

# QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

*Watching Them While They're Watching You*

**The Acting Secretary  
Health, Communities, Disability Services and Domestic and Family Violence Prevention  
Committee  
Parliament House  
QLD 4000**

health@parliament.qld.gov.au

Dear Madam,

## **Enquiry into the Queensland government's health response to Covid 19**

Please accept this submission in behalf of the QCCL in relation to the above enquiry.

The QCCL was established in 1967. It is an organisation of volunteers which exists to defend and promote the Civil Liberties and Civil Rights of Queenslanders.

### **1. Background**

#### **(a) States of Emergency**

From the beginning, the QCCL has accepted the medical opinion about the dangerousness of the coronavirus and consequently that a state of emergency designed to protect society from that virus can be justified.

Having said that, the fact that we are prepared to acknowledge and act upon established scientific opinion, does not mean that, as some would have it, we "must follow the science" without question. That is so for a number of reasons.

Firstly, because scientific knowledge is not always certain. This is particularly so when we are dealing with something that has only been known about for six months. Even in apparently well-established areas of science, there can be points of difference.

Secondly, a society in which we did whatever scientists told us to do would no longer be democratic and pluralistic. It would be a form of authoritarianism.

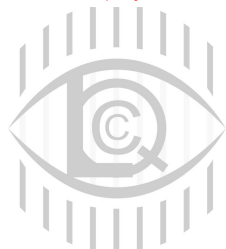
Thirdly, even where the scientific knowledge is relatively clear, the scientists are only providing information about the physical world. They do not, and we would submit are not entitled to a privileged position, in relation to what we ought to do in response to that information. What we ought to do in response to the information involves a whole series of normative and other considerations, which are the domain of politics.

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States of emergency cause great difficulty for civil libertarians. Unless you are that variety of libertarian, so visible in the United States at the moment, that subscribe to the proposition that there is no such thing as society, you must accept there will occasionally be circumstances which demand that our usual rights and liberties are temporarily curtailed.

Usually, the issue is whether there is a real state of emergency. In the context of a contagious disease, the population represents a single biomass and the concept of "the individual" breaks down to a certain extent. However, even in this context it is necessary that the powers taken by government to deal with the emergency must be both strictly necessary, proportionate and a fair response to the emergency.

In this context, the concepts of proportionality and fairness require decision-makers to take into account issues beyond the science, including normative issues, inequality, justice, privacy and the other basic interests and fundamental rights of Queenslanders

The first and fundamental rule is that any state of emergency must be time limited ie subject to a sunset clause.

Whilst it is true that in a time of emergency it may be justifiable to restrict Civil Liberties temporarily, it is equally true to say that in a time of emergency, we must be very careful to protect our Civil Liberties

The extraordinary powers, even though they may be justifiable, demand immediate accountability.

Emergency measures do not justify less scrutiny. In fact, the opposite is the case, we need to be even more alert to the threats to our basic liberties. In our submission that should be a key focus of this committee.

## (b) Social Norms

The above discussion is very much concerned with the legal architecture and the principles which should be applied when constructing the legal architecture.

But also, important are social norms.

The Council is extremely concerned by the prospect that should these new rules continue for a significant period of time, both the rulers and the ruled will become enured to these restrictions of basic rights and liberties. The effect of that we are concerned will be that one way or another the rules will continue after the emergency passes or alternatively, people would have become so used to such restrictions that when calls are made for them to be introduced for some other purpose in the future which is not an emergency, citizens will accept them on the basis that they have lived with them during the Covid crisis.

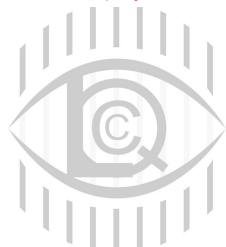
In our submission this is an important factor to be taken into account in assessing both the nature and extent of the rules introduced to deal with the crisis and, most importantly, in ensuring that they are kept in place for the absolutely minimum necessary time.

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This will become a particularly critical issue should the number of cases continue to be low and when a choice has to be made as to whether to adopt a localised restrictions strategy or a broader one.

(c) Role of compulsion

Pandemics must be treated foremost as public health problems, not as law enforcement matters. Victims and possible victims of disease must be treated as human beings who need help, not enemies. Expert opinion supports the view that mandatory restrictions such as quarantines and travel bans "can be effective only under specific circumstances"<sup>1</sup>. Treating sick or possibly sick people like enemies is counterproductive, because it drives them underground and makes them avoid seeking diagnosis and treatment.

This is also another reason that those who are detained must be given due process rights

## 2. Particular issues

(a) Time limits

The source of the Chief Health Officer's powers to make the extraordinary directions she has, is Part 7A of the *Public Health Act*. As we understand that legislation, part 7A of the Public Health Act will expire, on 19 March 2021 i.e. 12 months after it was assented to on 19 March 2020 unless:

- the Health Minister's emergency declaration is not renewed prior to that date
- the Parliament votes to extend the life of Part 7A

We note that the emergency declaration has been extended to 17 August 2020.

As we have said above, critical to our acceptance of these extraordinary powers is that they will come to an end as soon as is possible. It is our submission, that this committee needs to obtain from the government a clear public statement of the criteria by which it will determine whether it will extend the declaration past 17 August 2020.

(b) Accountability

As noted above, the extraordinary powers which have been exercised, particularly by the Chief Health Officer during the pandemic required immediate accountability. In our submission there has been none to date.

We note first of all the government chose to close down Parliament for a number of months at the height of the crisis.

This inquiry was referred to this committee on 22 April 2020. It would appear that the first and so far only public hearing conducted by this committee occurred on 23 June 2020, some two months after the referral.

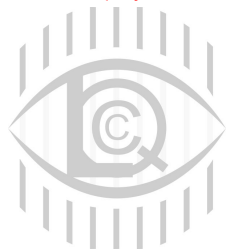
<sup>1</sup> Annas et al *Pandemic Preparedness* January 2008 page 6 (a report prepared by a panel of experts for the ACLU)

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We contrast this with the level of activity of the equivalent Senate committee which has so far had 19 hearings. Whilst we accept that it might be argued that the work in Queensland has been split between two committees, it is our submission that the contrast in the level of public accountability is stark.

It was, and remains, our position that the referral of the review of the government's Covid response to standing committees was wrong. The government should have established a select committee, as was done in the Senate, with representatives of all parties in Parliament, chaired by a non-government member. The committee should be tasked with examining the implementation of the Home Confinement laws, decisions to reduce or extend restrictions and the timing of those changes. It should also examine the use of any data which may be collected from the proposed tracing app and transferred to the Queensland government

Effectively, the Chief Health Officer has become an unelected legislator<sup>2</sup>. Our position is that there has been in adequate supervision of the use of the extraordinary powers which have been given by the Parliament to an unelected government official during the pandemic.

## (c) Review of Detention

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.

There is no right of review of this decision. We contrast this, with the provisions of part 7 where after 14 days an application must be made to a Magistrate to extend the period of detention and section 361 which allows a detained person to apply to a Magistrate for an order ending a person's detention.

In our view, it is fundamental that a person who is detained 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.

We note, the government has not chosen to make an override declaration in accordance with section 43 of the *Human Rights Act* which in section 29 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*.

In this context we also note our concern that part 7 of the *Public Health Act* has been amended to remove the previous three day period before which it was necessary to apply for an

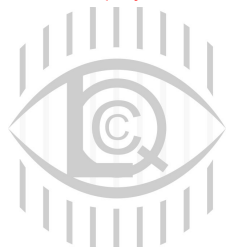
<sup>2</sup> this is one of the bases upon which challenges to similar laws have succeeded in some states of the United States.

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extension of time of a detention order under that Part, to make it 14 days. We do not see why this was necessary. It is our submission, that the legislation should be restored to its pre-existing condition.

(d) Conditions of detention

The QCCL has received a number of complaints from citizens who have been detained in hotel quarantine.

No doubt some of those complaints can legitimately be seen as a result of frustration caused by the simple fact of being isolated from the world for 14 days. However, some of those complaints in our view have substance. In particular, the complaint that people are not allowed outside into the fresh air at all.

These people are being quarantined in hotels. Hotel rooms are not meant to be lived in 24 hours a day for 14 days. They are generally only used for sleeping and changing clothes.

Section 30 (1) of the *Human Rights Act* provides that "all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person".

One of our correspondents suggested a way to respond to this issue would be for these people to be housed in serviced apartments, which usually have balconies and where some space will be available for people to exercise away from other people.

These comments are made in the context where the people in question have committed no crime. They are not being detained as punishment. They are being held for everybody else's protection. The community should be prepared to pay so these people can live in reasonable conditions.

We note, that some people who complained to our website informed us that they have lodged complaints with the Human Rights Commission. At this stage obviously, the results of those complaints have not been made public and under the Commission's legislation it is only entitled to publish the substance of any complaint.

(e) Home confinement direction

So far as we can tell, this direction must count as the most Draconian piece of law ever enacted in this State. At one stage, Queenslanders were restricted to their houses except for four stated reasons. Our researches would indicate that not even during the Spanish flu pandemic of 1918-1920 were such orders made. Certainly, no such orders were made during either of the world wars.

The Home Confinement Direction:

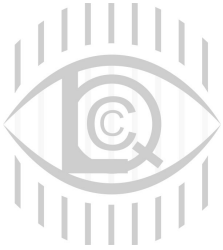
1. Is incredibly vague
2. does not state that punitive action should be **the last resort**
3. includes a defence of reasonable excuse, which we won't know the meaning of until some Court tells us in the distant future
4. reverses the onus of proof onto the defendant in relation to that excuse

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We have consistently maintained, that the direction needed to specifically state that punitive action under it should be the last resort.

Ultimately, these unsatisfactory aspects of the direction were dealt with by the exercise of police discretion. Whilst we accept that to some extent that was unavoidable again, there has been no public accountability for the exercise of discretion by the police. Once again, we acknowledge the Queensland police seem to have been less arbitrary in the exercise of this power than their Victorian counterparts. However, we maintain our position that this committee has to conduct a thorough review of the exercise by the police of their powers under the confinement direction

The police should be required to send de-identified details of all enforcement action taken by police under all direction to this committee and the committee should report on what has occurred to date and going forward should report fortnightly on that information.

This is so the police can be held accountable for their actions and the public can know what conduct is resulting in enforcement action against them.

(f) Privacy

There are two aspects of the right to privacy which arise out of the Covid pandemic to which we draw the committee's attention.

Firstly, there is any data which may ultimately be produced to Queensland authorities the COVIDSAFE App. It is our submission, that this committee should as part of its tasks, review the use of any data obtained through that app to ensure it is appropriately dealt with and destroyed.

Secondly, there is the question of the data being collected in café's restaurants et cetera under their Covid safe plan.

Again, we can accept the argument that whilst the virus is circulating in the community, the collection of information such as the name and phone number of people going to café's and restaurants can be justified. However, it is our submission that the Plans are totally inadequate from a privacy point of view.

Firstly, we do not know when this requirement will be withdrawn. The extended continuation of this requirement is going to result in these businesses collecting an enormous amount of personal information. It must come to an end, as soon as is possible. It is our submission that the Committee should seek a clear answer from the Chief Health Officer as to when this requirement will be removed.

Secondly, the plan requires that customers provide contact details including name email address (or residential address if not available) and a mobile number which must be kept for a period of at least 56 days.

We make the following comments on this requirement:

- Originally that period of 56 days was 28 days. We query why it has been increased. The committee should investigate this. We note in this regard that

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information from the COVIDSAFE app will be deleted after 21 days. What is the justification for the longer period?

- The direction does not say the information must be destroyed after 56 days. In our view it should do so.
- We are also pleased that the plan says that the records are to be used for Covid purposes only and are to be captured and stored confidentially and securely. However, it must be said that it is our experience in going out to such venues that that is not what is occurring.
- It is our view that the plan needs to be improved from privacy point of view. People should not be required to have their personal information stored on a clipboard at the front of the venue for everyone to see.

QCCL Vice President Angus Murray has suggested that upon entering a venue each person should be given a ballot with an envelope and required to put the information onto the piece of paper, seal it into the envelope and place it into a secure container. Each day's envelopes could then be kept in the secure container until they either are needed or can be destroyed after the specific period.

We have had enquiries about the use of apps to collect this data, and have no objection to this so long as it is optional and customers are fully advised as to the nature of the app, where the information is going to be stored and that the relevant privacy protocols apply, including the destruction of the data at the end of the 56 day period will be complied with. In fact, the use of an app on a person's phone probably has the benefit that there is much less touching of other objects which might be contaminated. But we have been informed by one producer of an app that they cannot sell the product because apparently some venues read the plan as not permitting the use of apps.

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  
5 July 2020

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