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Dear Jacqueline

**HEALTH ACT 1958 REVIEW  
FROM A PERSPECTIVE OF AN INDIVIDUAL MUNICIPAL EHO.**

Thank you for this opportunity to provide comment and input on the matters raised in this paper.

Comments and input provided are succinct due to time restrictions and are limited to issues of priority concern. Municipal EHOs have excessive caseloads (workloads) as reported on page 64 of the Victorian Auditor General's report dated 30 October 2002 into 'Management of food safety in Victoria' and as demonstrated by my own working experiences.

In my submission to the November 1998 review of the Health Act 1958, I called for the **Declaration of State Public Health and Safety Policy** similar to Declaration of State Environment Protection Policy under Section 16 (1) of the Environment Protection Act 1970 (in lieu of Regulations) and the enabling delegation of powers to **Environmental Health and Safety Protection Agencies** similar to Environment Protection Agencies under Sections 4 and 68 of the Environment Protection Act 1970.

I re-submit Foundations 8 and 9 of my previous submission dated 14 April 2000 for re-consideration by the Legislative Steering Committee.

The revised State Environment Protection Policy (Waters of Victoria) will serve the On-site wastewater sector well in rectifying many of the problems with malfunctioning or non SEPP (WoV) complying On-site wastewater systems.

These proposals are in accordance with the "Flexibility" guiding principal of the review.

**2004 Review.**

1. This review of the Health Act 1958 is a 'sweeping' review. The Administration of the new Act must also be 'modern in thinking', including the role of Enforcement Agencies and Authorised Officers.

The new Act could be renamed the 'Public Health and Safety Act' reflecting "the realisation of healthier and safer populations" (Directors Foreword). The

inclusion of Safety also expresses the Act aims for individuals and populations to be free of danger, harm or risk.

2. While the Tobacco Act 1987 and the Food Act 1984 have separate administrative and enforcement frameworks as the Health Act 1958, they share the same workforce. i.e. Municipal EHOs. Functions under these Acts are specialised and so should the workforce.

Septic Tank administration should remain in the Environment Protection Act 1970 as the attainment programs for On-site domestic wastewater management are contained in SEPP ( Waters of Victoria ).

3. The new Act should promote public health and safety by adding after Section 29B (2) ( b ) ( i ) "**(ia) promote public health and safety; and**".
4. The Act already addresses inequalities in the health and wellbeing of disadvantaged communities-see Section 29A (c) "health ( and wellbeing ) of particularly vulnerable population groups—". MPHP's should already be doing this.
5. Objectives to include public safety as well as public health.
6. Guiding principals are supported as they aid in interpretation of the Act. This works excellent with the Environment Protection Act 1970. Instead of "provides information to support efficient use of resources" as part of evidence-based decision making" guiding principals could be 'Administrative Capability and Public Health and Safety Reporting'.

An independent duty of care ( a positive statutory duty ) already exists for Municipal EHOs under Section 19 HB of the Food Act 1984 where every EHO must ensure that where a Standard Food Safety Program ( SFSP ) is not being fully implemented and complied with, that they serve a written Notice on the Proprietor advising an opinion and reasons why the SFSP is not being fully implemented and complied with and remedies to fully implement and comply with the SFSP.

7. Yes, functions should be stated for all stakeholders. Refer to Section 5B of the proposed ( but never proclaimed ) 48 / 1988 functions of the Chief General Manager and especially to ( f ) "**to monitor the activities of other agencies**".
8. Yes.
9. Delete from f ) "monitoring the activities of". Is it a function of municipalities to monitor hospitals?
10. No and overlaps and duplicates MPHPs. Municipal CEOs and 'Top Management' views municipals predominant function is basically to regulate and enforce the Food Act 1984 and Health Act 1958 and regulations. This is reflected in most Councils institutional structures, where EHOs are in the Regulation Department.
11. Section 37 must remain in the new Act and be enforced by the Secretary. The analogy is lack of reporting on municipalities compliance with the Food Act

legislation where I fear FSV has no idea on Municipalities Food Act 1984 activities.

12. Councils EHOs have generally lost the custody of preparing MPHPs. MPHPs need to be evaluated and reported on so they don't end up sitting on shelves as 'white elephant' documents in Councils buildings.
13. and 15. South Sydney City Council developed and published a Public Health Services Management Plan in April 1996 which was co-ordinated by the submitter. The Plan was based on the Municipal Health Plan - A Handbook for EHOs issued by the Australian Institute of Environmental Health in the early 1990s. The Plan was very well received by Council, Management and community. The Management Plan also specified Councils statutory functions and **services**, resources and staffing levels it would provide over the 3 year life of the Plan. Councils Environmental Health performance was assessed against the Plan. The Plan was formally adopted by the Council.

Municipals statutory public health functions must be properly planned, advocated and provided for. The new Act needs to require municipal councils to set out how they intend to fulfil their statutory functions. Otherwise, a similar situation will arise where FSV has no idea of Councils compliance with the Food Act 1984.

Municipals statutory public health functions must then be reported to the Secretary on a yearly basis. The Secretary must then audit the functions and where Councils are not complying with their functions they shouldn't be delegated the powers to conduct the functions.

16. Councils Environmental Health planning provisions can already be incorporated into Councils Planning Schemes, MSSs and Councils Plans. But there are no EHO planners to do the planning.
19. The new Act should require that a council ( or Public Health Protections Agencies ) only appoint as an EHO persons who have the qualifications / experiences declared by the Secretary as necessary for engagement or appointment as an EHO. This should also apply for ANTA endorsed competencies to all other Environmental Health Workers appointed or engaged by a council ( or Public Health Protection Agencies ).
20. Yes.
21. The new Act should provide that councils ( or Public Health Protection Agencies ) may only authorise Environmental Health Worker persons with ANTA endorsed competencies. Competencies can be attained by recognition of prior learning and current competency.
24. An Environmental Health Consultative Council should be established to play an important role in the continuing evaluation and improvement of environmental health services in Victoria.
27. And 28. Stand alone HIA in the new Act is not supported. Small scale land use and development HIA would be better served by strengthening the Planning and Environment Act 1987 and the Victorian Planning Provisions for health impacts. Hence the need for Public Health and Safety Protection Policies.

Section 60 of the Planning and Environment Act 1987 could be amended for a Public Health Protection Policy to be a matter a responsible authority must consider before deciding on a land use or development application.

29. Yes.

30. Yes.

31. Disease, sanitation and hygiene, state of mental health wellbeing, traditional nuisance, infection transmission, Registered / Licensed Premises / Operators.

Specific contexts or specified matters ( where a Standard or Public Health and Safety Protection Policy exists ).

**Exclude:** Occupational health and safety and environment protection duties already covered in Occupational Health and Safety legislation and the Environment Protection Act 1970.

There is already enough confusion on who's roles and responsibilities are and which powers are to be exercised. This will prevent 'handballing' of work. This is prevalent in small-scale environmental nuisance abatement.

32. Negative.

33. Administrative powers but for severe offences such as major Nuisance Public Health Duties criminal.

If a person wishes to sue for harm or damaged received from another person then civil.

The impact on Councils EHO staffing resources for a statutory public health duty are unknown. Unless mandated across the board Food Safety Program issues are resolved before proclamation of a public health duty, then a public health duty will become another bit of legislation in which there are no staff ( or skills ) to implement the legislation. It would be strongly recommended for a similar Section as 48A ( 9 ) of the Environment Protection Act 1970 ( Unreasonable noise from residential premises ) to be included into the new Act enabling proceedings for an offence to be taken by a "person claiming to be directly affected by the alleged offence;"

34. Yes, " Offender pays", and not necessarily by conviction in a Court. All functions should be cost recoverable. Then revenue can be generated to actually provide the service.

35. Yes.

36. Describe what constitutes a Public Health Duty in the new Act. Prescribe activities that may result in harm to health of other persons by declaration in the Government Gazette.

37. 38 and 39. On behalf of the City of Ballarat, I conducted a successful major nuisance action over many years cumulating in a plea of guilty for causing excessive lesser house flies to breed in an intensive large scale poultry ( layer hens ) farm. The Magistrate issued a COURT ORDER for the Proprietor to

comply with a Fly Control Management Plan ( similar to a Risk Management Plan ).

The Proprietor then sold the property so under Section 427 the Order was binding on the new Proprietor. A 'plain version' Fly Control Management Plan was prepared for the new proprietors who are following the steps in their Plan as well as keeping records. The levels of fly breeding on the poultry farm has significantly reduced. Section 427 should remain in the new Act. The implementation of a 'Management Plan' to abate nuisance in this situation is a successful example of how RMP could be used to abate public health risks.

However, the deletion of 'annoyance' from the definition of 'offensive' is **NOT** supported. In this instance it could not be proven beyond reasonable doubt that the high populations of lesser house flies or the excessive spraying of fly repellents were dangerous to health. Surprisingly, a sample of flies taken from a complainants property for salmonella was negative.

In evidence, Councils EHO accepted that the 'hovering' behaviour of this fly species and the continual 'swishing' of flies away from complainant's faces and the inability to have Bar-Be Ques due to attracting large fly populations was annoying to the complainants because they had suffered intolerable interference to their enjoyment and amenity of their dwelling and property.

The summons were prepared as the Proprietor caused an annoying **activity** of poultry farming; a wet, damp or moist **state** of manure; and the **condition** of excessive lesser house fly breeding on the property which was accepted by the Proprietor and the Magistrate. i.e. The proof of the lesser degree of nuisance. If annoying was removed from the definition Council would not have been able to abate this nuisance with any confidence.

Public Health nuisance is sufficiently clear as in determining a nuisance regard must not be had to the number of persons affected or that may be affected by the state, condition or activity. Also under Section 421 ( 2 ) the provisions of this Act as to nuisances shall be deemed to be in addition to and not to prejudice abridge or affect any right remedy or proceeding under any other provisions of this Act or of any other Act or at common law.

While the nuisance administrative powers could be applied to the general public health duty, nuisance as described in Section 39A and Section 40 ( 1 ) **must** be retained in the new Act. This is because nuisance as described has been interpreted over 150 years in common law. It is difficult enough to prove nuisance with commonly applied precedent, little-alone a test of what constitutes a nuisance is also a public health duty. This would be a solicitors 'goldmine'.

Instead of the making of regulations for scope of Public Health Duties, and the subsequent RIS process , the declaration of State Public Health and Safety Protection Policy for gazettal in the Government Gazette is put to you.

Scope of Public Health Duties need to be limited. If a local resident thought a rail crossing or road crossing was dangerous could they report the condition to Council as a Public Health Duty. Would Council then have to serve a Intervention Notice to VLine or VicRoads to upgrade the rail / road crossing? Would VLine or VicRoads have to comply with the Notice?

Also, if any amendment were to be made to what constitutes a nuisance, Section 39 A ( b ) should be amended to read **“any land, water except sewage as defined under Section 53J ( 1 ) of the Environment Protection Act 1970 and land covered by water except sewage as defined under Section 53J ( 1 ) of the Environment Protection Act 1970;”**.

This would make it pertinently clear that the EPA is the responsible authority under Section 31A of the Environment Protection Act 1970 to serve Notices for on-site domestic wastewater systems permit compliance and failing systems or off-site discharges.

These powers were transferred to the EPA in the 1989 changes to the Health Act 1958.

In a discussion paper published by the EPA Septic Tank Legislative review Group on 19 June 1998 makes this explicitly clear; 'Councils also have a duty under Part 3 of the Health Act 1958 to 'remedy as far as is reasonably possible all nuisances within their municipal districts. Discharges of untreated sullage and inadequately treated sewage or septic tank effluent poses a risk to public health, as well as causing pollution of local creeks, rivers, groundwater and surface waters. While used occasionally to resolve problems associated with septic tanks, **this provision has limited application and was not designed for this purpose.**'

40. Yes.

41. Yes.

42. Persons Registrable / Licensable.

Nuisance abatement improvement notices, Scope improvement Notices.

RMP audit system with audit competencies supported. Delineation of the role of RMP auditors and Councils EHO Regulators to be sorted out asap to avoid the confusion we have in Food Safety Programs at the moment and seven years after initial implementation.

43. Higher risk activities and offenders for breaching public health duty.

44. The Declaration of Public Health and Safety Protection Policy. DHS being the Register / Licensor of the RMP Audit Scheme and Registration Authority as pronounced in the discussion paper.

46. and 47 This realistically would not happen.

48. Yes.

49. Yes, such as reactive nuisance / public health risk abatement and comply with RMPs ( not for may contravening, address potential risks or proactive – these would be unworkable and unenforceable ).

50. Exhaustive and appropriate.

51. Not that I can think of.

52. Yes.

53. Yes, similar to the nuisance administrative procedures.
54. Yes.
55. and 56 NO, general criteria should be contained in State Public Health and Safety Policies.
57. When an activity changes or on a time frequency.
65. Yes and upon the service of an Improvement or Prohibition Notice.
66. to 69. As for public health duties. Defences Yes.
70. No, police matters.
71. Yes, Police matters.
72. Yes, for minor offences. If a Pin is defended the same evidence rules applies as in a Magistrates Court.
73. No but higher than they are now. Somewhere in between.
74. Yes.
75. Yes.
76. VCAT.
77. No, these activities should have RMPs.
79. Yes. Councils to remain registration Authorities for Prescribed Accommodation.
95. to 97. Yes.
- 116.and 117. Yes
- 118.Yes.
- 120.No. Section 34 ( 1 ) should make it an offence to have flesh from a prohibited animal at the shop, place or vehicle to be enforced by PrimeSafe inspectors.

Patrick Garry  
Dated 14 October 2004.

A handwritten signature in black ink that reads "Patrick Garry". The signature is written in a cursive style with a horizontal line underneath the name.

This approach also emphasises the responsibility of each personal business proprietor to ensure infection control is practiced within a legislative framework and is consistent with the implementation of food safety programs for food business.

How a more vigorous enforcement program can be achieved is discussed further in this submission.

## **FOUNDATION 8**

### **Declaration of State Public Health Policy in context with State Environmental Protection Policy Under Section 16 of the Environment Protection Act 1970.**

Under Section 16 of the Environment Protection Act 1970 the Governor in Council may on the recommendation of the Authority, by Order published in the Government Gazette declare the environment protection policy to be observed with respect to the environment generally

or in any portion or portions of Victoria or with respect to any element or segment or segments of the environment.

Section 18 establishes the basis for maintaining environmental quality sufficient to protect existing and anticipated beneficial uses in the area affected by the Order and in particular shall include in terms sufficiently clear to give an adequate basis for planning and licensing functions.

It is respectively suggested that similar provisions for the Declaration of State public health policy with respect to elements of public health be incorporated into the new Act.

Such provisions would establish clear public health goals and outcomes in State policy to attain and maintain levels beneficial to public health.

Declared policy could also be applied as the objective and goal for health planning and adequacy criteria for registrations, should registrations remain under a new Act.

Currently there is no provision for State 'declared' public health policy under the Act.

## **FOUNDATION 9**

### **Provisions to Delegate to an Environmental Health Protection Agency (delegated agency) the powers, duties and functions of the Act, across local government boundaries – similar to the enabling provisions for delegations to a environmental protection agency under Section 68 of the Environment Protection Act 1970.**

Under Section 68 of the Environment Protection Act 1970, the Authority may by instrument in writing, delegate to a protection agency all or any of its powers and functions under the Environment Protection Act 1970.

Under Section 4 (definitions) a delegated agency means any protection agency to which any power or function of the Authority is delegated under section 68. Other enabling provisions of delegation are contained in Section 68A and 68B of the Environment Protection Act 1970.

The national environmental health strategy and public health partnership agenda acknowledges that there is a disparity between the seriousness of public health and environmental protection offences, which has weakened the focus of health as a principle of the environment protection legislation and the principles of public health legislation ie harm or damage to the environment even though public health is not affected is more important than damage or harm to public health. This situation should be addressed and rectified as part of the reform agenda.

For these reasons it is considered and suggested that to increase the capacity of environmental public health service delivery, that similar enabling provisions for the delegation to environmental protection agencies to function across local government boundaries under the Environment Protection Act 1970, be made available to a public health protection agency under the new Health Act.

An immediate advantage of this recommendation being that the creation of competition between environmental health services providers will result in an increased quality and capability of service delivery with a subsequent improvement in environmental health practice and benefits to 'users' of environmental health services.

Under the existing Health Act 1958 the following amendments and additions are required to enable the delegation of the powers, duties, functions to an Environmental Health protection agency, under the new Act.

#### Section 3 – Definitions

**Add** "Environmental Health Protection Agency" means any protection agency to which any power or function of the Department (Human Services) is delegated under Section. (To be specified under the new Act).

**Add** "Delegated agency means an Environmental Health Protection Agency".

**Amend to read** "Officer" – includes any Officer or Inspector or Environmental Health Officer (whether of the Department or any Council or Delegated Agency) and also any authorised member of the police force".

Under Section 3 of the existing Act, "authorised" means authorised in writing either generally or specially by the Secretary or by a council (as the case may be);

#### Section 8A (1)

**After (d) add** "(e) any delegated agency or officer of a delegated agency."

#### Section 8B

**After public service add** "or to any other officer or class of officer of a delegated agency"

#### Section 30A

**After (1) (1) (B) add** "Every delegated agency must appoint one or more Environmental Health Officers."

Section 32 After Council add "or Environmental Health Protection Agency."

Section 36A

**After (a), (a) (a) add** "Order a delegated agency to perform any duties that the Secretary directs";

**After (c), (c) (c) add** "Order any officer of a delegated agency to carry out a particular function;"

Section 37

**After council add** "and delegated agency"

**Section 37 Reports of Environmental Health protection agency to the Secretary be amended to read:**

"State of health as to matters relating to the public health and sanitary circumstances of its municipal district or delegated area of competent jurisdiction and other such times as the Secretary directs – reports as to any matters specified by the Secretary."

Section 43

**(1) Add after nuisance occurs,** "or a delegated agency."

**After (2) add (2A),** "A delegated agency may investigate any notice of a nuisance."

**(3) Add after Council must** "or a delegated agency may "

**3(b) After Council add** "or a delegated agency"

Section 44

**(1) After council add** "or a delegated agency"

**(3)(b) Add after Council where mentioned in both instances** " or delegated agency"

**(9) After council add** "or delegated agency"

Section 47

**(Repealed and substituted with):**

1. Proceedings, where instituted by Council for an offence under Section 42 can only be instituted by the Council in whose municipal district the nuisance wholly or partly occurs.

**Add**

2. 'Proceedings where instituted by a delegated agency for an offence under Section 42 can only be instituted by the delegated agency in its area of competent jurisdiction'.

Section 47A

**After Council where appearing in both instances** "or delegated agency"

Section 47C

**After Council whenever appearing add** "or delegated agency."

**Statutory powers and Enforcement/ the role of a delegated environmental health agency**

The following delegations would be required for a delegated agency to perform the necessary functions and duties and to exercise its powers under the existing Act or equivalent to in the new Act.

Section 399A

**After (2) add (2A)** 'A delegated agency must issue an identify card to any person authorised by the delegated agency for the purposes of this Act'.

**Add after 3 (c)** After council add or delegated agency.

Section 408

**Amend 2 (a) (ii)** Delete and after police force and add "or delegated agency"

**Add 2(a) (iii) after (ii)** " of the protection agency if the seizure is made by an officer of the protection agency.

Section 410 (2)

**After Council add** "Protection agency."

Section 411 (1)

**After the council add** "or delegated agency"

Section 411(4)

**After council add** "or protection agency"

Section 411(5)

**Where council appears, add after council** "or protection agency"

Section 412(1)

**After any expenses incurred under this Act by any council where occurring in the first instance only add** 'or protection agency'.

Section 412 (2)

**After council add** 'protection agency'

Section 413 (1)

**After council add** "or delegated agency"

Section 413 (2)

**After council add** "or delegated agency".

**After (whether any judgement or order has been obtained or not)**

**Delete** "with interest at the rate of six per centum per annum and substitute:  
"with interest from the date determined under sub section (1) until payment at the rate for the time being fixed under Section 2 of the Penalty Interest Rates Act 1983."

Section 414 (1) (c)

**After council appears 4 times add** "or protection agency."

Section 414 (2)

**After council add** "or protection agency"

Section 424 (f)

**After council add** "delegated agency"

Section 426 (b)

**After council add** "or delegated agency"

Section 434

**Add (3)** "A delegated agency may direct either generally or in any particular case proceedings to be taken in respect of breaches of or offences against the Act committed in its area of competent jurisdiction."

Section 435 (1)

**After council add** "or delegated agency"

Section 437

**After or any officer of the Department add** "or by any officer of a protection agency"

Section 437 (1)

**After (c) add (d) to read**

"of the particular or general appointment of any officer of a delegated agency"

Section 439

**After (1) (b) add (c)**

"To be issued or written by or under the direction of any protection agency and to be signed by the person who is the Chief Executive Officer or authorised officer of a protection agency."

Section 440 (1) (a)

**After council after appearing the third time add** "or Chief Executive Officer of a delegated agency"

Section 440 (b)

**After council, add** "or delegated agency"

Section 442

**After (b) add (c)** 'of the person who is the Chief Executive officer or an authorised officer of any protection agency'

Section 447 (a)

**After where council appears twice, add** or 'delegated agency' **in both instances.**

Section 447 (b)

**After Secretary, add** or 'protection agency'

Section 448

**Where council appears twice, add in both instances** 'add or protection agency'

Section 450 (1)

**After inflicted delete** "and the remainder to the council in whose municipal district the offence was committed:

Provided that if the council or its officer is the complainant or informant the council shall be entitled to the whole of the penalty recovered" and substitute with " and where proceedings for an offence are taken by a person authorised by a council the remainder to the council in who's municipal district the offence was committed and where proceedings are taken by a person authorised by delegated agency the remainder to the protection agency in its area of competent jurisdiction" and

"Provided that if a council or a delegated agency or its officer is the complainant or informant the council or delegated agency (as the case may be) shall be entitled to the whole of the penalty recovered".

## **FOUNDATION 10**

### **POWER TO CLOSE WATER SUPPLIES**

Sections 79,80 and 81 under the existing Act, gives the Secretary the overriding power to close water supplies where the water is so contaminated that the water is unwholesome or unfit for drinking or domestic purposes or to be used in connection with the food industry or dairy industry. These provisions appear to extend to water supplies from non water supply authorities under the Water Act 1989 and Water Industries Act 1994. Therefore the Secretary could order the closure of water supplies from water tankers and bore sources, under the existing Act.