



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

The Secretary
Community Support and Services Committee

Email - CSSC@parliament.qld.gov.au

Dear Madam/Sir

Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022

Kindly accept this submission in relation to the above Bill.

1. STATE OF EMERGENCY

Article 4 (1) of the *International Covenant on Civil and Political Rights* sets out the generally accepted standard to be applied in determining whether a state of emergency is justified, namely whether the State faces a situation which "threatens the life of the nation".

According to the Paris Standards a public emergency means, "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed¹."

At the level of principle, the concept of a permanent state of emergency is inconsistent with the whole concept of a liberal political order²

In its General Comment number 29, the United Nations Human Rights Committee³ followed this when it made it clear that any emergency must be temporary in nature-paragraph 2

At the start of the pandemic, the QCCL accepted that the following circumstances justified the emergency powers introduced by the government to deal with the public health emergency declared in 2020:

1. the community was threatened by novel highly infectious disease for which there was no vaccine or effective treatments
2. the disease threatened to overwhelm the health system, resulting in the death of many people from both the disease itself and their inability to access other essential medical treatment.

¹ Quoted in Joseph et al *The International Covenant on Civil and Political Rights* Oxford University Press 2000 at page 625

² A permanent state of emergency exists in George Orwell's *1984*, brought about by the permanent state of war between the 3 power blocs.

³ General Comment on Article 4 31 August 2001 found at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsiYoiCfMKoIRv2FVaVzRkMiTnjRO%2Bfud3cPVrcM9YR0iix49nIFOsUPO4oTG7R%2Fo7TSsorhtwUUG%2By2PtslYr5BldM8DN9shT8B8NpbsC%2B7bODxKR6zdESeXKjiLnNU%2BgQ%3D%3D>



In relation to the second point, it must be emphasised that the strain on the health system must be severe. Otherwise, any measure to promote health could be mandated such as giving up smoking, losing weight, exercising and so on. Freedom has enormous value in our society and that includes the freedom to take on some risk.

2. JUSTIFICATION FOR EXTENSION

Having read the second reading speech and the *Human Rights Act* statement of compatibility, this extract from the speech of the Health Minister, seems to summarize the justification for the extension of these powers:

While the easing of restrictions has been welcomed by many, the recent Omicron wave has shown we must remain vigilant as COVID-19 can spread rapidly and unpredictably, with the potential to significantly impact hospital systems, the economy and the community. Our response to the Omicron wave is a testament to the careful planning and decisive action taken by our Chief Health Officer, clinicians, emergency officers, public health specialists, environmental health scientists and the broader health system. If not for the ability to issue directions, the Chief Health Officer would not have had the power to implement strategies such as requiring masks in high-risk settings and requiring unvaccinated travelers entering Queensland to quarantine. Those strategies have helped to slow the transmission of COVID-19 and the Omicron variant, limiting the impact on Queensland's health system through this peak period of transmission.

The pandemic continues to be unpredictable. We do not yet know whether new variants may emerge, particularly now that international borders are open. We do not yet know what the impacts will be in the winter months, particularly if it coincides with flu season. Queensland Health is also anticipating several more waves of COVID-19 in coming months, with the potential for waves consisting of multiple variants. It is critical that the ability to use flexible and rapid public health responses is retained so that, as normal social and economic activity resume, appropriate public health measures can be put in place if needed to address ongoing public health risks, the latest health advice and protect the health system.

For these reasons, the bill extends essential measures to support Queensland's public health response to the COVID-19 pandemic beyond their current expiry date of 30 April 2022. The bill will extend most temporary public health measures by six months to 31 October 2022 or until I, in my role as Minister for Health and Ambulance Services, declare the end of the public health emergency under the Public Health Act 2005 if this is earlier than 31 October 2022.

3. CURRENT SITUATION

It is for the government to justify the continuation of these emergency powers. In our view the above statement does not justify a continuation of the emergency powers. If it does justify such an extension, it would justify an extension of those powers for so long as the virus is circulating in our community which given the current state of our medicine will be forever⁴.

⁴ It is interesting to compare our situation to the Russian Flu which many now think was one of the coronaviruses which now causes the common cold rather than the flu. It first occurred between 1889 and 1893 continued to re appear in 1895, 1898 and 1899-1900. But of course, we have vaccines and

An emergency cannot last forever. The government's repeated failures to provide a set of criteria by which it will decide to end the emergency other than a criterion which must result in it continuing so long as the virus is circulating in the community, must lead one to conclude that the government will keep the emergency powers for as long as it likes.

So far as we can tell, these are the most Draconian powers that have ever existed in Queensland, including in wartime. The longer they are in force the more people will become enured to them with the consequence that they will become normalised. This is entirely unacceptable because it represents a clear and present danger to our civil liberties.

If at any time during the pandemic we *might* have faced a situation where the health system was actually under severe threat it was in January. But it did not happen. We note the repeated assurances of the former Chief Health Officer and the current Chief Health Officer that the health system will be able to cope with the virus. Surely when those officials and members of the government provided Queenslanders with those assurances, they had already planned for the obvious possibility that we could have a combined flu and covid season when we opened up.

In coming to our position, we have also had regard to the following:

1. According to *The Guardian*, as of the 3 March 2022, 89.69% of Queenslanders over the age of 12 have had a 2nd dose. 42.63% of Queenslanders aged 5 to 11 have had a first dose and 48.71% of Queenslanders over 18 have been boosted.
2. It seems clear that whilst a booster is desirable the 2-course regimen is still highly effective at preventing severe illness and hospitalisation⁵.
3. Effective treatments for covid are coming on board with both treatments by Pfizer and Merck having been approved in this country. The Pfizer treatment reportedly has an effectiveness of 89% in preventing hospitalisation, including against the omicron variant⁶.
4. According to our own Chief Health Officer, the consequence of the spread of the omicron variant through the community must be that it will find its way to those who do not already have immunity. The effect of this has been to vaccinate the unvaccinated and create a wall of immunity⁷.

increasingly effective treatments. – “*Taking pandemic sequelae seriously: from the Russian influenza to Covid 19 long haulers*”- The Lancet 12 October 2020

⁵ Peter Russell “*Hospitalisation Risk from Omicron Variant at around 1/3 Of Delta*” Medscape for January 2022 and Maria Bervanakis “*Omicron: what we know about of the new Covid variant*” *Courier Mail* 8 January 2022 and this information from the UK Health Security Agency dated 10 February 2022 <https://ukhsa.blog.gov.uk/2022/02/10/how-well-do-vaccines-protect-against-omicron-what-the-data-shows/>

⁶ Spencer Kimball “*FDA Authorizes Pfizer’s Covid Treatment Pill, The First Oral Antiviral Drug Cleared During The Pandemic*” 3 December 2021 <https://www.cnbc.com/2021/12/22/fda-authorizes-pfizers-covid-treatment-pill-the-first-oral-antiviral-drug-cleared-during-the-pandemic.html>

⁷ See also Kojima and Klausner “*Protected Immunity after Recovery From SARS-Cov-2 Infection*” *The Lancet- Infectious Diseases* published 8 November 2021

5. Countries overseas are now moving away from emergency measures including of course Denmark and the United Kingdom, but also even in the majority of American States, including those run by Democrat Governors⁸

It is now clear that, the virus will continue to circulate in the community and there will be waves of higher rates of infection, however not as high as the current peak⁹.

In that circumstance, what is to be done about non-vaccine measures which include:

1. testing
2. contact tracing
3. isolation
4. masking¹⁰
5. ventilation
6. density limits

All attempts at contact tracing seem to have stopped. In those circumstances, we see no reason why the current directions and the App supporting tracing should not be immediately removed. To the extent the continuation of this practice is as an immunity passport, we repeat our strenuous opposition to this most pernicious measure.

We support the government imposing rules and regulations in relation to air-conditioning systems to improve ventilation. This will be no different from any existing requirements in this area.

The other measures it seems to us are all directed at a situation where there is a virus circulating in the community resulting in levels of cases which threaten the health system. In other words, these measures should end when the emergency ends. In our view for the reasons set out it has.

At this point it is usual to say that the uncertainty of our situation justifies the application of the precautionary principle. However, this principle does not sit well with individual liberty and the concepts contained in section 13 of the *Human Rights Act*. It puts pressure on officials to take steps in the absence of clear evidence and gives permission for arbitrary decisions. Rather than balancing risk against liberty, the effect of this principle is that liberty is what you have left after all possible precautions have been taken. In effect it sets the value of liberty at naught before balancing commences.

The precautionary principle is a long-winded way of saying "Better safe than sorry". Better safe than sorry is not the standard for dealing with fundamental rights. Better safe than sorry is the motto of a police state. It would follow from better safe than sorry that all of us ought to be subject to continuous surveillance so that nobody could commit a crime

⁸ See the list on this website as at 23 February <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html>

⁹ Again, compare the Russian Flu

¹⁰ We have maintained the position that masks do in fact involve a restriction on a fundamental liberty, the liberty to communicate properly but that in the emergency limited mask mandates are justifiable

4. WHAT ABOUT THE VULNERABLE?

A response to that position would be to point to the situation of those who are immunocompromised, children under 5 and those who for whatever reason refuse to be vaccinated.

The evidence still seems to be clear that children rarely get serious cases of Covid 19¹¹. The advantage in vaccinating children is in reducing spread by increasing herd immunity¹². Pfizer has stated that it expects to have its vaccine ready for under 5s by April¹³.

In relation to those who are immunocompromised, it appears that they can obtain some benefit from vaccination¹⁴

In addition, those individuals can continue to wear a mask and use other protective strategies¹⁵. No one should be criticized or harassed for making the perfectly legitimate decision to do so. We note that the Biden administration has announced it will distribute "high quality" masks to every American.

Finally, in relation to those who refuse to be vaccinated, the Council's position is that no person should be compelled to take the vaccine who has a religious, personal or philosophical objection to doing so. Anyone who decides not to be vaccinated, is exercising their rights to bodily integrity and to control their own medical treatment. They must be taken to have accepted the risk of being infected.

The debate over how to deal with the pandemic has led us as a society to focus on a question little discussed until now, which is what restrictions society is justified in imposing on the healthy individual in order to protect the vulnerable. This is a complicated and difficult question on which reasonable minds can differ.

No matter what people may think or in fact say, our society does not act as if every single life is priceless and should be saved at any cost, no matter how high¹⁶.

In 2019 902 people died of the flu and 3915 were hospitalised in this country¹⁷. Those figures would no doubt be worse without a vaccine. But they were not used to justify large scale civil liberties restrictions.

¹¹ Andrew Jacobs "Omicron Is Not More Severe for Children, Despite Rising Hospitalizations" *New York Times* 28 December 2021 and Britton and Williams "It's time for children's lives to return to normal-schools must stay open"-*Sydney Morning Herald* 8 January 2022

¹² COVID vaccines and kids: five questions as trials begin <https://www.nature.com/articles/d41586-021-01061-4> 21 April 2021

¹³ Reuters "Pfizer expect updated COVID-19 vaccine data for kids and five by April" 6 January 2022

¹⁴ COVID-19 Vaccines for Moderately or Severely Immunocompromised People at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/immuno.html>

¹⁵ More advice on vaccines for immunocompromised patients <https://www.cdc.gov/vaccines/covid-19/info-by-product/clinical-considerations.html>

¹⁶ see the discussion by Brian Barry in his essay "Tragic Choices" in Brian Barry *Liberty and Justice- Essays in Political Theory* 2 Clarendon Paperbacks 1991

¹⁷ Review of the 2019 influenza season in Australia <https://www.immunisationcoalition.org.au/wp-content/uploads/2020/02/1-Barr-ASM-2020-presentation.pdf>

So clearly, every time we make a decision about safety and other rules there is a trade-off, which involves extra risk for those who are vulnerable. When it comes to dealing with people who are vulnerable to covid, the most effective way of protecting those people is of course to vaccinate everyone else as well as them. The vaccination rates in this country are heading towards amongst the highest in the world.

5. COVID, TIME, FREEDOM AND RISK

Many say that those who question the continuation of Covid restrictions are concerned exclusively about the economy. But as we sit here about to commence the 3rd year of the pandemic, we need to be reminded that time is finite for all of us, but especially for some of us, the elderly in particular.

The average life is between 70 and 80 years. In other words, we have now deprived people of 1/40th of their full life. This does not just apply to the elderly. Children and young people are being deprived of a chunk of their lives which they will never get back. Children and young people have missed out on social activities in school, dating, clubbing and other rites of passage. Older people missed out on hugging their grand kids and simple things like going out to movies or that dream overseas trip.

Quite simply it's about people's lives and in those lives covid is a risk, but not the only risk

Time is ticking whilst we prevent people from being able to make their own decisions about what risks they must take or are prepared to take given their stage of life or the time that is available to them.

With the vast majority of the population vaccinated in a way which is overwhelmingly effective at preventing serious illness or hospitalisation, it is time to allow people to make their own assessment of how they want to spend their time and the risks involved.

To this end the government should, for the foreseeable future, be making rapid antigen tests available free to anyone who wants them so they can test their own status prior to interacting with others, particularly the vulnerable.

6. ANOTHER VARIANT

The spectre that haunts the discussion of the future of this pandemic, is the variant which smashes through all the immunity be it acquired through vaccination or prior infection. The logic of this submission involves us accepting that if such a variant materialises then the government would be vindicated in reinstating an emergency¹⁸. However, the possibility that such a variant *may* arise, which it must be acknowledged is doubted by some experts, does not justify the continuation of the current state of emergency.

7. ALTERNATIVES

Given that position has been rejected we propose the following alternatives.

Firstly, part 7A of the *Public Health Act* should be repealed and replaced with provisions dealing with particular measures such as testing, isolation and masking which the government may wish to continue to use specifying in detail the criteria which will need to be met before

¹⁸ This should not be taken as a concession by the QCCL that current emergency powers as set out in the *Public Health Act* or the directions made under it are acceptable to us. They are not.

the Chief Health Officer can impose such measures. These powers should be sunsetted and isolation orders subject to review by a Magistrate.

If the current Part 7A is to be kept, it is our position that the following amendments need to be made to the legislation and directions:

- a. The advice of the Chief Health Officer to the government should be published as now happens in Victoria.
- b. Whenever the Chief Health Officer issues a new direction, a statement showing compliance with section 58 (1)(b) of the *Human Rights Act* should be published
- c. Section 366(2) of the *Public Health Act* should be repealed to enable those who suffer loss or damage because of the issuing of a public health direction to claim compensation
- d. The extraordinary powers which have been granted, must be the subject of immediate scrutiny. Effectively, the Chief Health Officer has become an unelected legislative chamber, his actions should and must be supervised by the Parliament¹⁹. It was, and remains, our position that, as was done in the Senate, a select committee with representatives of all parties in Parliament, chaired by a non-government member should be established to continually review the Government's covid response.
- e. The effect of the powers provided for in part 7A of the *Public Health Act*, is that an emergency officer, which includes every police officer in the State, is empowered to detain a person for 14 days.

In our view, it is fundamental that a person who is detained, including those required to isolate, should have a right of review before a Court. The statement of compatibility with the *Human Rights Act* which accompanied the Bill pursuant to which part 7A was introduced justified the removal of the right of review on the basis that, due to the high number of people who would be detained, a right of appeal would impose significant burdens on the court and divert the resources of the public health officials. We see no basis for this proposition. It is the usual "floodgates" argument which has never been vindicated. Moreover, a right of review when a person is detained is fundamental. It is our view that emergency circumstances such as this cannot justify its removal.

Section 29 of the *Human Rights Act* prohibits the arbitrary detention of a person. Subsection 7 of that section specifically provides that a person deprived of liberty is entitled to apply to a court for a declaration regarding the lawfulness of their detention. It would be our view, that the absence of a right of review under part 7A of the *Public Health Act*, is a violation of the *Human Rights Act*.

We note that in Victoria the law now provides a right of appeal to an independent review officer in all cases of detention by reason of the pandemic.

¹⁹ This is one of the bases upon which challenges to similar laws have succeeded in some States of the United States.

We would prefer that a Court reviews the question of detention, but the Victorian model would be a vast improvement on our current system.

- g. As well as providing for the expiration of the legislation on 31 October 2022, the legislation should also provide that it will expire at the end of any month during the period between 1 May and 31 October 2022, that a regulation or order (whichever is appropriate) is not made by the Governor in Council, providing for the continuation of the Part. That regulation or order will of course be a disallowable instrument. That will provide the opportunity for a monthly review of the situation and a debate in Parliament as to whether these powers should be extended.

8. SUMMARY

The Council has repeatedly called on the government to publicly identify the criteria which it will use to decide that the state of emergency is no longer required. We note it has again failed to do so.

We have maintained throughout this crisis the emergency powers are justified so long as they are necessary, proportionate and are in place for the absolute minimum period. It cannot be said at this time that the case has been made for the continuation of these emergency powers.

The government should, for the foreseeable future, be making rapid antigen available free to anyone who wants them so they can protect themselves and the vulnerable.

We trust this is of assistance to you in your deliberations.

Yours Faithfully



Michael Cope

President

For and on behalf of the

Queensland Council for Civil Liberties

4 March 2022