

## Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022

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# Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022

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Submission to  
Health and Environment Committee

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## Summary and Recommendations

1. Thank you for the opportunity to make submissions on the Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022 (**the Bill**).
2. The Bill implements many previous recommendations of the Queensland Human Rights Commission (QHRC) and we are generally supportive of the Bill. Nonetheless, in this submission we suggest further amendments should be considered and highlight areas where further justification is required for limitations on human rights.
3. The QHRC **recommends** that:
  - The legislation require a public health direction and accompanying human rights analysis to be tabled in parliament in less than the proposed 21 days. We suggest 5 days would be more appropriate and would align with the proposed timeframe of the human rights justification statement.
  - The government provide further justification for why the Bill doesn't include mechanisms for a person to seek an independent review of how a public health direction applies, particularly for those subject to isolation or quarantine directions.

- The government develop an accessible process for individuals to demonstrate they are exempt from a direction to avoid the confusion and confrontation we have observed to date, particularly regarding people exempted from wearing a face mask.
- The legislation include an automatic exemption for any person subject to a direction to leave their principal place of residence or move freely to obtain medical treatment to preserve the person's quality of life.
- The government provide additional information to justify the limitation on rights arising from powers of authorised persons to enter premises, seize items and use force.
- The government further justify several of the proposed amendments to the Corrective Services Act. On the information provided, we suggest that the QCS Commissioner's temporary powers should only be exercised in relation to COVID-19, not any emergency.
- The legislation provide that even during a declared emergency, oversight agencies be permitted (if they choose) to visit corrective services facilities.
- While the time limited nature of the amendments in the Bill may be a sufficient safeguard, if the amendments proposed in the Bill are extended, consideration be given to the CHO or QCS Commissioner only being provided such extraordinary powers following a declaration or similar decision by the Premier.
- The Committee also consider if the government should continue to consult with stakeholders and the broader community with a view to developing legislation to respond to other pandemics Queensland may face in future.

## Introduction

4. The QHRC is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).
5. The QHRC 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.
6. The QHRC 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.
7. Throughout the pandemic, the QHRC 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 QHRC to provide public commentary about

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

8. We agree with the Explanatory Statement that the previous amendments to the Public Health Act were 'integral to Queensland's successful response to COVID-19, including immediate efforts to eliminate and suppress the virus, and ongoing strategies to manage the endemic risks of COVID-19' but that now a 'step down' and more targeted suite of powers is necessary.<sup>1</sup>

## Positive changes

9. The Bill implements several previous recommendations of the QHRC to ensure any limitation on human rights arising from COVID-19 restrictions are reasonable and proportionate:
  - The Bill clarifies how the HR Act applies to the new framework, including providing for parliamentary scrutiny and that parliament may disallow public health directions.
  - This process provides for the publication of information about why any limitations on human rights is reasonable and proportionate.
  - The powers of the Chief Health Officer (CHO) are narrowed to those identified as most critical to respond to COVID-19 including seeking parliament's express authorisation for the CHO to make directions mandating vaccination (and then only to workers).
  - Isolation or quarantine directions may only be for up to 7 days.
  - Directions would expire automatically after 90 days.
  - Legislation expires after 12 months (31 October 2023).
  - The Statement of Compatibility generally provides sufficient detail to justify many of the limitations on human rights, although we note some instances where further information is required.

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<sup>1</sup> Explanatory Notes, Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022, 1.

# Suggested improvements

## Timeframe to table direction

10. We support the range of measures proposed in the Bill to enhance transparency of decision-making and ensure appropriate parliamentary scrutiny and consideration of human rights.
11. A significant improvement on the current framework is that the Bill requires a public health direction to be tabled in Parliament. Once the direction is tabled, it will be referred to the relevant portfolio committee of Parliament, under s 93 of the *Parliament of Queensland Act 2001*, so that the committee may examine the lawfulness of the direction, the policy to be given effect by the direction and whether the direction is compatible with human rights. The direction will be subject to disallowance in accordance with the procedures for disallowing subordinate legislation under s 50 of the *Statutory Instruments Act 1992*.
12. In addition to these tabling and disallowance provisions, within five days of giving a public health direction, the CHO must publish a statement justifying the direction and the reasons for it. The justification statement must include a summary of the CHO's rationale for giving the direction and assess whether the direction is compatible with human rights. The justification statement must also be tabled in Parliament within 21 days so that the portfolio committee may consider it when examining the direction. A direction is given by notice published on the department's website or in the gazette.
13. While it would be preferable for the human rights justification statement to be published at the same time as the direction, we accept there may be good reasons to delay its publication. However, the period of 21 days between direction being given and its tabling in parliament appears too long. For the parliamentary scrutiny to be meaningful it must take place in a timely fashion, and we anticipate that it will take some time for the committee to report and the parliament to then consider and debate any motion of disallowance that may arise. On this basis we suggest a more appropriate timeframe would be to require the direction and accompanying human rights certificate to be tabled within 5 days of the direction being made. This would align with the timeframe for the human rights justification statement to be finalised.

## Independent review

14. The Bill authorises the CHO to issue directions requiring individuals to isolate or quarantine for periods of up to 7 days.
15. The new framework does not appear to include any mechanism for a person subject to quarantine or isolation direction to seek an independent review of their situation. In contrast, in Victoria pandemic detention quarantine is reviewed by an authorised officer at least once every 24 hours, unless that is not reasonably

practical.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

16. At a minimum we suggest that where a person is subject to quarantine or isolation at a state-managed or operated facility, including hotel quarantine (should it again be used), then review measures should allow such individuals to seek a review of their isolation. Subsequent reviews, many months afterwards, whether through this Commission, the Ombudsman or a Court is not a sufficient safeguard to rights.
17. Consideration should also be given to providing those subject to vaccination mandates with a review process such as that provided for in the ACT legislation.<sup>6</sup>

## Humane conditions

18. Throughout the pandemic the QHRC has advocated for more humane treatment for those subject to isolation, quarantine or detention. We have previously made recommendations to Government about improvements to the previous hotel quarantine arrangements.<sup>7</sup> While it appears the government's use of such facilities has ceased, the powers proposed in the Bill would still allow the CHO to direct a person to quarantine or isolate at a facility managed or operated by the government.
19. Therefore, the QHRC suggests that the legislation should ensure anyone subject to an isolation direction at a state operated facility is quarantined in humane conditions, including with daily access to fresh air and exercise.

## Proof of exemption

20. The QHRC supports the practice of the CHO to date to build exceptions into public health directions, often to ensure they are more compliant with human

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<sup>2</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165BG.

<sup>3</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165BI.

<sup>4</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165BJ.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Public Health Act 1997* (ACT) subdivision 6C.6.5

<sup>7</sup> 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>>

rights. The Statement of Compatibility acknowledges this practice is likely to continue in relation to directions requiring the wearing of masks:

In practice, a public health direction requiring mask wearing will have exceptions, such as for people who have a disability, medical condition or illness or other reason that means they cannot wear a mask.<sup>8</sup>

21. This is welcome, but in our experience, the lack of a clear process for someone to demonstrate that they are exempt has led to many issues:
  - a. The directions have effectively required private sector businesses to ‘police’ the requirements.
  - b. There is a lack of understanding across the community of how exceptions work and when they apply. For example, we have seen instances of businesses asking for medical proof of exception which is not required under the direction for the exception to apply.
  - c. In responding to requests to ‘prove’ exceptions, there is a risk of people having to disclose sensitive and private information to third parties.
  - d. The response from some businesses and employers has been to refuse service or discipline employees when they feel insufficient proof of an exception has been provided.
  - e. These issues have resulted in many enquiries and complaints to us, particularly in relation to alleged impairment discrimination under the AD Act.
22. To address these issues, we suggest that the Government provide a mechanism for people to be able to display or provide proof of exception. This could be as simple as a self-applied questionnaire, similar to that used earlier in the pandemic for border passes, which allowed people to display a green tick after answering a series of questions about their circumstances. Benefits of such a system would be to increase awareness of exception categories and ensure those not wearing a mask are provided information about alternative measures they may take, such as social distancing. This would reduce the burden on several parts of the community to be ‘citizen police’ and enhance trust in the process.
23. Nonetheless, if applications were made via online system like that previously used for border passes, there would need to be a range of means for applying for and demonstrating ‘proof’, to ensure the system is accessible for all members of the community.

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<sup>8</sup> Statement of Compatibility, Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022, 10-11



## Automatic exemption for critical needs

24. The Statement of Compatibility notes that the requirements in a direction may, directly or indirectly, discriminate against a person. It provides the example of an isolation direction, which limits freedom of movement, may disproportionately affect access to services by people with a disability. It justifies this limitation:

However, in practice, any restriction on the movement of people made under a direction has included an exemption for a person to leave their principal place of residence or move freely to obtain medical treatment to preserve the person's quality of life. This exemption has allowed people requiring medical attention or other forms of care or support, such as disability services, to access that care or support.<sup>9</sup>

25. The QHRC suggests that for this to be a meaningful safeguard, it should be included in the Bill. A person should be able to move freely, even when subject to a public health direction, to obtain medical treatment to preserve their quality of life.

## Powers to enter, seize and use force

26. Proposed new sections 142N and 142O would permit authorised persons to enter a place where an authorised person reasonably suspects a person may be contravening a public health direction, without a warrant or consent, and seize evidence. The power to seize evidence applies only to evidence that a person has committed the offence of contravening a public health direction under new section 142K.
27. It is an important safeguard that authorised persons are not permitted to enter a dwelling or a place where health procedures or consultations are being undertaken.
28. Nonetheless, these are significant new powers. We are concerned there is insufficient justification for the limitation on rights included in the Statement of Compatibility. For example, the Statement briefly discusses the limitation on the right to privacy arising from the powers, but does not discuss the right to property (s 24) which would likely be limited for the seizure of property.
29. The Statement suggests these powers will allow authorised persons to act 'swiftly' to respond to 'serious' public health risks. However, the threshold for the use of these powers is one of reasonable suspicion (for a right of entry) of the contravention of a public health direction. We suggest that if the power is

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<sup>9</sup> Statement of Compatibility, Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022, 10.

intended to respond to 'serious' risks to public safety, that threshold should be reflected in the Bill.

30. Similarly, the Statement provides very brief justification for the potentially significant power for authorised persons to use reasonable force to enforce a public health direction under s 142Q. Again, the QHRC welcomes that the provision at least includes the safeguard that a person first be given the opportunity to voluntarily comply. However, the Statement does not discuss the limitation on the right to liberty and security that may arise through the use of this power.
31. In summary, we suggest there is insufficient justification in the Statement to support the suggestion that 'the Bill provides authorised persons with the minimum powers necessary to ensure compliance with a public health direction.'<sup>10</sup>

## Corrective Services Act amendments

32. The QHRC accepts that prisons are high risk environments for the spread of COVID-19. However, we question whether it is reasonable to apply restrictions on prisoners, when there is no longer a community-wide emergency declaration in force. While the proposed powers are at least subject to COVID-19 being declared a controlled notifiable condition, as discussed further below, we would prefer an approach where these extraordinary powers are enlivened (and ended) by a specific declaration by the Premier. The making of a declaration under s 268 continues to be subject to the approval of the Minister, but this applies to all declarations when they are made, rather than being a formal step taken to enliven these extraordinary new powers.
33. Subject to adequate justification being provided for such an approach, we note that:
  - a. Further justification is needed as to why these powers should be extended to **lower risk custodial environments such as work camps** and the Helana Jones Centre (a community corrections centre). Section 268 of the Corrective Services Act usually only provides for an emergency declaration for prisons. The Statement of Compatibility suggests this is essential to prevent loss of life, ensure QCS can respond to the unique risks surrounding COVID-19, and ensure the safety of staff, prisoners and visitors.<sup>11</sup>

In light of the widespread circulation of the virus in the community now, as well as greater understanding of how to limit its transmission, this justification may no longer be valid. Considering the developments and learning about the

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<sup>10</sup> Statement of Compatibility, Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022, 14.

<sup>11</sup> Statement of Compatibility, Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022, 27.

pandemic since May 2020, we suggest further justification is necessary to demonstrate why the powers should continue to apply beyond prisons to lower risk corrective services facilities such as work camps.

- b. It appears if s 268 were amended in the manner suggested, the additional extraordinary powers of the QCS Commissioner could be **used to respond to any emergency**. While the new power may be contingent on COVID-19 being declared a controlled notifiable condition, it seems likely that COVID-19 will be declared such a condition for a lengthy period. We suggest that the proposed emergency power be narrowed to only be permitted to respond to the COVID-19 pandemic.
- c. **Oversight and transparency** is particularly important during emergencies. While it does not appear to be an intended consequence of the proposed amendments, the QHRC suggests that any changes should explicitly confirm that key oversight agencies such as the Ombudsman, Inspector of Detention Services, Official Visitors and the United Nations Subcommittee on the Prevention of Torture (SPT) may visit a facility even if it is subject to an emergency declaration or direction. This will maintain confidence in the corrective services system and ensure any human rights issues are identified quickly.
- d. The Statement of Compatibility notes that 'while not required by statute, all declarations made under section 268 in response to COVID-19 have been made publicly available. This will continue to occur'. The QHRC welcomes QCS' commitment to transparency to date, but suggests that the Bill should require that all such emergency directions and declarations be published.<sup>12</sup>

## Powers enlivened by executive

34. The Bill provides for the CHO and QCS Commissioner to exercise powers without any overarching decision by the Executive. As already noted, while the QCS Commissioner's powers are contingent on COVID-19 being declared a controlled notifiable condition, this is likely for the foreseeable future. The CHO's powers would begin on commencement.
35. While each jurisdiction has taken a slightly different approach to its COVID-19 response, the human rights jurisdictions of the ACT and Victoria have both adopted models where elected members of the ministry, including the Premier and Health Minister, make directions of broad application to the community. This is based on the advice of the chief health officer, whose advice must be published with the direction, along with a human rights assessment.<sup>13</sup> The Explanatory Notes discuss the reason for a different approach in the Bill:

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<sup>12</sup> Noting this may already be required under the *Right to Information Act 2009*.

<sup>13</sup> See *Public Health and Wellbeing Act 2008* (Vic), Part 8A. Also, *Public Health Amendment Act 2022* (ACT).

There was also some support for public health directions to be issued by an elected representative, who is accountable to the community, rather than by the Chief Health Officer. Given the ongoing uncertainty around the risks, severity and impacts of COVID-19 at this time, the Chief Health Officer is considered best placed to access relevant information locally and internationally to assess the health risk to the community and impacts on the public health system and determine whether a public health direction is needed, and the exact nature of any such direction.<sup>14</sup>

36. We support the excellent work of the CHO to date in Queensland in responding to COVID-19, and acknowledge their significant public health expertise. Nonetheless, elected representatives are accountable to the Queensland community for their decisions. When significant community wide decisions are made that substantially limit human rights, the decision maker ought to be a person that is ultimately accountable to the community.
37. While the QHRC's preferred position is that the Premier should formally 'declare' an emergency for these powers to be enlivened, the proposed approach may be reasonable as the CHO and QCS Commissioner would cease to have these powers on 23 October 2023. However, if, like earlier legislation, these changes were to be extended, we would expect to see more checks and balances to avoid these extraordinary powers effectively being permanently provided to both.

## Long term pandemic legislation

38. The Queensland Government and broader community have learnt much in recent years about how to respond to a pandemic. In many ways, the amendments proposed in this Bill reflect that growing understanding, and an acceptance that initial legislation passed urgently in early 2020 was imperfect.
39. In response to similar concerns, Victoria, which is also a human rights jurisdiction, has sought to legislate on a long-term basis a framework for dealing with future pandemics.<sup>15</sup> Victoria previously used a similar framework to the current Queensland model (which will expire in October 2022). In December 2021, new legislation commenced in Victoria that comprehensively changed its approach to restrictions imposed in response to pandemics.
40. 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:

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<sup>14</sup> Explanatory Notes, Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022, 19.

<sup>15</sup> See *Public Health and Wellbeing Act 2008* (Vic) Part 8A. Also, *Public Health Amendment Act 2022* (ACT).

- The Premier is responsible for making pandemic declarations.<sup>16</sup>
  - Compulsory powers are subject to different safeguards depending on their breadth of coverage.<sup>17</sup>
  - The Minister for Health's pandemic orders are made to protect public health if a pandemic declaration has been made by the Premier.<sup>18</sup> 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.<sup>19</sup>
  - The Minister for Health makes pandemic orders accompanied by<sup>20</sup>:
    - 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.<sup>21</sup>
  - Government decision-making is subject to parliamentary scrutiny.
  - As outlined above, pandemic detention quarantine is reviewed by an authorised officer at least once every 24 hours, unless that is not reasonably practical.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>
41. While welcoming the changes in the Bill, the QHRC continues to suggest that consideration should be given as to whether Queensland should also legislate a similar framework for any future pandemic, beyond just COVID-19.

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<sup>16</sup> *Public Health and Wellbeing Act 2008* (Vic) ss 165AB – 165AG.

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

<sup>18</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165AI.

<sup>19</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165AU.

<sup>20</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165AP.

<sup>21</sup> See Department of Health (Victoria), *Pandemic Order Register* (Web Page)

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

<sup>22</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165BG.

<sup>23</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165BI.

<sup>24</sup> *Public Health and Wellbeing Act 2008* (Vic) s 165BJ.

<sup>25</sup> *Ibid.*

## Conclusion

42. Thank you for the opportunity to comment on the Bill. We support the important changes it includes, subject to further refinements and justification to ensure the Bill is compatible with human rights.