

Victoria's permanent pandemic legislation: strengths and weaknesses

Briefing paper

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Summary

Victoria's much-anticipated permanent pandemic legislation has been released this week, in the form of the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic) (**the Bill**). This Bill amends the *Public Health and Wellbeing Act 2008* (Vic) (**the Act**) in order to provide for the management of pandemics: while it makes many welcome modifications to the current legislative framework, the current consultation period presents an opportunity to make further essential amendments.

Currently, upon declaration by the Minister of a state of emergency under s 198(1) of the Act, public health directions can be made by the Chief Health Officer (**CHO**) (and other authorised officers) under ss 190 and 200 of the Act. The Bill empowers the Premier to make pandemic declarations, and – following the making of the former – confers upon the Minister power to make pandemic orders (which will be the equivalent of what we currently know as public health directions).

The Bill enables the Scrutiny of Acts and Regulations Committee (**SARC**) to report on pandemic orders and, critically, to recommend suspension and disallowance: in contrast, none of the public health directions issued to date has been scrutinised by the Parliament or the SARC, and they have been exempt from disallowance processes since 22 December 2020.¹ The fact that pandemic orders will be disallowable by the Parliament is a significant improvement on the current legislative framework.

The Bill also provides for improved timeframes for the SARC's processes. While we welcome these, we consider that the processes relating to SARC's powers could be further expedited in order to render them appropriate for emergencies. The SARC's jurisdiction to report to the Parliament should not be conditional upon government compliance with procedural matters, and the areas in relation to which it has jurisdiction to report should be widened to include any matter it considers appropriate.

¹ Up until 22 December 2020, when the Government amended the Subordinate Legislation (Legislative Instruments) Regulations 2011 in order to exclude the Directions from the operation of the SLA's scrutiny mechanisms,¹ this appears to have been a consequence of the Directions being treated as administrative in nature. This was in spite of the fact that there were very strong grounds for them being characterised as legislative instruments; such a characterisation would have attracted the Act's important scrutiny provisions and would also have had the effect of attracting the operation of the Human Rights Charter.

One of the real challenges throughout the COVID-19 pandemic has been ensuring that the Parliament has access to the information it requires to perform its scrutiny function. The Bill goes a good way to addressing this deficiency, by establishing requirements for the tabling of information – including advice from the Chief Health Officer – in the Parliament, and creating a publicly available Pandemic Order Register. However, there are no consequences for failure to comply with these important provisions.

The creation of an Independent Pandemic Management Advisory Committee is a potentially valuable inclusion, but its real value will depend upon its powers, resourcing, and transparency in respect of its processes. It is no substitute for an independent statutory agency, such as the Ombudsman, having powers of review in respect of the exercise of emergency executive powers.

The passage of this legislation presents an opportunity for Victoria to be a world-leader in pandemic legislation. While the Bill imports many welcome improvements to the current legislative framework, the Centre for Public Integrity urges the Parliament to adopt the following essential modifications:

- (1) Failure to comply with the sections of the Bill requiring provision of information to the Parliament and the public should carry consequences.
- (2) The SARC's powers in respect of suspension and disallowance should not be dependent upon the government's compliance with procedural requirements, and should simply be enlivened by the making of the relevant order.
- (3) The SARC's jurisdiction to report should not be limited to specified matters and should be widened to include any matters it considers appropriate (including but not limited to those set out at s 165AS).
- (4) Timeframes for the exercise of the SARC's powers should be further expedited
- (5) The Independent Pandemic Management Advisory Committee should be guaranteed necessary resources and powers to perform a meaningful role, and there should be greater transparency around committee appointments and advice.
- (6) An independent statutory agency, such as the Ombudsman, be given the investigative powers and jurisdiction to review the exercise of executive emergency powers.

Key transparency and accountability measures imported by the Bill

We have analysed the main transparency and accountability measures imported by the Bill to the current legislative framework: these relate to pandemic declarations, orders, and the proposed Independent Pandemic Management Advisory Committee.

Pandemic declarations

- Under s 165AB of the Bill, the Premier may make a declaration (a pandemic declaration) if satisfied that there exists a "serious risk to public health" arising from either a pandemic disease, or a disease of pandemic potential. Section 165AC(1)(c) provides that a declaration can be in force for 4 weeks (with extension for 3 months at a time permitted, and no limitation on the number of possible extensions: s 165AE(5)).
- The Premier is required to consult with and consider the advice of the Minister and Chief Health Officer before making such a declaration (s 165AB(2)).
- Section 165AG makes provision for reporting to the Parliament in relation to a pandemic declaration. Under this section, the Premier must provide a statement

of reasons for the declaration, a copy of the advice of the Minister and Chief Health Officer in respect of it, and other related matters, to the Parliament. In cases where a House of Parliament is sitting on the day after the declaration comes into force, the report must be laid before the House on that day: s 165AG(2). Where a House is not sitting, or it is not "reasonably practicable for the report to be laid before that House on that day", a copy must be given to the Clerk of that House (who must provide it to all members and ensure it is tabled on the next sitting day: ss 165AG(3), (5)). Under s 165AG(6), a failure to comply does not affect the declaration's validity: it is our view that information provision is vital to transparency, and there should be consequences for failure to comply with such provisions.

Pandemic orders

- Following the making of a pandemic declaration, under s 165AI(1) the Minister may make any order (a pandemic order) "that the Minister believes is reasonably necessary to protect public health". There appears to be no limitation upon the period for which a pandemic order can be in force.
- Pursuant to s 165AI(3), a period of detention specified in a pandemic order "must not exceed the period that the Minister believes is reasonably necessary to eliminate or reduce a serious risk to public health". The fact that this section appears to permit detention for an unlimited amount of time, with no review mechanism similar to that set up at Division 6, is concerning.
- Pursuant to ss 165AP and 165AQ, pandemic orders and associated documents are required to be published on a Pandemic Order Register (established under s 165CS) and tabled within 6 sitting days of the order's making. Under s 165AP(2) this information includes the advice given by the CHO under s 165AL(2)(a) or s 165AO(2), a statement of reasons, and an explanation of any human rights that are protected by the Charter of Human Rights and Responsibilities (**Charter rights**) and are or may be limited by the order, as well as how such limitations are demonstrably justified. We note that failure to comply with these sections does not affect validity: s 165AP(6). While the SARC may report on failure to comply under s 165AS and this may enliven the possibility of disallowance under s 165AU, suspension under s 165AT appears to be tied to compliance and this should be rectified.

Scrutiny, suspension and disallowance of pandemic orders

- As a consequence of the fact that pandemic declarations, orders, directions made in the exercise of a pandemic management power and other specified instruments are not legislative instruments under the *Subordinate Legislation Act 1994* (Vic) (s 165CR), they are not able to be suspended or disallowed unless the Bill provides for this.
- Division 4 of the Bill provides for the scrutiny, suspension and disallowance of pandemic orders. Under s 165AS, the Scrutiny of Acts and Regulations Committee (**SARC**) may report to each House if it considers that a pandemic order laid before the Parliament under s 165AQ(1)(a) does not appear to be within the powers conferred by the Act, or does any of the matters set out at s 165AS(1)(b) without clear authority, or is incompatible with the Charter rights. The SARC's report may contain any recommendations it considers appropriate, including that a pandemic order should be disallowed or amended: s 165AS(2).

- Pursuant to s 165AU, a pandemic order can be disallowed if the SARC recommends it under s 165AS, or there has been a failure to comply with s 165AQ and SARC has reported the failure to both Houses of Parliament. Section 165AU(2) provides that a pandemic order is disallowed if a notice of a resolution to disallow is given in each House either on or before the 18th sitting day of each House after the order is tabled (in circumstances where the order and associated documents have been tabled in accordance with s 165AQ), or on or before the 24th sitting day of each House after the pandemic order is published in the Government Gazette (where s 165AQ was not complied with), and the resolution is passed by each House on or before the 12th sitting day of each House after the giving of the notice of resolution. In our view, the SARC's jurisdiction to report should not be conditional in any way upon government compliance with specified procedures (including gazettal and tabling): its jurisdiction should simply be enlivened by the making of the relevant order. Furthermore, its jurisdiction to report should not be limited to specified matters and should be widened to include any matters it considers appropriate (including but not limited to those set out at s 165AS).
- Suspension of a pandemic order is possible under s 165AT in certain circumstances; however, because it is dependent on an s 165AS report it is dependent on s 165AQ(1)(a) tabling. We consider that the SARC's jurisdiction should not be conditional upon compliance with this requirement.

Independent Pandemic Management Advisory Committee

- Division 9 of the Bill makes provision for an Independent Pandemic Management Advisory Committee
- In respect of the requirement to consult with the Chief Health Officer under s 165CE(3), we recommend that there should be a requirement to formally seek advice and that the advice should be required to be tabled in the Parliament (in order to ensure the transparency of the appointment process).
- Advice from the Committee to the Minister should be required to be tabled in Parliament (as reports are under s 165CG), and provision should be made for public access to the Committee's advice and reports where Parliament is not sitting.
- Further information relating to the powers and resourcing of the Committee is required: for example, will it have the support of a secretariat, and have sufficient powers of inquiry?

Recommendations

The Centre for Public Integrity urges the Parliament to adopt the following essential modifications to the Bill in order to bolster the transparency and accountability provided for by Victoria's legislative framework in respect of pandemics:

- (1) Failure to comply with the sections of the Bill requiring provision of information to the Parliament and the public should carry consequences.
- (2) The SARC's jurisdiction in respect of suspension and disallowance should not be dependent upon the government's compliance with procedural requirements, and should simply be enlivened by the making of the relevant order.
- (3) The SARC's jurisdiction to report should not be limited to specified matters and should be widened to include any matters it considers appropriate (including but not limited to those set out at s 165AS).
- (4) Timeframes for the exercise of the SARC's powers should be further expedited

- (5) The Independent Pandemic Management Advisory Committee should be guaranteed necessary resources and powers to perform a meaningful role, and there should be greater transparency around committee appointments and advice.
- (6) An independent statutory agency with investigative powers and flexible powers of response should be empowered to review the exercise of executive emergency powers.

About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC. More information at www.publicintegrity.org.au.