



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

Submission to

Community Support and Services Committee

4 March 2022

Table of contents

Summary	2
Recommendations	3
Introduction.....	3
Fit for purpose pandemic legislation.....	8
Conclusion.....	12

Summary

1. Thank you for the opportunity to make submissions on the Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022 (**the Bill**). The Bill extends 'essential public health measures required to support Queensland's response to the COVID-19 pandemic until the COVID-19 public health legislation expiry day, which is defined as the day on which the COVID-19 emergency is ended by the Minister or 31 October 2022 (whichever is earlier).¹
2. In particular, the Bill will extend all temporary amendments to the *Public Health Act 2005*, including to:
 - increase powers for two key decision-makers under the Act:
 - the **Chief Health Officer (CHO)**, who may take action to respond to the spread of COVID-19 in Queensland, including by issuing **public health directions** to require physical distancing, restrict movement and gatherings, require people to quarantine or self-isolate and implement other containment measures;
 - **emergency officers**, who may also take related action, particularly against individuals, including by issuing **detention orders**;
 - authorise the sharing of confidential information for contact tracing;
 - encourage compliance with quarantine requirements and other public health directions by providing appropriate penalties for contraventions;
 - increase the period for which a regulation may extend a declared public health emergency from seven to 90 days;
 - enable fees to be charged for costs associated with the mandatory quarantine of persons in government-arranged accommodation; and

¹ Explanatory Notes, Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022, 3.

- protect personal information collected for contact tracing COVID-19.
3. The Bill also extends other temporary changes made to various legislation during the pandemic. In the time available, the Commission has been unable to consider all the extended provisions in detail. This submission focuses on the extension of extraordinary powers under the Public Health Act.

Recommendations

4. The Queensland Human Rights Commission (**the Commission**) does not support the extension of existing COVID-19 legislation in this Bill. Instead, the current provisions of the *Public Health Act 2005* which relate to public health emergencies must be replaced with more transparent, accountable and human rights compatible legislation.
5. The Commission **recommends** that, in light of the experience in Queensland during the pandemic, and the approach taken in other human rights jurisdictions, the Committee advise the parliament that there may not be sufficient justification to continue the limitation on human rights inherent in extending the existing framework.
6. At a minimum, the Government must also, through legislation, urgently clarify how the *Human Rights Act 2019* applies to the Chief Health Officer's decisions to make public health directions.

Introduction

7. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).
8. The Commission has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
9. The Commission also deals with complaints of discrimination, vilification, and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act.
10. Throughout the pandemic, the Commission has generally supported the Government's approach, noting in particular the obligation imposed on it to protect the right to life. Without direct access to the relevant evidence and expertise, it is not within the capacity or functions of the Commission to

provide public commentary about whether restrictions imposed at any given time were proportionate and justified. The Commission has therefore been very careful throughout the pandemic not to undermine public health responses.

11. We agree with the Statement of Compatibility that ‘the amendments to public health legislation have enabled an effective public health response to the COVID-19 pandemic in Queensland and allowed time for a large proportion of the population to be vaccinated to minimise transmission, illness and hospitalisations’.²
12. Nonetheless, the Commission has previously questioned if aspects of the current legislative framework meet all requirements to be compatible with human rights. In summary, the Commission advocates that the following must be incorporated into any response to this and future pandemics:
 - a. Any limitations on rights should be **necessary and proportionate**, and the justification for those limitations should be backed by **evidence**.

The assessment of what is necessary and proportionate, particularly with legislation of this kind, must occur regularly based on up to date evidence. For example, this Bill extends the power for the CHO and emergency officers to issue directions or orders that may result in a person being subject to 14 days detention. The Statement of Compatibility refers to this period aligning ‘with publicly available information from the Australian Health Protection Principal Committee (**AHPPC**) that most people who are infected with COVID-19 will develop symptoms within 14 days of infection. This time period is therefore a reasonable and proportionate response to the risk of COVID-19 spreading and accordingly, the ability to detain a person is not arbitrary’. However, on 30 December 2021 the AHPPC advised ‘that the isolation period for COVID-19 cases should be standardised regardless of vaccination status to a length of 7 days. Household contacts or those identified as being at risk of significant transmission should quarantine for 7 days after last exposure to a case regardless of vaccination status.’³

² Statement of Compatibility, Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022, 13.

³ Australian Health Protection Principal Committee, *AHPPC statement on testing, tracing, isolating and quarantining in high levels of COVID-19 community transmission* (Statement, 30 December 2021) <<https://www.health.gov.au/news/ahppc-statement-on-testing-tracing-isolating-and-quarantining-in-high-levels-of-covid-19-community-transmission>>

- b. **Human rights legislation** should continue to apply throughout the exercise of pandemic-specific powers.

The Commission welcomes that amendments have generally preserved the application of the *Human Rights Act 2019*, subject to the uncertainty about how the Human Rights Act applies to CHO public health directions, discussed below.

- c. There must be **sufficient transparency in decision-making**, including the publication of accessible, timely, clear and comprehensive information about **limitations on human rights** in a manner the public can understand.

The Commission suggests this is a key part of the current framework which must be improved. For example, public health directions made by the CHO are not accompanied by a statement of reasons or analysis of human rights limitations.

This situation is compounded by uncertainty about how the HR Act now applies to the decisions of the CHO. Previously, while advocating for more transparency in decision-making, the Commission has welcomed the commitment of the Government that the CHO is subject to obligations under s 58 of the HR Act to act and make decisions compatibly with human rights and to give proper consideration to human rights when making decisions. The Minister repeats this commitment in the Statement of Compatibility to this Bill,⁴ and this safeguard is the basis for the assertion that there is no limitation on the right to equality.⁵ If this is correct, the making of public health directions would at least be subject to judicial review, with a person potentially able to 'piggy-back' a claim that the CHO has failed to discharge his or her duties under s 58 of the HR Act.⁶

However, the application of this safeguard to decisions of the CHO is increasingly unclear, particularly concerning public health directions that apply to some or all of the community (as opposed to a single individual). The Victorian Government made submissions to the Victorian Supreme Court that the equivalent obligation under the

⁴ Statement of Compatibility, Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022, 14: 'The Chief Health Officer is a public entity for the purposes of the Human Rights Act and when making public health directions under section 362B of the Public Health Act, is required to consider the human rights impacts and act compatibly with human rights'.

⁵ Statement of Compatibility, Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022, 8.

⁶ S 59 of the HR Act.

Charter of Human Rights and Responsibilities 2006 to act compatibly with human rights did not apply to the Victorian Chief Health Officer, when exercising a similar power to s 362B of the Public Health Act.⁷ This was based on an interpretation that when making community-wide directions, the Victorian CHO was exercising power of a legislative character.

The Victorian and Queensland Supreme Courts are yet to rule on this question. However, if public health directions are made using power of a legislative character, it potentially places them in a vacuum of oversight under the HR Act. The ability to review them via a piggy-back action to other proceedings under s 59 of the HR Act would be at question. Yet, these directions are not subject to the usual human rights scrutiny process for legislation, such as the production of a statement of compatibility or human rights certificate,⁸ or parliamentary scrutiny. The only application of the HR Act to such directions by the courts may be in interpreting them compatibly with human rights.⁹ This issue has been clarified in new COVID-related legislation in Victoria and the ACT, discussed further below.

- d. There should be **independent oversight and review** of decisions made under public health directions, in particular review of decisions to detain people in quarantine. As already discussed, the ability for a person to seek a judicial review of a public health directions on human rights grounds is unclear.

Further, there are limited rights of independent review for detention orders made by emergency officers. As discussed in the Statement of Compatibility,¹⁰ section 361 of the Public Health Act allows a person subject to a detention order to apply to a magistrate for an order ending the detention. However, the magistrate ‘may make an order ending the person’s detention only if satisfied the person’s continued detention is not reasonably necessary to effectively respond to the declared public health emergency’. Further, the person has no appeal rights from the

⁷ *Harding v Sutton* [2021] VSC 741 at [158] in which the court summarised the argument of the respondents as being “s 38(1) of the Charter did not apply to the giving of the Vaccination Directions, which they characterised as instruments of a legislative character.” Further, at [208]: ‘The defendants’ position is that the Vaccination Directions are subordinate instruments for the purposes of the Charter, because they are instruments of a legislative character. They rely on *Kerrison* as authority that s 38(1) — or at least its substantive limb, the prohibition on acting in a way that is incompatible with a human right — does not apply to the making of the Vaccination Directions’

⁸ As required for Bills and subordinate legislation under Part 3 Division 1 of the HR Act.

⁹ As per s 48 of the HR Act.

¹⁰ Statement of Compatibility, Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022, 5.

decision of a magistrate. In contrast, the emergency officer or chief executive may appeal the magistrate's decision to release the person, and if so, the release is automatically stayed until the appeal is heard.¹¹ This makes it challenging for a person to commence such a proceeding, and then have both the magistrate review and District Court appeal heard and an order for release made within 14 days.

A person subject to quarantine pursuant to a public health direction made under section 362B does not have any such review rights (unless these are provided for in the CHO direction itself, which, to date, it appears that they have not).¹²

- e. People should be **quarantined in humane conditions**, including with daily access to fresh air.¹³

In this respect, the Commission welcomes the commissioning of the Wellcamp facility and the increased use of home quarantine.

- f. While daily press conferences have been beneficial, **scrutiny** ought to come from a **range of sources**, including **parliament and the courts**.
- g. Pandemic specific laws that allow rights to be restricted should be **time-bound**.

The Commission welcomes the time limits placed on many legislative changes made in response to COVID-19. Further, the Bill does not seek to extend all temporary legislative changes made during the pandemic. However, the Bill does extend arguably the most significant powers. Further, these temporary legislative changes, made in urgent circumstances, have been in place without significant change for more than 2 and a half years. Such urgent measures have now served their purpose and should be replaced with legislation that provide sufficient safeguards for human rights.

¹¹ S 358 of the *Public Health Act 2005*

¹² Section 361 only applies to a person detained under a detention order made under Part 7. On this basis, it does not appear that detention ordered or direction made under Part 7A (which includes the public health direction power in s 362B) could be reviewed by a magistrate.

¹³ For further discussion on the right to access fresh air, see Queensland Human Rights Commission *Hotel quarantine: Unresolved complaint report under section 88 Human Rights Act 2019* (15 October 2020) <<https://www.qhrc.qld.gov.au/resources/legal-information/reports-on-unresolved-human-rights-complaints>>

- h. There should be additional **safeguards and supports** built in to minimise limitations on human rights, **prevent potential misuse of power** and mitigate the risk of **entrenching inequality**.

The Commission welcomes the amendments made to the Public Health Act in September 2021, restricting the use of check-in data. Nonetheless, as discussed further below, the Commission suggests the current framework can be significantly improved for example by enacting pandemic legislation like that in Victoria.

13. The Explanatory Note refers to the Government undertaking targeted consultation on the proposed Bill. The Commission was not one of those organisations consulted.

Fit for purpose pandemic legislation

14. Presently, the only checks and balances on the significant powers exercised by the government during this pandemic appear to be:
- (limited) review by a magistrate of detention orders made by emergency officers;
 - judicial review under the *Judicial Review Act 1991*; and
 - the parliamentary committee system.
15. These avenues for review arguably do not provide a timely or accessible remedy for individuals subject to public health directions and detention orders. In addition, in Queensland's response to the pandemic, the parliamentary committee system has generally considered matters retrospectively, rather than proactively. Further, no independent body (whether parliamentary or otherwise) has a formal role in considering if powers currently granted to the CHO are being appropriately exercised in real time.
16. Inquiries such as this one are one of the few times that an independent body can comprehensively review the effect of the significant powers given to the CHO and others during this pandemic. It is therefore imperative that the Committee give serious consideration to whether these powers remain compatible with human rights.
17. Many of the provisions proposed to be extended were legislated in early 2020 when the government was rushing to respond to a then largely unknown pandemic.
18. Since then, we have learnt much more about the virus and the impact of restrictions on our community. There is diminishing justification for

continuing an approach that does not meet many of the principles set above, particularly when other human rights jurisdictions are comprehensively changing their response to government power during pandemic emergencies.

19. The Commission does not agree with the statement in the Explanatory Note that 'there is no alternative method of achieving the policy objective'.¹⁴ Further, we suggest that there are less restrictive ways of achieving the policy objective for the purposes of assessing the human rights compatibility of the Bill.
20. In response to similar concerns, Victoria and the ACT, which are also human rights jurisdictions, have taken steps to address these issues.¹⁵ Both previously had legislative models similar to that used in Queensland. In December 2021, new legislation commenced in Victoria that comprehensively changed its approach to restrictions imposed in response to pandemics.
21. As the Victorian Government acknowledges, the new Victorian legislation is now 'fit-for-purpose'. It meets many of the key human rights principles of such legislation:
 - The Premier is responsible for making pandemic declarations. The Premier can only do this if satisfied on reasonable grounds that there is a serious risk to public health resulting from a disease that is or could be a pandemic disease. When making a pandemic declaration, the Premier will need to Report to Parliament about why the declaration has been made and include the advice given by the Chief Health Officer and Minister for Health that informed that decision.¹⁶
 - Compulsory powers are subject to different safeguards depending on their breadth of coverage. The Statement of Compatibility refers to these as 'two tiers of compulsory powers'. 'Under the new Part, a broader power is given to the Minister to make 'pandemic orders' that are capable of significantly affecting large parts of the community, and a narrower power is given to authorised officers to take action and give directions 'on the ground' using various 'pandemic management powers' in a way that affects individuals and, in certain limited circumstances, smaller groups'.¹⁷

¹⁴ Explanatory Note, Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2022, 6.

¹⁵ See *Public Health and Wellbeing Act 2008* (Vic), Part 8A. Also Public Health Amendment Bill 2021 (No 2) presently before the ACT Legislative Assembly.

¹⁶ Sections 165AB – 165AG, *Public Health and Wellbeing Act 2008* (Vic).

¹⁷ Statement of Compatibility, Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic).

- The Minister for Health's pandemic orders are made to protect public health if a pandemic declaration has been made by the Premier.¹⁸ Before the Minister for Health can make any orders, the Minister must consider the advice of the Chief Health Officer but can also consider additional advice.¹⁹ This means that the Minister can listen to others and look at the matters like social and economic factors, before making a pandemic order. A pandemic order can include restrictions that are necessary to protect the community during a pandemic such as restricting movement or requiring people to wear a face mask. Parliament may disallow a pandemic order.²⁰
- As required by the legislation, the Minister for Health has already made pandemic orders accompanied by²¹:
 - A statement of reasons explaining why the pandemic order was reasonably necessary to protect public health.
 - The Chief Health Officer's advice.
 - An assessment of any human rights that are limited by the pandemic orders.²²
- Like the Queensland legislation (as now amended), it safeguards private information obtained through contract tracing (including QR code data), making it an offence to use or disclose the information other than in very limited circumstances. Generally police will not have access to this data.
- Government decision-making is open to increased parliamentary scrutiny through the joint parliamentary Pandemic Declaration Accountability and Oversight Committee, the Chair of which is independent of government.²³ To further strengthen accountability and Parliamentary oversight, this Committee can recommend that a pandemic order be disallowed under certain circumstances. The committee may report to Parliament and recommend disallowance if the Committee is of the view that the pandemic orders are incompatible with human rights or if they appear to have improper legal authority. This Committee can also recommend changes be made to the orders.²⁴

¹⁸ Section 165AI, *Public Health and Wellbeing Act 2008* (Vic).

¹⁹ Section 165AL, *Public Health and Wellbeing Act 2008* (Vic).

²⁰ Section 165AU, *Public Health and Wellbeing Act 2008* (Vic).

²¹ Section 165AP, *Public Health and Wellbeing Act 2008* (Vic).

²² See Department of Health (Victoria), *Pandemic Order Register* (Web Page)

<<https://www.health.vic.gov.au/covid-19/pandemic-order-register>>

²³ Currently Ms Suzanna Sheed MP, Independent.

²⁴ Sections 165AS – 165AU, *Public Health and Wellbeing Act 2008* (Vic).

- The Minister for Health also has the benefit of advice from the Independent Pandemic Management Advisory Committee, which will comprise members with a broad range of expertise, including public health, human rights, and the interests and needs of Aboriginal Victorians and communities who experience disadvantage.²⁵
- If a pandemic declaration is in force, the Victorian CHO may authorise authorised officers to exercise public health risk powers or the pandemic management powers. These powers include directing a person to do things reasonably necessary to give effect to a pandemic order, or detaining a person in a pandemic management area in accordance with a pandemic order.²⁶
- Pandemic detention quarantine is reviewed by an authorised officer at least once every 24 hours, unless that is not reasonably practical.²⁷ A person subject to quarantine may ask for their detention to be reviewed by a Detention Appeals Officer, which may lead to confirmation of detention, changes to the conditions of detention, or release.²⁸ The review may consider many aspects of the detention including the reasons for it, the period, the place, the conditions and any other matter relating to the detention. The review must generally be completed within 72 hours.²⁹ The person may also complain to the Victorian Ombudsman, and may also make a complaint to the Secretary of the Department of Health or seek review in a court.³⁰

22. In debating the amendments to the Victorian legislation, the Victorian Minister for Health stated:

As the pandemic persisted through 2021, Members of Parliament and many others from various sections of the community have rightly questioned the appropriateness of continuing to rely on the State of Emergency framework. The suitability of some aspects of the current regulatory scheme for managing the kinds of risk posed by pandemics, which may persist for longer than other kinds of emergency, has also been questioned.

...However, rather than simply replacing the State of Emergency powers that expire on 15 December 2021, this Bill implements the lessons Victoria has learned to significantly improve the regulatory

²⁵ See Part 8A, Division 9, *Public Health and Wellbeing Act 2008* (Vic).

²⁶ Section 165B, *Public Health and Wellbeing Act 2008* (Vic).

²⁷ Section 165BG, *Public Health and Wellbeing Act 2008* (Vic).

²⁸ Section 165BI, *Public Health and Wellbeing Act 2008* (Vic).

²⁹ Section 165BJ, *Public Health and Wellbeing Act 2008* (Vic).

³⁰ *Ibid.*

framework available to keep Victorians safe in the event of future pandemics.

Decisions about how to respond to public health risks from pandemic diseases can, as we have seen over the course of the COVID-19 pandemic, have far-reaching consequences. Inevitably, COVID-19 will not be the last pandemic faced by Victoria. The experience of responding to COVID-19, together with insights shared by the Victorian community and its leaders, have clearly demonstrated the need for pandemic management decisions to be transparent and accountable, proactive, protective of human rights, and guided above all else by the imperative of minimising risks to public health and the right to life. The Bill supports and promotes these key principles for effective Government action in a pandemic.³¹

23. The Commission submits the same could be said of the COVID-19 response in Queensland

Conclusion

24. In summary, the provisions being extended are no longer fit for purpose in responding to the COVID-19 pandemic, or future pandemics.
25. As a community, we have learnt about the impacts of quarantining conditions on people's mental health, the human rights limitations arising from public health directions that confine people to their homes and the mandating of vaccines. Powers imposing such significant human rights limitations cannot continue without proper oversight, transparency and external review. Otherwise, their compatibility with human rights is at question.
26. The Commission recommends this Bill not proceed and instead be replaced with comprehensive, human rights compatible pandemic legislation.

³¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 2021, 4240.