifications to create appropriate distancing between the lawyer and the prisoner that are necessary to mitigate the risk of COVID-19.

### **Protection of families and children**

Section 17 of the Charter recognises that families are the fundamental group of society and are entitled to be protected by society and the State.

The Bill may limit this right as an order restricting or prohibiting visitors will interfere with the ability of a prisoner to interact with their family and children.

However, this is mitigated to some extent by allowing other non-physical forms of communication. In my opinion, any limitation to the protection of families and children is

justified and proportionate to the risk posed by COVID-19, and no less restrictive means are available to effectively address the risk of COVID-19.

#### Right to fair trial and rights in the criminal process

Section 25(2)(b) of the Charter recognises that a person charged with a criminal offence is entitled to communicate with a lawyer or advisor chosen by them.

The Bill engages the right in section 25 of the Charter as restrictions on visitors will limit in-person contact with lawyers and this may affect the nature of contact between the lawyer and person charged with an offence. However, the Bill requires alternate types of communication to be permitted and allows modified in-person contact with a lawyer where permitted by the Governor.

Any limitation on the right is justified and proportionate as it ensures COVID-19 does not enter the prison system, yet still enables prisoners to access legal services. Less restrictive means are not available to address the significant risks posed by COVID-19.

#### Other rights

The restrictions on visitors may also engage other rights protected by the Charter including freedom of movement (section 12), the right to privacy and reputation (section 13), freedom of expression (section 15), right to liberty (section 21) and humane treatment when deprived of liberty (section 22). There may be some limitation on these rights as a result of the temporary measure to restrict visitors. In all cases, the temporary measure is directly related to the purpose of preventing COVID-19 from entering the prison system. Further, any limitation on these rights is a proportionate, reasonable and necessary measure to address the significant risk posed by COVID-19 and the impact is mitigated by the requirement to provide alternate forms of communication.

In my opinion, the temporary measure of restricting visits may limit some rights protected by the Charter, as set out above, but the limitations are adequately mitigated and justifiable.

#### **Protective quarantine and restrictions to placement and movement of prisoners**

The Bill also amends the *Corrections Act 1986* to allow the Secretary or Governor of a prison to require the mandatory quarantine of prisoners who enter the prison system for up to 14 days. Prisoners who enter the prison (other than by a transfer from another prison) will be required to enter into mandatory isolation quarantine in a protective quarantine unit or a cell separate from other units or cells in the prison.

The Bill also allows the Secretary or Governor of a prison, for the purposes of preventing, detecting and mitigating the risk of COVID-19, to order the separation, quarantine or isolation of a prisoner from some or all other prisoners, the establishment of separate cells/units/areas/parts of the prison for occupancy by prisoners and the prohibition or restriction of movement and placement of prisoners in one or more, or all prisons. The period of the order must not exceed the period necessary to prevent, detect or mitigate the risk of COVID-19 or related health risks in relation to a prison, prisoners, prison staff, visitors or any other person.

The Secretary or Governor of the prison must consider, as far as reasonably practicable, the medical or psychiatric conditions of the prisoner, their vulnerability, any risk to their welfare, disabilities and cultural background before ordering the separation, quarantine or isolation of a prisoner.

#### Right to humane treatment, including when deprived of liberty

Section 10(b) of the Charter recognises a person must not be treated or punished in a cruel, inhuman or degrading way. Section 22 of the Charter states that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

Quarantining a prisoner may appear to limit these rights to the extent that it places an additional restriction on a prisoner that he or she would not experience in ordinary circumstances. However, with regards to quarantining prisoners, I believe any limitation is mitigated by the supports provided to prisoners during the quarantine period.

Prisoners placed in quarantine units are supported with access to in-cell phone calls, video-based visits, books, educational material, printed exercise routines and TVs. Prison and health staff, including Aboriginal Liaison Officers and specialist mental health services, regularly check in and monitor the health and wellbeing of all prisoners, including vulnerable and high-risk people.

The Bill provides that during their quarantine period, when necessary the prisoner must be observed regularly by staff, to ensure that the safe custody and welfare of the prisoner is maintained.

The quarantine period is limited in time to 14 days for mandatory quarantine, and to the period necessary to prevent, detect or mitigate the risk of COVID-19, for additional or separate periods of quarantine ordered by the Secretary or Governor of a prison. Where appropriate, and on advice of a medical practitioner, the quarantine period may be ended earlier than 14 days, and out-of-cell time may be arranged, subject to the safety, security and good order of the prison and if reasonably practicable.

The quarantine requirement is a proportionate and necessary means to respond to the acute health risk and is consistent with current medical advice directly related to the aim of preventing or mitigating the risk of COVID-19 to the prison system.

In my opinion, the temporary measure is compatible with sections 10 and 22 of the Charter.

#### Freedom of movement and right to liberty

Section 12 of the Charter recognises that every person has the right to move freely and section 21 of the Charter recognises that every person has a right to liberty and security and must not be subject to arbitrary arrest or detention.

A prisoner's freedom of movement and right to liberty is inherently and significantly limited in prison by the fact of their confinement under the order of imprisonment. However, quarantine requirement further limits this right.

The mandatory quarantine and potential for additional or separate periods of quarantine are reasonable, necessary and proportionate measures because this regime for prisoners:

- is protective, not punitive: for the protection of the prisoner and other persons at a prison from the acute health risks posed by COVID-19 and related health risks;
- is time-limited;
- may be ended in accordance with medical advice;
- may still enable out of cell time for prisoners if reasonably practicable or if medically advised;
- enables advice on, and activities to facilitate, physical and mental health and wellbeing of prisoners affected by these measures; and
- maintains access to support and mental health services.

In my opinion, any limitation to the freedom of movement is proportionate and justified. Its purpose is to protect the safety of prisoners, staff and visitors in a prison where COVID-19 can quickly spread, and any lesser restriction would not be effective as many carriers are asymptomatic.

### **Assessment and treatment of prisoners**

The Bill allows the Secretary or Governor of a prison to direct that a prisoner be medically examined, assessed, tested or treated in relation to preventing, detecting or mitigating the risk of COVID-19 or other related health risks, with the voluntary and informed consent of the prisoner. Staff will also be permitted to give orders or directions to facilitate such arrangements.

In my opinion, these provisions of the Bill do not limit any Charter rights including the right to protection from degrading treatment in section 10, the right to humane treatment when deprived from liberty in section 22, or the right to privacy in section 13. Any medical procedures may only be provided with the voluntary and informed consent of the prisoner, as defined in the *Mental Health Act 2014*. Additionally, the purpose of the medical procedures is to protect the safety of the prisoner and other people inside the prison, in line with section 47(1)(f) of the *Corrections Act 1986* which provides that each prisoner has the right to have access to reasonable medical care and treatment. I therefore consider this part of the Bill to be lawful and not arbitrary, and accordingly compatible with rights under the Charter.

### **Magistrates' Court power to impose electronic monitoring**

The Bill engages the right to privacy in section 13 of the Charter and the right to liberty in section 21 of the Charter by enabling the Magistrates' Court to impose electronic monitoring as a condition of a CCO. The Supreme Court and County Court already have the ability to impose electronic monitoring as a condition of a CCO. The purpose of this amendment is to protect community safety by ensuring offenders can be safely and effectively monitored in the community. In particular, during the COVID-19 pandemic, electronic monitoring will enable offenders to be monitored in a way that protects the health and wellbeing of community corrections staff.

While electronic monitoring of an offender engages, and arguably limits their rights to liberty and privacy, the ability of the Magistrates' Court to impose electronic monitoring as a condition of a CCO is less restrictive than imprisonment.

It is therefore in my opinion that this amendment is consistent with sections 13 and 21 of the Charter.

### **Greater flexibility to hear matters by audio visual link and audio link**

The Bill provides that an adult or child accused who is in custody will attend most court events by audio visual link (AVL) and allows a court to direct an accused to appear by audio link where AVL is not reasonably practicable in the circumstances. The Bill will also remove the requirement that an accused person consent to having their first appearance, after being taken into custody, heard by AVL. However, the Bill only changes the mode of appearance – an accused is still required to be brought before a court promptly in person.

These reforms may engage or limit the right to a fair hearing in section 24 of the Charter and rights in criminal proceedings in section 25 of the Charter.

The Bill balances these impacts by ensuring a court may order physical attendance if it is in the interests of justice to do so. In making this assessment, the court must consider the ability of an accused to comprehend proceedings, and to communicate with their legal representatives and give instructions or express wishes to their representative.

Similarly, the Bill only permits audio link to be used where it is not reasonably practicable to use AVL, and it is in the interests of justice to proceed by audio link. This will require the court to consider the accused's ability to comprehend proceedings, whether they are self-represented and whether they have consented to the use of audio link.

Further, the legislation already contains minimum requirements for an AVL link to ensure that the transmission quality is fit for purpose, and the Bill will set out the technical requirements for audio link appearance. These minimum requirements mean that if a matter proceeds by AVL or audio link, an accused person can fully participate in the proceedings, be heard by the court and give necessary instructions to their legal representative.

These measures will reduce the number of people who are required to attend court buildings and the number of accused persons who are transported to court. They will assist courts to safely hear proceedings while practicing social distancing and minimise face-to-face interactions. This is consistent with the right to life.

In addition, these measures promote an accused person's right to be tried without unreasonable delay. While courts are working to prioritise bail decisions and criminal cases where an accused is in custody, the impacts of COVID-19 place considerable strain on the court system. By facilitating more attendances by AVL or audio link, the Bill gives courts flexibility to proceed with more matters than would otherwise be possible.

Finally, these are temporary measures targeted at reducing a significant risk to public health. As such, though these reforms may limit certain rights under the Charter, they do so in order to promote the right to life and the right to be tried without unreasonable delay. During the pandemic, I do not consider there are less restrictive means reasonably available. I consider that any limitation on these rights is reasonable and demonstrably justified in the extraordinary circumstances posed by COVID-19.

### **Determining issues on the basis of written submissions**

The Bill will amend the *Criminal Procedure Act 2009*, *Supreme Court Act 1986* (SCA) and *County Court Act 1958* (CCA) to enable courts to decide issues entirely on the basis of written submissions, without the appearance of the parties. While this engages the right to a fair hearing in section 24 of the Charter and the right to be tried in person in section 25(2)(d) of the Charter, in my view, it does not limit those rights.

It is well recognised at common law that a hearing based on written submissions can be fair, provided that parties can fully present their case and respond to adverse material. What is required for a fair hearing will depend on all of the circumstances of a case, and this reform will require courts to take those circumstances into account.

To further ensure these rights are not limited, the Bill will only allow courts to determine issues on written submissions if it is in the interests of justice to do so. The Bill specifically requires the court to have regard to an accused's right to be present at their trial, and their right to a fair hearing, when considering whether to determine an issue in a criminal proceeding without a hearing. The court is also required to consider the nature of the issue, whether the accused has had the opportunity to receive legal advice, and whether the parties consent. The Bill also permits regulations to prescribe issues that may not be determined without a hearing.

In my view, there are sufficient safeguards to ensure that the rights in section 24 and 25(2) of the Charter are not limited by this reform. However, to the extent that they may be limited, those limitations are necessary and justified to protect the community during this pandemic.

### **Flexibility for courts to restrict access and amend procedures**

The Bill temporarily amends the *Open Courts Act 2013* to establish a flexible, discretionary framework allowing certain courts and the Victorian Civil and Administrative Tribunal (VCAT) to make a new type of order (a Modified Access and Procedures (MAP) order). MAP orders enable courts and VCAT to implement temporary alternative procedural and access arrangements within their jurisdiction where required to maintain public health during the COVID-19 pandemic.

The right to freedom of expression in section 15 of the Charter includes the freedom to seek, receive and impart information, including through the media, about public and political issues. The Bill engages this right to the extent that modifying access to courtrooms or amending court procedures may affect the ability of the news media and general public to seek and obtain information by attending court. However, because subsection 15(3) of the Charter recognises that this right may be subject to lawful restrictions reasonably necessary for the protection of public health, I do not consider that the Bill limits the right to freedom of expression. The amendments in the Bill are reasonably necessary to protect judicial officers, court staff and the community from undue exposure to the risk of COVID-19 transmission during the pandemic and will operate for only six months before sunseting.

The Bill may also engage the right to freedom of movement (section 12), peaceful assembly and freedom of association (section 16), and rights in criminal proceedings (section 25). To the extent that any of those rights may be limited by the Bill, I consider that those limitations are necessary, justified and proportionate for the reasons outlined above.

### **Amendments to the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA)***

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

These amendments are necessary to ensure that certain CMIA proceedings can continue throughout the COVID-19 pandemic. Avoiding unreasonable delay is particularly important in CMIA matters as proceedings often involve vulnerable accused persons. As with amendments to allow judge alone criminal trials, these amendments engage the right to a fair hearing in section 24 of the Charter and rights in criminal proceedings in section 25 of the Charter. I consider that any limitations on these rights are reasonable and justified in the circumstances.

The Bill will also amend the CMIA to extend the timeframe for a special hearing to be conducted from three months to as soon as practicable but not later than six months after a finding that an accused is unfit and not likely to become fit within 12 months. The impact of modifying statutory timeframes may limit the accused person's rights in section 25 of the Charter, particularly the right to be tried without unreasonable delay. However, the requirement that the special hearing be heard as soon as practicable will ensure that any limitation on this right is minimised.

For these reasons, I consider that any limitations to the right to a fair hearing and rights in criminal proceedings are reasonable and justified.

### **Allowing for emergency regulations to override justice portfolio legislation**

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

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

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

The Attorney-General will only be able to recommend that the Governor in Council make these emergency regulations if the Attorney-General considers that the regulations are consistent with Chief Health Officer advice and reasonable, in managing or responding to the COVID-19 pandemic, to protect the health, safety or welfare of persons in relation to administration of justice or law, or to provide for the effective or efficient administration of

justice or law, or conduct of integrity agencies. These safeguards ensure the emergency regulations are only made where there is an appropriate nexus to COVID-19 and will be directed at enabling the justice system to operate safely and effectively, in a way that promotes the rights to life and security of persons.

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

## **Amendments to the criminal process for children**

### Rights of children in criminal process

Sections 23(2) and 25(3) of the Charter provide for the protection of children in the criminal process, including that children should be brought to trial as quickly as possible (section 23(2)) and that a child who has been charged with or convicted of an offence must be treated in an age appropriate way (sections 22(3) and 25(3)).

The Bill engages sections 22(3) and 25(3) of the Charter by providing for greater use of AVL as an alternative to physical attendance in the court room. This new process may be difficult for children and young people who may have greater difficulty comprehending and participating in proceedings that they do not physically attend. In light of the COVID-19 emergency, the purpose of this amendment is to reduce people-to-people contact through physical attendance of courts and to enable proceedings to be conducted with minimum delays during the pandemic.

While the Bill does not require accused children to attend proceedings by AVL by default (as for adult accused), it does broaden the court's power to make own motion orders for the appearance by AVL. However, existing safeguards are in place by requiring the court to consider the child's capacity to comprehend proceedings when assessing whether it should order AVL.

Accordingly, I do not consider that it limits the right contained in sections 23 or 25 of the Charter.

## **Isolation of child or young person**

### Right to be free from cruel, inhuman or degrading treatment

The Bill amends the *Children, Youth and Families Act 2005* (Children, Youth and Families Act) to support Youth Justice to respond to the significant public health risks posed by the spread of COVID-19.

The amendments to the Children, Youth and Families Act allow the Secretary or officer in charge of a relevant facility to authorise the isolation of a child or young person for a specific time for the purpose of detecting COVID-19 or another infectious disease or preventing or mitigating their transmission within the facility. Any period of isolation may be informed by current health advice and the period authorised must not exceed 14 consecutive days. This is

to reduce the risk of a COVID-19 outbreak in our prisons and youth justice facilities, and in the broader community, and is in line with current public health advice to practice social distancing. It also ensures the government meets its obligation to use all means reasonably necessary to protect the health and life of persons in closed environments, particularly where such persons are deprived of their liberty and cannot act to protect themselves or separate themselves from other individuals who pose a risk.

This amendment engages section 10(b) of the Charter which provides that a person must not be treated or punished in a cruel, inhuman or degrading way. This includes actions that affect a person's physical or mental well-being, including reforms that allow for prolonged periods of segregation or other crisis intervention strategies. A limitation on the right in section 10(b) will generally involve deliberate mistreatment that reaches a minimum standard of severity.<sup>1</sup>

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

#### Right to humane treatment when deprived of liberty

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

Isolation of a child or young person in custody is more onerous than detention and can have a negative impact on the physical and mental health of children and young people. It has been recognised as inhumane treatment when used excessively or unnecessarily.

I consider that necessary safeguards are in place, by allowing a person in isolation to access the outdoors, where he or she can partake in recreation activities, once a day for a reasonable time-period (unless this entitlement is removed by the Secretary). The Bill also requires that children and young people in isolation are closely supervised and observed at intervals of no longer than 15 minutes and provides mechanisms for reporting and oversight of the use of this power.

A person in isolation also has the usual entitlements under section 482(2) of the Children, Youth and Families Act unless the Secretary determines that they should not be given effect.

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<sup>1</sup> *Certain Children v Minister for Families & Children & Ors (No 2)* [2017] VSC 251, [250].

This provision for the limitation of entitlements under section 482(2), if relied upon, would allow the removal of the following existing entitlements:

- to have their developmental needs catered for;
- to receive visits from parents, relatives, legal practitioners and other persons;
- to have reasonable efforts made to have their medical, religious and cultural needs met;
- to receive information about the rules of the centre and their rights;
- to complain about the standard of care to the Secretary or Ombudsman;
- to be advised of their entitlements.

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

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

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

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

#### Protection of families and children

Section 17(2) of the Charter provides that every child has the right, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child. This right recognises that children are entitled to special protection.

The amendments to authorise the isolation of children to prevent the spread of COVID-19 in youth justice facilities will engage this right to the extent that they may limit the opportunities for children to socialise with peers, have visits from family and important connections, and participate in exercise and other activities. These amendments may appear to not be in the best interests of all children to whom these provisions will apply.

However, I consider that appropriate safeguards are in place, by allowing the child or young person to access the outdoors and undertake outdoor recreation activities once a day for a reasonable period of time (unless this entitlement is removed by the Secretary) and receive medical and mental health support and treatment, and regular supervision and observation, during the period of isolation.

A person in isolation also has the entitlements in section 482(2) of the Children, Youth and Families Act unless the Secretary determines that they should not be given effect for specified reasons. However, as previously mentioned, these reasons are limited, and the removal of any entitlements only applies to the duration of the isolation.

The amendments protect both the child in isolation and other children in the facility, as well as staff and visitors of a facility, from the spread of COVID-19. Therefore, on balance, I consider that any limitation on the right in section 17 of the Charter is reasonable and demonstrably justified under the extraordinary circumstances posed by the global COVID-19 pandemic.

In my opinion, this amendment is consistent with section 17.

#### Freedom of movement and the right to liberty and security of person

Section 12 provides that every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live. Section 21 of the Charter recognises that every person has a right to liberty and security and must not be subject to arbitrary arrest or detention.

The amendment which provides for isolation will engage section 12 and 21 by preventing children and young people in a remand centre, youth residential centre or youth justice centre from moving about to the extent normally permitted. The right to liberty may legitimately be constrained only where it is lawful (specifically authorised by law) and not arbitrary (reasonable or proportionate in all the circumstances).

I do not consider the isolation to be unlawful or arbitrary. The isolation will be specifically authorised by law and the isolation will be proportionate to the purpose of protecting the health of the child or young person and people inside the facility. It does not restrict rights more than necessary to achieve that purpose. The period of isolation is defined in the Bill as the minimum period that is required to detect or prevent or mitigate the transmission of COVID-19 or other infectious disease. As mentioned previously, the duration of isolation will be determined by the Secretary based on current health advice and the period authorised must not exceed 14 days. Further, the right to freedom of movement and the right to liberty may be limited where it is necessary to protect public health under international conventions.<sup>2</sup>

In my opinion, any limit on these rights are reasonable and justified as they are temporary, based on medical evidence, for the minimum period necessary and serve the purpose of protecting public health.

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<sup>2</sup> See article 12(3) of the International Covenant on Civil and Political Rights and article 5(1)(e) of the European Convention on Human Rights.

### Freedom of thought, conscience, religion and belief

Section 14 of the Charter provides that every person has the right to freedom of thought, conscience, religion and belief. A person must not be restrained or coerced in a way that limits their freedom to have or adopt a religion, observance, practice or teaching.

While the right to hold a religious belief will not be limited by the amendments, the right to demonstrate a religion, observance, practice and teaching may be limited if the child or young person is placed in isolation, although these aspects of the right may be already limited to some extent by the fact of detention. However, the Bill does contain safeguards including that reasonable efforts must be made to meet their religious needs.

On balance, I consider that any limits on this right are demonstrably justifiable as the limits are temporary and based on medical evidence that limits of this kind for the relevant time period are necessary to detect, prevent or mitigate the transmission of COVID-19 or any other infectious disease.

### Peaceful assembly and freedom of association

Section 16 provides that every person has the right to peaceful assembly and freedom of association with others. These rights may be further limited if a child or young person is placed in isolation, beyond the fact of detention itself. The Bill safeguards these rights to some extent by allowing the child or young person in isolation to remain in contact with their parents, carers, relatives, legal representatives and others where it is safe or permitted having regard to the factors set out in the Bill.

On balance, I consider that any limits on this right are demonstrably justifiable as the limits are temporary and based on medical evidence that limits of this kind for the relevant time period are necessary to detect, prevent or mitigate the transmission of COVID-19 or any other infectious disease.

### Cultural rights

Section 19 provides that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and use their language. Section 19 also recognises the distinct cultural rights of Aboriginal people who must not be denied the right to maintain their kinship ties.

Detention already limits these rights to some extent, but these rights may be further limited if the child or young person is placed in isolation. However, the entitlement under section 482(2) to have their religious and cultural needs met, including in the case of Aboriginal children, their needs as members of the Aboriginal community met, will continue unless the Secretary determines otherwise. They must also, during the period of isolation, be allowed to remain in contact with significant people in their lives including parents, carers and relatives.

On balance, I consider that any limits on this right are demonstrably justifiable as the limits are temporary and based on medical evidence that limits of this kind for the relevant time

period are necessary to detect, prevent or mitigate the transmission of COVID-19 or any other infectious disease.

#### Further limitations on Charter rights with regards to extension of requirements to infectious disease

The amendments to the Children, Youth and Families Act allow the Secretary or officer in charge of a relevant facility to authorise the isolation of a child or young person for the purpose of detecting and mitigating the transmission of an infectious disease other than COVID-19. The breadth of the definition of “infectious disease” may further limit the Charter rights, previously mentioned, including the right to humane treatment when deprived of liberty in section 22(1) of the Charter.

Isolation may be necessary in order to protect others from an infectious disease that has significant health impacts (including in this case where the desire is to prevent the spread of diseases that would threaten life at the same time as COVID-19). In this regard, it can readily be said that the additional hardship caused to the detained person is necessary.

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

To the extent that any Charter rights are limited by the extension of the isolation requirements to mitigating other infectious diseases, I consider that any potential limit is justified and proportionate for the following reasons.

First, other infectious diseases like influenza have very similar symptoms as COVID-19. It is important that young people with these similar symptoms can be kept separate from other young people in custody, in case they in fact have COVID-19.

Second, the health risk posed by COVID-19 is worsened if a child or young person simultaneously contracts both COVID-19 and another infectious disease, especially influenza. Isolating young people who have other infectious diseases protects them from more serious episodes of COVID-19.

Third, the most vulnerable young people in youth justice facilities often have co-morbidities that increase their risk to becoming seriously ill if they contract COVID-19 and/or another infectious disease. The use of isolation for the purposes of reducing their risk of contracting COVID-19 and/or another infectious disease is necessary to protect their health, and will potentially save lives.

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

### **Extended period for registration**

The Bill will temporarily amend the *Fines Reform Act 2014* (Fines Reform Act) to extend the periods for registering an infringement fine for enforcement with the Director, Fines Victoria. If a fine is not paid, enforcement agencies must either pursue the fine in the Magistrate's Court or register the fine with the Director for enforcement under the Fines Reform Act. The Director can then impose a range of sanctions on the fine recipient to encourage payment. Ordinarily, a fine must be registered within 6 months of the date of the alleged offence. This timeframe is extended only in a limited range of circumstances, such as where the fine recipient applies for an internal review of the fine.

Due to the extraordinary measures adopted to deal with the COVID-19 pandemic, many in the community are experiencing financial and emotional stress. In recognition of this, many enforcement agencies are providing additional time to pay to fine recipients. Agencies' capacity to do so however is limited by the 6-month deadline on registration. Agencies cannot currently grant an extension to pay beyond the 6-month deadline or the fine will become enforceable only through the commencement of court proceedings. The changes to be made by the Bill will give enforcement agencies the flexibility they need to respond to fine recipients' circumstances by extending the registration period from 6 months to 12 months.

The temporary extension of registration periods for infringement fines means, however, that fine recipients will be exposed to possible enforcement action for non-payment of a fine for a longer period than normal. This might be regarded as indirectly engaging the rights in criminal proceedings in section 25 of the Charter, more specifically, the right to be informed promptly and in detail of any criminal charge (section 25(2)(a)) and the right to be tried without unreasonable delay (section 25(2)(c)).

To the extent that these rights are engaged, I consider that any limitation is reasonable and demonstrably justifiable. If an enforcement agency chooses to delay enforcing a fine, this delay will also benefit fine recipients because they will not be obliged to deal with the fine until the emergency measures adopted to deal with the COVID-19 pandemic have been eased. It is precisely for this reason – to provide fine recipients with additional time to deal with their fines during the COVID-19 crisis – that this temporary change is being made. Fine recipients will retain the right, during this time, to deal with their fine if they wish to do so. The amendments simply give enforcement agencies a longer period to register their fines for enforcement, if registration is necessary. Further, the amendments are of a temporary nature and will be repealed 6 months after their commencement.

### **Commercial tenancy reforms**

The Bill enables the making of regulations to implement the principles of a mandatory code of conduct announced by National Cabinet on 7 April 2020 (the Code) in relation to commercial tenants experiencing financial hardship due to the impact of COVID-19.

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

The Bill authorises the Governor in Council to make regulations modifying rights and obligations in relation to eligible leases by:

- prohibiting the termination of an eligible lease;
- changing any period under an eligible lease or certain Acts or regulations in relation to an eligible lease in which someone (including a landlord or a tenant) must or may do something;
- changing or limiting the exercise of rights of landlords under eligible leases or certain other Acts or regulations;
- changing or limiting any other right a landlord under an eligible lease has under an agreement related to that eligible lease;
- exempting a tenant or landlord from having to comply with an eligible lease or certain other Acts, regulations or agreements;
- modifying the operation of an eligible lease or an agreement relating to an eligible lease;
- modifying the application of certain Acts, regulations and the common law in relation to an eligible lease;
- extending the period during which an of an eligible lease is effective;
- deeming a provision of the regulations as forming part of an eligible lease;
- imposing new obligations on landlords or tenants under an eligible lease, including in relation to negotiating amendments to an eligible lease;
- requiring tenants and landlords who are in dispute to participate in mediation arranged by the Small Business Commission (as well as regulations regarding the conduct of, and fees and expenses payable for, such mediation);
- requiring landlords and tenants to have a mediation certificate before commencing proceedings in VCAT or a court in relation to an eligible lease;
- requiring a landlord or tenant who are in dispute about the terms of an eligible lease to get leave of a court to commence a proceeding in relation to the dispute in the court; and
- conferring jurisdiction on VCAT to hear and determine disputes about the terms of an eligible lease that is a retail lease.

The Minister for Small Business may only recommend that regulations be made under these provisions if the Minister is of the opinion that the regulations are reasonably necessary for responding to the COVID-19 pandemic.

The Bill confers relevant functions on the Small Business Commission in relation to facilitating dispute resolution between landlords and tenants, and monitoring and enforcing the regulations. The Bill also authorises the Governor in Council to make regulations conferring further functions and powers on the Small Business Commission.

Under the Bill, the State is not liable to compensate any person for loss, damage or injury of any kind suffered by the person as a result of, or arising out of, the making of regulations under these provisions.

Regulations made under this Part of the Bill may have retrospective effect to a day not earlier than 29 March 2020.

### Right to Property

Section 20 of the Charter provides that a person must not be deprived of their property other than in accordance with law.

'Property' under the Charter includes all real and personal property interests recognised under the general law, relevantly including contractual rights, leases and debts. A 'deprivation' of property may occur not just where there is a forced transfer or extinguishment of title, but where there is a substantial restriction on a person's use or enjoyment of their property. However, the right to property will only be limited where a person is deprived of property 'other than in accordance with the law'. For a deprivation of property to be 'in accordance with the law', the law must be publicly accessible, clear and certain, and must not operate arbitrarily. A broad, discretionary power capable of being exercised arbitrarily or selectively may fail to satisfy these requirements.

The provisions in the Bill which enable alterations to existing property and contractual rights under eligible leases and preventing their enforcement may in some cases amount to a deprivation of property. However, any deprivation of property will be in accordance with the law. While the power to make regulations under the Bill is a broad discretionary power, it is provided for a clear purpose, and its aim is to enable the implementation of the Code agreed by the National Cabinet. That Code provides a framework for altering commercial lease agreements in specific circumstances, where doing so is necessary to counteract the significant economic impacts of COVID-19. Further, there are procedural protections to ensure against arbitrary or inappropriate use of regulation making powers as the regulations must be reasonably required to manage or respond to COVID-19, and they are disallowable by Parliament.

As any deprivation of property will be in accordance with the law, I consider that the right to property is not limited by the provisions.

### Right to privacy

The Bill authorises the making of regulations which in some circumstances may affect the right to privacy in section 13 of the Charter. In particular, the Bill may affect the private decisions that individuals are able to make in relation to how they deal with their property (for example, by preventing a person from terminating a lease, or by extending an existing

lease, where the person may have wished to use that property for other purposes). However, to the extent that the right to privacy may be affected by the provisions, any interference will be neither arbitrary nor unlawful. The regulation-making power is established for the clear purpose of addressing serious financial hardship caused by the COVID-19 pandemic, will only apply to eligible leases as defined in the Bill, and will have effect for only a limited time. I therefore consider that the provisions are compatible with the right to privacy.

### Right to a fair hearing

Section 24 of the Charter provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The right generally encompasses the established common law right of each individual to unimpeded access to the courts of the State, and may be limited if a person faces a procedural barrier to bringing their case before a court. The right will not be engaged, however, by a provision that substantively changes the law so that a cause of action no longer exists.

The Bill provides that no compensation is payable by the State in relation to loss, damage or injury arising as a result of regulations made under these provisions. However, in my view, although this provision changes substantive rights and liabilities, it does not affect the procedure by which a Court is to determine such rights. The right to a fair hearing is therefore not engaged.

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

Further, in so far as the Bill empowers the making of regulations having retrospective effect, and such regulations may also apply to existing court proceedings, they may also be said to engage the right to a fair hearing. However, any regulations will only relate to a change in the substantive law, rather than the procedures to be applied in the course of any determination or the nature of the tribunal itself. Accordingly, they will not limit the right to a fair hearing.

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

For this reason, in my view the fair hearing right is not engaged by these provisions.

### **Residential tenancy reforms**

The Bill provides for amendments to the *Residential Tenancies Act 1997* (RT Act) and related legislation to give effect to the decision by the National Cabinet, announced on 29 March 2020, to declare a temporary moratorium intended to prevent eviction for non-payment of

rent where residential tenancies are impacted by severe rental distress due to the COVID-19 pandemic.

The Bill will amend the RT Act to:

- introduce an alternative termination process to give effect to National Cabinet's decision by ensuring that tenancy agreements are only terminated in specified circumstances during the operation of the declared moratorium;
- suspend rent increases, permit orders for the reduction of rent or payment plans for a specified period, and provide for tenants to end tenancy agreements early without incurring lease break fees and other compensation in certain circumstances;
- establish the office of the Chief Dispute Resolution Officer (CDRO) for resolving disputes arising out of the declared moratorium, and provide for the Director of Consumer Affairs Victoria to appoint an individual to that office; and
- insert an emergency regulation-making power into the RTA to enable the Governor in Council to make relevant regulations, including to prescribe a scheme for the purposes of resolving disputes during the declared moratorium (the Residential Tenancies Dispute Resolution Scheme) and to confer upon and clarify relevant powers of VCAT and the CDRO, including in relation to the mediation or conciliation of disputes under the RT Act and the ability to make binding orders on parties to eligible disputes.

Finally, in light of the COVID-19 crisis, the Bill will defer the general commencement of the *Residential Tenancies Amendment Act 2018* (RT Amendment Act) to allow sufficient time for rental stakeholders to prepare for and deal with the implementation of those reforms, but will also bring forward a crucial amendment contained in that Act to protect victims of family violence.

#### Right not to not be deprived of property other than in accordance with law

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

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

statutory causes of action to recover possession of their property in the case of non-payment of rent.

To the extent that an accrued cause of action may constitute property for the purpose of the Charter, the right not to be deprived of property in section 20 is also arguably engaged by the Bill's suspension of existing notices to vacate and suspension of the alternative procedure for VCAT to order possession for rent arrears (under existing section 335 of the RT Act) during the declared moratorium. Because the declared moratorium commenced on 29 March 2020, these provisions have a limited retrospective operation.

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

I note also that these amendments are being implemented in the context of an unprecedented public health emergency, in order to mitigate the effects of large-scale rental stress. The scope of the proprietary interests affected by the Bill (being highly specific statutory limitations on the operation of contractual rights and existing statutory mechanisms) is limited and of a temporary duration. The purpose of suspending existing notices to vacate from the commencement of the declared moratorium (and, potentially, extinguishing existing possession order applications that may be before VCAT) is to ensure the fair and effective operation of the alternative termination process during the declared moratorium.

I am also satisfied that the regulation-making power provided in the Bill will not limit the right in section 20 of the Charter, although I acknowledge in some circumstances regulations made in accordance with this part of the Bill may authorise the deprivation of property. The power to make regulations only arises for certain specified purposes directly relevant to the effective operation of the declared moratorium and the resolution of resulting disputes, and may only be exercised during that time. Further, in line with normal *Subordinate Legislation Act 1994* requirements, the responsible Minister will be required to consider the impact of the regulations on Charter rights when making recommendations to the Governor in Council.

#### Right to a fair hearing

Section 24 of the Charter provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The right generally encompasses the established common law right of each individual to unimpeded access to the courts of the State, and may be limited if a person faces a procedural barrier to bringing their case before a court. The right will not be engaged, however, by a provision that substantively changes the law so that content of a law that a court or tribunal must apply is varied or where a cause of action no longer exists.

### *Retrospective operation of the alternative termination process*

As previously mentioned, certain amendments in the Bill will result in certain notices to vacate that have already been issued under the existing provisions of the RT Act being of no effect, or a party to a tenancy agreement etc being disentitled to being awarded lost rent or other compensation. Such provisions may, in some cases, effectively extinguish claims in proceedings that have already been commenced and are before VCAT. However, while the application of the provisions to existing claims may have the effect of requiring VCAT to determine a matter in a certain way after it is instituted, this does not mean that the fair hearing right is engaged.

The right to a fair hearing is considered to be a procedural right that affects the way a hearing is conducted, rather than affecting the substantive rights between the parties. In my view, the effect of the amendments contained in the Bill is to change the scope of the substantive rights and liabilities that a court or tribunal is to determine. It is not to affect the ability of a party to have their rights determined by an impartial court or tribunal according to a fair procedure.

I note that the Bill also authorises the making of regulations that may, among other things, require parties to participate in mediation or conciliation in relation to eligible disputes, and may confer on the CDRO the power to make orders that are binding on the parties to eligible disputes. To the extent that the regulations may require parties to participate in alternative dispute resolution processes and prevent them from commencing proceedings in VCAT unless they have complied with that obligation, the right to a fair hearing may be engaged. However, the Bill does not bar access to VCAT, it only provides for regulations to be made that may require participation in an additional process before a dispute can be litigated. Further, nothing in the Bill will limit the Supreme Court's jurisdiction to consider residential tenancies matters, including in relation to matters arising from the operation of the Residential Tenancies Dispute Resolution Scheme. While the Bill and resulting regulations may affect how the right to a fair hearing is realised, they do not limit that right.

For these reasons, in my view the fair hearing right is not limited by the suspension of existing termination mechanisms under the RT Act nor the power to make regulations for the new Residential Tenancies Dispute Resolution Scheme.

### *Protection against liability for Chief Dispute Resolution Officer*

The Bill will provide that the CDRO is not personally liable for acts or omissions done in good faith in the performance of a function or the exercise of a power under the RT Act as amended by the Bill (or in the reasonable belief that the act or omission was in the performance or exercise of such a function or power). Instead, any liability arising from such an act or omission attaches to the State. In other jurisdictions, it has been found that a broad statutory immunity from liability which imposes a bar to access to the courts for persons seeking redress against those who enjoy the immunity may breach the fair hearing right.

However, this provision does not remove available causes of action, but instead shifts liability to the State, which in my view does not result in the imposition of a bar to bringing a

proceeding and consequently does not limit the right to fair hearing. I also note that an individual could still initiate legal proceedings against the CDRO for actions not taken in good faith.

In any event, the relevant immunity and protections are, in my view, appropriately granted in these circumstances, with regard to the CDRO's role in supporting the implementation of the Residential Tenancies Dispute Resolution Scheme during the declared moratorium and the need for the finality of decisions and the maintenance of the CDRO's independence. The decisions of the CDRO will affect the rights of tenants and landlords, and it is essential that the CDRO is able to make decisions without fear of legal retribution. I note that other oversight mechanisms are in place to ensure that the CDRO exercises an appropriate level of care in the performance of their functions, such as obligations under the *Public Administration Act 2004* and the Charter.

Accordingly, I am satisfied that this provision is compatible with the Charter.

*Termination and new tenancy agreements because of family violence or personal violence*

Reflecting the amendment brought forward from the RT Amendment Act, the Bill inserts a new scheme into the RT Act whereby a person who is a party to an existing residential rental agreement or is residing in rented premises as their principal place of residence has been or is being subjected to family violence by another party to an existing residential rental agreement, or who is a protected person under a personal safety intervention order made against a party to an existing agreement, may apply to VCAT for an order terminating the current residential rental agreement and requiring the relevant provider to enter a new agreement with the applicant (and any other persons specified in the application) on the same terms. This scheme also applies in respect of rooming house residents solely occupying a room who are on a fixed term tenancy agreement, agreements under section 144, and Part 4A site agreements.

In such a proceeding, the person who subjected the applicant to family violence or against whom the personal safety intervention order was made may not cross-examine the person subjected to violence unless VCAT gives leave. If leave is granted, the person may only cross-examine the person subjected to violence in relation to certain matters, such as the hardship they would suffer if compelled to leave the premises and their ability to comply with the duties of a renter. This reflects clause 73A of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* which provides that in a proceeding under the RT Act, a respondent to a family violence intervention order may not personally cross-examine the protected person unless VCAT gives leave to do so. The Bill also amends this provision to extend it to personal safety intervention orders.

These provisions may interfere with the right to a fair hearing by limiting the opportunity of the alleged perpetrator of violence to cross-examine another person. Consequences of such a proceeding may include the termination of the alleged perpetrator's rental agreement and being found liable for outstanding charges in relation to the property. However, in my view, the right to a fair hearing is not limited by these provisions. The purpose of the prohibition on direct cross-examination is to protect victims of violence from being subjected to further

trauma, and reflects current practice in intervention order matters. The person will still be able to conduct a cross-examination through a representative or if VCAT gives leave, can introduce contrary evidence and make relevant submissions, and will not be at risk of a finding of guilt or significant penalties. Accordingly, I consider that these provisions strike an appropriate balance between the right to a fair hearing and the protection of victims of violence, and are compatible with the right in section 24 of the Charter.

#### Protection against interference with privacy and reputation

A number of provisions in the Bill protect against interference with privacy and therefore promote the right to privacy in section 13 of the Charter. For example, section 13(a) of the Charter encompasses a right to protection from arbitrary or unlawful interference with a person's home. The Bill promotes this aspect of the right by protecting tenants and residents from sudden eviction where they are unable to meet rental payments due to the economic impacts of COVID-19. In addition, the Bill will protect the rights to privacy and reputation by prohibiting the listing of individuals on residential tenancies databases in the case of non-payment of rent because of a COVID-19 reason.

However, the Bill may also authorise some interference with the right to privacy in certain circumstances. For example, the Bill may affect the private decisions that individuals are able to make in relation to how they deal with their property (such as, by preventing a person from terminating a tenancy or other agreement, where the person may have wished to use that property for other purposes). Further, the Bill provides for regulations to be made to permit the CDRO to share information with the Director of Consumer Affairs Victoria, VCAT and other prescribed entities.

To the extent that the right to privacy may be engaged by these provisions, any interference will be neither arbitrary nor unlawful. The alternative termination process under the Bill is established for the clear purpose of addressing severe hardship caused by the COVID-19 pandemic, will only apply in certain specific circumstances, and will have effect for only a limited time. To the extent that the Bill authorises the making of regulations providing for the sharing of personal information in the context of the Residential Tenancies Dispute Resolution Scheme, that will also be for a specific purpose relevant to the effective operation of the scheme and will only occur between officers and entities that are subject to oversight mechanisms including the existing confidentiality offences contained in section 499 of the RT Act and statutory privacy obligations. I therefore consider that the provisions are compatible with the right to privacy.

#### **Increased statutory notice period for second entitlement terminations under the WorkCover scheme**

Under the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act) and the *Accident Compensation Act 1985* (AC Act), injured workers who are incapacitated for work are eligible to receive WorkCover weekly payments at 80 per cent of their pre-injury average weekly earnings for a maximum of 130 weeks. An entitlement to ongoing weekly payments beyond this time only arises if a determination is made that an injured worker has no capacity

for any work in the foreseeable future. If this higher threshold is not met, the worker is given 13 weeks' notice that weekly payments will cease at the expiry of the second entitlement period (130 weeks).

The Bill amends the WIRC Act and the AC Act by extending the termination notice period from 13 weeks to 39 weeks. The amendments only apply to determinations made at the end of the second entitlement period from 1 December 2019 and up to six months after commencement of the amendments (prescribed period).

These amendments might engage the right to equality in section 8 of the Charter, as they only apply to terminations made at the expiry of the second entitlement period and do not extend to other terminations made under the WIRC Act or AC Act.

Section 8(3) of the Charter provides that every person is equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. This means that laws, policies and programs should not be discriminatory, and also that public authorities should not apply or enforce laws, policies and programs in a discriminatory or arbitrary manner. 'Discrimination' for the purposes of the Charter means discrimination within the meaning of the *Equal Opportunity Act 2010* and can involve either direct or indirect discrimination.

If these amendments are considered to amount to a limit of this right, it is my view that any limit will be minor, reasonable and demonstrably justifiable in accordance with section 7(2) of the Charter. These measures under the Bill have been specifically tailored to support the most vulnerable injured workers in the WorkCover scheme during the COVID-19 pandemic, being those workers who have not returned to work for 130 weeks and whose weekly payments have been terminated. These measures acknowledge that the COVID-19 pandemic has significantly impacted the economy, the labour market and the way in which work is currently undertaken, resulting in these injured workers facing even greater difficulties reintegrating back into the workforce and transitioning off WorkCover weekly payments.

The extended notice period of 39 weeks will provide financial support to these vulnerable workers over a longer period of time, to support their recovery and efforts to return to work.

Accordingly, I am satisfied that this amendment is compatible with the Charter.

### **Safe patient care reforms**

The Bill engages the right to life in section 9 of the Charter by amending the *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015* (SPC Act) to allow the Minister (after consulting with the relevant union and representative body) to make a declaration temporarily allowing the hospitals named in the declaration not to be penalised in the event of staff to patient ratios not being met at all times. This amendment may be viewed to limit the right, as the right creates a positive obligation on the State to protect persons in its care and reducing the staff to patient ratio may decrease the standard of medical attention that a patient receives.

However, in my opinion, in these exceptional circumstances this amendment does not limit the right but rather strengthens it, recognising that the COVID-19 emergency is placing considerable strain on health services and this amendment prevents the need to close beds or reduce services to maintain strict compliance with the ratio requirements. The Bill also provides the safeguard of requiring this amendment to be repealed after six months and that the operator of the relevant hospital to which the declaration applies, must, as far as practicable, staff the hospital in a manner that takes into account the safety of patients and staff, having regard to staffing levels and the skill mix of the staff.

This amendment promotes the right to life by helping ensure that health services are able to maintain continuity of services by adapting workforce and care delivery models to the COVID-19 pandemic, thereby enhancing the availability of health care and protecting the right not to be arbitrarily deprived of life.

Accordingly, the amendment is compatible with section 9 of the Charter.

### **Amendments to the *Local Government Act 2020***

The Bill amends the *Local Government Act 2020* to provide that, where members of a Council or other persons are required to attend a meeting of the Council or joint meeting of Councils, a meeting of a delegated committee or joint delegated committee, a meeting of the governing body of a regional library or a meeting of a special committee under the *Local Government Act 2020* or any other Act, attendance is satisfied if the meeting is held by electronic means of communication.

Where an Act requires a meeting to be open to the public and that meeting is held by electronic means of communication, that requirement is satisfied, in the case of Council meetings and joint Council meetings, by being streamed live on the Council's website, and, in the case of a meeting of a delegated committee or joint delegated committee or a special committee, being streamed live on the Council's website or a recording of the meeting being made available on the website of the Council as soon as practicable.

These amendments engage a person's right to freedom of expression, which includes the right to receive information in section 15 of the Charter, and the right to participate in the conduct of public affairs in section 18(1) of the Charter by limiting the public's physical presence at the meetings.

However, in my opinion the Bill does not limit the right to freedom of expression, or to participate in the conduct of public affairs as it provides an alternative way to exercise these rights during the COVID-19 state of emergency. In particular, the Bill enables meetings to take place by electronic means and requires a Council to stream the meeting live or a recording of the meeting to be made available on the Council's website if a meeting is held by electronic means.

Accordingly, the amendment is compatible with the Charter.

## **Amendments to the *Planning and Environment Act 1987***

### Right to privacy and reputation

Currently, the *Planning and Environment Act 1987* (PE Act) requires certain entities (such as the Minister for Planning, Councils and other authorities) to make certain documents available to the public for inspection free of charge at their offices. These documents include planning scheme amendments, planning permit applications, planning permits granted, submissions and objections, and planning panel reports. These requirements are important in supporting the PE Act's objectives to support public participation in decision making processes. Making this information publicly accessible is also consistent with the right to freedom of expression in section 15(2) of the Charter, which includes the freedom to seek and receive information.

However, with the measures currently in place under the *Public Health and Wellbeing Act 2008* to address COVID-19, it is not possible for members of the public to attend the relevant offices to access these documents in person. As such, the Bill will require entities to make these documents available on the internet free of charge instead. Making the documents available online means that any personal information in these documents is more accessible by a wider audience. This engages the right to privacy in section 13(a) of the Charter.

The Bill specifies that in making these documents available online, the entities must not disclose personal information of individual permit applicants, objectors or submitters without their consent. The Bill therefore significantly reduces any potential interference with individuals' privacy.

There will necessarily be some interference with individuals' privacy. The Bill provides that the address of land the subject of permit applications, permit amendment applications or planning scheme amendments may be made known, as this is necessary to understand the application or amendment being considered. Further, discretion is provided to the relevant entities to make personal information available to persons on request. This discretion is given to facilitate access to personal information that would ordinarily be available on inspection of the physical copy of the document. It does not give a right to the public at large to gain access to such information. There will need to be a basis under the PE Act as it currently stands to justify the information being made available. An example would be to enable a person to ascertain the identity of relevant parties for the purposes of conducting and commencing proceedings in VCAT.

As such, in my opinion, the Bill is compatible with the right to privacy.

### Freedom of expression and right to take part in public life

In light of the measures in place to address COVID-19, it is not possible for planning panels to sit and conduct hearings in public as they are required to do under the existing legislation. The Bill will allow for panels to conduct hearings by electronic means, and provides for panels to require those who have a right to be heard to contribute using electronic means. This engages the right to freedom of expression which includes the freedom to seek, receive and

impart information and ideas of all kinds in section 15 of the Charter, as well as the right to participate in the conduct of public affairs in section 18 of the Charter.

The Bill requires panels to make their hearings available to be viewed by the public free of charge by electronic means, either while the hearing is being held or as soon as reasonably practicable afterwards. Panels will still be bound by the overall obligation to provide a reasonable right to be heard to relevant persons under the Act. As such, the amendments create alternative measures required to facilitate rights to freedom of expression and to take part in public life and do not, in my view, limit these rights.

For these reasons, in my opinion the proposed Bill is compatible with the right to freedom of expression and the right to take part in public life.

**The Hon Daniel Andrews MP**

**Premier**



## COVID-19 OMNIBUS (EMERGENCY MEASURES) BILL 2020

### TABLING OF STATEMENT OF COMPATIBILITY AND SECOND READING SPEECH

#### Tabling of Statement of Compatibility

In accordance with section 28 of the *Charter of Human Rights and Responsibilities Act 2006*, I table a statement of compatibility for the **COVID-19 Omnibus (Emergency Measures) Bill 2020**.

#### Second Reading Speech

I move that this Bill be now read a second time.

The last time this place met, we knew we were on the verge of an unprecedented challenge.

And yet, as much as we knew, we could never have imagined the drastic change – and the devastating tragedy – that has unfolded in so short a span of time.

The impact of the coronavirus (COVID-19) pandemic is without rival.

And like the rest of the world, we are grappling with a challenge the likes of which we have never seen before.

As a state, we must be prepared to do what we can to slow the spread of the virus – to keep our families and friends and communities safe – while also addressing its far-reaching social and economic impacts.

To that effect, this Bill includes urgent measures to enact a number of policies across a range of portfolios.

At the heart of each of these measures though, is a singular aim: to support our state's response to, and recovery from, COVID-19.

The Bill provides flexibility to adjust processes and adopt different ways of delivering critical services. These reforms will minimise the risk of transmission of COVID-19 and revise procedures and practices to ensure critical services can continue operating safely.

The majority of reforms will sunset six months after their commencement and cannot be extended. This reinforces the time limited nature of this Bill's emergency response measures. There are however some exceptions. Commencement of provisions in the *Environment Protection Amendment Act 2018* and the *Residential Tenancies Amendment Act 2018* will be delayed, and registration periods for infringement fines and extensions of teacher and

education training provider registrations, as well as the additional Youth Parole Board appointments, will be extended.

### *Reforms to support residential tenants and landlords*

The Bill will implement a broad moratorium on residential tenancy evictions, subject to specified exceptions, such as where a tenant is wilfully causing serious damage to premises or is using them for an illegal purpose.

While the Government's expectation is that tenants will continue to meet their rental obligations where possible, a tenant may not be evicted for non-payment of rent where they are experiencing financial distress during the moratorium. The moratorium on evictions will be for the six-month period from 29 March 2020 to 26 September 2020. The moratorium recognises the importance of sustaining tenancies and giving tenants and landlords the ability to manage the impacts of COVID-19.

The Bill will amend the *Residential Tenancies Act 1997* to include a targeted regulation-making power that will allow the Governor in Council, on recommendation of the responsible Minister, to implement the principles on the residential tenancy moratorium agreed to by National Cabinet. Specifically, the regulation-making power will permit the Governor in Council (acting on the Minister's recommendation) to modify provisions relating to the termination of a tenancy and to enable the establishment of any administrative process to support dispute resolution and appeals during the moratorium.

The regulation-making power will be subject to important limitations. For example the recommendation to the Governor in Council may only:

- override limited Acts and laws related to residential tenancy matters; and
- be made where reasonably required to respond to the COVID-19 pandemic.

The regulations cannot override the Bill, the *Constitution Act 1975* or the *Charter of Human Rights and Responsibilities Act 2006*.

The regulations must sunset within 6 months of being made and are disallowable by either House of Parliament.

The Bill defers the implementation of the *Residential Tenancies Amendment Act 2018* by six months (to 1 January 2021 or earlier proclamation) and replicates a reform from that Act to protect victims of family violence during the moratorium.

Rent increases will be suspended during the moratorium and, during this period, tenants cannot be listed on a residential tenancy database for a breach that is related to the impacts of COVID-19. Residential tenancies disputes, including eviction matters, will be referred to a 'single front door' administered by Consumer Affairs Victoria, where landlords and tenants will receive information and support to reach agreements, primarily to reduce rent. Landlords and tenants will be expected to negotiate in good faith. Where parties need additional support, they will be referred to a new specialist mediation service to be provided through the Dispute Settlement Centre of Victoria.

The mediation service will have the ability to make binding orders. If the order is breached, the matter will be referred to the Victorian Civil and Administrative Tribunal (VCAT) for hearing. VCAT will consider the order and the action of the parties since it was made and then determine the dispute accordingly.

### *Reforms to support commercial tenants and landlords*

The impact of COVID-19 on many small business operators in Victoria has been profound. This Government supports Victoria's small businesses. It's \$1.7 billion economic survival package is already providing valuable support to businesses. Additionally, a \$500 million Business Support Fund has payments already flowing to thousands of small businesses, helping them pay their rent and employees.

The Bill will create a regulation-making power that will allow the Governor in Council, on the recommendation of the Minister for Small Business, to implement the principles on commercial tenancies agreed to by National Cabinet. Specifically, the regulation-making power will permit the Minister to prohibit termination of leases and recovery of possession of leased premises; to modify certain rights and liabilities arising under leases; to extend eligible lease periods and to require landlords and tenants to participate in mediation facilitated by the Small Business Commission.

The regulation-making power will be subject to important limitations. For example, the recommendation to the Governor in Council may only:

- override limited Acts and laws relating to relevant eligible leases; and
- be made where reasonably required to respond to the COVID-19 pandemic.

The regulations cannot override the Bill, the *Constitution Act 1975* or the *Charter of Human Rights and Responsibilities Act 2006*.

The regulations must sunset within 6 months of being made and are disallowable by either House of Parliament.

The provisions will apply in respect of all eligible commercial leases where the tenant qualifies for (and is a participant in) the Commonwealth's JobKeeper program and has an annual turnover of up to \$50 million. It will apply to leases which are retail leases within the meaning of the *Retail Leases Act 2003* and to other commercial and industrial leases. This includes but is not limited to eligible sole traders, not for profit businesses and franchisees. The regulations made under these provisions will exclude from the scheme tenants that are members of a group of companies with a combined annual turnover of \$50 million or over.

It is important to note that this eligibility criteria allows for flexibility, because the Commonwealth's JobKeeper program itself provides a high level of discretion to the Commissioner of Taxation to determine final eligibility for businesses that do not neatly fit into that program's criteria. This is particularly important for many businesses that might have started in the past year and do not yet have the same complement of documentation to compare turnover that more established businesses might have.

Under these principles, where a tenant is suffering economic hardship due to COVID-19, landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period or a reasonable recovery period, and tenants must remain committed to the terms of their lease.

To assist the long-term viability of impacted businesses, landlords are encouraged to offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100 per cent of the amount ordinarily payable, based on a reduction in the tenant's trade.

There will be a freeze on rent increases for eligible leases, except for retail leases that are based on turnover rent, and tenants should be provided with an opportunity to extend their lease for an equivalent period of the rent waiver or deferral to enable them additional time to trade on their existing lease terms during the recovery period.

In Victoria, these provisions will apply from 29 March 2020 to 29 September 2020, to support Victorian small businesses that had rental payments due on 1 April 2020.

It is our expectation that most commercial tenants and landlords will work together to reach agreements based on the national principles that consider each party's individual circumstances. Where the landlord or tenant cannot reach agreement, either party may refer the matter for mediation by the Victorian Small Business Commission

### Justice and community safety portfolio reforms

#### *Impacts on the justice system*

The Government's reform package will support the justice system's emergency response to COVID-19 and the continued delivery of these critical services.

#### *Reforming evidence and procedure laws*

The Bill will amend a range of legislation to allow the courts, VCAT and other justice agencies to manage procedural matters flexibly and efficiently, while managing public health risks.

For example, in certain circumstances the Bill will:

- enable courts to hear more matters by audio visual link (AVL) and audio link;
- enable courts to deal with matters without a hearing;
- enable Youth Justice to deliver pre-sentence reports verbally;
- allow courts to modify their procedures and make alternative arrangements in relation to physical access to court rooms and buildings if required on public health grounds; and
- provide more flexible procedures for bail matters.

Similarly, the Bill makes a range of amendments to the *Children, Youth and Families Act 2005* to enable Children's Court proceedings and out-of-court processes to be conducted with greater flexibility throughout the COVID-19 pandemic.

### *Judge alone trials in criminal cases*

Currently, criminal trials in Victoria must be heard by a jury, reflecting the longstanding and fundamental role of juries in the criminal justice system. However, both the Supreme and County Courts have suspended new jury trials due to the COVID-19 pandemic. This raises significant issues for the justice system, particularly for accused persons facing indictable charges who are on remand, and victims of crime, who may experience further trauma due to delays.

As a temporary measure, the Bill will allow judge alone trials for any Victorian indictable offence, if the court considers it in the interest of justice to do so and the accused person has obtained legal advice and provided consent. While the prosecution's consent will not be required, the court must consider any prosecution submissions before deciding whether to hear a matter by judge alone. This model is broadly based on the NSW provisions, and will give courts the discretion and flexibility to continue hearing indictable charges during the COVID-19 pandemic.

### *Flexibility in dealing with matters under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

The Bill will amend the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CMIA) to allow fitness to stand trial to be determined by a judge rather than a jury, and a special hearing to be heard by a judge alone. With respect to fitness to stand trial, this replicates an amendment included in the Crimes (Mental Impairment and Unfitness to be Tried) Bill 2020, which is currently before Parliament.

The Bill will also provide flexibility for the timeframe in which a special hearing must be conducted.

### *Allowing the making of emergency regulations*

To allow emergency COVID-19 reforms to be implemented efficiently, the Bill will allow the making of emergency regulations by the Governor in Council on the recommendation of the Attorney-General to override certain justice related legislation, including in relation to the State's integrity bodies. This power will permit reforms to be implemented in key critical areas quickly. It is not intended that the power will allow substantive orders, such as a prison sentences, to be altered. The regulation-making power will be focused on process changes and limited to particular subject matter areas. This includes:

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

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

The regulations must cease operation within six months of the Act commencing or if otherwise revoked earlier and are disallowable by either House of Parliament.

#### *Allowing appointment of an additional Youth Parole Board alternate chairperson*

The Bill will amend the *Children, Youth and Families Act 2005* to alleviate workload pressure on the Youth Parole Board by allowing for an appointment of an additional, alternate chairperson and expand eligibility for chair and alternate chair positions.

This will better support the Board to undertake its vital function in relation to managing the youth parole system and also ensure that the Board has additional scope to assist with managing capacity pressures in youth justice custodial facilities.

#### *Allowing the Magistrates' Court to order electronic monitoring of community correction orders*

The Bill will amend the *Sentencing Act 1991* to enable the Magistrates' Court to order electronic monitoring as a condition of a community correction order (CCO) for offenders. The Supreme Court and Country Court already have the power to order electronic monitoring as a condition on CCO's. Existing requirements and considerations for the imposition of electronic monitoring will apply.

The amendments provide an additional tool for courts and Community Corrections to provide the safe and effective supervision of offenders on CCOs throughout the COVID-19 pandemic.

#### *Health risk management in the corrections system*

The Bill also amends the *Corrections Act 1986* to permit the imposition of temporary measures to prevent, detect and mitigate the risk of COVID-19 or related health risks in relation to and in respect of a prison, to provide for:

- prohibitions or restrictions on persons who can visit a prisoner (whilst also providing for alternative arrangements to permit visits without physical contact);
- mandatory quarantine of each prisoner (in a separate prison cell or unit) on entering the prison, via remand or sentence (not a transfer between prisons);
- powers to separate, quarantine or isolate a prisoner, or lockdown part or the whole of a prison, including through the establishment of separate units within a prison or single cell occupancy of any prisoner; and

- with the consent of the prisoner, medical assessment and treatment of prisoners to mitigate COVID-19 or related risks.

The temporary measures will override any contrary provision in any Act or regulation, other than the Bill, the *Constitution Act 1975* or the *Charter of Human Rights and Responsibilities Act 2006*. Arrangements will be put in place to ensure the safety, protection and welfare of prisoners subject to mandatory quarantine, separation, quarantine or isolation orders, including those who are vulnerable as a result of their age, health (including mental health, cognitive function, social development and maturity); cultural, ethnic, religious factors; or Aboriginal prisoners.

These measures significantly support the preservation of the health of prisoners and any other persons at a prison, including the valued frontline staff who continue to service Victoria's corrections facilities during the COVID-19 pandemic.

#### *Health risk management in the youth justice system*

The Bill further amends the *Children, Youth and Families Act 2005* to provide a specific power to isolate a young person in a youth justice facility in order to detect, prevent or mitigate the transmission of COVID-19 or other infectious diseases in such a facility. The Bill also permits isolation on a preventative basis. This amendment supports the public health response to COVID-19, by reducing the risk of infection penetrating and transmitting within a youth justice facility, and it mitigates the resultant serious impacts to the health of young people, frontline staff and the broader community. The power to isolate extends to other infectious diseases whose symptoms are similar to COVID-19 and have significant health impacts that would threaten life if contracted at the same time, such as influenza.

The Bill ensures that any isolation on this basis is accompanied by robust safeguards to protect the health, wellbeing and developmental needs of children and young people. These include strict limits on when isolation is permitted, a requirement for isolation to be for the minimum duration required (noting that any period of isolation may be informed by current health advice and the period authorised must not exceed 14 consecutive days), supervision and observation requirements, and reporting and oversight mechanisms. The Bill also ensures a child or young person is provided with the medical and mental health support that they require.

In addition to the existing entitlements under the *Children, Youth and Families Act 2005*, children and young people will have access to time outdoors and recreation during their period of isolation. Such entitlements can only be limited where it is not reasonably safe to meet that entitlement, or an entitlement cannot reasonably be met, having regard to current health advice and the security of youth justice facilities.

This is a reasonable, necessary and proportionate amendment that is time-limited and for the express purpose of ensuring youth justice facilities can respond to this significant health crisis. This amendment will ensure the safety and security of children and young people, frontline staff, and the broader community.

### *Fines Reform Act 2014*

The Bill will amend the *Fines Reform Act 2014* to extend the registration periods for infringement fines issued during COVID-19 from six months to 12 months to support enforcement agencies which may choose to pause some activities due to inability to carry out administrative functions to comply with public health guidance or directions. It will also permit fine recipients to have longer than usual to pay their fines in recognition of the financial and emotional difficulties many people are experiencing as a result of the COVID-19 pandemic.

Changes to the *Fines Reform Act 2014* will also ensure that even if requests by prisoners (including prisoners subsequently released) to participate in a time served scheme (which enables prisoners to use time spent in prison to pay off unpaid fines) cannot be processed because of COVID-19, those prisoners can make that request at a later date.

### Workplace Safety portfolio reforms

This Government acknowledges that COVID-19 is creating barriers for long-term injured workers to re-enter the workforce and transition off the WorkCover scheme. Approximately 600 injured workers will have had their weekly payments terminated at the end of the second entitlement period during the period 1 December 2019 to 30 April 2020, with a further 1,500 terminations expected over the six months thereafter.

The Bill will amend the *Workplace Injury Rehabilitation and Compensation Act 2013* and the *Accident Compensation Act 1985* to give these long-term injured workers who are unable to return to work or find employment an additional six months' notice of termination to provide a longer transition period to return to work or find employment. These measures will have a positive economic impact for this group of long-term injured workers by reducing financial hardship due to COVID-19 and supporting a sustainable transition from the WorkCover scheme back into the workforce.

### Energy, Environment and Climate Change, Local Government and Planning portfolios - reforms

#### *Environment Protection Amendment Act 2018*

The Bill will delay commencement of Victoria's once in a generation reforms to the environment protection framework to enable duty holders to focus on immediate challenges posed by the COVID-19 pandemic. This will give businesses and other duty holders more time to prepare for and understand their new rights and responsibilities, with the support of the Environment Protection Authority. The proclamation previously made will be revoked. Reforms will now commence on 1 December 2021 or earlier by proclamation. The Government's intention is to proclaim an earlier commencement date of 1 July 2021. The existing framework under the *Environment Protection Act 1970* will continue to apply.

### *Local Government Act 2020*

The Bill will amend the *Local Government Act 2020* to permit local councils and libraries to operate more flexibly by having virtual council meetings, ensuring continued service delivery and decision-making. Members of the public will be able to observe certain meetings online.

### *Planning and Environment Act 1987*

It is critical that Victoria's planning system continues to operate during the COVID-19 restrictions, to send a strong signal to the community, industry and investors that planning remains open for business. The Bill will amend the *Planning and Environment Act 1987* to enable requirements to make planning scheme amendments, planning permit applications and other documents physically available for inspection to be satisfied by displaying these documents on an Internet site. It will also enable planning panels to conduct hearings by video conference or in other ways.

### Education and Training and Skills portfolio reforms

The Bill will amend the *Education and Training Reform Act 2006* to establish a temporary scheme to enable:

- the Victorian Registration and Qualifications Authority to extend the existing registrations of registered training organisations and providers of accredited senior secondary courses and qualifications for up to six months;
- the Victorian Institute of Teaching (VIT) to extend the existing registrations of persons who hold permissions to teach, provisional registrations and non-practising registrations for up to six months; and
- the VIT to send or serve notices relating to disciplinary proceedings of registered teachers by electronic communications.

These reforms will enable Victoria's education system and its teachers to continue to deliver exceptional learning outcomes for students during the uncertainty of COVID-19.

### Health portfolio reforms

The Bill will amend the *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015* to establish a new limited power for the Minister of Health to temporarily suspend the operation of the enforcement provisions of the Act should it become impracticable for health services to meet the nurse to patient ratios

This Government recognises that during the COVID-19 state of emergency there has been an increased demand on hospitals and health staff across the state, requiring modification of normal workforce models to meet patient demand and to protect us all from the effects of COVID-19. All Victorians are forever grateful for these dedicated frontline workers who continue to provide safe and high-quality patient care in these stressful and uncertain times.

### Premier portfolio reforms

The Bill will amend the *Parliamentary Committees Act 2003* to enable members of committees established under that Act to attend meetings and vote remotely. This will align parliamentary procedure with efforts already underway in our community to practise social distancing and work from home where possible.

The Bill will commence on assent. Transitional arrangements will enable only certain necessary action taken under these extraordinary provisions to remain valid after their sunset.

Today – just as we are asking Victorians to play their role – we must do the same. As representatives on behalf of our communities, and as representatives on behalf of our state.

This is a Bill like no other.

It enacts a number of reforms critical to our state's response to COVID-19. Even more importantly, it enables us to help slow the spread – and save lives.

Each of us should be aware of the critical juncture at which we find ourselves.

We should acknowledge keenly the impact of our decision-making on the lives of Victorians.

And we should each feel the weight of the immense responsibility that rests upon our shoulders.

We do not have time to waste.

I commend the Bill to the house.