MAY 2025

Guidance on Adopting Model Legislative Provisions

Fit and Proper Persons Tests



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How this document helps you

This document has been written for legislative and policy officers working with the Office of the Chief Parliamentary Counsel (OCPC) on new or amended legislative provisions in regulatory schemes.

The Department of Treasury and Finance (DTF) has prepared this document in collaboration with OCPC and in close consultation with departments and regulators. This document does not a provide a 'one size fits all' or mandated approach, but guides policymakers through the conceptual and legislative considerations to make it easier to develop legislative provisions suited to your needs and aligned with best practice.

DTF has consulted OCPC and OCPC has drafted a clause bank of Model Legislative Provisions. These reflect the most modern and effective version of a regulatory provision, align with best practice, and promote consistency across Victoria's regulatory environments.

Context

Victoria has over 70 state government regulators with responsibility for over 500 different permission schemes (licences, permits and other approvals which grant the recipient permission to conduct an activity, operation, or establish a premises that would otherwise be unlawful).

Legislation governing Victoria's regulators varies significantly in provisions covering the same topic. Some variations are justified and reflect the different needs of regulators and regulated entities, as well as the level and likelihood of harm being managed. However, many of these are needless, create confusion for regulators, frustration for businesses and detract from the effectiveness and efficiency of the overall regulatory system.

The model provisions in this document reflect the most modern and effective version of a regulatory provision, align with best practice, and promote consistency across Victoria's regulatory environments.

This model provisions guidance helps you to prepare, at the policy development stage, for your discussions with OCPC on the suitability of applicants seeking permission to conduct a certain regulated activity. This guidance complements the following guides that should be considered before you conduct your review of your regulatory scheme:

- <u>Victorian Permissions Framework</u>: This framework helps policymakers and regulators ensure permissions are justified, well designed, and applied using best practice. It can be used when developing new permissions when reforming existing permissions.
- <u>Victorian Framework for Fit and Proper Tests</u>: This framework helps policymakers
 consider when screening for applicant suitability should be used, principles for best
 practice, and how to best ensure Fit and Proper Tests are well designed and efficiently
 administered.
- <u>Delegations Guidance Note</u>: This document supports policymakers in identifying powers
 which may be appropriate for delegation, as well as the scope of the delegation (broad
 or narrow). The Guidance Note should be read concurrently with this document.

This model provisions guidance forms part of a series of <u>model provisions guidance</u> covering:

- · confidentiality and information sharing
- inspector and entry powers and regulator toolkits
- authorised officer appointments, service of documents, and commencing legal proceedings.

Adoption of model provisions is not compulsory, but they are a helpful tool for legislative policy areas seeking to introduce or revise legislation.

If you are working within a **national scheme**, alignment with the national scheme is often a paramount consideration to maximise the benefits and efficiencies from harmonised approaches. However, where there is scope to tailor provisions or where your input is sought on new or amended provisions, the considerations in this guidance will also be useful conceptual tools.

This document contains a selection of model provisions developed by OCPC and supporting guidance for legislative criteria commonly referred to as 'fit and proper (person) tests'. To align with modern legislative terminology, this document refers to all fit and proper tests as 'assessments'.

1. Background

1.1 What is a 'fit and proper' test?

The concept of 'fit and proper' is adaptable to the circumstances in which it may be applied. For example, in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, the High Court noted:

'The expression 'fit and proper person', standing alone, carries no precise meaning. It takes its meaning from context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur...'

In Victoria, these assessments are typically contained in an agency's authorising legislation and may be used to consider an individual or body corporate's suitability to undertake a regulated activity. They can be used in various contexts and regulatory environments, including for permissions related to labour hire, education, the legal profession and for the conduct of certain business activities.

While this guidance does not cover broader regulated entities not subject to assessments for suitability to undertake a regulated activity, policymakers should consider whether obligations on other persons not subject to assessments, or standards of conduct for certain activities (regardless of who undertakes them), may be needed in a particular context to ensure a regulatory scheme works effectively.

Application of general legislation

The nature, extent and varying subject matters contained in legislated assessments means there is a suite of general legislation (beyond the specific Act administering the assessment) which a policymaker may need to consider. This includes, for example, legislation related to identity verification and the making of oaths and affirmations. These general legislative regimes and their potential application are outlined in the table below.

Legislation	Summary	When should this legislation be considered?
Oath and Affirmations Act 2019	Consolidates Victorian law related to oaths, affirmation, affidavits and statutory declarations (including processed related to certifying documents).	When requiring that an applicant make a statement or provide certified copies of identity documents. See Baseline Elements on page 13.
Service Victoria Act 2018	Makes provision for identity verification standards, including guiding principles for their making and use (see Part 6, Division 3).	When requiring that an applicant verify their identity. See Baseline Elements on page 13.
Service Victoria Identity Verification Standards	Outlines requirements including related to identity documents used by Service Victoria to verify identity	See the <u>Identity Verification</u> <u>Standards</u> .
Charter of Human Rights and Responsibilities Act 2006	Sets out the basic rights, responsibilities and freedoms of Victorians, and requires that all Bills proposed in Victorian Parliament be accompanied by a statement of compatibility (section 28). Relevant rights include, for example, a right to privacy (see section 13) which may be relevant where a person's information is collected for the purposes of undertaking an assessment.	When requiring that an applicant disclose sensitive information, such as criminal history or health information. See Bespoke Elements on page 29. See the Victorian Equal Opportunity and Human Rights Commission's Charter of Human Rights and Responsibilities guidance.
Equal Opportunity Act 2010	Places a positive obligation on organisations to eliminate discrimination and victimisation. The Act makes a spent conviction an attribute based on which discrimination is prohibited, which is a relevant consideration when assessing a person's criminal history.	When requiring that an applicant disclose their criminal history. See Standard Elements on page 17. See the Victorian Equal Opportunity and Human Rights Commission's Equal Opportunity Act guidance.
Crimes Act 1958	Laws such as the offence of perjury in section 314(1) of the <i>Crimes Act 1958</i> may apply when a false or misleading statement is made in as part of an assessment.	When requiring that an applicant make a statement. See Baseline Elements on page 13.

Legislation	Summary	When should this legislation be considered?
Spent Convictions Act 2021	Provides relevant considerations for assessing a person's criminal history, in the context of an FPT.	The potential application of the Spent Convictions Act is set out in detail on page 16.
		See the Victorian Department of Justice and Community Safety's Spent Convictions guidance.

Policymakers should also have regard to OCPC's <u>Legislative Process handbook</u>.

1.2 Development of Model Provisions

There are several established best practice principles for legislative development and drafting. These principles are reflected in various Victorian Government guidance documents (including legislative drafting guides and the Victorian Government's Regulatory Reform Program objectives). These principles underpin the provisions and guidance in this document.

These principles have been applied below in the context of fit and proper persons tests.

Principle	Application
Clear purpose	Consider whether each criterion is necessary and appropriate and include it in the principal Act.
	This means, for example, only including such criteria where it is appropriate to be applied to all or most potential applicants (rather than just some) to reduce regulatory burden and using other means to address risks that are only applicable to a narrow class of potential applicant. This also aligns with Better Regulation Victoria's principles for good regulatory practice, which includes being clear on regulatory outcomes and the harm being minimised.
Plain language drafting and streamlined structure	Criteria should identify 'core' and specific elements. Core elements should form the basis of the provision, while a selection of specific elements should be provided as options for consideration by regulators when seeking to apply the model provision, with reference to their risk environment and risk appetite. Minimum requirements for each element should be contained in the
	principal Act, to allow for flexibility in application.

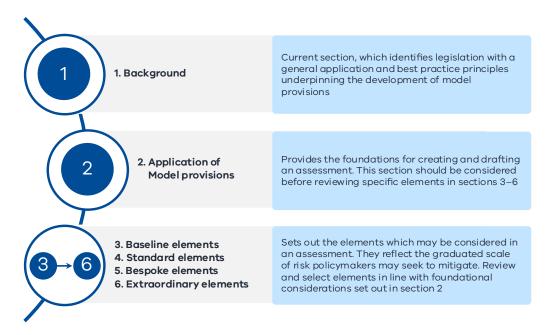
	Principle	Application
Q	Proportionate	Model provisions should reflect a graduated scale of evidence requirements.
·		Principal Acts should not require the applicant to provide significant evidence – this should be a matter for operational policy to establish and provide guidance to potential applicants.
		Where the risk of harm is lower, regulators should accept a declaration from the applicant that they meet the necessary requirements. Additional information should be sought in line with operational policy.
		Where the risk environment requires it, a provision may place an obligation on the applicant to provide evidence at the time of application or allow the regulator to source evidence independently.
	Objective and future-proofed	Criteria should be as objective and objectively applied as possible to ensure a consistent and fair approach to assessments. Decision-making processes should be technology agnostic.

Policymakers are encouraged to consider these principles and their risk appetites when identifying and justifying the most appropriate clauses for inclusion in specific legislation.

Throughout this process, policymakers should engage with OCPC and seek independent legal advice on the inclusion of the desire provisions, if required.

1.3 Structure of this document

The sections contained in this document are designed to be read sequentially, in line with the below diagram. Section 2 - Structure of Model Provisions should be considered first, as it sets out the precursors policymakers should consider before introducing an assessment into legislation, as well as starting points for model provisions.



2. Application of Model Legislative Provisions

In Victoria, assessments are used to prevent inappropriate applicants from being granted permission to undertake a regulated activity. **Assessments should only be used in the design of a permission or licence where the risk or potential consequence of an** *inappropriate* **applicant undertaking an activity is unacceptable. This risk is distinct from other risks, e.g. the general risk of non-compliance with a prohibition or standard of behaviour.**



Clear purpose in practice Before considering the model provisions in this document, policymakers should **ensure an assessment contained in legislation is necessary and appropriate.**Assessments should be reserved for application in high-risk regulatory environments.

Appropriate use of assessments mitigates unnecessary regulatory burden for businesses, regulators and the community.

The table below outlines the circumstances where a legislated assessment may and may not be appropriate.

OCPC's Guidance on Legislative Drafting requires prioritising the most important concepts and leaving those which are not required to be contained in a principal Act for inclusion in a subordinate instrument (such as regulations) or policy. Here, this requires that an assessment is set out in primary legislation, with additional detail set out in regulations (if required).



Legislated assessment may be appropriate when:



objective characteristics

- The assessment is appropriate for application to all potential applicants
- The regulatory and administrative burden created by the assessment is commensurate with the level of risk which the assessment seeks to mitigate.



Legislated assessment may not be appropriate when:

- Increased risk cannot be clearly tied to objective characteristics
- The assessment is not appropriate for application to all potential applicants
- The regulatory and administrative burden created by the assessment exceeds the level of risk which the assessment seeks to mitigate
- Harm can be remedied in a timely, cost-effective way, including through existing regulation
- The assessment creates a barrier to entry to a profession or market that significantly reduces competition
- A product or service standard or other regulation could be used instead, or
- The need arises from a short-term issue.

The <u>Victorian Framework for Fit and Proper Tests</u> provides further guidance for policymakers in determining the need for assessments, supports their effective design and efficient administration. Where an assessment may not be appropriate, you should consider other approaches outlined in the <u>Victorian Permissions Framework</u>.

After determining that an assessment is necessary, an applicant's suitability should be assessed with reference to a selection of specified elements. The elements which form part of this assessment should be consistent with relevant best practice principles, as outlined below.

		The elements selected should reflect the graduated scale of risk which they seek to mitigate .
Propo in pro	ortionality actice	For example, lower risk general business licensing activities should be assessed with reference to baseline elements and, if necessary, a selection of relevant standard elements.
		In higher risk environments, such as firearms licencing or adoption of a child, bespoke and extraordinary elements may be relevant.
	Objectivity in practice	The nature of the elements considered in an assessment should be capable of verification through collection of facts and evidence .
		Subjective criteria, such as assessments of good character, integrity and honesty, should be avoided unless required in exceptional circumstances.
		Not only should elements be objective, but they should be objectively applied where possible (meaning regulators should not generally have discretion to choose which elements to have regard to and which to disregard, unless they are not applicable to the applicant).
		A desire for subjectively applied elements may indicate that the scheme has not adopted the minimum number of necessary elements, and is seeking to achieve through an enlarged assessment process what should be addressed with other tools.

To support design of a best practice assessment, elements can be categorised as baseline, standard, bespoke or extraordinary. These categories are defined below.

Category	Level 1: Baseline elements	Level 2: Standard elements	Level 3: Bespoke elements	Level 4: Extraordinary elements
Definition	Elements reflect the minimum information required to undertake an FPT.	Elements are a relevant and necessary consideration in a range of circumstances, where identified risks cannot be sufficiently mitigated through baseline elements.	Elements are relevant and necessary in a limited range of circumstances, where a customised FPT is required to address identified risks.	The subjective nature of the elements means inclusion in an FPT should only occur in high-risk environments, where no other elements can address the identified risks.
Example	An identity check should form part of every FPT, as it allows regulators to validate that information provided is related to the applicant.	Past regulatory compliance under the regime through which the licence or permission may be issued is relevant for consideration in a broad range of FPTs, regardless of the nature of the permission or licence. E.g. a licence for labour hire services.	Assessment of health and medical conditions will only be required where there is a physical or mental health component to the activities permitted under the relevant licence or permission. E.g. accreditation as a driver of a commercial vessel.	An assessment of good character, including with reference to honesty and integrity, will only be required where subjective details of a person's character are required to accompany an objective assessment. E.g. an assessment to adopt a child.

Policymakers should consider these categories against the level of risk they are seeking to mitigate and select the most appropriate combination of elements. The minimum number of mandatory elements (and corresponding evidentiary requirements) should be included in an assessment. The model provisions in this document reflect this approach.

Identity verification should form part of every assessment. Policymakers must consider the appropriate level of assurance (LOA) commensurate with the level of risk being mitigated. This should consider:

- the risk of fraud which may exist in the regulatory environment (e.g. the requirement for a higher LOA may exist where there is evidence of fraudulent behaviour in the regulatory environment)
- the intention behind the regulatory scheme (e.g. a scheme with a primarily educative focus may require a lower LOA), and
- the appropriate LOA with reference to the overall regulatory context.

For additional information on Service Victoria's Identity Verification Standards, review the Standards on the <u>Service Victoria</u> website.

Applying the minimum number of mandatory elements

Best practice favours inclusion of the minimum level of mandatory elements for an assessment. This includes that, if satisfied with the applicant's suitability under legislated criteria, a regulator 'must' grant the relevant permission.

Similarly, assessments using mandatory elements means that an adverse finding against an identified element necessarily leads to an adverse finding in relation to the relevant assessment.

The model clause below reflects a provision where there is a presumed 'issue' or presumed 'refusal' of a permission where certain elements are or are not met. **This is an example of a mandatory assessment.**

[Policymakers should select the most appropriate option*]

Provision A. Consideration of application

[presumed issue/refusal if certain elements met/not met - elements specified or prescribed]

- (1) After considering an application that complies with section 1 and any further information provided under section 2, the Regulator must:
 - (a) issue/grant the [licence/registration/exemption] if the applicant meets:
 - *the prescribed requirements; or
 - *the requirements specified in subsection (2);),;); or
 - (b) refuse to issue/grant the [licence/registration/exemption] if the applicant does not meet one or more of : the: ...
 - * the prescribed requirements
 - * requirements specified in subsection (2).
- (2)*For the purposes of subsection (1), the following are specified requirements:
 - (a) [list of elements formulated as requirements].

[These elements could also be used to limit the class of persons who may apply for a licence/registration/an exemption.]

While appropriate in some limited circumstances, **discretionary assessments** are discouraged. Best practice considers that with reference to human rights, natural justice and administrative law, inherent issues arise where an applicant fulfills all elements of an assessment, but the relevant permission is not granted.

Discretionary assessments, if absolutely necessary, should identify exhaustive factors for consideration, as set out in 5A below, and avoid non-exhaustive or open-ended factors such as 'and other relevant factors'. This helps prevent scope creep that may be invalid, unduly burdensome, or non-transparent and not sufficiently open to parliamentary scrutiny. Where a discretionary assessment is required, the number of factors for consideration should be minimised to limit the potential for infringements on human rights, natural justice and administrative law.

The decision-maker should also consider the following when reaching a decision:

- The competing interest of the applicant and the overarching objectives or principles of the relevant Act
- Any factors specified in legislative provisions
- Any recent and relevant court or tribunal authorities.

While the following model provisions relate to discretionary assessments, these do not reflect best practice in most cases and are discouraged.

Provision B. Consideration of application

[at discretion of the Regulator]

- (1) On receiving an application that complies with section 1, the Regulator—
 - (a) may [issue the licence/registration/grant the exemption]; or
 - (b) may refuse to [issue the licence/registration/grant the exemption].
- (2) In considering the application, the Regulator
 - (a) must consider the following
 - (i) list of any mandatory specified elements; and
 - (b) may consider the following

[list of any discretionary specified elements].

Example in practice (discretionary)

Example details: Application for a licence to supply hammers. Licences issued by the Hardware Regulator. Licences to be issued at the discretion of the Hardware Regulator, who must consider the applicant's criminal and regulatory compliance history before issuing a licence.

Consideration of application

- (1) On receiving an application that complies with section 1, the Hardware Regulator
 - (a) may issue the hammer supply licence; or
 - (b) may refuse to issue the hammer supply licence.
- (2) In considering the application for a hammer supply licence, the Hardware Regulator must consider:
 - (a) whether the applicant has at any time been found guilty of any of the following:
 - (i) an offence against this Act or the Regulations;
 - (ii) an offence involving fraud or dishonesty, whether committed in Victoria or another jurisdiction;
 - (iii) an offence against a law of another State, a Territory or the Commonwealth [another jurisdiction] that corresponds to this Act.
 - (b) whether the applicant has been charged with an offence referred to in paragraph (a) and that charge has not been finally determined;

- (c) if the applicant holds or has held a licence or permit to supply hammers (however described) issued under a law of another State, a Territory or the Commonwealth that the Hardware Regulator considers to be the equivalent of a licence to supply hammers
 - (i) whether the applicant has contravened that licence or permit at any time,; or
 - (ii) whether, at any time, that licence or permit is or was suspended; or
 - (iii) whether, at any time, that licence or permit is or was revoked.

Where discretionary criteria are applied, a decision-maker's satisfaction of an applicant's suitability is based on the facts and the relevant statute. Notably, in *Avon Downs Pty Ltd v Commissioner of Taxation* (Cth) (1949) 78 CLR 353, the High Court held at [360]:

'If [a decision maker] does not address himself to the question which the... [Statute]... formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review.'

In some limited cases, such as the examples set out below, use of discretion may be appropriate.

cample

An individual applies to be a taxi driver. The applicant satisfies all mandatory criteria, including satisfactory medical and police checks. However, there is a limit on the number of taxi licences which can be in operation at any one time. This limit has been reached and therefore, the decision-making uses their discretion to deny the taxi licence on this occasion, providing clear reasoning.

ample

An inspection is conducted on the premises of a registered firearms licence holder. The licence may be revoked where firearms are stored in an unsafe manner or condition which is otherwise non-compliant with relevant legislation. The inspection finds that the firearms safe has a loose bolt. The licence holder immediately remediates the bolt, the safe is otherwise compliant, and the licence holder has no history of non-compliance. The inspector exercises their discretion to allow the licence holder to retain their licence.

Approach to evidence requirements



To reduce the regulatory burden on applicants, regulators and businesses, minimum acceptable levels of evidence should be required to substantiate an applicant's assessment.

Evidence required should be commensurate with the level of risk a regulator is seeking to mitigate, in line with the below.

While legislated assessments should be reserved for application in high-risk regulatory environments, the table below recognises the scale of harm that may exist within these environments.

Risk level	Where the risk of harm is lower to medium	Where the risk of harm is medium to high	Where the risk of harm is high or very high
Evidence	Applicant attests their identity and demonstrates that they satisfy the requirements of the assessment. See Baseline Elements on page 10.	Applicant provides documentation to prove their identity and demonstrates that they satisfy the requirements of the assessment (e.g. evidence of professional qualifications or record of criminal history).	Applicant provides documentation to prove their identity and demonstrates that they satisfy the requirements of the assessment (e.g. evidence of professional qualifications or record of criminal history). Regulator undertakes checks to verify the applicant's identity and documentation. Regulatory may seek additional information from the applicant.
			In rare circumstances , regulator may assess the applicant's character (see Extraordinary Elements on page 25).

For more information on appropriate evidence requirements, see the Victorian Fit and Proper Test Framework.

For lower risk environments, an attestation of the applicant's identity is likely to be sufficient for assessing suitability (noting that cancellation of the relevant licence or permission may follow where such an attestation is proven to be false).

In most circumstances, it will be appropriate for an applicant to verify their identity or provide evidence to support their attestation. Policymakers should select (and justify) how an applicant may complete this step as part of a level of assurance assessment.

Policymakers should refer to and seek alignment with the Service Victoria Identity Verification standards. These align with national guidelines on suitable, risk-based identity verification processes. Policymakers should also refer to the National Identity Proofing Guidelines (NIPG) to which all states and territories have agreed.

Baseline elements 3.

Baseline elements reflect the minimum information required to assess an applicant's suitability. In lower risk environments, it is sufficient that an application contain a statement by the applicant where the applicant:

- 1. identifies themselves as the applicant (including whether the applicant is an individual or body corporate), and
- 2. makes an attestation that they are suitable to undertake an activity or hold a permission, with reference to elements set out in the applicable legislation.

Identifying an applicant



For lower risk environments, an attestation of the applicant's identity may be sufficient for assessing suitability (noting that cancellation of the relevant licence or permission may follow where such an attestation is proven to be false).

Where the risk is higher, an applicant would need to verify their identity or provide evidence to support their attestation. Policymakers should select (and justify) the means through which an applicant may complete this step based on consideration of the applicant cohort risk environment:

- using Service Victoria's <u>Identity Verification Service</u>, which supports multiple levels of assurance including a higher standard of proofing for higher-risk environments. A level of assurance assessment can be completed with Service Victoria to determine an appropriate level of assurance.
- requiring that an applicant provide certified copies of identity documents (in line with requirements contained in the Oaths and Affirmations Act 2018 (Vic) using non-digital channels. This will be most appropriate for applications from vulnerable cohorts. The Victorian Department of Justice and Community Safety provides additional guidance on certification, or
- using a points-based system of evidence. However, it should be noted that points-based approaches are considered outdated, with digitised approaches to identity an applicant being the favoured alternative due to improved accuracy and efficiency.

The Department of Justice and Community Safety (<u>CCLConsultation@justice.vic.gov.au</u>) should be consulted on any appropriate offence provision or other penalties for providing false or misleading information.

ample

An individual is applying for a 28-day recreational fishing permit. Section 49(5) of the *Fisheries Act* 1995 (Vic) provides that a permit may not be issued unless the decision-maker is satisfied the applicant is fit and proper to hold such a licence.

In these circumstances, identification of the applicant, completion of an online form (requiring a date of birth and contact information), a declaration that the individual is not exempt from holding a licence and is aware that making a false or misleading statement is an offence will be sufficient for issuing the permit.

ample

A company is seeking to register as a Booking Service Provider. This will enable that company to receive requests for commercial passenger vehicle (CPV) trips and arrange for CPV drivers to provide services.

Section 58 of the *Commercial Passenger Vehicle Industry Act 2017* does not specify the requirements for a fit and proper assessment. Here, it will be sufficient for the company to register with Safe Transport Victoria by providing an attestation of their identity and fit and proper status.

[Policymakers should select the most appropriate option*]

Model provisions setting out baseline elements

[define licence/registration/exemption in meaningful way]

1 Application for [licence/registration/exemption]

- (1) A person may apply for...
 - * a licence to [engage in a regulated activity].
 - * registration to [provide a regulated service].
 - * an exemption from [section xxxx/any or all of the requirements under section xxxx].
- (2) An application must—
 - (a) be in...
 - *the prescribed form;
 - * the form approved by the Regulator;

[Alternatives for para (a) relate to the application form. If the application form is prescribed, desired elements can be included in the application form by prescription.]

- (b) include—
 - * a statement of the qualifications or experience that make the person suitable to [hold the licence/engage in the regulated activity/be issued an exemption];
 - * any prescribed information;
 - * evidence of specified elements; [see criminal history and regulatory compliance elements]

[other application requirements].

2 Regulator may request further information

(1) For the purposes of determining an application for [licence/registration/exemption], the Regulator may request the applicant to provide information relating to the following—

[list of information relating to relevant elements];

- (2) The request must—
 - (a) be in writing;
 - (b) specify the period within which the applicant must provide the information; and
 - (c) [other requirements].

The Regulator may refuse to consider the application if the applicant does not provide the information in accordance with the request.

3 Applicant must provide information

On receiving a request for further information [under section 2], the applicant must provide the information to the Regulator—

- (a) in writing; and
- (b) within the period specified in the request.

[Provisions should also set out the consequences of an applicant's failure to provide this information.]

4 False or misleading information

An applicant must not knowingly provide information to the Regulator that is false or misleading [in a material particular] in relation to an application under section 1.

Penalty: [penalty units].

Example in practice

Example details: Application for a licence to supply hammers. Licences issued by the Hardware Regulator. Licences to be issued at the discretion of the Hardware Regulator, who must consider the applicant's criminal and regulatory compliance history before issuing a licence.

Hammer supply licence means a licence issued under section [5];

1 Application for hammer supply licence

- (1) A person may apply to the Hardware Regulator for a hammer supply licence
- (2) The application must—
 - (a) be in the form approved by the Hardware Regulator; and
 - (b) include any prescribed information; and
 - (c) be accompanied by any prescribed document; and
 - (d) be accompanied by the prescribed fee.

2 Regulator may request further information

- (1) For the purposes of determining an application for a hammer supply licence, the Hardware Regulator may request the applicant to provide information relating to the following—
 - (a) the applicant's criminal history;
 - (b) any previous history of non-compliance by the applicant with this Act;
 - (c) any prescribed matter.
- (2) The request must—
 - (a) be in writing; and
 - (b) specify the period within which the applicant must provide the information.
- (3) The Hardware Regulator may refuse to consider the application if the applicant does not provide the information in accordance with the request.

3 Applicant must provide information

On receiving a request for further information [under section 2], the applicant must provide the information to the Hardware Regulator

- (a) in writing; and
- (b) within the period specified in the request.

4 False or misleading information

An applicant must not knowingly provide information to the Hardware Regulator that is false or misleading [in a material particular] in relation to an application under section 1.

Penalty: [penalty units].

Standard elements 4.

Standard elements are relevant and necessary for consideration in a range of circumstances, where identified risks cannot be sufficiently mitigated through baseline elements. Standard elements include:

- assessment of criminal history
- assessment of past regulatory compliance
- outcomes of previous permissions
- disqualifications, bans and prohibitions
- professional standards
- relevant skills and experience
- assessment of financial position, and
- solvency

Application of the Spent Convictions Act 2021



Elements in this section reference the need to consider applicants' criminal history, past regulatory compliance, bans, disqualifications, prohibitions or the existence of relevant court orders.

The Spent Convictions Act 2021 (SCA) will be a relevant consideration when adopting and applying these elements. Disclosures of criminal history must align with the purpose and policy intent of the SCA, which governs the release and disclosure of criminal history information in Victoria and aims to reduce the barriers which past convictions may pose the rehabilitation.

Generally, convictions will become spent in line as follows:

- If a conviction is not a 'serious conviction' or is not eligible to be spent immediately, the conviction will become spent once the relevant conviction period has passed without any further offending (except for some minor offences).
- If the person was aged 15-20 when they were sentenced, the conviction period is five years.
- If the person was 21 years or older when they were sentenced, the conviction period is 10 years.
- If the person reoffends during these periods (apart from some minor offences), the conviction period restarts.

More information on when a conviction may become spent can be found on the Department of Justice and Community Safety website.

In some circumstances, some government agencies, the police, and courts have exemptions to collect, use and disclose information about a person's spent convictions for a particular purpose, including, but not limited to:

- Working with Children Check
- NDIS worker screening
- some occupational accreditations, such as health professionals, teachers and lawyers
- courts and tribunals
- family violence information, and
- immigration decision making.

Importantly, the SCA does not include a broad exemption for the use and disclosure of spent conviction information for the purpose of all assessments. Consideration may be given to seeking an exemption to the SCA for an assessment, but this should be limited to situations where this is required for public safety.

The SCA establishes exemptions for particular agencies, including registration, accreditation and licensing agencies to use spent conviction information.

However, the SCA does not specify which spent conviction information is relevant to a regulator when determining whether to approve a registration or license, nor does the Act limit which spent convictions can be considered by each regulator as convictions relevant to their regulatory function.

It is vital that these limitations are instead detailed in the relevant legislation establishing each regulatory scheme.

Statutory review of the SCA

A statutory review of the SCA (<u>Review of the Spent Convictions Act 2021</u>) found that spent conviction information should only be permitted for use in a 'fit and proper person assessment' if the purpose falls under a specific exemption included in the SCA or *Spent Convictions Regulations 2021*. Where this exemption is not in place, the disclosure may be unlawful under section 23 of the SCA.

The review recommended that, where an exemption exists, the permitted use of spent conviction information should be limited to the performance of exempt functions. It is important that the relevant legislation which establishes assessments also limits the permitted use of spent conviction information to what is relevant or required for the particular assessment being conducted.

For more information on the SCA, including obligations and restrictions on collecting and sharing information about spent convictions, see the <u>Department of Justice and Community Safety website</u>.

4.1 Assessment of criminal history

In some circumstances, an applicant may be required to disclose their criminal history as part of an assessment. This may be a relevant consideration in circumstances where the licence or permission:

- could put the applicant in close proximity with vulnerable persons, such as a licence to operate a rooming house or to employ children, or
- is for a high-risk activity or function, such the operation of a firearm or the manufacturing of dangerous goods.

Criminal history may also be relevant where the particular Act or regulations creates an offence for licence or permission holders, and a regulator is interested in where the applicant has committed that offence under a past licence or permission.

As part of an assessment, a regulator may seek an applicant's consent to conduct a formal police check. This may include mechanisms such as the <u>National Police Check</u>. This check will produce a criminal history report which contains details including:

- upcoming court details and hearing dates for matters with police involvement
- past offences for which a conviction has been recorded
- sentencing outcomes.

A criminal history report will not provide details on:

- the Act or regulation under which an offence was committed
- whether the offence was an offence against the Commonwealth, Victoria, or another jurisdiction, or
- whether an offence was an indictable offence.

Notably, a criminal history report **will not** provide details on any prosecution or criminal history related matters under the jurisdiction of enforcement agencies or regulators other than police.

Where these additional details are required, policymakers may seek to include legislated powers which require an applicant to make disclosures about the applicant's criminal history, including for regulatory-based offences outside the jurisdiction of police. Any information disclosed by an applicant, or collected by a regulator, must be done in accordance with the SCA.

Criminal history [for Provision A on page 9 or Provision B on page 10]

The Regulator [must/may] consider whether the applicant has [within [number] years before the application]

[Policymakers to select one or more of the following.]

- (a) at any time has been found guilty of any of the following—
 - (i) an offence against this Act or the regulations;
 - (ii) an offence involving fraud or dishonesty, whether committed in Victoria or another jurisdiction [or other specified behaviour/subject matter];
 - (iii) an offence against a law of another State, a Territory or the Commonwealth [another jurisdiction] that corresponds to this Act;
- (b) any indictable offence or an offence against a law of another State, a Territory or the Commonwealth [another jurisdiction] that, if committed in Victoria, would be an indictable offence;
- (c) been charged with an offence referred to in paragraph (a) and that charge has not been finally determined.

Policymakers should consider best practice principles in determining the preceding time period in which an applicant is required to disclose their criminal history.

Where the licence or permission sought relates to a lower risk activity (e.g. a meat and seafood transport vehicle licence), a shorter disclosure period may be appropriate (3 years).

Where there is a greater risk to the public or of exposure to offending behaviour, (e.g. tobacco sales or provision of a firearms licence) a longer disclosure period may be appropriate (up to 10 years).



The length of time in which an applicant's criminal history may be considered should be determined with reference to:

- the seriousness and relevance of the conduct related to the offending
- where the offending results in a sentence, the severity and nature of the sentence
- the nature of the licence or permission for which the applicant is applying, including the level of harm which a regulator is seeking to manage
- any legislated timeframes for which such offences can be considered relevant (e.g. 5 years), and
- compliance with the Spent Convictions Act 2021 (where relevant).

An indictable offence 🛨



This specification is contemplated in paragraph (b) of the model provision set out above.

In determining whether an applicant should be required to disclose any history of indictable offences, a regulator should consider the risk that is posed to the public by the applicant being granted the relevant licence, registration or authority.

An indictable offence is a serious criminal offence (refer to the *Crimes Act 1958* for information about offences deemed as indictable).

The regulator should consider whether the applicant will be involved in the provision of a children's service, health service, education and care, or anything else placing them in proximity to or engaging with vulnerable persons.

An offence in a specified jurisdiction 🛨



This specification is contemplated in paragraphs (a)(iii) and (b) of the model provision set out above.

In determining the jurisdictions which may be relevant for an applicant to identify a relevant criminal history, a regulator should consider:

- jurisdictions with similar or comparable legal and regulatory frameworks in relation to the specific subject matter being regulated
- any shared or mutual recognition arrangements between jurisdictions, e.g. the Trans-Tasman mutual recognition arrangement between Australia and New Zealand.

An offence committed under a specified Act or regulations 🛨



This specification is contemplated in paragraph (a)(i) and (b) of the model provision set out above.

In determining whether an applicant should be required to disclose any history of offending under a specified Act or regulations, a regulator should consider the relationship between their primary and specified Acts or regulations.

When seeking a licence to employ children, consideration may be given to an applicant's compliance with child employment laws in Victoria, as well in other Australian jurisdictions.

An offence related to a specified behaviour or class of person



This specification is contemplated in paragraph (a)(ii) of OCPC's model provision set out above.

In determining whether an applicant should be required to disclose any history of offending involving a particular behaviour or related to a specified class of persons, a regulator should identify relevant behaviours or classes of persons for which past offending may be relevant.

In determining an individual's suitability to hold a Working with Children permit, any criminal history will be relevant for consideration.

When applying for registration as an architect, consideration may be given to whether in the last 5 years an applicant has committed an offence under any law regulating architectural services or architects.

4.2 Assessment of past regulatory compliance

The applicant may be required to disclose any history of non-compliance with an applicable regulatory regime. This may include, for example, an assessment of compliance with the regulatory ecosystems which surround:

- building licences and development permits
- mining licences
- eligibility to provide education and care services, or
- eligibility to work with children.

[Policymakers should select the most appropriate option*]

Regulatory compliance [for Provision A on page 9 or Provision B on page 10]

If the applicant holds or has held a [licence, registration or exemption] (however described) issued or granted under this Act [or any previous corresponding enactment] or a law of another State, a Territory or the Commonwealth that the Regulator considers to be the equivalent of a [licence, registration or exemption], the Regulator [must/may] consider whether...

- * within [number] years before the application—
- * at any time—
- (a) the applicant has contravened that [licence, registration or exemption]; or
- (b) [that licence, registration or exemption] is or was suspended; or
- (c) that [licence, registration or exemption] is or was revoked; or
- (d) the applicant contravened the prescribed requirements.

Policymakers should consider best practice principles in determining the preceding time period in which an applicant is required to disclose relevant disqualifications, bans or prohibitions.



Proportionality in practice

The length of time in which an applicant's past regulatory compliance may be considered should be determined with reference to:

- the seriousness and relevance of the conduct which resulted in the noncompliance
- the nature of the licence or permission for which the applicant is applying
- any legislated timeframes for which such non-compliance(s) can be considered relevant (e.g. 5 years), and
- compliance with the Spent Convictions Act 2021 (where relevant).

4.3 Outcomes of previous permissions

An applicant may be required to disclose the outcomes of previous applications for a licence or permission. This may be relevant where there is a likelihood of harm or risk arising where that applicant has previously been deemed to be unsuitable to carry out the relevant activity.

ample

When applying for a Working with Children's Check in Victoria, an applicant may be required to disclose the outcomes of previous applications in other Australian states and territories.

This is because information which led to an adverse finding in those jurisdictions may be relevant in assessing the applicant's suitability in Victoria, when concerning a high-risk environment (i.e. working with children).

To include this requirement, policymakers may seek to add a paragraph to the model provision provided by OCPC above. Policymakers should always engage with OCPC to ensure their intended provisions are appropriate and fit for purpose. Policymakers should also seek legal advice where necessary.

4.4 Disqualifications, bans and prohibitions

An applicant for a licence or permission may be required to disclose their current or past disqualifications, bans or prohibitions from:

- conducting a relevant activity, or
- holding a licence or permission under a specified Act or regulations.

This specification is contemplated in **paragraphs (a) and (d)** of OCPC's model provision set out above.

For example, when applying for an Australian Financial Services Licence, the Australian Securities and Investments Commission (ASIC) will consider whether a ban or disqualification order has been made by a court against the applicant under Subdivision B of Division 8 of the *Corporations Act 2001* (Cth) or Part 2-4 of the *National Consumer Credit Protection Act 2009* (Cth). ASIC might also consider whether any bans apply to the applicant, for any credit-related activities under state or territory laws.

Policymakers should consider best practice principles in determining the preceding time period in which an applicant is required to disclose relevant disqualifications, bans or prohibitions.

xample

An individual applies to be a taxi driver. The applicant satisfies all mandatory criteria, including satisfactory medical and police checks. However, there is a limit on the number of taxi licences which can be in operation at any one time. This limit has been reached and therefore, the decision-making uses their discretion to deny the taxi licence on this occasion, providing clear reasoning.



The length of time in which an applicant's relevant disqualifications, bans or prohibitions may be considered should be determined with reference to:

- whether the ban, disqualification or prohibition is current or historical
- the seriousness and relevance of the conduct which results in the ban, disqualification or prohibition
- the nature of the licence or permission for which the applicant is applying
- any legislated timeframes for which such bans, disqualifications or prohibitions can be considered relevant (e.g. 5 years), and
- the need for compliance with the Spent Convictions Act (where relevant).

cample

An individual is disqualified from managing corporations and is seeking permission to register as a building practitioner. As the applicant's disqualification is current, registration as a building practitioner will not be permitted.

This individual is also seeking to apply for a driver's licence. The nature of the conduct which led to the individual's disqualification from managing corporations (e.g. business-related conduct) may not be relevant in considering the applicant's ability to fulfill the requirements of a driver's licence holder. Where all other relevant requirements are satisfied, the driver's licence may be granted.

Policymakers considering disqualifications, bans and prohibitions may also need to consider a requirement that an applicant disclose whether they are:

- currently or have been subject to a court order
- currently or have been found to be in breach of relevant and applicable professional standards, e.g. an individual applying to work in disability services, who has previously been found to have violated the Nursing and Midwifery Board's Professional Standards, or
- currently being investigated for conduct which may result in a relevant ban, disqualification of permission.

For these matters, departments may seek to add a paragraph to the model provision provided by OCPC above. Policy makers should always engage with OCPC to ensure their intended provisions are appropriate and fit for purpose. Policymakers should also seek legal advice where necessary.

4.5 Relevant skills and experience

In some circumstances, an application may be required to demonstrate they hold the skills and experience required to undertake an activity or hold the relevant permission.

The relevant skills and experience will vary depending on the nature of the activity or permission sought by the applicant. It may include a requirement that an applicant provide evidence to demonstrate their suitability (such as a certificate, or proof of a qualification).

[Policymakers should select the most appropriate option*]

Relevant skills and experience

1 Application for [licence/registration/exemption]

- (4) A person may apply for...
 - * a licence to [engage in a regulated activity].
 - * registration to [provide a regulated service].
 - * an exemption from [section xxxx/any or all of the requirements under section xxxx].
- (5) An application must—
 - (a) be in...
 - * the prescribed form;
 - * the form approved by the Regulator;

[Alternatives for para (a) relate to the application form. If the application form is prescribed, desired elements can be included in the application form by prescription.]

- (b) include—
 - * evidence that the applicant has
 - * appropriate skills, qualifications or experience to [hold a licence/engage in the regulated activity/be issued an exemption];
 - * skills, qualifications or experience in [specify].

Relevant skills and experience [for Provision A on page 9 or Provision B on page 10]

The Regulator must not [issue the licence/registration/grant the exemption] unless the Regulator is satisfied that the person has appropriate skills, qualifications or experience to [hold the licence/engage in the regulated activity/be issued an exemption].

xample

An individual applying for a firearm's licence may be required to provide evidence that they have satisfactorily completed the prescribed firearms safety or other training courses.

Example

A disability worker applying to hold a limited registration may be required to provide evidence of the nature, extent, period and recency of any previous practice as a disability worker.

4.6 Assessment of financial position

An applicant may be required to provide information which supports a regulator in making an assessment as to the applicant's financial position. This may be required where:

- significant or ongoing financial output is required to undertake the activity for which the permission is being sought
- there is a risk of consumer harm if the business becomes insolvent (e.g. where there is an
 ongoing relationship, such as a financing relationship, where the consumer is unlikely to
 obtain the benefit of an expensive or highly valuable good or service if the business
 becomes insolvent), or
- where an activity would put an applicant at risk of actual or perceived financial coercion or bribery.

xampl

In determining whether to register premises as a health services establishment, the Secretary of the Department of Health must consider whether the applicant for registration has and is likely to continue to have the financial capacity to carry on a health service establishment.

Example

When determining whether to grant a licence for the operation of a Keno business, consideration of whether the applicant is of sound and stable financial background, and has financial resources that are adequate is required.

This is to ensure the financial viability of a Keno business and, given that Keno is a form of gambling, assess the applicant's risk of engaging in behaviours which do not comply with relevant gambling laws.

Example

An applicant seeking to adopt a child must include in the application details which demonstrate whether the applicant or applicants' financial circumstances are suitable for providing financial support to the child until they reach adulthood.

4.7 Solvency

The applicant may be required to disclose their solvency status. This may be required in circumstances where the relevant permission or licence requires that the applicant hold and maintain adequate control over any personal or business-related financial risks.

While legislation may create the requirement for a decision-maker to consider solvency, policymakers may determine the relevant solvency criteria. Examples include:

- the applicant's ability to pay any debts they have incurred as at the date of the application
- future debts and the extent to which these can be paid, with reference to debts pending on the date of application
- other factors of uncertainty, such as the withdrawal of existing financial support.

[Policymakers should select the most appropriate option*]

Solvency

1 Application for [licence/registration/exemption]

- (1) A person may apply for...
 - * a licence to [engage in a regulated activity].
 - * registration to [provide a regulated service].
 - * an exemption from [section xxxx/any or all of the requirements under section xxxx].
- (2) An application must—
 - (a) be in...
 - * the prescribed form;
 - * the form approved by the Regulator;

[Alternatives for para (a) relate to the application form. If the application form is prescribed, desired elements can be included in the application form by prescription.]

- (b) include—
 - * a statement of the skills, qualifications or experience that make the person suitable to [hold the licence/engage in the regulated activity/be issued an exemption];
 - * any prescribed information;
 - * evidence of specified elements;
- (c) state that the applicant is an insolvent under administration.

Solvency [for Provision A on page 9 or Provision B on page 10]

The Regulator must not [issue the licence/registration/grant the exemption] if the applicant is an insolvent under administration.

xample

A builder is seeking permissions to commence a long-term, capital-intensive project, so there is a need to consider the builder's solvency in determining whether sufficient funds are available to undertake the project on an ongoing basis. While assessing solvency, it is discovered that the project's risk is not managed by insurances and the builder has previously declared bankruptcy. The permission will not be awarded in this case.

5. Bespoke elements

Bespoke elements are relevant for consideration in a limited number of assessments, where a customised approach is required to address identified risks.

This may include circumstances such as applications for drivers licences, taxi-drivers licences, the manufacture of listed or narcotic substances, the provision of health services, adoption, and operating a bingo or other gaming centre.

Bespoke elements include:

- associates and affiliations
- required resources (other than financial resources)
- assessment of health and medical conditions, and
- public interest

Given the customised nature of these elements and their appropriateness for consideration in only a limited number of assessments, this section does not contain model provisions.

Policymakers wishing to include a bespoke element should engage directly with OCPC to ensure that the inclusion of the clause is justified and appropriately tailored to the relevant regulatory environment.

Considering human rights

The Charter of Human Rights and Responsibilities Act 2006 (the Charter), along with the Equal Opportunity Act 2010, provide legal protections for Victorians from unjustified infringements on human rights and discrimination. Section 13 of the Charter creates a right to privacy, which extends to the collection of personal information by public authorities, results of medical tests or examinations and other confidential matters.

The nature of some bespoke elements contained in this section means interactions with the Charter must be carefully considered. Any requirement that an individual disclose or provide personal information, such as health-related information or information related to foster caring arrangements, must be justified. This includes identification of a high risk of harm if this information is not collected as part of an assessment.

Collection of personal, health or other sensitive information may also enliven requirements contained in the *Privacy and Data Protection Act 2014* (PDP Act) and the *Health Records Act 2001* (HR Act). Additional information on the operation of these regimes can be found as below:

- For the PDP Act, see the Office of the Victorian Information Commissioner's guidance
 The PDP Act a deep dive
- For the HR Act, see the Health Complaint Commissioner's Health records guidance.

5.1 Associates and affiliations

An applicant may be required to declare their associates and affiliates as part of an assessment. In some circumstances, this may extend to demonstrating that the applicant's associates are also fit and proper through the collection of evidence or assessment by a regulator.

An applicant's associates and affiliates are necessary for consideration where:

- the associates and affiliates may be in a position to exert negative influence or control over the activity to which the application relates, and
- observed ongoing or recent market behaviours and conditions indicate a need to assess associates and affiliates.

For example, for building practitioner registrations, assessment of an applicant's associates and affiliates may be required to combat illegal phoenixing activity in the building market. Illegal phoenixing occurs when an entity goes into external administration and avoids payments to creditors, before re-entering the market as a new company run by the same individuals. When registering as a building practitioner, this assessment will consider company directors, secretaries and other influential individuals from companies who have entered external administration to mitigate the risk of phoenixing activity.

Where the risk cannot be tied to ongoing or recent market behaviours, the burden arising from assessing an applicant's associates and affiliates may be in excess of the risk being managed.

For individuals, associates may include:



- a relative of the individual
- a partner of the individual or a partnership to which the individual is a partner
- the spouse or child of the partner
- a trustee of a trust under which the individual or their associates benefits, or
- a company under the control of the individual or their associate.

For body corporates, associates may include:



- a partner of the company or a partnership in which the company is a partner
- a trustee under which the company benefits
- another entity or its associates who control the company, or
- another company under the primary company's control.

ample

An applicant seeking a licence to manufacture listed substances (specifically, the cultivation of alkaloid poppies or the processing of poppy straw) may be required to declare their associates as part of an assessment.

This is because where the applicant may be negatively influenced by an associate in a position of power, manufacturing activities and manufactured end-products may be misused or sold in a manner which is against the law. Given the manufactured products may be used or consumed as illicit substances, there is a high risk of harm to the public.

5.2 Required resources (other than financial resources)

The applicant may be required to demonstrate they hold or have access to resources required to undertake the activity or hold the relevant permission.

This may be required in circumstances where the activity for which permission is being sought requires possession of specific resources, such as machinery or certain types of premises.

Example

A person cannot be granted a licence to carry on the business of trading in motor cars if the Business Licensing Authority considers that the applicant does not have, or is not likely to have, premises in which the applicant can lawfully carry on such a business.

Example

A person cannot be issued a licence to possess a firearm unless the Commissioner is satisfied that the applicant is capable of meeting the relevant storage and safety requirements.

The same requirement applies in respect of a firearms dealers licence.

5.3 Assessment of health and medical conditions

In some circumstances, an applicant may be required to:

- disclose if the applicant has a health or medical condition which may impair the applicant's ability to undertake the relevant activity or hold the relevant permission, or
- demonstrate that the applicant is sufficiently healthy for the purposes of conducting the activity or holding the relevant permission.

kample

A person who seeks to become a police reservist must be free from any illness or physical defect which would render the person physically unfit to perform the duties of a police reservist.

Example

When determining an application for entrance into a witness protection program, the Chief Commissioner may require the applicant to undergo medical tests or examinations, or psychological or psychiatric examinations.

As identified above in 'Considering Human Rights', appropriate statutory power (with sufficient justification) is required before requesting a person's health and medical information. The intrusive nature of collecting sensitive health-related information can also create potential discrimination risks.

A **clear linkage** between the risk of harm being managed and the ability for collection and assessment of sensitive health information to mitigate this harm should be evident and justifiable.

For example, a person applying for or renewing a driver's licence should demonstrate that their vision is sufficient for operating a motor vehicle, and that they are not impaired by a health or medical condition. This is a relevant and justified consideration, as driving with a vision or other impairment creates a significant risk to that individual and to the public.

When considering an individual's suitability for holding a taxi licence, the applicant's emotional and psychiatric health may also be relevant. In QWE v Taxi Services Commission (Review and Regulation) [2015] VCAT 1512, the Tribunal had regard to applicable public care objectives, which require the provision of safe and comfortable driving services. Here, a driver sought to have his licence reinstated. However, a recent chronic psychiatric (paranoid) schizophrenia diagnosis meant the Tribunal held that it was not appropriate for the applicant's licence to be reinstated.

The Tribunal considered the particular context of taxi driving and stated (at [38]):

'...I am not satisfied, that there are sufficient safeguards in place, that if the applicant was not to turn up for his injection that he would be apprehended in sufficient time before damage could be done to the public through his driving or, more importantly, to a passenger in his particular taxi. Passengers often become difficult and rude and it follows that somebody in a psychotic state, as the applicant may be if he was not complying with his medication, may inflict harm on that person.'

This example can be compared with collection of health information related to a lawyer's or real estate agent's history of mental illness. While there may be some instances where collection of this information is considered relevant (for example, to prevent defalcating of trust funds), policymakers should consider alternative means to mitigate this potential harm. This could include through undertaking audits or other external scrutiny processes.

In contrast with the above example related to taxi drivers, there is less immediate risk of harm to life or safety associated with these desktop-based roles compared to where a driver has a passenger in a confined space that they can quickly and remotely control.

5.4 Public interest

Public interest assessments may be relevant in limited circumstances where there is a need to balance potential risks to the public against the benefits of awarding the relevant licence or permission to an applicant.

In Comalco Aluminium (Bell Bay) Ltd v O'Connor (1995) ALR 657, the Court held at paragraph 6 that a 'public interest test' involves consideration of the interests of the whole community, not just the interests of the relevant individual.

Example

To grant a licence application for the operation of a Keno business, the Secretary of the Department of Justice and Community Safety must be satisfied that doing so is in the public interest, having regard to a set of specified, mandatory considerations.

This is a necessary consideration given the business's likely interactions with the community in which it operates, and the potential for a non-compliant business to cause disruption or harm to that community.

6. Extraordinary elements

Extraordinary elements reflect rare circumstances where a subjective element may be relevant for consideration in an assessment. These elements should be applied only where no other elements can address the risks identified by the regulator.



Extraordinary elements have been separately categorised as they are subjective in nature.

Criteria in this section should only be used in exceptional circumstances.

Where possible, objective criteria, capable of verification through collection of facts and evidence, should be used in place of subjective criteria.

Given the subjective nature of these elements and their appropriateness for consideration in rare circumstances, this section does not contain model provisions.

Policymakers wishing to include extraordinary elements should engage directly with OCPC to ensure that the inclusion of the clause is justified and appropriately tailored to the relevant regulatory environment.

6.1 Assessment of good character

The phrase 'good character' is referred to in Victorian statutes such as the *Estate Agents Act 1980* (see section 25), and the *Children, Youth and Families Act 2005* (see section 227).

'Good character' should be interpreted with reference to its ordinary meaning unless it is otherwise defined in relevant statute. In *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422, the Full Federal Court stated (at 431-432) that 'good character' refers to '...the enduring moral qualities of a person, and not the good standing, fame or repute of that person in the community'.

An assessment of good character is generally not considered best practice for inclusion in assessments. However, in some circumstances, an assessment of good character may be appropriate to support a regulator in deciding an applicant's suitability, with reference to honesty, integrity or stability.

Example

A person applying for registration as a police officer or a police reservist is required to be of good character. This is a justified consideration, with reference to the role of police officers in community safety and law enforcement.

A person or persons applying to adopt a child will be assessed having regard to relevant criteria including the character of the applicant(s).

kample

In the case of adoption, this extends to an assessment of an applicant's emotional, physical and mental state, their age and maturity, life experience and skills, and whether the applicant's general stability of character is suitable for adopting.

This kind of assessment is justifiable in this context given the vulnerability of a child and the need to ensure the child's safety upon adoption.

Policymakers wishing to include character assessments should engage with OCPC to ensure their intended provisions are appropriate and fit for purpose. Policymakers should also seek legal advice where necessary.

7. Efficient administration

When considering components which are appropriate and effective in managing the risk of harm, policymakers should consider how assessments can be administered in a way that minimises burden on applicants.

7.1 Service Victoria

Regulators should take a 'Service Victoria First' approach to administering assessments, considering in-house or alternative provision only when this is not feasible.

Service Victoria is the Victorian Government's one stop shop for engagement with business and the community. Service Victoria offers assessment components including:

• Identity Verification

• National Police Check

Regulators should check in with Service Victoria frequently to assess their new FPT offerings and evaluate if they can deliver services more efficiently. Using Service Victoria can improve regulatory efficiency and minimise burden on applicants, while reducing cyber security risk and supporting better data governance.

The use of Service Victoria can minimise administrative burden on regulators and regulatory burden on businesses. This burden is expected to continue to decline as Service Victoria continues to develop its reusable capabilities.

7.2 Alternative administration options

When Service Victoria is not a feasible option for administration, or specific assessment components are not offered by Service Victoria, regulators should engage cost-effective, high-quality third-party providers (e.g. to obtain a credit history report via a credit reporting body.) Regulators should ensure that third-party providers conduct assessment components digitally to enable assessments to be requested and results received with speed and security. Non-digital methods should also be offered to cater to applicants who cannot or will not engage digitally.

Where an assessment involves the use of numerous components, the use of full-suite Fit and Proper Test providers (providers offering multiple components, rather than discrete components) should be considered to improve operating efficiencies and reduce burden on businesses. These providers generally offer several components and enable regulators to outsource their assessments.

Assessments should only be administered in-house when the regulator has the necessary digital capability or if components cannot be administered digitally. Digital components allow for applicants to provide the necessary information to regulators simply and quickly and reduce processing times of regulators. Manual processing of assessments should be reserved for bespoke and extraordinary elements of assessments, or for when applicants cannot or will not engage digitally.

Appendix A - Consolidated OCPC provisions

This Appendix includes a consolidated summary of the OCPC model provisions which have been incorporated throughout this document.

Model provisions

[* select appropriate option]

[define licence/registration/exemption in meaningful way]

- 1 Application for [licence/registration/exemption]
 - (1) A person may apply for...
 - * a licence to [engage in a regulated activity].
 - * registration to [provide a regulated service].
 - * an exemption from [section xxxx/any or all of the requirements under section xxxx].
 - (2) An application must—
 - (a) be in...
 - * the prescribed form;
 - * the form approved by the Regulator; [Alternatives for para (a) relate to the application form. If the application form is prescribed, desired elements can be included in the application form by prescription.]
 - (b) include—
 - * a statement of the skills, qualifications or experience that make the person suitable to [hold the licence/engage in the regulated activity/be issued an exemption];
 - * any prescribed information;
 - * evidence of specified elements [see criminal history and regulatory compliance elements]
 - * evidence that the applicant has:
 - *appropriate skills, qualifications or experience to [hold a licence/engage in the regulated activity/be issued an exemption];

*skills, qualifications or experience in [specify];

Example

Example details: Application for a licence to supply hammers. Licences issued by the Hardware Regulator. Licences to be issued at the discretion of the Hardware Regulator, who must consider the applicant's criminal and regulatory compliance history before issuing a licence.

hammer supply licence means a licence issued under section [5];

- 1 Application for hammer supply licence
 - (1) A person may apply to the Hardware Regulator for a hammer supply licence.
 - (2) The application must
 - (a) be in the form approved by the Hardware Regulator; and
 - (b) include any prescribed information; and

(c) be accompanied by any prescribed document; and

(c) state if the applicant is an insolvent under administration; (d)

[other application requirements].

2 Regulator may request further information

- (1) For the purposes of determining an application for [licence/registration/exemption], the Regulator may request the applicant to provide information relating to the following: [list of information relating to relevant elements];
- (2) The request must—
 - (a) be in writing; and
 - (b) specify the period within which the applicant must provide the information; and
 - (c) [other requirements].
- (3) The Regulator may refuse to consider the application if the applicant does not provide the information in accordance with the request.

3 Applicant must provide information

On receiving a request for further information [under section 2], the applicant must provide the information to the Regulator—

- (a) in writing; and
- (b) within the period specified in the request.

[Provisions should also set out the consequences of an applicant's failure to provide this information.]

4 False or misleading information

An applicant must not knowingly provide information to the Regulator that is false or misleading [in a material particular] in relation to an application under section 1.

Penalty: [penalty units].

(d) include evidence that the applicant has appropriate skills, qualifications or experience to hold a hammer supply licence; and (e) state if the applicant is an insolvent under administration; and (f) be accompanied by the prescribed fee.

2 Regulator may request further information

- (1) For the purposes of determining an application for a hammer supply licence, the Hardware Regulator may request the applicant to provide information relating to the following (a) the applicant's criminal history;
- (b) any previous history of noncompliance by the applicant with this Act;
- (c) any prescribed matter.
- (2) The request must—
 - (a) be in writing; and
 - (b) specify the period within which the applicant must provide the information.
- (3) The Hardware Regulator may refuse to consider the application if the applicant does not provide the information in accordance with the request.

3 Applicant must provide information

On receiving a request for further information [under section 2], the applicant must provide the information to the Hardware Regulator

- (a) in writing; and
- (b) within the period specified in the request.

4 False or misleading information

5A Consideration of application [at discretion of the Regulator]

- (1) On receiving an application that complies with section 1, the Regulator—
 - (a) may [issue the licence/registration/grant the exemption]; or
 - (b) may refuse to [issue the licence/registration/grant the exemption].
- (2) In considering the application, the Regulator—
 - (a) must take into account the following—
 - (i) list of any mandatory specified elements; and
 - (b) may consider the following
 - (i) [list of any discretionary specified elements].

An applicant for a hammer supply licence must not knowingly provide information to the Hardware Regulator that is false or misleading [in a material particular] in relation to the application.

Penalty: [penalty units].

5 Consideration of application

- (1) On receiving an application that complies with section 1, the Hardware Regulator
 - (a) may issue the hammer supply licence; or
 - (b) may refuse to issue the hammer supply licence.
- (2) In considering the application for a hammer supply licence, the Hardware Regulator must take into account:
 - (a) whether the applicant has at any time been found guilty of any of the following
 - (i) an offence against this Act or the regulations;
 - (ii) an offence involving fraud or dishonesty, whether committed in Victoria or another jurisdiction;
 - (iii) an offence against a law of another State, a Territory or the Commonwealth [another jurisdiction] that corresponds to this Act;
 - (b) whether the applicant has been charged with an offence referred to in paragraph (a) and that charge has not been finally determined;

- 5B Consideration of application [presumed issue/refusal if certain elements met/not met—elements specified or prescribed]
 - (1) After considering an application that complies with section 1 and any further information provided under section 2, the Regulator must
 - (a) issue/grant the [licence/registration/exemption] if the applicant meets...
 - * the prescribed requirements; or
 - * the requirements specified in subsection (2); or
 - (b) refuse to issue/grant the [licence/registration/exemption] if the applicant does not meet one or more of the...
 - * the prescribed requirements.
 - * requirements specified in subsection (2).
 - *(2) For the purposes of subsection (1), the following are specified requirements:—
 - (a) [list of elements formulated as requirements].

[These elements could also be used to limit the class of persons who may apply for a licence/registration/an exemption.]

Criminal history [for 5A or 5B]

The Regulator [must/may] consider whether the applicant has [within xxxx years before the application]

[Policy to select one or more of the following.]

- (a) at any time has been found guilty of any of the following
 - (i) an offence against this Act or the regulations;

- (c) if the applicant holds or has held a licence or permit to supply hammers (however described) issued under a law of another State, a Territory or the Commonwealth that the Hardware Regulator considers to be the equivalent of a licence to supply hammers
 - (i) whether the applicant has contravened that licence or permit at any time; or
 - (ii) whether, at any time, that licence or permit is or was suspended; or
 - (iii) whether, at any time, that licence or permit is or was revoked.
- (3) The Hardware Regulator must not issue the hammer supply licence:
 - (a) unless the Hammer Regulator is satisfied that the person has appropriate skills, qualifications or experience to hold a hammer supply licence; or
 - (b) if the applicant is an insolvent under administration.

- (ii) an offence involving fraud or dishonesty, whether committed in Victoria or another jurisdiction [or other specified behaviour/subject matter];
- (iii) an offence against a law of another State, a Territory or the Commonwealth [another jurisdiction] that corresponds to this Act;
- (b) any indictable offence or an offence against a law of another State, a Territory or the Commonwealth [another jurisdiction] that, if committed in Victoria, would be an indictable offence;
- (c) been charged with an offence referred to in paragraph (a) and that charge has not been finally determined.

Regulatory compliance [for 5A or 5B]

If the applicant holds or has held a [licence, registration or exemption] (however described) issued or granted under this Act [or any previous corresponding enactment] or a law of another State, a Territory or the Commonwealth that the Regulator considers to be the equivalent of a [licence, registration or exemption], the Regulator [must/may] consider whether...

- *within X years before the application*at any time:—
 - (a) the applicant has contravened that [licence, registration or exemption]; or
 - (b) [that licence, registration or exemption] is or was suspended; or
 - (c) that [licence, registration or exemption] is or was revoked;
 - (d) the applicant contravened the prescribed requirements.

Relevant skills or experience [for5A or 5B]

The Regulator must not [issue the licence/registration/grant the exemption] unless the Regulator is satisfied that the person has appropriate skills, qualifications or experience to [hold the licence/engage in the regulated activity/be issued an exemption].

Solvency [for 5A or 5B]	
The Regulator must not [issue the licence/registration/grant the exemption] if the applicant is an insolvent under administration.	

Appendix B – Consolidated list of resources

Document title	URL (if applicable)
Better Regulation Victoria's Towards best practice guide for regulators	https://www.vic.gov.au/towards-best-practice-guide-regulators
Delegations Guidance Note	https://www.dtf.vic.gov.au/development-model-legislative-provisions
Department of Justice and Community Safety's Guidance (on certification)	https://www.justice.vic.gov.au/certifiedcopies
Department of Justice and Community Safety's Guidance (on spent convictions)	https://www.justice.vic.gov.au/spent-convictions
Health Complaint Commissioner's Guidance on the HR Act	https://hcc.vic.gov.au/public/health-records-individuals
Information about spent convictions, generally	https://www.justice.vic.gov.au/spent-convictions
Information about statutory review of the Spent Convictions Act 2021	https://engage.vic.gov.au/review-of-the-spent-convictions-act-2021
OCPC Legislative Process Handbook	https://content.vic.gov.au/sites/default/files/2020-06/Legislative Process Handbook June2020.pdf
Office of the Victorian Information Commissioner's Guidance on the PDP Act	https://ovic.vic.gov.au/privacy/resources-for-organisations/privacy-officer-toolkit/the-pdp-act-a-deep-dive/
Service Victoria Identity Verification Standards	https://service.vic.gov.au/about-us/service-victoria-identity-verification-standards
Victorian Equal Opportunity and Human Rights Commission's Guidance	https://www.humanrights.vic.gov.au/legal-and-policy/victorias-human-rights-laws/the-charter/
Victorian Framework for Fit and Proper Tests	https://www.vic.gov.au/victorian-permissions-framework-guidance
Victorian Permissions Framework	https://www.vic.gov.au/victorian-permissions-framework-guidance



