

~~These initiatives will also complement recent amendments to the Equal Opportunity Act 1995 that prohibit discrimination on the grounds of employment activity, and are part of a suite of reforms of this government aimed at establishing a safety net of rights for Victorian workers.~~

~~I commend the bill to the house.~~

~~Debate adjourned on motion of Mr CLARK (Box Hill).~~

~~Debate adjourned until Thursday, 25 October.~~

**PORT SERVICES AMENDMENT BILL**

*Statement of compatibility*

**Mr PALLAS (Minister for Roads and Ports) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:**

In accordance with section 28 of the Charter of Human Rights and Responsibilities, I make this statement of compatibility with respect to the Port Services Amendment Bill 2007.

In my opinion, the Port Services Amendment Bill 2007, as introduced to the Legislative Assembly, is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

**Overview of bill**

The bill will enact a suite of amendments to:

- (a) affirm the powers of the Port of Melbourne Corporation and the Victorian Regional Channels Authority to deposit and place dredged material and undertake works for this purpose;
- (b) enable the creation of restricted access areas in respect of which the abovementioned port managers can manage access to facilitate the carrying out of their respective powers or functions and give effect to their objectives. In most situations, these areas will be required to ensure public safety, although other important purposes may be to facilitate security, environmental management, and important activities, works and projects;
- (c) clarify the imposition of wharfage and channel fees and increase the flexibility of the Port of Melbourne Corporation and other channel operators to charge channel fees; and
- (d) make a range of other unrelated amendments including regarding the auditing of safety and environment management plans, and deregulation of certain non-infrastructure prescribed services.

**Human rights issues**

- 1. *Human rights protected by the charter that are relevant to the bill*

*Section 12: freedom of movement*

The proposed part 5A of the Port Services Act 1995 will enable the minister on recommendation of the respective Port of Melbourne Corporation or the Victorian Regional Channels Authority as recommending authorities, to declare that part of port of Melbourne waters or land or port waters of the Victorian Regional Channels Authority, as applicable, are areas to which access is restricted. The minister must not make the declaration unless satisfied that it is necessary for the purposes of the powers or functions and objectives of the recommending authority. It will be an offence for someone who is not authorised, to enter or remain in the restricted access area.

More specifically:

Clause 84 provides that the minister on recommendation of the relevant recommending authority, may declare that:

part of port of Melbourne waters or land, or port waters of the Victorian Regional Channels Authority is an area to which access is restricted; or

when a vessel is in port of Melbourne waters or port waters of the Victorian Regional Channels Authority, that an area within a specified distance of the vessel is an area to which access is restricted.

Clause 84 also provides that the minister must not make the declaration unless satisfied that it is necessary to enable the recommending authority to carry out its powers or functions and give effect to its objectives.

Clause 85 permits the minister to make the declaration so that certain vessels or persons are permitted access or prohibited access.

Clause 88B provides that it is an offence for a person to enter or remain in a restricted access area in contravention of a declaration unless the person is within a category of persons who may be authorised to enter. Various categories of persons will be permitted to enter the restricted access area as follows:

any persons requiring entry who are authorised by the recommending authority to enter. This would include officers, employees or contractors of the recommending authority as authorised by that authority;

a member of the police force;

employees in the public service within the meaning of the Public Administration Act 2004 and officers or employees of public bodies, performing duties or functions under specified legislation.

Clause 88B also provides that it is a defence if the person charged has a reasonable excuse for entering into or remaining in the area.

Clause 88C provides that it is an offence, unless otherwise permitted within the terms of the act, to interfere with/hinder or cause another person to interfere with or hinder activities being carried out by the recommending authority in the restricted access area or

the entry into the restricted access area of a person authorised by the recommending authority.

These provisions limit a person's right to move freely within port of Melbourne waters and land or port waters of the Victorian Regional Channels Authority to the extent that a restricted access area is declared over the areas. The provisions limit a person's right to move because they restrict a person's right to enter restricted access areas unless they are permitted to enter or are specifically authorised within the terms of the provisions and as outlined above.

*Section 15(2) and (3): freedom of expression*

Section 15(2) of the charter gives a person the right of freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside of Victoria in a variety of forms.

The right to freedom of expression encompasses a freedom not to express; to say nothing.

Section 15(3) provides amongst other things that the right may be subject to lawful restrictions reasonably necessary for instance, for the protection of national security, public order, public health or public morality.

Clause 88D engages the right to freedom of expression by compelling a person to express information or produce documents. It provides that:

- (1) a person who is in a restricted access area must, if asked to do so by a member of the police force, give certain details about him or her self or provide certain evidence about his or her authority to be in the area.
- (2) A person who is not entitled to enter or remain in a restricted access area without a relevant certificate of authorisation, when asked to do so by a member of the police force, must produce the certificate.

Failure to comply with either of clauses 88D (1) or (2) are offences.

These provisions limit a person's right to freedom of expression.

*Section 13(a): privacy*

Clause 88D engages, but does not limit, the right to privacy as provided in section 13(a) of the charter.

Clause 88D(1) requires a person who is in a restricted access area, if required to do so by a member of the police force, to give his or her name and address, state the authority under which he or she is entitled to be in the area and provide evidence relating to that authority.

Clause 88D(2) requires a person who is not entitled to enter or remain in a restricted access area without a certificate of authorisation, when asked to do so by a member of the police, to produce the certificate.

The right to privacy encompasses the idea that individuals should have an area of autonomous development, interaction and liberty — a 'private sphere' free from government intervention and from excessive unsolicited intervention by other individuals.

A law will contravene this provision if it interferes with a person's privacy 'unlawfully or arbitrarily.' An interference with privacy will not be 'unlawful' where the interference is permitted by law and where the provisions are precise and circumscribed so that there are not broad discretions in authorising an interference with privacy. An interference with privacy will not be arbitrary where it is in accordance with the provisions, aims and objectives of the charter and is reasonable in the circumstances.

The interferences with privacy outlined above are not unlawful. The power to interfere with privacy will be conferred by statute, and is of confined scope and for a reasonable purpose. The information which must be provided on request of Victoria Police is limited to that information which is reasonably required to assess whether a person is authorised to be in the restricted access area.

Furthermore, the interferences with privacy are not arbitrary. The information which the police may request is limited and the power may only be exercised in precise circumstances.

Therefore, the above provisions do not limit the right to privacy as they do not interfere with privacy either unlawfully or arbitrarily.

*Section 20: property rights*

Section 20 of the charter provides that a person must not be deprived of his or her property other than in accordance with law.

In the proposed section 88F, a member of the police force may take charge of a vessel and move it to an appropriate place or direct that another person do so if the person in charge of the vessel commits an offence within sight of that member of the police force.

Clause 88F raises the property right because it will permit a member of the police force to take charge of a person's vessel. However, the right is not limited because there is no deprivation of property other than in accordance with law. If the precondition to taking charge of the vessel is met, that is, if a person has committed an offence under the relevant provisions within the sight of the member of the police force, then the deprivation of property will be 'in accordance with law' and will not occur on an arbitrary basis.

*Section 25: rights in criminal proceedings*

Clause 88D of the bill requires a person who is in a restricted access area to comply with a requirement to provide their name and address and state the authority under which they are in the area and provide any evidence of that authority.

Section 25(2)(k) of the charter provides that a person charged with a criminal offence has the right not to be compelled to testify against himself or to confess guilt. This is a very limited protection of the right to silence as it applies only to persons charged with an offence. At the time the person is required to provide information under clause 88D, he/she will not have been charged with an offence. On this basis, the right in section 25(2)(k) of the charter would have no application. Further, during any criminal proceeding regarding the offence, the court will have a discretion regarding whether information produced under clause 88D is admissible and will exercise its power in a manner compatibly with the charter.

**2. Consideration of reasonable limitations — section 7(2)**

*Section 12: freedom of movement*(a) the nature of the right being limited

An aspect of the right to freedom of movement is that every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it. The right is not dependent on any particular purpose or reason for a person wanting to move or stay in a particular place. Under the charter, it may be subject to reasonable limitations that are demonstrably justified.

(b) the importance of the purpose of the limitation

Clause 84 is necessary for the Port of Melbourne Corporation and the Victorian Regional Channels Authority to have clear access to and power to regulate access to their respective waters, and in the case of Port of Melbourne Corporation, its land. This is to enable their respective powers or functions to be carried out in furtherance of their objectives. Clear access and the ability to regulate access may arise in situations of urgency or emergency or in the carriage of activities, such as special projects.

Clear access and the ability to regulate access may not only be necessary to facilitate the particular activity but will in most cases, be necessary to protect persons from a safety perspective in the context of a proposed activity or due to safety risks arising from other circumstances.

Examples of where access might be restricted or regulated are:

where potentially hazardous activities such as capital dredging are to be carried out in port waters or those managed by the Victorian Regional Channels Authority and it is necessary and responsible to restrict access of persons to ensure their safety.

where a large cruise ship is visiting port waters or waters managed by the Victorian Regional Channels Authority and there is public interest in the event, such that persons may seek to come in close proximity to the vessel to observe it.

where a war ship is visiting port waters or waters managed by the Victorian Regional Channels Authority and there is public protest to the visit such that persons may seek to obstruct the entry or movement of the vessel in relevant waters.

The offences specified in the proposed division 3 of Part 5A, being clauses 88B, 88C, and 88D are required to address the safety risk posed by the presence of persons in waters in situations of potential danger, as well as where there might be other risks such as security or environmental risk. In most circumstances, it will not be sufficient that a person who has committed a relevant offence is served with an infringement notice. Particularly in the context of safety risk, it is imperative that persons are moved away from areas that are potentially hazardous.

Clause 88E is required to bring into play additional offences under the Summary Offences Act 1966 to further support the prevention of safety and other risks.

Clause 88F which enables Victoria Police to take or move or direct another person to move a vessel where the person in charge has committed an offence under the proposed

provisions, also restricts a person's freedom of movement to the extent persons are in charge of the vessel or on the vessel and are not free to move. The clause is needed to address the safety risk posed by the presence of vessels or persons in vessels in situations of potential danger, as well as other risks such as security and environmental risks. The clause, in conjunction with the power of arrest, for example under the Crimes Act 1958, also is necessary to enable Victoria Police to enforce the requirement not to enter a restricted access area without authority.

(c) the nature and the extent of the limitation

As provided in clause 84(3), declaration of a designated access area may only be made by the minister if the minister is satisfied that the declaration is necessary to enable the recommending authority to carry out its powers or functions and give effect to its objectives. These powers, functions and objectives are set out in the Port Services Act 1995 and consequently, access to waters and land, cannot be restricted unless necessitated by a statutory purpose.

Clause 86(3) provides that a restricted access area declaration only remains in force for the period specified in the declaration unless revoked earlier, and in any event, is limited to a maximum of no more than 12 months.

In a variety of circumstances, access to restricted access areas will still be permitted and clause 83 in conjunction with clauses 88B and 88C, sets these out. Importantly, the intention is not to restrict public service employees and officers and employees of public bodies in performing duties and functions under relevant legislation and their right to carry out statutory duties and functions in restricted access areas is expressly preserved.

So too, the definition of 'authorised person' in clause 83 in conjunction with clauses 88B and 88C, recognises the right of a member of the police force to enter a restricted access area.

Clause 88G also permits the Port of Melbourne Corporation and the Victorian Regional Channels Authority to permit access to restricted access areas, subject to conditions. Accordingly, there may be circumstances where persons are permitted to enter with appropriate controls or precautions for their safety.

Also, clause 85 permits the minister to make the declaration so that certain vessels or persons or classes of vessels or persons are permitted access (or prohibited access) and so that conditions may be inserted into the declaration so that the prohibition is not all encompassing if circumstances permit this.

(d) the relationship between the limitation and its purpose

The limitations are rationally connected to the purpose they seek to achieve. They establish an effective means by which:

access to Port of Melbourne waters and land, and waters managed by the Victorian Regional Channels Authority is restricted or can be managed through authorisation to facilitate what those recommending authorities need to do in accordance with their statutory purposes;

access to the waters and land in the circumstances above can be restricted or managed as appropriate, to protect persons from safety risk. A safety risk might occur in the

context of a proposed activity or project or as a result of an unexpected incident;

safety and other risks can be managed in areas where clear or regulated access to waters is required by Port of Melbourne Corporation or the Victorian Regional Channels Authority (and land in the case of Port of Melbourne Corporation).

Importantly, the restrictions are narrow and focused on the purpose and objectives of the relevant sections of the bill. The restrictions on entering a declared restricted access area are only applicable:

during the period specified in the restricted access area declaration, which cannot be for more than 12 months; and

in the area specified in the restricted access area declaration, which in the case of an area around a vessel cannot be greater than 1.4 km from the vessel and in the case of a fixed area, cannot be greater than 12 square km.

Further, certain public bodies will be automatically permitted to enter the area in the carriage of their statutory functions and powers and otherwise, access may be permitted by the Port of Melbourne Corporation and the Victorian Regional Channels Authority.

In addition, the terms of the declaration may specifically permit (or prohibit) certain vessels or classes of vessel or persons or classes of person to enter the restricted access area. As noted above, conditions may also be inserted into the declaration so that the prohibition is not all encompassing if circumstances permit this.

There may be circumstances where the minister on recommendation of the recommending authority considers that it is entirely safe, appropriate and reasonable for certain access to continue in an area which becomes declared as a restricted access area.

The restrictions by virtue of Victoria Police's powers to take charge and direct the movement of vessels are also narrow and focused as they are limited to circumstances where an offence under the relevant provision has been committed within the sight of a member of the police force.

Accordingly, the restrictions are narrow and focused on the purpose and objectives of the bill and are therefore proportionate.

(e) any less restrictive means reasonably available to achieve its purpose

No other means are considered reasonably available to achieve the purpose of the restrictions imposed.

In fact, there are precedents for the creation of zones where freedom of movement is restricted such as:

Commonwealth Maritime Transport and Offshore Facilities Security Act 2003, where a range of maritime security zones can be created and access can be restricted or otherwise managed;

Safety on Public Land Act 2004 (Vic), where public safety zones can be created in state forests and entry and activities in the zones can be restricted and regulated.

*Section 15: freedom of expression*

(a) the nature of the right being limited

The freedom of expression is a right of fundamental importance in our society.

(b) the importance of the purpose of the limitation

Section 15 of the charter is engaged and limited because clause 88D compels a person to express information or produce documents. The purpose of the limitation in section 15 is to determine compliance with the act. Victoria Police needs to be able to identify whether a person is validly in a restricted access area or whether an offence has been committed.

(c) the nature and the extent of the limitation

The requirement to provide information is limited to seeking information from persons in a restricted access area seeking a certificate of authorisation from persons who require one to be validly in the restricted access area. Accordingly, the request is not one that can be made arbitrarily.

(d) the relationship between the limitation and its purpose

The limitation is proportionate to achieve effective compliance as the information can only be requested in the limited circumstances referred to in paragraph (c) above. The limitation is also necessary to determine compliance with the act and to facilitate public safety and security and carriage of important objectives, powers and functions of the Port of Melbourne Corporation and the Victorian Regional Channels Authority.

(e) any less restrictive means reasonably available to achieve its purpose

No other means are considered reasonably available to achieve the purpose of the restrictions imposed.

#### Conclusion

I consider that the bill is compatible with the Charter of Human Rights and Responsibilities because while it does restrict certain human rights, the restrictions are reasonable and demonstrably justifiable in accordance with the criteria set out in section 7(2) of the charter.

TIM PALLAS MP  
Minister for Roads and Ports

*Second reading*

**Mr PALLAS (Minister for Roads and Ports) — I move:**

That this bill be now read a second time.

This bill makes a number of important amendments to the Port Services Act 1995.