PARLIAMENT OF VICTORIA

Scrutiny of Acts and Regulations Committee

Alert Digest No. 9 of 2022

June 2022

On the following Act and Bills

Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Bill 2022

Independent Broad-based Anti-corruption Commission Amendment (Facilitating Timely Reporting) Bill 2022

Local Government Legislation Amendment (Rating and Other Matters) Bill 2022

Meat Industry Amendment (Rabbit Farms) Bill 2021

Summary Offences Amendment (Nazi Symbol Prohibition) Bill 2022

Treaty Authority and Other Treaty Elements Bill 2022

Victims of Crime (Financial Assistance Scheme) Act 2022

The Committee

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Terms of Reference - Scrutiny of Bills

The functions of the Scrutiny of Acts and Regulations Committee are –

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –

- (i) trespasses unduly upon rights or freedoms;
- (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
- (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
- (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Privacy and Data Protection Act 2014*;
- (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
- (vi) inappropriately delegates legislative power;
- (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
- (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –

- (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
- (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
- (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

***Parliamentary Committees Act 2003*, section 17**

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Scrutiny of Acts and Regulations Committee

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Useful information

Role of the Committee

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

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

Interpretive use of Parliamentary Committee reports

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

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

When may human rights be limited

Section 7 of the *Charter* provides –

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

Glossary and Symbols

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

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

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

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

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

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

'PCA' refers to the *Parliamentary Committees Act* 2003

'penalty units' refers to the penalty unit fixed from time to time in accordance with the *Monetary Units Act* 2004 and published in the government gazette (as at 1 July 2021 one penalty unit equals $181.74)

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

'VCAT' refers to the Victorian Civil and Administrative Tribunal

[ ] denotes clause numbers in a Bill

Alert Digest No. 9 of 2022

Children and Health Legislation Amendment (Statement of Recognition and Other Matters) Bill 2022

Member	Hon Martin Foley MP	**Introduction Date**	7 June 2022
Portfolio	Health	**Second Reading Date**	8 June 2022
Member	Hon Anthony Carbines MP		
Portfolio	Child Protection and Family Services		

Summary

The Bill amends various Acts related to the health and wellbeing of children. The Bill:-

- Includes an Aboriginal Statement of Recognition and recognition principles relating to child protection decision-making for Aboriginal children in various Acts; Note the Second Reading Speech:-

  > The Bill amends six different legislative systems to make progress on embedding the Government's commitment to Aboriginal self-determination in Victoria's laws and make technical amendments to other key regulatory schemes…
  >
  > The Statement of Recognition acknowledges past wrongs and mistreatment within the health system, the strength of Aboriginal people, culture, kinship and communities in the face of historic and ongoing injustices and the essential role of Aboriginal Community Controlled Health Organisations in meeting the health, wellbeing and care needs of Aboriginal people in Victoria.
  >
  > The accompanying principles reinforce the Victorian Government's commitment to Aboriginal self-determination in health and acknowledge the importance of culturally safe and appropriately resourced services to meet the health and wellbeing needs of Aboriginal people in Victoria.

- Makes amendments relating to authorisation of principal officers of an Aboriginal agency and provides for use and disclosure of information;
- Enables judicial registrars to issue search warrants for the purposes of having a child placed in emergency care;
- Makes amendments in relation to the reportable conduct scheme and enables the Commission for Children and Young People (Commission) to commence proceedings for reportable offences. It provides for the Commission to monitor and enforce compliance in relation to the notification of reportable conduct by the head of an entity;
- Enables the Commission to assist and support child protection clients.

Part 2 – Amendment of *Children, Youth and Families Act* 2005 (CYF Act) – Part 3 – Amendment of *Social Services Regulation Act* 2021

Clause **[2]** is the commencement provision. Parts 1, 5, 6 and 11 and Division 2 of Part 4 come into operation on the day after the day on which the Bill receives Royal Assent. The remaining provisions come into operation on a day or days to be proclaimed subject to subsection (3) which provides a default date of 1 July 2024. The Committee notes the delayed commencement date and the Explanatory memorandum:- '*Aspects of the Bill are connected to the implementation of the significant changes to the regulation of social services provided for by the Social Services Regulation Act 2021 and require a longer default commencement date to allow for the implementation of those changes*.'

It inserts an Aboriginal Statement of recognition into the CYF Act which acknowledges the treaty process[1] and a statement of recognition principles and the right of Aboriginal people to self-determination. Courts[2] and the Secretary[3] must have regard to and apply the recognition principles. The recognition principles are intended to give guidance[4] to ensure that the distinct cultural rights of Aboriginal children and Aboriginal families and the right of Aboriginal people to self-determination are recognised, respected and supported. **[4]**

The Secretary may delegate the power to authorise an Aboriginal agency to undertake the powers or functions of the Secretary specified in section 18.[5] **[5]** It substitutes section 18 and inserts new sections 18AAA and 18AAB so that the Secretary may provide written authorisation for the principal officer of an Aboriginal agency to perform or exercise the Secretary's specified functions and powers as a protective intervener[6] or in relation to a protection order. The principal officer may only be authorised if the principal officer is an Aboriginal person. An authorisation may be revoked. **[6,9]** Note the Statement of Compatibility:-

> Clause 6 substitutes section 18 of the CYF Act and inserts new sections 18AAA and 18AAB. New section 18 enables the Secretary to authorise a principal officer of an Aboriginal agency to perform certain functions and exercise certain powers conferred on the Secretary as a protective intervenor or in relation to the making of a protection order or other relevant order, in respect of an Aboriginal child or class of Aboriginal children, or their non-Aboriginal siblings. New section 18 aims to empower principal officers to exercise the functions and powers of the Secretary with regard to the entire course of a child protection investigation: from the investigation of the first report until the making of a protection or other order. The new provision also avoids the need for a principal officer to obtain authorisations at different stages of a case, for example at the commencement of a protective intervention investigation, and then again once a protection order is made…
>
> These changes are intended to streamline the authorisation process that empowers principal officers of Aboriginal agencies to exercise the functions and powers of the Secretary in relation to Aboriginal children and to ensure these children receive continued culturally safe services from the protective investigation stage through to the making of protection orders.

It provides for use and disclosure of information to and by principal officers authorised under sections 18 and 19. **[8]** Part 3 amends the *Social Services Regulation Act* 2021 to provide for the continued operation of the Suitability Panel during the transitional period.[7] **[16-18]**

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1 See new subsection 7B Acknowledgement of treaty process

(1) The Parliament acknowledges Victoria's treaty process and the aspiration of Aboriginal people to achieve increased autonomy, Aboriginal decision-making and control of planning, funding and administration of services for Aboriginal children and families, including through self-determined Aboriginal representative bodies established through treaty.

2 See new section 7F.

3 See new section 7G.

4 See new section 7H.

5 Note the Explanatory memorandum:- 'Clause 5 inserts section 17(3) into the *Children, Youth and Families* Act 2005 so that the Secretary may delegate her power to authorise an Aboriginal agency to undertake the powers or functions of the Secretary specified in section 18. The power may be delegated via instrument to an executive within the meaning of the *Public Administration Act* 2004.' Note section 4 of the *Public Administration Act* 2004, 'executive' means a person employed under Part 3 as a public service body Head or other executive.

6 Note the Explanatory memorandum:- 'Clause 9 amends section 181 of the *Children, Youth and Families Act* 2005 to provide that a principal officer of an Aboriginal agency authorised under section 18 is a protective intervener to the extent the principal officer is performing functions and exercising powers under the authorisation in relation to the child. This is a new category of protective intervenor.'

7 Note the Explanatory memorandum:- 'Currently, the Suitability Panel has a role in hearing and determining matters under Part 3.4 of the *Children, Youth and Families Act* 2005 in relation to out of home carers. Section 352 of the *Social Services Regulation Act* 2021 repeals Part 3.4 of the *Children, Youth and Families Act* 2005, because that Part will no longer be required as Part 5 of the *Social Services Regulation Act* 2021 establishes a worker and carer exclusion scheme including out of home carers.'

Part 4 – Amendment of *Child Wellbeing and Safety Act* 2005 – Part 5 – Amendment of *Child Wellbeing and Safety (Child Safe Standards Compliance and Enforcement) Amendment Act* 2021 – Part 6 – Amendments relating to judicial registrars – Part 7 – Amendment of the *Commission for Children and Young People Act* 2012 – Part 8 – Consequential amendments relating to the *Social Services Regulation Act* 2021 – Part 9 – Part 10 – Part 11

Part 4 amends the *Child Wellbeing and Safety Act* 2005. It inserts new Part 5B to strengthen the powers of the Commission to monitor and enforce compliance with the requirement to notify the Commission about allegations of reportable[8] conduct. **[30]** It amends the definition of employee to ensure that the reportable conduct scheme applies to a broader range of people who are 18 years or older.[9] **[19,20]** It amends section 16G to insert additional functions of the Commission in relation to new section 16M. This includes monitoring, enforcing and investigation in relation to the head of an entity with respect to new section 16M. **[25]**

Authorised officers may be appointed for the purposes of Part 5B. New Division 2 sets out powers of entry and inspection. It authorises a reportable conduct authorised officer to enter and inspect any location where an entity that is required to comply with Part 5A of the *Child Wellbeing and Safety Act* 2005 may be undertaking activities that relate to children. (See PCA). New section 16ZZR makes provision for a complaints process. Note the Statement of Compatibility:

> New section 16ZZ sets out a complaints process enabling a person to complain about the exercise of a power by an authorised officer under that Division or under a warrant issued under new section 16ZV to the Commission. The Commission must investigate the complaint and provide a written report to the complainant and the authorised officer.

The Commission may give the head of an entity a reportable conduct notice to comply if it reasonably believes the entity is not complying with section 16M(1)(a) or (b). The Commission may review a decision to give a notice to produce. A head of an entity may apply to VCAT for review of a decision by the Commission to give the head of an entity a reportable conduct notice to comply. (See new section 16ZZQ). The Commission may apply to the Magistrates' Court for the payment of a civil penalty[10] for failure to comply with a notice to produce or the reportable conduct notice to comply. Infringement notices may be issued. (See new section 16ZZM).

Part 5 deals with procedural matters to clarify that police officers in addition to sector regulators may bring a proceeding for an offence against Part 6 of the *Child Wellbeing and Safety Act* 2005. Part 6 amends the *Children, Youth and Families Act* 2005 and the *Magistrate's Court Act* 1989. The amendments provide for judicial registrars in the Children's Court of Victoria and the Magistrates' Court of Victoria to exercise all the powers of the registrars in those courts. This includes the issue of search warrants for the purpose of having a child placed in emergency care. **[33-37]** Part 7 inserts new functions for the Commission. The new functions relate to assisting and advocating for children and young persons conferred by new Part 4A. The Commission may liaise with the Victorian Ombudsman or the Office of Public Advocate where it becomes aware a protected child or young person has sought assistance from that entity. **[38,39]** Part 8 makes consequential amendments to various Acts relating to the *Social Service Regulation Act* 2021 and the new role of the Regulator[11] under that Act. **[40]** It inserts new Part 1A a Statement of Recognition and Statement of Recognition Principles into the *Health*

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8 'Reportable conduct' is defined in section 3 of the *Child Wellbeing and Safety Act* 2005.

9 Note the Explanatory memorandum:- 'The expanded definition of employee in section 3(1) of the *Child Wellbeing and Safety Act* 2005 is intended to capture workers who are "indirectly engaged" by an entity via third parties, such as labour hire workers, secondees and volunteer workers.' It also includes 'volunteer worker'. [20]

10 The maximum amount for the civil penalty is $9000.

11 *Social Service Regulation Act* 2021, s. 3 Definitions: *Regulator* means the Social Services Regulator established under section 4.

Services Act 1988 and the *Public Health and Wellbeing Act* 2008. **[60,61]** Part 11 makes statute law revision amendments and corrects references to various Acts. **[62]**

Comments under the PCA

Rights and freedoms – Powers after entry without consent or warrant – (Section 17(a)(i), PCA)

Clause 30 inserts new Part 5B into the *Child Wellbeing and Safety Act* 2005 which sets out the powers and functions for the purposes of the enforcement and monitoring of compliance with section 16M. Section 16M sets out the obligation for the head of an entity to notify the Commission about reportable allegations. New Division 2 sets out powers of entry and inspection. It authorises a reportable conduct authorised officer to enter and inspect any location where an entity that is required to comply with Part 5A of the *Child Wellbeing and Safety Act* 2005 may be undertaking activities that relate to children.

New Part 5B comprises new sections 16ZO to 16ZZR. New section 16ZR provides that a reportable conduct authorised officer may enter and inspect any premises or place if the officer reasonably believes it is a premises or place from or in which an entity (a) operates or (b) exercises care, supervision or authority over children or (c) provides for support for activities referred to in (a) and (b). Pursuant to 16ZR(2) entry may be by consent or in accordance with a warrant.

Section 16ZR(2)(c) also provides that an authorised officer may enter in the case of any premises or place other than residential premises, if the officer reasonably believes that the head of the entity is not complying or has not complied with section 16M(1). New section 16ZR(3) provides that when exercising a power of entry under subsection (2)(a) a reportable conduct authorised officer must not enter any part of a premises or place in which the entity provides accommodation or residential services unless (a) the resident of that part of the premises or place consents to the entry or (b) if the resident is unable to consent, the resident's parent or guardian consents to the entry.

New section 16ZZ sets out the powers after entry without consent or warrant. The authorised officer may do any of the matters set out in subsections (2)(a) to (j).[12] New section 16ZZC sets out the protection against self-incrimination. In relation to the exercise of powers note the Statement of Compatibility:-

> New section 16ZR provides that an authorised officer may enter and inspect any premises or place if they reasonably believe it is a premises or place from, or in which, an entity: (a) operates; or (b) exercises care, supervision or authority over children; or (c) provides support for an activity referred to in paragraph (a) or (b). Authorised officers may enter such premises: …

[12] See new subsection 16ZZ Powers after entry without consent or warrant
(2) The reportable conduct authorised officer may do any of the following—
(a) search any part of the premises or place;
(b) inspect and examine any document or thing at the premises or place;
(c) make enquiries with any person at the premises or place;
(d) observe any activity being conducted at the premises or place;
(e) take photographs, or make any type of recording or sketches, of any document, thing or activity at the premises or place;
(f) copy or take an extract from any document at the premises or place;
(g) take into or onto the premises or place any person, equipment or materials;
(h) use and operate any equipment and materials, including but not limited to any disk, tape or storage device, at the premises or place;
(i) secure any electronic equipment that the officer reasonably believes stores or contains information that may be lost, destroyed or tampered with if the equipment is not secured;
(j) with the consent of the owner of the document or thing, seize any document or any other thing at the premises or place that the authorised officer reasonably believes is evidence relevant to whether the head of an entity is not complying, or has not complied, with section 16M(1).

- for premises that are not residential premises, without a warrant and without consent if the authorised officer reasonably believes that the head of the entity is not complying, or has not complied with the notification requirement in section 16M(1) of the CWS Act…

Where the entry does not rely on consent, authorised officers have stronger powers, and may require a person to produce documents, disclose certain information, operate equipment, provide assistance or comply with lawful directions. Under new sections 16ZY and 16ZZB, it is an offence for a person to fail to provide assistance to an authorised officer without reasonable excuse, respectively in relation to entry to premises with a warrant, and entry to premises without consent or a warrant.

The powers enable significant interference with privacy, including information privacy and privacy of the home, as authorised officers may inspect both workplaces and, in limited circumstances, residences and accommodation. However, a number of safeguards apply to the exercise of such powers to ensure they are not exercised arbitrarily or unlawfully. In particular, authorised officers who enter a premises:

- must produce their identity card and inform the occupier of the purpose of the entry and their right to refuse to consent to entry or to the exercise of various powers, where the authorised officer is entering the premises by consent (new s 16ZS);
- must only enter a part of a premises in which there is accommodation or in which residential services are provided if the resident of that part of the premises consents, or if the resident is unable to consent, the resident's parent or guardian has provided consent, unless they are entering the premises under a warrant (new s 16ZR(3));
- must provide notice to a resident, parent or guardian of the purpose of entry and of the rights and the powers that the authorised officers may exercise, amongst other things, before authorised officers can enter a residential part of a premises (new s 16ZR(4));
- must only exercise powers of entry during normal business hours of the premises or during the entity's usual hours of operation (unless otherwise provided for under a warrant, or by consent) (new s 16ZR(8));
- must leave a premises or place if consent is withdrawn (unless the entry is by warrant or does not require consent) (new s 16ZR(9));
- may only exercise powers (other than under a warrant) if they reasonably believe it is necessary to do so to investigate whether a relevant entity is not complying or has not complied with section 16M(1) of the CWS Act (new ss 16ZT(3) and 16ZZ(6));
- must not secure electronic equipment for more than 24 hours (other than with consent or under a warrant, or with an extension granted by a magistrate) (new ss 16ZX and 16ZZ);
- when consent is required to exercise a power, must explain certain matters including the person's right to refuse to consent, and seek a signed acknowledgment of consent (new ss 16ZU and 16ZZA); and
- when exercising powers of entry under a warrant, must generally announce that they are authorised by warrant, give a person at the place or premises the opportunity to allow entry, and provide a copy of the warrant to the occupier (if present) (new s 16ZW).

Further, new section 16ZZR sets out a complaints process enabling a person to complain about the exercise of a power by an authorised officer under that Division or under a warrant issued under new section 16ZV to the Commission. The Commission must investigate the complaint and provide a written report to the complainant and the authorised officer, after giving the authorised officer the opportunity to comment on the proposed report…

The powers are appropriately tailored to reflect the source of the authority to enter premises and exercise associated powers, with the most significant powers requiring the issue of a warrant by a magistrate. Unless a person consents to entry of a residential premises or accommodation, or unless a warrant is issued, authorised officers are restricted to entry of commercial or public premises and places, at which there is generally a lesser expectation of privacy. Further, where a person considers that powers have been exercised inappropriately, the legislation sets out a complaints process.

The Committee notes the above comments. The Committee notes the purpose of the amendments is to investigate and protect children in premises where an entity required to comply with Part 5A of the *Child Wellbeing and Safety Act* 2005 may be undertaking activities that relate to children. The Committee is of the view the provisions are justified.

Charter Issues

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

Environment Legislation Amendment (Circular Economy and Other Matters) Bill 2022

Member	Hon Lily D'Ambrosio MP	**Introduction Date**	7 June 2022
Portfolio	Energy, Environment and Climate Change	**Second Reading Date**	8 June 2022

Summary

The Bill makes amendments to the various Environmental Acts to generally enhance the effectiveness of the circular economy[13], environment and environmental sustainability.[14] The Bill:-

- Introduces a single Victorian Recycling Infrastructure Plan (VRIP);
- Establishes a new waste to energy scheme and a framework for a cap on thermal waste to energy facilities' capacity in Victoria;
- Provides for market oversight to enhance transparency and accountability including the introduction of a Risk, Consequence and Contingency Planning framework; (Note: A responsible Entity Risk, Consequence and Contingency Plan (RERCC Plan) is a plan prepared by a responsible entity under new section 74F in the *Circular Economy (Waste Reduction and Recycling) Act* 2021.)
- Makes further provision for matters relating to compliance and enforcement through Monetary Benefits Orders;
- Enables Sustainability Victoria to share information for purposes relating to environmental and sustainability, environment protection and the circular economy;
- Amends the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act) to vary the operation of that Act in relation to the review of decisions relating to the waste to energy scheme.

Part 2 – Amendment of *Circular Economy (Waste Reduction and Recycling) Act* 2021

It confers additional functions on the Head, Recycling Victoria (Head) including the preparation of the VRIP, the preparation of the CERCC Plan and the monitoring of compliance by responsible entities. Additional material must be included in annual reports. **[5,6]** It inserts new Division 3A of Part 2 for the Head to prepare and submit to the Minister for approval a market strategy to foster sustainable markets for recycled materials and resources recovered from waste**.** If approved by the Minister it must be published on a website maintained by the Department. **[7]** It inserts new Part 2A which provides for a VRIP, a new recycling infrastructure planning regime including consultation with specified authorities and long-term strategic planning. The notice of approval of the VRIP by the Minister must be published in the Government Gazette. The VRIP must be published on an approved website maintained by the Department. The Head must conduct a review of an approved VRIP if

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13 Note 'circular economy market' as inserted by clause [4] means the market for waste, recycling or resource recovery services within the circular economy.

14 Note the Second Reading Speech:- 'On 2 December 2021, the Circular Economy (Waste Reduction and Recycling) Bill 2021 was passed by Parliament giving effect to important components of Recycling Victoria: A new economy, the Victorian Government's policy and action plan, delivered in February 2020, to transition Victoria to a circular economy and reform our waste and recycling system over the next decade… The *Circular Economy (Waste Reduction and Recycling) Act* 2021 established the foundational powers and functions of the Head, Recycling Victoria, a dedicated business unit within the Department of Environment, Land, Water and Planning. Recycling Victoria will commence its operations from 1 July 2022 and includes staff transitioning from the former Waste and Resource Recovery Groups, and from a part of Sustainability Victoria... This Bill comprises the next significant tranche of these previously foreshadowed further legislative changes, which build on and complement the already legislated functions and powers of the Head, Recycling Victoria.'

directed by the Minister, if the Head considered it necessary and in any event every 3 years. (See new section 37X). Annual VRIP progress reports must be prepared and published. **[8]** The Head may disclose information to Sustainability Victoria to enable Sustainability Victoria to perform its functions.[15] **[9,10]**

It inserts new Division 4 of Part 5 which provides for risk, consequence and contingency plans. The Head must prepare an annual CERCC Plan to the Minister for approval. If approved the Minister must ensure the CERCC Plan is published on a website maintained by the Department. A responsible entity must not without reasonable excuse fail to comply with a requirement of the CERCC Plan and must submit them to the Head each year.[16] A statement of assurance must also be submitted to the Head. The Minister may direct the Head to prepare a written report on RERCC Plans. The Head may issue guidelines in respect of risk, consequence and contingency planning. **[13]**

It inserts new Part 5A which provides for a waste to energy scheme[17] in Victoria. **[14**] A person must not operate a thermal waste to energy facility except as authorised by a licence. (See new section 74O).[18] The Head may invite expressions of interest to apply for a cap licence from specified persons and has the power to issue, revoke, suspend and transfer waste to energy licences. VCAT may review decisions.[19] **[20]**[20] **[14]** Note the Second Reading Speech:-

> The Bill outlines a scheme which will cap the amount of "permitted" waste able to be processed by thermal waste to energy facilities. The cap amount will be prescribed by regulations following passage of the Bill and will be 1 million tonnes per year, in line with previous commitments. The Head, Recycling Victoria will have power to issue, revoke, suspend and transfer waste to energy licences under the scheme. Use of recyclable materials in waste to energy facilities will not be permitted, and penalties can be issued by the court for those that are found to be in contravention of the scheme.

It makes provision for monetary benefit orders which must be paid into the Consolidated Fund if a court is satisfied that a person has committed an offence against the Act or breached an enforceable undertaking. **[17]** The Minister may issue guidelines. **[21]** It prescribes additional subject matter about which regulations may be made. **[24]**

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15 Note the Statement of Compatibility:- 'Part 2 of the Bill includes amendments that expand the agencies to which an otherwise unauthorised disclosure of confidential information or commercially sensitive information is permitted under section 55 of the Circular Economy Act. The purpose of this expansion is to enable confidential or commercially sensitive information to be disclosed to specified oversight agencies to enable that agency to prevent, detect, investigate or prosecute an offence.' The agencies are the Victorian Inspectorate, Ombudsman, the Auditor-General or a prescribed person of body.' (See new section 55(2)(j)(vi)) [10]

16 See new section 74D in clause [13]. The penalty in the case of a natural person is 120 penalty units and in the case of a body corporate is 600 penalty units. It is a civil penalty provision.

17 Note the Explanatory memorandum:- 'Waste to energy involves a process that converts waste into useful energy resources such as heat, electricity, gas and liquid fuels. Thermal waste to energy technologies use heat to turn waste into these products.'

18 The penalty for failure to comply is 1000 penalty units in the case of a natural person and 5000 penalty units in the case of a body corporate. (See new section 74O and 74P) [14]

19 Note the Statement of Compatibility:- 'There is a right to apply to Victorian Civil and Administrative Tribunal (VCAT) for review in relation to … certain decisions, including decisions in the waste to energy scheme grant with conditions or to vary, suspended, cancel or disqualify a waste to energy licence. Decisions to refuse to grant cap licences will be reviewable, but VCAT will not have the power to issue a cap licence following that review if to do so would breach section 74T, which sets a cap on allocation across all licences. Similarly, conditions pertaining to cap allocation of waste to energy amounts under the licence are not reviewable decisions in order to ensure the integrity of the maximum cap amount specified by the regulations and contravene new section 74T. These provisions ensure that the waste to energy cap is not undermined.'

20 Reviewable decisions. See clause [20] which inserts items 5A to 5Q into the table in section 178(1) of the *Circular Economy (Waste Reduction and Recycling) Act* 2021.
Note the Explanatory memorandum:- 'The jurisdiction of VCAT in determining reviews of decisions related to waste to energy scheme is the jurisdiction provided for in section 51(2)(a) and (d) of the *Victorian Civil and Administrative Tribunal Act* 1998, namely that VCAT may affirm the decision of the Head, Recycling Victoria or set the decision aside and remit the matter for reconsideration by the Head, Recycling Victoria. New item 11 also provides for VCAT review for section 171(1)(c) (things seized by authorised officers are forfeiture in certain circumstances).'

Part 3 – Amendment of *Environment Protection Act* 2017 – Part 4 – Amendment of other Acts

Part 3 amends the *Environment Protection Act* 2017 to clarify provisions to ensure that the Environment Protection Authority and local government can undertake their regulatory functions. It also facilitates the transition from the *Environment Protection Act* 1970, repealed on 1 July 2021 to the *Environment Protection Act* 2017. The waste and resource recovery infrastructure and planning framework set out in the *Environment Protection Act* 2017 is repealed. It is provided for by new Part 2A. **[8]** It clarifies that the *Environment Protection Act* 2017 contains a head of power enabling the *Environment Protection Regulations* 2021 to prescribe unreasonable noise and noise prescribed not to be unreasonable. **[26]**

It sets out the persons a council may appoint a residential noise enforcement officer. **[49]** It makes further provision for the appointment of authorised officers under the *Environment Protection Act* 2017.[21] **[52]** It inserts additional regulations which may be made by the Governor in Council. **[66]** It makes provision for incorporation of documents of standards, methods, specifications etc made under regulations and under section 48 of the Act. **[67]** It contains transitional provisions. **[70]** Part 4 amends other Acts to enable information sharing between Sustainability Victoria, the Head, the Environment Protection Authority to foster broader information sharing that relates to environment sustainability, environment protection and the circular economy. **[76-80]** It enables motor vehicle noise testers to retain fees related to their services rather than the fees being paid into consolidated revenue. **[26,62]** It inserts new Part 3A into the VCAT Act which provides VCAT with the power to review decisions related to the waste to energy scheme under new Part 5A.[22] **[20,80]**

Comments under the PCA

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

Charter Issues

Discrimination – Spent convictions – Fit and proper person to operate a thermal waste to energy facility

Summary: *The effect of clause 14 may be that the Head, Recycling Victoria may receive a person's spent convictions from a law enforcement agency. The Committee will write to the Minister seeking further information.*

Relevant provisions

The Committee notes that clause 14, inserting new sub-sections 74T(4), 74Y(5) and 74ZI(5) into the *Circular Economy (Waste Reduction and Recycling) Act* 2021, provides that the Head, Recycling Victoria

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21 Note the Explanatory memorandum:- 'Subclause (2) inserts new subsections (2A) and (2B) after section 242(2) of the *Environment Protection Act* 2017 to clarify that a council with a delegated power or function may also appoint a specified person or each member of a specified class of persons as an authorised officer, and that a written report must be prepared and given to the Authority upon request by a public sector body or council who has appointed an authorised officer. Subclause (3) consequentially amends section 242(3) of the *Environment Protection Act* 2017 to also refer to new subsection (2A).'

22 Note the Explanatory memorandum:- 'VCAT's powers, when reviewing decisions related to the waste to energy scheme under new Part 5A of the *Circular Economy (Waste Reduction and Recycling) Act* 2021, do not include those set out in section 51(2)(b) and (c) of the *Victorian Civil and Administrative Tribunal Act* 1998. VCAT may still affirm the decision of the Head, Recycling Victoria or set the decision aside and remit the matter for reconsideration by the Head, Recycling Victoria under section 51(2)(a) or (d) of the 1998 Act.'
Note section 51(2(b) and (c) of the VCAT Act provide that VCAT may by order '(b) vary the decision under review' and '(c) set aside the decision under review and make another decision in substitution for it.'

must not issue a cap licence or an existing operator licence, or transfer a waste to energy licence, to a person to operate a thermal waste to energy facility unless satisfied that the person is a fit and proper person. New section 74ZJ provides:

> When determining, for the purposes of this Part, whether a person is a fit and proper person to operate a thermal waste to energy facility, the Head, Recycling Victoria may have regard to any relevant matter including, but not limited to—
>
> (a) whether the person has been convicted or found guilty of an offence against this Act or the regulations; or
>
> (b) whether the person has been convicted or found guilty of an offence against the Corporations Act; or
>
> (c) whether the person has, within the preceding 10 years, been convicted or found guilty of—
>
> (i) an indictable offence; or
>
> (ii) an offence that, if committed in Victoria, would constitute an indictable offence; or
>
> (iii) an offence involving fraud or dishonesty; or
>
> (iv) an offence that, if committed in Victoria, would constitute an offence referred to in subparagraph (i) or (iii); or
>
> (v) an offence against a law of another State or a Territory that regulates the supply of energy…

The Committee also notes that existing s. 21(1) of the *Spent Convictions Act* 2021 provides:

> A law enforcement agency or a court or tribunal may disclose a spent conviction as part of the disclosure of the criminal record of a person, or information contained in the criminal record of a person—
>
> (a) to another law enforcement agency…—
>
> (i) for the purposes of performing a function or exercising a power under any Act; or
>
> (ii) for the purposes of enabling the other law enforcement agency… to perform a function or exercise a power under any Act; or
>
> (b) for the purposes of performing a law enforcement function.

A 'law enforcement agency' includes 'an agency responsible for the performance of functions or activities directed to any law enforcement function'. A 'law enforcement function' includes 'the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction for a breach'. The functions of the Head, Recycling Victoria include 'to support, monitor and enforce compliance with requirements under' the *Circular Economy (Waste Reduction and Recycling) Act* 2021.[23] Head, Recycling Victoria may issue notices, apply to a court for a civil penalty order, and appoint authorised officers to prosecute people in relation to some contraventions of the Act.[24]

The Committee observes that the effect of clause 14 may be that the Head, Recycling Victoria may receive a person's spent convictions from a law enforcement agency (such as Victoria Police) and may take some of those convictions (including any convictions for an indictable, fraud or dishonesty offence in the past 10 years) into account in assessing whether or not to give a person a licence related to operating a thermal waste to energy facility.

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23 *Circular Economy (Waste Reduction and Recycling) Act 2021*, s. 16(j).

24 *Circular Economy (Waste Reduction and Recycling) Act 2021*, Part 7.

Charter analysis

The Statement of Compatibility remarks:

> For the Head, Recycling Victoria to satisfy themselves that relevant persons are 'fit and proper', the Head, Recycling Victoria may require the provision of personal information by applicants who are natural persons, such as criminal history, financial records and probity checks. To the extent that this may interfere with the privacy rights of such applicants, I consider it to be not arbitrary, in that there is a legitimate and important purpose in ensuring that only fit and proper persons hold these licences. The effectiveness of the thermal waste to energy scheme will depend upon the proper performance of roles as a licence holder, and there is a strong need to protect against the risk of any improper, negligent, or fraudulent conduct occurring. Additionally, as discussed above, an applicant has a reduced expectation of privacy in relation to this information, as they are voluntarily applying for a role in a regulated industry where it is a requirement that they demonstrate that they are a fit and proper person to assume that position of responsibility.

The Committee notes that the Statement does not address the compatibility of clause 14 with the Charter's rights against discrimination on the basis of a spent conviction.[25]

Relevant comparisons

In relation to similar Australian schemes imposing fitness requirements on licensing in relation to waste activities, the Committee notes that:

- similar federal and Queensland laws expressly preserve the application of spent conviction laws to assessments of the fitness of persons to hold licences with respect to waste or recycling.[26]
- similar ACT, NSW and Tasmanian laws are generally subject to those jurisdictions' spent conviction laws.[27]

Conclusion

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

- **whether or not the Head, Recycling Victoria may obtain a person's spent convictions from a law enforcement agency (e.g. Victoria Police) and take a spent conviction into account when determining whether or not a person is a fit and proper person to operate a thermal waste to energy facility; and**
- **if so, the compatibility of clause 14 with the Charter's rights against discrimination on the basis of a spent conviction.**

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25 Charter s. 8. See Charter s. 3(1) ('discrimination') and *Equal Opportunity Act 2010*, s. 6(pb).

26 *Recycling and Waste Reduction Act 2020* (Cth), s. 175(4); *Waste Reduction and Recycling Act 2011* (Qld), s. & Schedule ('criminal history') (see *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s. 5.)

27 *Waste Management and Resource Recovery Act 2016* (ACT), s. 22(3)(b) (see *Spent Convictions Act 2000* (ACT), s. 16(c)(i)); *Protection of the Environment Operations Act 1997* (NSW), ss. 45(f), 48 (see Schedule 1, clause 18) & 83 (see *Criminal Records Act 1991* (NSW), s. 12(c).); *Environment Management and Pollution Control Act 1994* (Tas), s. 42L(2) (see *Annulled Convictions Act 2003* (Tas), s. 9(d)(i)).

Independent Broad-based Anti-corruption Commission Amendment (Facilitating Timely Reporting) Bill 2022

Member	Hon David Davis MP	**Introduction Date**	7 June 2022
Private Member's Bill		**Second Reading Date**	8 June 2022

Summary

The Bill amends the *Independent Broad-based Anti-corruption Commission Act* 2011 (IBAC Act) to facilitate timely reporting by the Independent Broad-based Anti-corruption Commission (IBAC).

Amendments to the IBAC Act

Clause 4 amends various provisions and declares Parliament's intention that applications under sections 59M, 100 and 147 be determined with as much speed as the requirements of the Act and proper consideration of the application permit. **[4]** (See PCA)

Clause **[5]** amends section 162. Section 162 provides for the tabling of special reports in the Parliament. Section 162(1) provides that the IBAC may at any time cause a report to be transmitted to each House of the Parliament on any matter relating to the performance of its duties and functions. Existing subsections (2) and (3) provide that if the IBAC intends to include in a report under that section adverse findings[28] or comments[29] about a public body, the IBAC must give the relevant principal officer of that public body an opportunity to respond to the adverse finding and a person reasonable opportunity to respond to the adverse material. Existing subsections (5) to (8) set out the matters which must not be included in a report transmitted and tabled under section 162.

Clause **[5]** substitutes subclauses (2) and (3) into section 162. Amended subclause (2) specifies three months or a later time agreed with the IBAC for the principal officer to respond to the adverse material. Amended subclause (3) specifies three months or a later time agreed with the IBAC for a person to respond to adverse material. New subclauses (2)(c) and 3(c) of section 162 provide that if the principal officer and the person do not respond the IBAC may transmit it report to the Parliament. **[5]**

Clause **[6]** inserts new section 162AA. It provides that a special report may be transmitted to each House of Parliament despite any proceedings that are pending in court in relation to the subject matter of the report or any other thing or matter that may be relevant to the report. **[6]** (See PCA) It makes provision for transitional arrangements. **[7]**

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28 See *Independent Broad-based Anti-corruption Commission Act* 2011, s. 162(2):

(2) If the IBAC intends to include in a report under this section adverse findings about a public body, the IBAC must give the relevant principal officer of that public body an opportunity to respond to the adverse material and fairly set out each element of the response in its report.

29 Ibid., s. 162(3):

(3) If the IBAC intends to include in a report under this section a comment or an opinion which is adverse to any person, the IBAC must first provide the person a reasonable opportunity to respond to the adverse material and fairly set out each element of the response in its report.

Comments under the PCA

If a bill does not repeal, alter or vary section 85 of the Constitution Act 1975, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue (Section 17(b)(iii), PCA)

Section 59N of the IBAC Act provides for the determination of a claim of privilege made by application to the Supreme Court of Victoria under section 59M. Clause **[4]** inserts subclause (7) after section 59N(6) which states:-

> It is the intention of the Parliament that an application under section 59M be determined with as much speed as the requirements of this Act and the proper consideration of the application permit.

Section 101 provides for the determination of a claim of privilege made by application to the Supreme Court of Victoria under section 100. Clause **[4]** inserts subclause (7) after section 101(6) which states:-

> It is the intention of the Parliament that an application under section 100 be determined with as much speed as the requirements of this Act and the proper consideration of the application permit.

Section 148 provides for the determination of a claim to determine privilege or application of secrecy made by application to the Supreme Court of Victoria under section 147. Clause **[4]** inserts subclause (9) after section 148(8) which states:-

> It is the intention of the Parliament that an application under section 147 be determined with as much speed as the requirement of this Act and the proper consideration of the application permit.

The amendments made by clause **[4]** may declare Parliament's intention that applications made to the Supreme Court of Victoria pursuant to sections 59M, 100 and 147 be determined 'with as much speed as the requirements of this Act and the proper consideration of the application permit'. Note the Second Reading Speech:-

> The Supreme Court must be free to make its decisions unimpeded but should be aware of Parliament's intention that applications be determined with as much speed as is relevant within the requirement of this Act.

The Committee notes that the Bill does not repeal, alter or vary section 85 of the *Constitution Act* 1975. The Committee also notes that a section 85 statement has not been made.

The Committee notes that Section 85(1) of the *Constitution Act* 1975 provides that the Supreme Court of the Victoria shall be the superior Court of Victoria with unlimited jurisdiction.[30] **The Committee makes the general observation that the Supreme Court of Victoria may take an unspecified length of time required to determine any applications made to it pursuant to sections 59M, 100 and 147 of the IBAC Act.**

Rights and freedoms – Right to a fair hearing – Protections – Presumption of innocence (Section 17(a)(i), PCA)

Clause **[6]** inserts new section 162AA. New section 162AA provides that the IBAC may transmit a report to the Parliament under section 162 <u>despite any proceedings that are pending in a court</u> in relation to the subject matter of the report or any other matter or thing that may be relevant to the report.

Existing subsection (5) of section 162 provides:-

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[30] See *Constitution Act* 1975, s.85(1):

(1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

(5) If the IBAC is aware of a criminal investigation or any criminal proceedings or other legal proceedings in relation to a matter or person to be included in a report under this section, the IBAC must not include in the report any information which would prejudice the criminal investigation, criminal proceedings or other legal proceedings.

(6) The IBAC must not include in a report under this section a statement as to—

(a) a finding or an opinion that a specified person is guilty of or has committed, is committing or is about to commit, any criminal offence or disciplinary offence; or

(b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence.

(7) The IBAC must not include in a report under this section any information that would identify any person who is not the subject of any adverse comment or opinion unless the IBAC—

(a) is satisfied that it is necessary or desirable to do so in the public interest; and

(b) is satisfied that it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and

(c) states in the report that the person is not the subject of any adverse comment or opinion.

(8) The IBAC must not include in a report under this section any information that—

(a) discloses the identity of a person to whom, or in respect of whom, a direction has been given under—

(i) Division 1 of Part 9 of this Act;

(ii) Part 5 of the *Victoria Police Act* 2013; or

(b) is likely to lead to the identification of a person who has made an assessable disclosure.

(9) However, the IBAC may in a report under this section include information to which section 53(2)(a), (c) or (d) of the *Public Interest Disclosures Act* 2012 applies.

Existing subsection (5) of section 162 provides 'If the IBAC is aware of a criminal investigation or any criminal proceedings or other legal proceedings in relation to a matter or person to be included in a report under this section, the IBAC must not include in the report any information which would prejudice the criminal investigation, criminal proceedings or other legal proceedings.' Subsections (5) to (8) provide protections so that a fair hearing can be conducted for a specified person. The IBAC must not include information in a report which would prejudice the criminal investigation, criminal proceedings or other legal proceedings.[31]

New section 162AA provides that 'The IBAC may cause a report to be transmitted to each House of the Parliament under section 162 despite any proceedings that are pending in a court in relation to the subject matter of the report; or any other matter or thing that may be relevant to the report.'

The Committee will write to the member seeking clarification as to whether existing subsections (5) to (8) of section 162 apply to reports transmitted by the IBAC under new section 162AA. The Committee notes the Charter report.

[31] See subsections (5) to (8) of section 162.

Charter Issues

Privacy – Reputation – Rights of criminal defendants – Special reports – IBAC may cause transmission to Parliament despite pending court proceedings

Summary: *The effect of clause 6 may be that IBAC may cause a report to be published despite any pending court proceedings. The Committee will write to the member seeking further information.*

Relevant provisions

The Committee notes that clause 6 inserts a new section 162AA, which provides:

> The IBAC may cause a report to be transmitted to each House of the Parliament under section 162 despite any proceedings that are pending in a court in relation to—
>
> (a) the subject matter of the report; or
>
> (b) any other matter or thing that may be relevant to the report.

Existing s. 162 provides:

> (1) The IBAC may at any time cause a report to be transmitted to each House of the Parliament on any matter relating to the performance of its duties and functions.

Clause 5, substituting existing sub-ss. 162(2) & (3) provides that IBAC must give a public body or person adversely named in a report three months to respond, and must include any response in the report. Existing sub-s. 162(4) provides that IBAC must provide relevant material to any person named in the report. The remainder of existing s. 162 provides:

> (5) If the IBAC is aware of a criminal investigation or any criminal proceedings or other legal proceedings in relation to a matter or person to be included in a report under this section, the IBAC must not include in the report any information which would prejudice the criminal investigation, criminal proceedings or other legal proceedings.
>
> (6) The IBAC must not include in a report under this section a statement as to—
>
> (a) a finding or an opinion that a specified person is guilty of or has committed, is committing or is about to commit, any criminal offence or disciplinary offence; or
>
> (b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence.
>
> (7) The IBAC must not include in a report under this section any information that would identify any person who is not the subject of any adverse comment or opinion unless the IBAC—
>
> (a) is satisfied that it is necessary or desirable to do so in the public interest; and
>
> (b is satisfied that it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and
>
> (c) states in the report that the person is not the subject of any adverse comment or opinion.
>
> (8) The IBAC must not include in a report under this section any information that—
>
> (a) discloses the identity of a person to whom, or in respect of whom, a direction has been given under—
>
> (i) Division 1 of Part 9 of this Act;
>
> (ii) Part 5 of the *Victoria Police Act* 2013 ; or
>
> (b) is likely to lead to the identification of a person who has made an assessable disclosure.

The clerks must cause any received report to be laid before each House of the Parliament. The report is taken to be published by or under the authority of each House and is subject to absolute privilege.

The Committee observes that the effect of clause 6 may be that IBAC may cause a report to be published by or under the authority of each House of the Parliament, despite any pending court proceedings. The Committee notes that the pending proceedings may include claims of an alleged breach of sub-ss. 162(2)-(8) or proceeding referred to in sub-s. 162(5), and may permit IBAC to transmit a report to each House of the Parliament despite interlocutory court orders barring such a transmission pending the determination of such a proceeding.

Charter analysis

The Statement of Compatibility remarks:

> This Bill seeks to ensure the timely tabling of Independent Broad-based Anti-corruption Commission (IBAC) reports in Parliament and to expedite their tabling while preserving relevant protections of the rights of those upon whom IBAC may comment unfavourably.
>
> The Bill preserves the position of the Supreme Court of Victoria while informing the court of Parliament's view that applications be determined with as much speed as the requirements of the Act and proper consideration of an application permits.
>
> It strikes an appropriate balance in preserving the rights of those on whom adverse comments may be made by IBAC and the risk that legal machinery, shenanigans and roadblocks are used to stymy the release of a critical IBAC report in a timely way thereby allowing corruption to thrive and wrongdoers to escape just exposure by IBAC.

The Committee notes that, while the Statement addresses the modifications to existing s. 162 by clause 5, it does not expressly address clause 6.

The Committee observes that the statement of compatibility for the clause that became existing s. 162 remarked:[32]

> There are restrictions on who can be identified in a report. IBAC must not identify a person in a report who is not the subject of an adverse comment or opinion, unless it is necessary or desirable in the public interest to do so, IBAC is satisfied that there will not be unreasonable damage to the persons' reputation, safety or wellbeing and IBAC makes clear that the person is not subject to any adverse comment or opinion. This is the case for both special reports and annual reports. These matters appropriately balance the rights to privacy and reputation protected by the charter…
>
> IBAC is similarly precluded from including in a report a recommendation or opinion that a specified person should be prosecuted for an offence or disciplinary offence. This is a crucial restraint placed on IBAC, which not only counters the limitation of the right to freedom from reputational attack, but also supports the right to a fair hearing (in that it ensures that a prosecution is not prejudiced) and the presumption of innocence.

Relevant comparison

The Committee notes that there are no equivalent provisions to proposed new 162AA in similar legislation in Australia.[33]

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32 Statement of Compatibility of the Independent Broad-based Anti-corruption Commission (Investigative Functions) Bill 2011, Parliament of Victoria, 8th December 2011, discussing the then proposed new section 86.

33 See *Integrity Commission Act 2018* (ACT), Parts 3.9 & 4.2; *Independent Commission Against Corruption Act 1988* (NSW), ss. 74B & 74BA; *Independent Commissioner Against Corruption Act 2017* (NT), Part 3, Division 7; *Crime and Corruption Act 2001* (Qld), Part 6; *Independent Commission Against Corruption Act 2012* (SA), s. 42; *Integrity Commission Act 2009* (Tas), s. 11; *Corruption, Crime and Misconduct Act 2003* (WA), Part 5.

Conclusion

The Committee will write to the member seeking further information as to the compatibility of clause 6 with the Charter, including the Charter's rights to privacy and reputation, and criminal defendants' rights to a fair hearing and the presumption of innocence.

Local Government Legislation Amendment (Rating and Other Matters) Bill 2022

Member	Hon Shaun Leane MP	**Introduction Date**	7 June 2022
Portfolio	Local Government	**Second Reading Date**	8 June 2022

Summary

The Bill:-

- Amends the *Local Government Act* 1989 to implement reforms to the local government rating system, including arrangements for ratepayers facing financial hardship;
- Amends the *Local Government Act* 2020 to update confidentiality and councillor conduct provisions;
- Amends the *Essential Services Commission Act* 2001, the *Accident Compensation Act* 1985 and the *Workplace Injury Rehabilitation and Compensation Act* 2013 to ensure consistency of exclusions from compensation for misconduct and serious misconduct processes;
- Amends the *Domestic Animals Act* 1994 to permit regulations to be made reuniting lost pets with their owners.

Part 2 – Amendment of *Local Government Act* 1989 – Part 3 – Amendment of *Local Government Act* 2020 – Part 4 – Amendment of *Essential Services Commission Act* 2001

Clause **[2]** is the commencement provision. (See PCA). Clause **[3]** amends the *Local Government Act* 1989 so that Councils will be able to declare service rates or annual service rates for 'waste, recycling or resource recovery services.' **[3]** Councils cannot charge annual services for the provision of water supply or sewage services which are no longer provided by them. **[5]** It expands the circumstances in which Councils may grant a rebate or concession. This includes where the land is being used for a public benefit and if the land is being used for the direct provision of goods or services available to the public or a substantial portion of the public, free of charge or for a nominal charge. **[7]**

It makes further provision for payment plans for unpaid rates. **[9-11]** It sets out circumstances in which a Council is prevented from commencing a proceeding for the recovery of an unpaid rate or charge. **[13,14]** The Minister may make guidelines relating to the payment of rates and charges in relation to the meaning of hardship, the content of hardship policies, the circumstances in which a council may apply the hardships policies, the process for applying for a payment plan and the waiver of interest. The Minister must consult with the Minister administering the *Essential Services Commission Act* 2001 and the Essential Services Commission. The guidelines must be published in the Government Gazette and on the Department's internet site. A Council must comply with guidelines issued under that section. **[15]** The Minister will fix the maximum interest rate on unpaid rates or charges. The Minister must consult with the Minister administering the *Essential Services Commission Act* 2001. This replaces the current requirement for interest to be calculated at the rate fixed under section 2 of the *Penalty Interest Rates Act* 1983. **[16,17]** Note the Second Reading Speech:-

> The Bill provides a new requirement for the Minister for Local Government to set the maximum rate of interest that may be levied by councils on unpaid rates and charges. This will ensure the maximum interest rate amount – which is currently 10 per cent – does not place those experiencing financial hardship under even more financial strain and is proportionate for unpaid local government rates and charges. The Essential Services Commission will be required to provide advice to the Minister in setting the maximum interest rate.

Part 3 amends the *Local Government Act* 2020 so that confidential information may be disclosed if it is information provided for the purposes of an application for an internal arbitration hearing or a Councillor Conduct Panel Hearing.[34] It clarifies that the rules of natural justice also apply to an internal arbitration hearing. **[19,23]** A Councillor Code of Conduct under section 139 automatically includes standards of conduct prescribed by the regulations. **[22]** The Principal Councillor Conduct Registrar has functions to provide general assistance to arbiters in relation to their functions and to publish any decision made by an arbiter and the statement of reasons for that decision. **[26]** It updates references and corrects typographical errors.[35] **[36,37]** Part 4 amends the *Essential Services Commission Act* 2001 to update references so they refer to the correct provisions of the *Local Government Act* 1989. **[42]** Clause **[40]** is a statute law revision amendment.

Part 5 – Amendment of *Accident Compensation Act* 1985 – Part 6 – Amendment of *Workplace Injury Rehabilitation and Compensation Act* 2013 – Part 7 – Amendment of *Domestic Animals Act* 1994

Clause 43 amends section 82(2A)(d) of the *Accident Compensation Act* 1985 to replace a reference to section 154 of the *Local Government Act* 2020 with a reference to section 81B of the *Local Government Act* 1989. **[43]** It amends the *Workplace Injury Rehabilitation and Compensation Act* 2013 to clarify its operation with respect to entitlement to compensation in respect of a mental injury to a worker caused wholly or predominantly by an application for internal arbitration relating to alleged misconduct of a Councillor.[36] [**44,45]** The Governor in Council may make regulations for reuniting seized or found dogs and cats with their owners and duties and obligations of Council contracted authorised officers in relation to deceased dogs and cats. **[47]**

Comments under the PCA

Commencement provision – Retrospective effect – (Section 17(a)(i), PCA)

Clause **[2]** is the commencement provision. Subsection (2) provides that sections 40 and 43 are taken to have come into operation on 24 October 2020.

Clause **[40]** is a statute law revision amendment so that savings and transitional provisions are preserved. Note the Explanatory memorandum:-

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34 Note the Statement of Compatibility:- 'Section 125 of the LG Act 2020 prohibits the intentional or reckless disclosure of 'confidential information' by a current or former Councillor, member of a delegated committee or member of Council staff, except in the circumstances set out in that section. Clause 19 amends section 125 to provide that documents containing certain categories of confidential information are not 'exempt documents' by virtue of section 38 of the *Freedom of Information Act* 1982 (FOI Act). The purpose of this amendment is to improve consistency with exemptions under the FOI Act, whilst upholding the principles of transparency and accountability that underpin both Acts. The amendment will not require that confidential information be disclosed, but will enable FOI applications to Councils to be processed and considered in a manner consistent with FOI Act exemptions. While there is a small possibility that this amendment may result in some disclosure of personal information, when balanced against the right to access certain government-held information in the FOI Act I am satisfied that any limitation of the right to privacy would be neither unlawful or arbitrary.'

35 Note the Explanatory memorandum:- 'Clause 36… The effect of this amendment will be to confirm that the same requirements in respect of notifying persons enrolled on the previous electoral roll apply to all Councils for the elections to be held on the fourth Saturday in October 2024. Clause 37 amends section 243 of the *Local Government Act* 2020 to clarify that it applies to the general elections for the Whittlesea City Council and Casey City Council to be held on the fourth Saturday in October 2024. The effect of this amendment is to confirm the entitlement of persons to be enrolled without application on the voters' roll.'

36 Note the Explanatory memorandum:- 'Clause 44 amends section 40(1)(d) of the *Workplace Injury Rehabilitation and Compensation Act* 2013 to provide that there is no entitlement to compensation in respect of a mental injury to a worker caused wholly or predominantly by an application for internal arbitration relating to alleged misconduct of a Councillor under section 143 of the *Local Government Act* 2020 or related proceedings. This amendment will ensure that section 40(1)(d) applies to applications for, and hearings regarding, alleged misconduct or serious misconduct by a Councillor.'

> Clause 40 is a statute law revision amendment to section 329(7), (8) and (9) of the *Local Government Act* 2020, which are savings and transitional provisions relating to the continued effect of some provisions of the *Local Government Act* 1989 despite their repeal. The provisions of the *Local Government Act* 1989 referred to in those subsections were repealed on 24 October 2020 on commencement of section 361 of the *Local Government Act* 2020. The amendment ensures that these subsections correctly refer to the commencement of section 361 (rather than section 362), as section 361 repealed the relevant provisions of the *Local Government Act* 1989. The amendments made by this clause are taken to have commenced on 24 October 2020 (see clause 2), so that the savings and transitional arrangements made by sections 329(7), (8) and (9) are appropriately preserved.

Clause **[43]** is a statute law revision amendment and corrects an erroneous reference. Note the Explanatory memorandum:-

> Clause 43 amends section 82(2A)(d) of the *Accident Compensation Act* 1985 to replace a reference to section 154 of the *Local Government Act* 2020 with a reference to section 81B of the *Local Government Act* 1989. Section 82(2A)(d) was amended by item 2 of Schedule 1 to the *Local Government Act* 2020 on 24 October 2020. However, that amendment to change the reference to the *Local Government Act* 2020 was erroneous as the *Accident Compensation Act* 1985 does not apply to an injury to a worker that occurs on or after 1 July 2014.
>
> The amendment made by this clause is taken to have commenced on 24 October 2020 (see clause 2) and provides that there is no entitlement to compensation in respect of a mental injury to a worker caused wholly or predominantly by an application under section 81B of the *Local Government Act* 1989 (as in force before its repeal) that alleges misconduct or serious misconduct by a Councillor.

The Committee notes the technical amendments made by retrospective operation of clauses [40] and [43] as provided for by clause [2]. The Committee is of the view the provisions are appropriate.

Charter Issues

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

Meat Industry Amendment (Rabbit Farms) Bill 2021

Member	Hon Andy Meddick MP	**Introduction Date**	9 September 2021
Private Member's Bill		**Second Reading Date**	8 June 2022

Summary

The Bill amends the *Meat Industry Act* 1993 in relation to rabbits, rabbit farming and other matters.

Amendments

It provides that rabbits are not consumable animals[37] under the Act. **[3]** Section 35 provides for a ban on sale or slaughter. It inserts subsection (2A) so that the Minister must not recommend to the Governor in Council an exemption in relation to meat from a rabbit not living in a wild state. **[4]** It inserts new section 55 to ensure any existing rabbit farms that hold a current or valid licence are not affected by the amendments. Licences however will not be able to be renewed and new licences will not be issued to rabbit farms. **[5]**

Comments under the PCA

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

Charter Issues

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

[37] See section 3(1) '*consumable animal* means (c) an animal from any of the following families, *if not living in a wild state*'.

Treaty Authority and Other Treaty Elements Bill 2022

Member	Hon Gabrielle Williams MP	**Introduction Date**	7 June 2022
Portfolio	Aboriginal Affairs	**Second Reading Date**	8 June 2022

Summary

The Bill:-

- Establishes the Treaty Authority (Authority) established under the Treaty Authority Agreement;
- Confers on the Authority legal powers as it if were a body corporate;
- Amends the *Advancing the Treaty Process with Aboriginal Victorians Act* 2018 in relation to the treaty negotiation framework and the administration of the self-determination fund. Note the Second Reading Speech:-

> In 2016, this government committed to advancing treaty with Victoria's First Peoples as a necessary step in realising Aboriginal self-determination. This commitment was formalised in law through this Parliament, with the passage of the *Advancing the Treaty Process with Aboriginal Victorians Act* 2018 – the first treaty legislation in Australia's history. That Act set out a roadmap for the treaty process and ensured we listened to and were led by Aboriginal people and communities. The Act committed the State to work in partnership with the Aboriginal Representative Body to establish elements necessary to support future treaty negotiations…
>
> This Bill will support the establishment and ongoing operation of the Treaty Authority, required by the Treaty Act as a necessary element of Victoria's treaty process to support future treaty negotiations. The Bill will also amend the *Advancing the Treaty Process with Aboriginal Victorians Act* 2018, in relation to the treaty negotiation framework and self-determination fund. This Bill continues the government's strong commitment to treaty, truth, justice and self-determination for Victoria's First Peoples…
>
> The State and Assembly have developed a unique Treaty Authority model as an independent unincorporated body, with the necessary powers and capacities to operate effectively. This novel legal form will provide independence from all parties to ensure public trust and integrity in the treaty process, while being publicly accountable to all Victorians and culturally accountable to First Peoples.
>
> The Treaty Authority will be the first body of its kind in Australia. The Treaty Authority is modelled on best practice examples internationally, including Canada and New Zealand. Learnings from these processes have demonstrated the need and value of an independent body, such as a Treaty Authority, to facilitate and oversee treaty negotiations. Treaty processes underway in other Australian jurisdictions have also identified the need for independent bodies with similar functions, to ensure accountability in negotiations.

Part 1 – Part 2 – The Treaty Authority

Part 1 sets out various definitions including the Treaty Authority Agreement.[38] It establishes the Authority so that it has the legal powers of a body corporate and may exercise its powers within and outside Victoria and outside Australia.[39] **[6,7,9]** It provides for the execution of documents. The Registrar of Titles must register any land dealings of the Authority in its own name as if it were a body corporate. **[11,12,13]** The Authority may delegate a power or function to a member or employee of,

[38] Treaty Authority Agreement means the agreement establishing the Treaty Authority entered into by the Aboriginal Representative Body and the State pursuant to section 27 of *Advancing the Treaty Process with Aboriginal Victorians Act* 2018. [3]

[39] The Authority has perpetual succession as if it were a body corporate; may sue and be sued; may acquire or hold (whether on trust or absolutely) and dispose of real and personal property in its name; has the legal capacity of an individual and may do and suffer all acts and things that a body corporate may by law do and suffer. [7] The Authority consists of the requisite number of members (including acting members) as specified under the Treaty Authority Agreement.

or consultant engaged by the Authority. **[15]** It provides for the appropriation of funds from the Consolidated Fund each financial year from 2022-2023 onwards to the Authority for the performance of its functions in the amounts set out in the Table. **[16]** The Authority is responsible for any liabilities incurred as a result of the performance of its functions. A member of the Authority is not personally liable for anything done or omitted to be done in good faith. **[17,18]** The Authority must comply with financial reporting obligations under the *Financial Management Act* 1994 and submit an annual report to the Minister who must table it in the Parliament. **[19,20]**

Part 3 – Amendment of *Advancing the Treaty Process with Aboriginal Victorians Act* 2018

It clarifies that the Aboriginal Representative Body under the *Advancing the Treaty Process with Aboriginal Victorians Act* 2018 may enter into treaty negotiations. It must meet minimum requirements under that Act. The Aboriginal Representative Body may administer the self-determination fund by appointing a company wholly owned by the Aboriginal Representative Body to hold the self-determination on trust. **[20,21]**

Comments under the PCA

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

Charter Issues

Treaty Authority – Whether a public authority – Whether relief or remedy available

Summary: *The effect of clause 8 may be that the Treaty Authority will have additional functions agreed to by the State and the First Peoples' Assembly of Victoria. The Committee will write to the Minister seeking further information.*

Relevant provisions

The Committee notes that clause 8 provides:

> Without limiting section 28 of the *Advancing the Treaty Process with Aboriginal Victorians Act* 2018, the Treaty Authority has any other function agreed to by the parties under the Treaty Authority Agreement before, on or after the commencement of this section.

The Treaty Authority is 'the entity established under the Treaty Authority Agreement'. The Treaty Authority Agreement is 'the agreement establishing the Treaty Authority entered into by the Aboriginal Representative Body and the State pursuant to section 27 of the *Advancing the Treaty Process with Aboriginal Victorians Act* 2018.' The 'Aboriginal Representative Body' is the First Peoples' Assembly of Victoria.

Existing clause 12.2 of the Treaty Authority Agreement states:

> Pursuant to section 28(2) of the Treaty Act, the Treaty Authority has such additional functions hereafter agreed by the Parties and recorded in the Framework consistent with the Treaty Act. The Parties will consult with the Treaty Authority before conferring additional functions on the Treaty Authority under the Framework.

The Framework is 'the treaty negotiation framework established by agreement by the Aboriginal Representative Body and the State pursuant to Part 5' of the Act.

The Committee observes that the effect of clause 8 may be that the Treaty Authority will have additional functions agreed to by the State and the First Peoples' Assembly of Victoria and recorded in the treaty negotiation framework.

Charter analysis

Charter s. 38(1) provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'. Charter s. 39(1) provides that 'If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.'

The Committee notes that Charter s. 4(1) provides that, for the purposes of the Charter, a public authority includes:

- 'an entity established by a statutory provision that has functions of a public nature'
- 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)'

The Committee observes that the Treaty Authority may not be 'established by a statutory provision' and may not exercise its functions 'on behalf of the State or a public authority'.

The Committee also notes that clause 12.3 of the Treaty Authority Agreement states:[40]

> In performing its functions and duties under this Agreement, the Framework and the Treaty Act, the Treaty Authority must not act incompatibly with human rights and must give proper consideration to relevant human rights when making decisions, as if it were a public authority within the meaning of section 4(1)(b) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

The Committee observes that a breach of clause 12.3 may not be 'a ground of unlawfulness arising because of' the Charter.

Relevant comparisons

The Committee notes that the Queensland government has accepted 'in-principle' the following recommendations of an 'Eminent Panel':[41]

- 'That principal carriage of the actions required to progress the Path to Treaty be the responsibility of a statutory entity established by an Act of the Queensland Parliament called the First Nations Treaty Institute'
- 'The proposed legislation will… enable the creation of a future Treaty Tribunal to oversee the treaty making process, monitor compliance, arbitrate and resolve disputes and review treaties over time'.

Queensland's human rights law provides, in similar terms to Charter ss. 38 and 39, for obligations and relief or remedies of breaches of obligations of 'an entity established under an Act when the entity is performing functions of a public nature'.[42]

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40 Clause 21 provides that the Treaty Authority must prepare an annual report that includes 'activities undertaken by the Treaty Authority in performance with its functions under the Framework and the Treaty Act, including acting compatibly with and taking into account human rights'.

41 Queensland Government, 'Queensland Government Treaty Statement of Commitment and response to recommendations of the Eminent Panel', August 2020 at <https://documents.parliament.qld.gov.au/TableOffice/TabledPapers/2020/5620T1358.pdf>, Recommendations 2.1 (see p. 5) & 6.36 (see p. 8.) Acceptance 'in-principle' means that '[t]he Queensland Government supports the intent or merit of the policy underlining the recommendation, but further policy consideration including assessment of resourcing is required.' (p. 5.)

42 *Human Rights Act 2019* (Qld), ss. 9(1)(f), 58 & 59.

Conclusion

The Committee will write to the Minister seeking further information as to whether or not the Treaty Authority is a public authority under the Charter; and whether or not any relief or remedy is available for a breach of clause 12.3 of the Treaty Authority Agreement.

Ministerial Correspondence

The Committee received responses on the Act and Bill listed below.

The responses are reproduced. Please refer to Appendix 3 for additional information.

Summary Offences Amendment (Nazi Symbol Prohibition) Bill 2022

Victims of Crime (Financial Assistance Scheme) Act 2022

Jaclyn Symes MP

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Mr Mark Gepp MP
Chairperson
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By email: helen.mason@parliament.vic.gov.au

Dear Mr Gepp

I refer to your letter of 24 May 2022, enclosing an extract from Alert Digest No. 7 of 2022 which contains issues raised by the Scrutiny of Acts and Regulations Committee (Committee) on the Summary Offences Amendment (Nazi Symbol Prohibition) Bill 2022 (Bill). As the Minister responsible for the Bill, I am pleased to provide the following information in response to the Committee's queries.

The burden of proof when an accused person seeks to rely on an exception to the offence

The Committee seeks further information about the meaning of the phrase 'the person establishes that' in subsection 41K(2) of the Bill.

My advice is that, on its proper construction, and having regard to the statutory text, context and extrinsic materials, subsection 41K(2) will not transfer the legal burden of proof.

The phrase 'the person establishes that' will place an evidential burden on the accused when they are seeking to rely on an exception to the offence. The accused will be required to adduce or point to evidence that the display of a Nazi symbol was for a prescribed purpose. Once the accused has pointed to evidence of an exception, the burden shifts back to the prosecution to prove the essential elements of the offence beyond reasonable doubt.

The use of the word 'establishes' is not sufficient, in all the circumstances, to impose a legal burden of proof on the accused. The provision must be read in the context of the Bill, the explanatory materials and consistently with the Charter and with other statutes, such as the *Criminal Procedure Act 2009.*

As the Committee observes, section 72 of the *Criminal Procedure Act 2009* imposes an evidential burden on an accused in relation to an 'exception, exemption, proviso, qualification or excuse' to a statutory offence heard summarily. This Bill creates a summary offence and its explanatory materials refer to appropriate public displays of a Nazi symbol exclusively as 'exceptions' to the offence. The

Bill does not displace section 72 and the ordinary application of the evidential burden to exceptions. In particular, the use of the word 'establish' is consistent with the imposition of an evidentiary but not a legal burden.

The extrinsic materials support this interpretation. The Bill's Statement of Compatibility confirms that the intention of section 41K(2) is to place an evidential burden on the accused in its discussions of the right to freedom of thought, conscience, religion and belief; the right to culture; and the right to be presumed innocent until proven guilty according to law.

This interpretation is also supported by the Charter. Section 32(1) of the Charter requires all statutory provisions to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. An interpretation of subsection 41K(2) of the Bill as shifting the legal burden of proof to the accused would be contrary to the right to be presumed innocent and would limit this right to a greater extent than an evidential burden would.

The Committee observes that exceptions to the offence in subsections 41K(3), (4) and (5) of the Bill are not preceded by the phrase 'the person establishes that'. The Bill is not intended to impose different burdens of proof on an accused person depending on which exceptions they seek to rely upon. The Bill and its explanatory materials do not distinguish between exceptions other than requiring a display which relies on an exception under subsection 41K(2) to have been 'engaged in reasonably' and 'in good faith', to ensure a person publicly displaying a Nazi symbol takes appropriate steps and care in considering any harm the display could cause.

The Committee also seeks further information about whether omitting the phrase 'the person establishes that' in subsection 41K(2) of the Bill would be a less restrictive alternative reasonably available to achieve the exception's purpose. Given the use of this phrase does not, when read in the statutory context as a whole, shift the legal burden of proof, it is not necessary to amend the Bill.

Police power to direct a person to remove a Nazi symbol from public display

The Committee seeks further information about the operation of new section 41L in three areas, each of which are addressed below.

First, the Committee has questioned whether the commission of an offence against section 41K of the Bill must be proved in any proceedings for an offence against section 41L.

The Bill does not require that an offence under section 41K is proven for a person to be guilty of an offence under section 41L, for refusing a police direction to remove a Nazi symbol from public display. It would highly impractical and risk rendering the power ineffective if police had to prove the offence before being able to exercise the power to require removal. For example, there will be instances where a Nazi symbol is being displayed (e.g. graffiti) but police do not know immediately who caused the display.

However, it is important to note that while the offence does not need to be proved in any proceedings for a contravention of s 41L, there are safeguards in the Bill to ensure the power to direct removal are used appropriately.
A police officer must reasonably believe a person is committing, or has committed, an offence under section 41K(1) in order to direct the removal of a Nazi symbol from display. An offence is not committed if an exception under subsections 41K(2) – (5) applies. As such, if a police officer had evidence to suggest that an exception applies, the officer would not be able to direct removal as they would not be able to form a reasonable belief that an offence is being, or has been, committed.

Further, a person is not liable for a penalty for contravening a direction if they have a reasonable excuse. In *Taikato v R* (1996) 186 CLR 454 at 464, the High Court considered the meaning of the term 'reasonable excuse':

> 'the term "reasonable excuse" has been used in many statutes and is the subject of many reported decisions. But decisions on other statutes provide no guidance because *what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excuse" is an exception* [emphasis added].'

Taking into account the purpose of provisions of the Bill, it is clear that a display is not prohibited if an exception applies. As such, a reasonable excuse for failing to comply with a direction under section 41L would include that a person genuinely believed an exception applied (e.g. for a religious purpose). This ensures a person would not be convicted of the offence of failing to remove where an exception applies.

Second, given no such proof is required, the Committee has sought further information on the compatibility of new section 41L with the Charter's right to be presumed innocent until proved guilty according to law.

Section 25(1) of the Charter provides that a person charged with a criminal offence has the right to be presumed innocent until guilty according to law. The right is relevant where the commission of an offence does not need to be proved in any proceedings.

Section 41L of the Bill does not limit the right to be presumed innocent. It is important to note the direction power under section 41L applies in two separate circumstances. It can be exercised in respect of:

- persons who police reasonably believe have committed the offence (section 41L(1))
- persons who have not committed the offence but are the owner or occupier of the property where a Nazi symbol has been displayed (section 41L(2)).

It would not be possible for section 41L(2) to limit a person's rights under section 25(1) of the Charter, as the person is not presumed to have committed an offence under section 41K.

In relation to 41L(1), a police officer must reasonably believe the person is committing an offence in order to exercise the direction to remove. If the person fails to comply with the direction, they are liable for a penalty of 10 penalty units. However, the failure to comply is not proof that the person has committed an offence under new section 41K. The prosecution would still need to prove all the elements in new section 41K beyond reasonable doubt for a person to be found guilty. In addition, the offence in new section 41L(5) does not include as an element requiring that the underying offence in section 41K has been committed. As such, new section 41L does not limit the right to be presumed innocent.

Further, even if section 41L(1) were to limit a person's rights under section 25(1) of the Charter, this would be reasonable and justified in the circumstances. Such limitation would minimise the harm caused by the display of a Nazi symbol in public by ensuring it can be quickly removed from display. Such limitation is consistent with the Bill's purpose to reduce racism and vilification in the community by discouraging the display of hateful ideology, enabling the immediate removal of publicly displayed Nazi symbols and deterring refusals to remove such displays.

Several aspects of section 41L of the Bill would also lessen the extent of any such limitation. Firstly,

to give a direction, a police officer must reasonably believe the person is committing or has committed an offence under section 41K. This means a police officer must not have evidence to suggest that an exception applies. Secondly, the defence of reasonable excuse will ensure, for example, a person who does not receive the notice, or refuses to comply as they genuinely believe an exception applies, would not be liable for a penalty. Thirdly, a penalty of 10 penalty units for contravening a direction to remove without reasonable excuse is commensurate with the severity of the conduct.

Third, the Committee has sought further information about whether expressly providing for a court to review the direction would be a less restrictive alternative reasonably available to achieve the direction power's purpose. However, in some cases, this would mean the display of a Nazi symbol and the harm it causes would continue until a court heard the matter, which would undermine the efficacy of the direction power and the purpose of the offence. Additionally, like other offences under the *Summary Offences Act 1966* for contravening a police direction, a person can contest the notice and/or penalty in the Magistrates' Court.

For these reasons, I consider any potential limitation on the right to be presumed innocent (if there be such a limitation) is reasonable and justified in the circumstances.

I hope this information is of use to the Committee.

Yours sincerely

Jaclyn Symes MP
Attorney-General
Minister for Emergency Services

07 / 06 / 2022

VICTORIA
State Government

The Hon. Natalie Hutchins MP

Minister for Crime Prevention
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Dear Mr Gepp

Thank you for your letter of 16 May 2022 in relation to the queries raised in Alert Digest No. 6 regarding the Victims of Crime (Financial Assistance Scheme) Bill 2022 (the Bill). As requested in your letter, please find further information in response to the issues raised by the Scrutiny of Acts and Regulations Committee (the Committee) regarding interactions with the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

Rights to protection from discrimination and the right to privacy
The Committee queries whether or not clause 33 of the Bill is compatible with the right to protection from discrimination on the basis of spent convictions (section 8), and the right to privacy more generally (section 13) under the Charter.

Right to protection from discrimination on the basis of spent convictions
It is not intended that the scheme decision maker will take into account spent convictions. The intention of clause 33 of the Bill is to ensure the scheme decision maker can consider, for example, whether it is appropriate to pay assistance to an applicant in circumstances where the applicant may have been involved in the commission of the act of violence which is the subject of the application. Guidelines will be published to make this intention explicit.

In any event, the operation of the *Spent Convictions Act 2021* (the Spent Convictions Act) will prevent a scheme decision maker from obtaining and considering spent conviction information. Section 20(1)(b) of the Spent Convictions Act stipulates that a person is not required to disclose the existence of or information relating to a spent conviction, while section 20(1)(c) prohibits a person from requesting such information from another person. This would apply to prohibit the scheme decision maker from requesting, through clause 56 or otherwise, that an applicant provide spent conviction information.

While section 21 of the Spent Convictions Act authorises disclosure of spent conviction information by a law enforcement agency, court or tribunal to another law enforcement

agency, court or tribunal for limited purposes, this does not apply to the scheme decision maker. It is not intended that the scheme decision maker be considered a law enforcement agency, court or tribunal for the purposes of this provision. While the scheme decision maker is employed by the Secretary of the Department of Justice and Community Safety (who is a law enforcement agency under section 3), the scheme decision maker exercises its own statutory powers independently, and further, is its own statutory position under the Bill with its own statutory functions, staff and powers of delegation, and it does not exercise a law enforcement function as defined in the Spent Convictions Act.

Further, there is no intention for the scheme decision maker to be a specified or prescribed body to whom spent conviction information could be disclosed under section 22 of the Spent Convictions Act. As such, the scheme decision maker will not be able to request or consider spent conviction information under the Bill. Therefore, in my view, clause 33 does not limit the right to equality and protection from discrimination on the basis of spent convictions under section 8 of the Charter.

Right to privacy

Section 13(a) of the Charter provides that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with. As noted in the Statement of Compatibility of the Bill, an interference will be lawful if it is permitted by a law which is precise and appropriately circumscribed, and will be arbitrary only if it is capricious, unpredictable, unjust or unreasonable, in the sense of being disproportionate to the legitimate aim sought.

The right to privacy is engaged when the scheme decision maker, in considering an application for financial assistance, takes into account the character, behaviour (including past criminal activity, and the number and nature of any findings of guilt or convictions, that the scheme decision maker considers relevant) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence.

Clause 33 is not intended to apply to irrelevant past criminal convictions, rather it is there to ensure the scheme decision maker can appropriately consider an application and decide eligibility. In particular, to ensure that an applicant to the scheme is not complicit in, or participated in, the act of violence. Under clauses 9(6), 13(3) and 15(2), an applicant is not eligible for assistance if they are criminally responsible for that act of violence. Clause 31(1)(b) also requires the scheme decision maker to refuse an application if the person makes that application in collusion with the person who committed or is alleged to have committed that act of violence. Similarly, an applicant's character or past convictions may be relevant to appropriately considering an application to ensure they are not attempting to obtain financial assistance through fraud or by providing false or misleading information.

Under clause 22, an applicant will be required to give authorisation to the scheme decision maker that allows them to obtain any information necessary to decide the application. As highlighted in the Statement of Compatibility, this authorisation is necessary to ensure applications are appropriately considered on their merits and assistance is provided to victims to assist in their recovery. This is balanced with safeguarding that a person does not benefit from their criminal activity. Furthermore, the Bill ensures the scheme decision maker can only request or seek information that is directly relevant to the application for financial assistance being considered.

I consider that clause 33 falls within the qualification on the right to privacy because it is reasonable and proportionate to the aim of enabling the scheme decision maker to thoroughly evaluate applications for assistance. As such, in my view, clause 33 is compatible with the Charter.

Clauses 63 and 64 - evidence on whether an application was made and was successful

The Committee seeks further information on whether clauses 63 and 64 permit a litigant to adduce evidence on whether or not a witness for an opposing party has made an application for financial assistance in respect of the events the witness has described and whether or not any application was successful.

The effect of clauses 63 and 64 is that a defendant or other litigant cannot obtain scheme documents, present them as evidence or cross-examine the applicant on them, regardless of their relevance in other legal proceedings, unless any of the circumstances in clause 62(2) apply, including with the consent of the applicant.

These clauses seek to protect the privacy of victims of crime and to prevent their re-traumatisation during the legal process, particularly during cross-examination.

Clauses 63 and 64 do not prevent a party from leading evidence or asking a witness in cross-examination as to whether or not they have made an application for financial assistance, as long as they do not seek to adduce scheme documents in contravention of clause 63 or cross examine a victim on the contents of those documents. However, clause 63 would operate to prevent a document (such as a statement of reasons of a decision) from being adduced as evidence. Clause 64 would then prevent a victim from being asked about the contents of such documents in cross-examination, and this would include the outcome of the application.

If a victim consents to the admission of scheme documents and is questioned on them in examination-in-chief, clause 64(1) would allow them to then be cross-examined on these documents, and in this context, they may also be asked about the outcome of an application.

In my view, any interference with the right to a fair hearing (section 24) and rights in criminal proceedings (section 25) are reasonable and justified under s 7(2) of the Charter. As noted in the Statement of Compatibility, the provisions are important in achieving the aim of protecting a victim's right to privacy and to ensure scheme documents are not used to challenge the credibility of a victim in legal proceedings such that they are re-traumatised or disincentivised from making an application for financial assistance.

Alternative approach to clause 63

The Committee seeks further information on whether Division 2A of Part 2 of the *Evidence (Miscellaneous Provisions) Act 1958* (EMPA) would be a less restrictive alternative reasonably available to achieve the purpose of clause 63.

Division 2A of Part 2 of the EMPA generally bars the disclosure or admission in any legal proceeding of a confidential communication between a sexual offence complainant and a doctor or counsellor, but permits a court to grant leave to disclose or admit the evidence in limited circumstances. The court has to be satisfied on the balance of probabilities that:

- the evidence has substantial probative value to a fact in issue
- other evidence of a similar or greater probative value concerning the matters to which the protected evidence relates is not available, and
- the public interest in preserving the confidentiality of the communications and protecting the protected confider from harm is substantially outweighed by the public interest in admitting the information into evidence.

In my view, there is no less restrictive alternative (including the EMPA approach) that achieves the policy intent behind the Victorian Law Reform Commission (VLRC) recommendation, which is to ensure that the sensitive records of victims of crime are protected from disclosure and use in criminal proceedings.

The VLRC noted in their reports *The Role of Victims of Crime in the Criminal Trial Process* (2016), *Review of the Victims of Crime Assistance Act 1996* (2018) and *Improving the Justice System Response to Sexual Offences: Report* (2021), that although the protections afforded by the EMPA go some way towards protecting victims, they are not working as intended and could be improved. Stakeholders have told the VLRC that access to materials is too easily granted. The scope of the confidential communications scheme in Victoria focuses on the public interest of admitting the evidence rather than the victims' right to privacy. The VLRC, in their 2021 report, also raised that the protection of the confidential scheme continues to be undermined by the challenges victims face in participating in decisions made about their records.

Specifically, the VLRC has continued to raise widespread stakeholder concerns that scheme material would be used in criminal proceedings without the victim's consent, that victims may be retraumatised and that using scheme material in criminal proceedings would undermine the benefit of any assistance provided by the scheme.

Lastly, it is noted that clause 63 only protects from admission documents that are produced solely for the purposes of an application to the scheme. The clause would not protect documents that were produced for other purposes, such as medical notes. The outcome of this is that the classes of documents that are protected from admission pursuant to clause 63 are more confined than in the EMPA scheme.

Accordingly, in my view, clause 63 is the least restrictive means available to ensure that victims' scheme documents are protected from disclosure in legal proceedings.

Right of criminal defendants to examine witnesses under the same conditions
The Committee seeks further information on whether clause 64, by applying only to cross-examination, is compatible with the right of criminal defendants to examine witnesses under the same conditions as (or in 'equality of arms' with) prosecutors.

Under clause 64(1) of the Bill, a victim may be cross-examined on the contents of an application document if it is admissible in the proceeding under clause 63(2). Where a victim consents to the admission of a document under clause 63(2)(e), they may then be cross-examined on its contents. If the prosecution asks an applicant about the contents of scheme documents in examination-in-chief or re-examination, the victim will be consenting to the admission of the content of those documents. Subsequently, the victim can then be cross-examined on their contents.

In my view, both the prosecution and defence may only question a victim about the contents of a protected document on the same terms (that is, if the victim has consented to the admission of that document). Accordingly, in my view, there is no inequality of arms beyond the issues already considered in the Statement of Compatibility in relation to a fair hearing.

Lastly, and perhaps most importantly, as recommended by the VLRC, this is another step towards a fundamental change in victim support system – one that takes a victim-centred approach. I trust this information is of assistance to the Committee.

Yours sincerely

The Hon. Natalie Hutchins MP
Minister for Victim Support

25 / 5 /2022

VICTORIA State Government

Appendix 1
Index of Bills and Subordinate Legislation in 2022

BILLS	**Alert Digest Nos.**
Terrorism (Community Protection) Amendment Act 2021 [House Amendment]	15 of 2021
Transport Legislation Amendment (Port Reforms and Other Matters) Bill 2022	5
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Treaty Authority and Other Treaty Elements Bill 2022	9
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Appendix 2
Committee Comments classified by Terms of Reference

This Appendix lists Bills under the relevant Committee terms of reference where the Committee has raised issues requiring clarification from the appropriate Minister or Member.

Alert Digest Nos.

Section 17(a)

(i) trespasses unduly upon rights or freedoms

Independent Broad-based Anti-corruption Commission Amendment (Facilitating Timely Reporting) Bill 2022 — 9

Road Safety Amendment (Hoon Events) Bill 2021 — 3, 6

(vi) inappropriately delegates legislative power

Transport Legislation Amendment (Port Reforms and Other Matters) Bill 2022 — 5

(vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

Conservation, Forests and Lands Amendment Bill 2022 — 3, 6

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

Agriculture Legislation Amendment Bill 2022 — 6. 8

Casino and Gambling Legislation Amendment Bill 2021 — 15 of 2021, 1

Children, Youth and Families Amendment (Child Protection) Bill 2021 — 13 of 2021

Circular Economy (Waste Reduction and Recycling) Bill 2021 — 15 of 2021

Conservation, Forests and Lands Amendment Bill 2022 — 3, 6

Constitution Amendment (State of Emergency and State of Disaster) Bill 2021 — 15 of 2021

Drugs, Poisons and Controlled Substances Amendment (Decriminalisation of Possession and Use of Drugs of Dependence) Bill 2022 — 3, 4

Environment Legislation Amendment (Circular Economy and Other Matters) Bill 2022 — 9

Equal Opportunity (Religious Exceptions) Amendment Bill 2021 — 15 of 2021, 1

Health Legislation Amendment (Quality and Safety) Bill 2021 — 1, 7

Independent Broad-based Anti-corruption Commission Amendment (Facilitating Timely Reporting) Bill 2022 — 9

Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021 — 15 of 2021

Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Bill 2022 — 3

Mental Health Amendment (Counsellors) Bill 2021 — 13 of 2021

Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 — 15 of 2021, 2

Road Safety Amendment (Hoon Events) Bill 2021 — 3, 6

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

Sex Work Decriminalisation Bill 2021	14 of 2021, 1
Summary Offences Amendment (Nazi Symbol Prohibition) Bill 2022	7, 9
Terrorism (Community Protection) Amendment Act 2021 [House Amendment]	15 of 2021
Transport Legislation Amendment (Port Reforms and Other Matters) Bill 2022	5
Transport Legislation Miscellaneous Amendments Bill 2021	5 of 2021
Treaty Authority and Other Treaty Elements Bill 2022	9
Victims of Crime (Financial Assistance Scheme) Bill 2022	6, 9
Wildlife Amendment (Duck Hunting) Bill 2022	5
Windfall Gains Tax and State Taxation and Other Acts Further Amendment Bill 2021	14 of 2021, 1

Appendix 3
Table of Ministerial Correspondence

Table of correspondence between the Committee and Ministers or Members

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

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Transport Legislation Miscellaneous Amendments Bill 2021	Public Transport	06-05-21	5 of 2021
Children, Youth and Families Amendment (Child Protection) Bill 2021	Child Protection	13-10-21	13 of 2021
Mental Health Amendment (Counsellors) Bill 2021	Georgie Crozier MP	13-10-21	13 of 2021
Sex Work Decriminalisation Bill 2021	Consumer Affairs, Gaming and Liquor Regulation	27-10-21 *06-02-22*	14 of 2021 *1 of 2022*
Windfall Gains Tax and State Taxation and Other Acts Further Amendment Bill 2021	Treasurer	27-10-21 *14-12-21*	14 of 2021 *1 of 2022*
Terrorism (Community Protection) Amendment Bill 2021 [House Amendment]	Attorney-General	28-10-21 17-11-21	*15 of 2021* 15 of 2021
Casino and Gambling Legislation Amendment Bill 2021	Consumer Affairs, Gaming and Liquor Regulation	17-11-21 *13-12-21*	15 of 2021 *1 of 2022*
Circular Economy (Waste Reduction and Recycling) Bill 2021	Energy, Environment and Climate Change	17-11-21	15 of 2021
Constitution Amendment (State of Emergency and State of Disaster) Bill 2021	Hon David Davis MLC	17-11-21	15 of 2021
Equal Opportunity (Religious Exceptions) Amendment Bill 2021	Attorney-General	17-11-21 *02-12-21*	15 of 2021 *1 of 2022*
Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021	Attorney-General	17-11-21	15 of 2021
Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021	Health	16-11-21 30-11-21	15 of 2021 *2 of 2022*

Bill Title	**Minister/ Member**	**Date of Committee Letter / *Minister's Response***	**Alert Digest No. Issue raised / *Response Published***
Health Legislation Amendment (Quality and Safety) Bill 2021	Health	08-02-22 *17-05-22*	1 of 2022 *7 of 2022*
Conservation, Forests and Lands Amendment Bill 2022	Energy, Environment and Climate Change	10-03-22 *26-04-22*	3 of 2022 *6 of 2022*
Drugs, Poisons and Controlled Substances Amendment (Decriminalisation of Possession and Use of Drugs of Dependence) Bill 2022	Fiona Patten MP	10-03-22 *10-03-22*	3 of 2022 *4 of 2022*
Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Bill 2022	Attorney-General	10-03-22	3 of 2022
Road Safety Amendment (Hoon Events) Bill 2021	Stuart Grimley MP	10-03-22 *04-04-22*	3 of 2022 *6 of 2022*
Transport Legislation Amendment (Port Reforms and Other Matters) Bill 2022	Ports and Freight	06-04-22	5 of 2022
Wildlife Amendment (Duck Hunting) Bill 2022	Jeff Bourman MP	06-04-22	5 of 2022
Agriculture Legislation Amendment Bill 2022	Agriculture	12-05-22 *25-05-22*	6 of 2022 *8 of 2022*
Victims of Crime (Financial Assistance Scheme) Bill 2022	Victim Support	12-05-22 *25-05-22*	6 of 2022 *9 of 2022*
Summary Offences Amendment (Nazi Symbol Prohibition) Bill 2022	Attorney-General	24-05-22 *07-06-22*	7 of 2022 *9 of 2022*
Environment Legislation Amendment (Circular Economy and Other Matters) Bill 2022	Energy, Environment and Climate Change		9 of 2022
Independent Broad-based Anti-corruption Commission Amendment (Facilitating Timely Reporting) Bill 2022	Hon. David Davis MP		9 of 2022
Treaty Authority and Other Treaty Elements Bill 2022	Aboriginal Affairs		9 of 2022