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**Liberty Victoria Comment on the  
Justice Legislation Amendment (Police and Other Matters) Bill 2019**

1. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at [www.libertyvictoria.org.au](http://www.libertyvictoria.org.au).
2. Recent events in Victoria's criminal justice system should remind us all of the vital need to have judicial oversight of the decisions and procedures of Victoria Police.
3. Despite this, if enacted the Justice Legislation Amendment (Police and Other Matters) Bill 2019 ("the Bill") would, amongst other things:

- a. Create new powers in the *Crimes Act 1958* (“the *Crimes Act*”) for police to take a DNA sample from certain suspects and offenders without a court order, including in some cases children; and
  - b. Introduce new criminal offences and sanctions in the *Crimes Act*, *Sentencing Act 1991* and *Bail Act 1977* for acts that harm or threaten harm to police officers, protective services officers (“PSOs”) and police custody officers (“PCOs”).
4. Liberty Victoria opposes these proposed reforms.

### **Taking DNA samples without judicial oversight**

5. A person’s DNA is their personal property. People have the right, as protected by s 13(a) of the *Charter of Human Rights and Responsibilities Act 2006* (“the Charter”) to privacy without arbitrary interference.
6. Section 25(1) of the *Charter* provides that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
7. Pursuant to s 7(2) of the *Charter*, any limitation to that right must only be to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
8. The Bill would strip the oversight from the Courts over the taking of DNA samples. The proposed justification is that this will constitute “streamlined powers” that reduce the “administrative burden” on the Courts.
9. Simply put, if there is such an “administrative burden” on the Courts to fulfil its vital oversight role, then that is an argument for better resourcing the courts, not for removing that function.
10. The Bill would permit a “senior police officer” to authorise the taking of a DNA sample from suspects and offenders, including specified 15 to 17 year

olds, if “justified in all the circumstances”. That includes suspects before they are charged with committing any offence.

11. Notably, the Statement of Compatibility to the Bill makes it clear that “the new power does not require that material reasonably believes to be from the body of a person who committed the offence has been found before a DNA can be taken from a suspect (that is, there is no requirement that the taking of a sample from a suspect will be forensically relevant to the offence for which they are a suspect)”.
12. It is clearly the case, therefore, that without any form of Court order, the Bill would allow police to determine there are justifiable circumstances even prior to there being any DNA found at a crime scene. It would be enough if a police officer believed there *could* be such DNA found.
13. It is difficult to see how, in those circumstances, the test for taking a DNA sample provides any real protection for suspects and protects the presumption of innocence.
14. The reality of the Bill is that it would create the potential for Victoria Police to warehouse DNA samples from persons who are only suspected of criminality. The Government contends that “while taking DNA profile samples from suspects may only be authorised when a person is suspected or believed of committing certain offences, they do not engage the right to be presumed innocent because they are an investigation tool that may also exonerate a suspect and assist them in the proof of their innocence”.
15. With respect that is flimsy logic that could be applied to any compulsory procedure such as compelling a suspect to participate in police interview or give evidence.
16. The right to the presumption of innocence means that people should be treated as innocent until proven guilty, and the fact that a compulsory procedure might provide exculpatory evidence does not alter the fact that

this Bill would force people to provide their DNA to police at a very early stage in the investigation.

17. While the Government notes that the decision to take a sample could be subject to judicial review at the Supreme Court of Victoria, that ignores the practical limitations, in a costs jurisdiction, for people to seek judicial review of administrative decisions. Simply put there is no equality of arms for most people subject to such decisions and the potential adverse costs orders are prohibitive.
18. If the Bill is enacted, the Independent Broad-based Anti-corruption Commission ("IBAC") would have an oversight role. However, that is far removed from the present situation where an independent court has oversight over each case to determine whether the taking on a DNA sample is justified in the circumstances.
19. The vital oversight role of the Courts with regard to DNA samples should be retained and protected.

### **New Criminal offences and sanctions**

20. The Bill would introduce new offences against police officers, PSOs and PCOs:
  - a. The offence of discharging a firearm when reckless to the safety of a police officer or a PSO; and
  - b. The offence of intimidation of a law enforcement officer or a family member of law enforcement officer.
21. These reforms are unnecessary. There are already criminal offences, with significant maximum sentences, that would incorporate such conduct:
  - a. Reckless conduct endangering life;
  - b. Reckless conduct endangering serious injury;

c. Assault of an emergency worker on duty (which includes police officers and PSOs); and

d. Assault.

22. These offences are taken seriously by the courts, even more so in circumstances where a victim is a police officer, and will often result in a sentence of imprisonment. Indeed for some offences against emergency workers there are mandatory sentences of imprisonment subject to very restricted exceptions.
23. There is no suggestion by the Government that the sentences for such offences are failing to meet community standards.
24. The proposed offence of “intimidation of a law enforcement officer”, with a maximum penalty of 10 years’ imprisonment, is particularly nebulous and will see the over-charging of alleged offenders, often from disadvantaged parts of our community.
25. “Intimidation” will be made out if “the person engages in conduct that could reasonably be expected to arouse apprehension or fear in the victim for the safety of the victim”.
26. Notably, the test for the new offence applies “whether or not the conduct arouses apprehension or fear in the victim”.
27. Further, under the Bill an offender would not have to intend to commit an act of intimidation, it is enough if the “person ought to have known” that engaging in the conduct would be likely to arouse that state of apprehension or fear. The removal of the mental element, or *mens rea*, of specific intent is particularly troubling.
28. The reality of these reforms will see people charged with this offence in circumstances where the victim was not placed in a state of apprehension or fear, and where the accused did not intend to place the victim in a state

of apprehension or fear. The potential for misuse and overcharging for this offence should be clear.

29. In conclusion this Bill constitutes yet another “ratcheting up” of the law and order auction in circumstances where the case for such reforms has not been made out.
30. For any further information please do not hesitate to contact Michael Stanton of our Policy Committee at [michael.stanton@vicbar.com.au](mailto:michael.stanton@vicbar.com.au), or the Liberty Victoria office at [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au).