

Joint position paper

The Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic)

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Executive summary

The Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Vic) proposes significant changes to the *Public Health and Wellbeing Act 2008* (Vic), in order to provide for the management of pandemic emergencies.

In respect of **transparency and accountability**, the Bill proposes welcome changes to the framework provided for by the current legislation, which is, in many key respects, non-existent. However, a number of amendments are essential to achieve appropriate levels of transparency and accountability for these emergency powers. These amendments, first, relate to the way in which parliamentary oversight and possible disallowance is proposed to function, the function and role of the proposed Independent Pandemic Management Advisory Committee, and the consequences for failure to comply with the Bill's information provision requirements. Second, the addition of a cross-parliamentary committee would reflect emerging practice in parliamentary scrutiny of the executive's management of pandemics. Finally, powers conferred on the executive by the Bill are of such significance that we consider an independent merits review process to be an essential element of the framework providing for their exercise.

In respect of **human rights considerations**, essential amendments to the Bill include the protection of the internationally and domestically-protected right to peaceful protest, the inclusion of appropriate safeguards on the exercise of the proposed executive detention powers, the elimination or amendment of the proposed aggravated offence, and the elimination of the Bill's proposed exemption from equal opportunity legislation.

Amendments to address each of these concerns would mean that Victorians can be confident there are sufficient safeguards in place upon the exercise of the significant powers provided for by the Bill.

Finally, in our view there are strong grounds for considering the inclusion of a **sunset clause** in the legislation. The Bill's regrettably hasty introduction has meant that there was insufficient time for expert stakeholders, the media and the wider community to understand the implications of the significant powers for which it provides before it was passed by the Legislative Assembly: it is clear that this has contributed to the discontent with which the Bill has been met, and there is a manifest need for genuine consultation and refinement of the Bill's provisions before its passage through the Legislative Council.

In these circumstances, sunseting the legislation 12-18 months after its commencement would be appropriate. The fact that we are currently in a pandemic clearly presents various challenges, including time pressure to adopt permanent pandemic legislation; one consequence of this is that circumscribed consultation is inevitable. Sunseting the legislation would allow the opportunity for more extensive consultation - which would almost certainly produce a better and less divisive piece of legislation - as well as the opportunity to learn from our lived experience as evaluative studies emerge.

In the absence of a sunset clause, the review process mandated by s 165CX should be bolstered and brought forward by 6 months (and therefore undertaken 18 months rather than 24 months after the Act's commencement); it should be required to be performed by an independent party appointed by the Parliament (for example, a former judge or the former head of an independent statutory oversight agency) and specifically require review of the following matters, including additional emerging best practice:

1. Parliamentary scrutiny
2. Independent merits review oversight
3. Detention powers
4. Safe protest
5. Fines/criminal penalties

Recommendations

We recommend that in order to create fit-for-purpose permanent pandemic legislation, a suite of interconnected and mutually-reinforcing amendments is required to:

1. Establish a cross-party parliamentary scrutiny committee.
2. Broaden the proposed jurisdiction of the Scrutiny of Acts and Regulations Committee, ensure that the relevant timeframes are appropriate for emergencies, and make the Committee's jurisdiction independent of government compliance with procedural matters.
3. Enable a disallowance motion to be of effect where passed by only one House of Parliament.
4. Strengthen the proposed information provision requirements by making the relevant timeframes appropriate for emergencies, and ensuring that there are consequences for failure to comply.
5. Ensure that the Independent Pandemic Management Advisory Committee will be empowered and resourced to perform a meaningful, transparency role.
6. Guarantee protection of the right to peaceful protest.
7. Ensure sufficient protections and accountability in respect of executive detention powers.
8. Remove or amend the proposed aggravated offence provisions.
9. Make provision for an independent merits review process in the case of the imposition of a penalty for breach of an instrument.
10. Remove the proposed exemption from the *Equal Opportunity Act 2010* (Vic)

1. Cross-party parliamentary committee

One missing component of the framework provided for by the Bill is broad political accountability for the conduct of the government during the pandemic. A cross-party parliamentary committee should be established as soon as a pandemic declaration has been made, in order to oversee in a comprehensive way the exercise of the significant powers granted by the Bill. This would mean that Victoria would have in place arrangements similar to those in place at a federal level, where the Senate Select Committee on Covid-19 provides for parliamentary oversight of the Commonwealth's response (alongside the Senate Standing Committee for the Scrutiny of Delegated Legislation).

This reflects emerging practice in parliamentary scrutiny of the executive's management of the pandemic in other jurisdictions as well. For instance, the Epidemic Response Committee was set up in New Zealand in April 2020. This cross-party committee had specific oversight and investigation powers over the way in which the executive managed the pandemic. In NSW, the Public Accounts Committee created specific terms of reference to create permanent cross-party oversight of the executive's pandemic management process.

This committee should meet regularly (online if necessary) and have power to inquire into all actions taken by the executive in response to the pandemic, including, but not limited to, actions taken under the PHW Act. The makeup of the committee should be balanced to avoid political grandstanding. One possibility is that it should include equal numbers of representatives from both the government and opposition. The government and opposition representatives would then both be able to appoint 1 cross-bencher to the committee, and the Legislative Council would appoint an additional 3 members. It might also have the responsibility of reviewing the Premier's extensions of a Pandemic Declaration after a certain amount of time (for example, after 9 months).

2. Scrutiny of Acts and Regulations Committee

As a consequence of the fact that the proposed s 165CR of the Bill states 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), they are not within the jurisdiction of the SARC or able to be suspended or disallowed except to the extent provided for by the Bill.

Division 4 of the Bill provides for the scrutiny, suspension and disallowance of pandemic orders.

Jurisdiction

Section 165AS of the Bill provides that the SARC may report to each House in respect of a pandemic order laid before the Parliament under s 165AQ(1)(a).

In our view, the SARC's jurisdiction must not be dependent upon government compliance with procedural matters (while we recognise that a disallowance resolution may be given where s 165AQ is not complied with, in such cases it depends instead upon gazetting: s 165AU(2)). The need to make the SARC's jurisdiction independent of government compliance with the relevant procedures was made manifest in 2020 when, in spite of a very strong case for public health directions to be characterised as

legislative instruments and treated as such under the *Subordinate Legislation Act 1994* (Vic), the Government failed to gazette or table them and the SARC's jurisdiction was avoided.

Section 165AS of the Bill provides that the SARC may report to each House if it considers that a pandemic order laid before the Parliament either 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 and express authority, or is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities. We recommend that the SARC's jurisdiction should not be limited to reporting solely on the issues identified in the Bill; rather, it should be empowered to report in relation to any issue it considers appropriate.

Suspension

Suspension of a pandemic order is possible under s 165AT in certain circumstances. This suspension, however, does not go into effect immediately (there is a seven day waiting period) and the suspension can be overridden by the Health Minister during that time (s 165AT(3)). In addition, because SARC's jurisdiction to suspend an order is enlivened by it making an s 165AS report, it is dependent on s 165AQ(1)(a) tabling. In our view, the SARC's jurisdiction should be independent of government compliance with procedural matters like tabling.

Timeframes

The timeframes proposed in the Bill for the enlivening of SARC's jurisdiction are inappropriate for emergency circumstances (bearing in mind that the Bill as proposed ties SARC's jurisdiction to compliance with procedural requirements). For example, s 165AR requires gazetting of a pandemic order either in the next general edition of the Gazette after it is made (or varied or revoked), or in a special edition of the Gazette within 10 working days of its making. Rather, SARC's jurisdiction should simply be engaged as soon as a relevant instrument is made.

The disallowance mechanisms proposed by the Bill refer to disallowance resolutions needing to be introduced up to the 18th sitting day after an instrument is laid before the House (s 165AU(2)(a)(i)), or the 24th day in circumstances where s 165AQ was not complied with (s 165AU(2)(a)(ii)); any resolution must then be passed on or before the 12th sitting day of each House after notice of it is given: s 165AU(2)(b). These timeframes fail to take account of the urgency which characterises circumstances of emergency: as we have experienced over the past 20 months, orders may be revoked or varied very quickly, and when Parliament is not sitting - indeed, even when it is sitting - timeframes of 12, 18 and 24 days are inordinately long (particularly considering the nature of the rights and liberties which can be curtailed by pandemic orders).

3. Disallowance

The Bill proposes that disallowance of a pandemic order could only be done by *both* Houses of Parliament passing a disallowance resolution (s 165AU). Rather, disallowance should be effected by *either* House of the Parliament passing a disallowance resolution (as indeed is the case under s 25C of the *Subordinate Legislation Act 1994* (Vic): there is no justification for the Bill imposing the higher threshold of both Houses having to pass the resolution in respect of pandemic orders).

4. Information provision requirements

The Bill improves on the transparency of the current legislative framework by proposing welcome requirements for the provision of information in relation to pandemic orders and pandemic declarations. Those in respect of pandemic declarations require information to be provided to the Parliament; those in respect of pandemic orders require certain information to be provided both to the Parliament and directly to the public.

However, the lack of consequences for failure to comply with these provisions risks rendering them meaningless. Furthermore, some of the timeframes proposed by the Bill are inappropriate for emergency circumstances.

Information relating to pandemic declarations - tabling

Section 165AG of the Bill makes provision for reporting to the Parliament in relation to a pandemic declaration.

Under this section, the Premier must provide to the Parliament a statement of reasons for the declaration, a copy of the advice of the Minister and Chief Health Officer in respect of it, and - if relevant - the information set out in subsection 4. 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)).

Information relating to pandemic orders - tabling

Pursuant to s 165AQ(1), pandemic orders and associated documents are required to be 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 and are or may be limited by the order, as well as how such limitations are demonstrably justified.

Provision directly to the public

Pursuant to s 165AP(1), pandemic orders are required to be published on a Pandemic Order Register (established under s 165CS).

Pursuant to s 165AP(2), certain documents associated with the making of pandemic orders are required to be published on an Internet site maintained by the Department within 14 days of the making of the relevant order. 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 and are or may be limited by the order, as well as how such limitations are demonstrably justified.

Consequences for failure to comply

The information provision requirements are welcome additions to the current legislative framework, and their inclusion implicitly acknowledges the importance of transparency around the making of pandemic declarations and orders. However, a failure to comply with them does not affect the validity of a declaration or order (ss 165AG(6) and 165AP(6)). There is therefore a risk that they will serve as little more than mere rhetoric: to be meaningful, the validity of a declaration or order should be conditional upon compliance with the requirements that the Parliament has determined to be of significance.

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 is tied to compliance (and can also be overridden by the Minister): this must be rectified.

Timeframes

The timeframes proposed for compliance with ss 165AQ(1) and 165AP(2) are problematic.

Because Parliament does not sit year-round, basing timeframes on sitting days is patently inappropriate. Furthermore, even where Parliament *is* sitting, it is likely that at least two weeks would pass before six sitting days elapsed.

In the context of an emergency, where - as we have experienced throughout the past 20 months - orders may be imposed for less than 14 days before they are revoked or varied, allowing six sitting days (s 165AQ(1)) is inappropriate. The information specified in s 165AP(2) should be required to be made available to the public immediately upon its making (or within some appropriately expedited period, which should not exceed 2 working days of its making).

In addition, the Bill should guarantee public access to the relevant information related to the making of a pandemic declaration even where Parliament is not sitting (as it does in respect of pandemic orders: s 165AP(2)). This could be achieved by, for example, requiring the Clerk to ensure that it is published on the Parliament's website outside of sitting periods (again, publication should be immediate upon the making of an order, or within an appropriately expedited period).

5. Independent Pandemic Management Advisory Committee

Division 9 of the Bill makes provision for an Independent Pandemic Management Advisory Committee. This Committee is a potentially valuable addition to the legislative framework; however, its intended function needs to be clarified. If it is to serve as a technocratic body, this should be clearer in its design.

Function, powers and resources

The Committee should report to the Parliament, rather than to the Minister (s 165CF).

Further information relating to the powers and resourcing of the Committee is required in order to determine its potential value: for example, will it have the support of a secretariat; will it have powers of inquiry?

Trigger

If the Committee is genuinely an important addition to the legislative framework, it should be enlivened immediately upon the making of a pandemic declaration (rather than within 30 days of the first extension of a declaration, under s 165CE(1)). Indeed, we can see no justification for delaying its enlivening in this manner.

Appointments

Appointments to the Committee must be made via a merit-based process. Considering the obvious difficulties with undertaking such a process in emergency circumstances, Committee membership should operate as a standing appointment (for three-year periods, for example, with members' functions being enlivened upon the making of a pandemic declaration). There is an example of this from Queensland where the Parliamentary Services has established a standing 'Human Rights Advisory Panel' made up of barristers and academic experts who are engaged for a fixed period to give independent advice on the implications of Bills for the Queensland Human Rights Act.

In respect of the requirement to consult with the Chief Health Officer in relation to appointments 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).

Transparency

Advice from the Committee to the Minister should be required to be tabled in Parliament (as reports are under s 165CG).

Section 165CG requires reports to be laid before Parliament within 6 sitting days of having been provided to the Minister. Provision should be made for access by the Parliament and the public to the Committee's advice and reports where Parliament is not sitting.

6. Safe protest protection

The right to peaceful protest is fundamental to liberal democracy. The right to freedom of assembly and association is protected under international law, the Victorian Charter of Human Rights and domestically the implied freedom of political communication is well-established.

The Bill fails to protect the right to safe protest, and this must be remedied.

There are a number of examples of limitations on protest during Covid which should be remedied in the Bill. For instance, in April 2020, activists staged a car convoy protest in Melbourne to highlight the plight of refugees in detention who face a heightened risk of contracting COVID-19 due to overcrowded conditions. Despite the fact that protestors were observing social distancing restrictions in the cars, police [arrested one man](#) and fined 26 others a total of \$43,000 because they were not in public for [a permitted reason](#) (education/work, exercise, shopping for essentials or caregiving).

We note that in providing for safe protest during a pandemic, there are competing public interests at play here which are of great importance. On the one hand, there are rights of free speech and public assembly and, on the other, the significant public health issues arising from a pandemic (including the need to enforce the public health measures that have been put in place to minimise the scope for community transmission of that virus).

Although pandemic movement restrictions may serve a legitimate purpose (by ensuring the safety and wellbeing of the community), it is arguable that a wholesale ban on protest would not be proportionate. Here we note that there are alternative means of achieving the purpose of pandemic restrictions in a manner which is less burdensome on political communication and the right to freedom of assembly and expression.

Specifically, the Bill could set out provisions which allow protest as a permitted reason to leave home if movement is restricted under a pandemic order and that it would be an exception to any Gathering Restrictions made under the Bill. The provision would state that these exceptions for protest would be made on the basis that protesters would be expected to observe social distancing rules and other general requirements that may be put in place during the relevant period (such as the wearing of masks). This would allow for the carrying out of protest that observes those general rules. For example, a 'sit down' protest (as has occurred in [Israel](#) and elsewhere) or in a 'drive by' protest via limiting cars to members from the same household, or to a maximum of two people where gatherings are severely restricted by a pandemic order.

7. Executive detention powers

The Bill proposes to empower authorised officers to detain people (ss 165AZ, 165B(1)(b) and 165BA(1)(b))

Detention of an individual for breach of a health order (as opposed to an ordinary crime) is a significant power and must therefore be tightly constrained.

We have the following concerns about the detention provisions:

First, the detention should not be open-ended in nature. One concern with the Bill is that there is no explicit upper limit on the period for which a person may be detained. Although it may be argued that the powers would not be used in such a way to indefinitely detain a person, this is theoretically possible if there is no explicit upper limit in the legislation (eg a 3 month limit).

Second, the Bill currently provides for an internal executive process centred around a Detention Review Officer and the Chief Health Officer. This means that executive detention will be supervised by two other bodies within the Executive. We would argue that these bodies are not sufficiently independent to provide the necessary oversight of this important power.

It is undesirable to grant detention powers to the executive arm of government without legislating for the involvement of a court or other independent body to review the exercise of those powers. Here we emphasise that if someone is charged with a crime, the ordinary process is that they are brought before a magistrate. A similar process should be put in place for detention in the pandemic context. Therefore, we recommend that the Bill be amended to provide that detention should be subject to review by an independent merits review body.

Third, the Explanatory Memorandum refers to the right of a person to appeal to the Supreme Court for habeas corpus. Whilst that provides a means of challenging a detention order in *theory*, in practice this mechanism is very difficult to access, particularly for those without legal representation. Access to this remedy is technical and would usually require legal representation and it is therefore an insufficient protection in the context of such a significant power.

8. Aggravated offence

Section 165BO of the Bill creates an aggravated offence of failure to comply with a pandemic order, direction or other requirement: this offence is subject to a penalty of 500 penalty units (more than \$90,000) or imprisonment for two years in the case of a natural person, and 2500 penalty units or a fine determined in accordance with section 165BP in the case of a body corporate.

Imprisonment for two years is a grave penalty, and we consider it to be inappropriate in light of the risk that it may disproportionately affect vulnerable members of the community.

9. Expedited independent merits review body

Insofar as the Bill provides for the exercise of significant powers by the executive, including detention of individuals, and the imposition of penalties including fines, an expedited independent merits review process is essential and providing for it would give the community greater confidence in the proposed legislative framework.

We recommend that an independent body such as the Ombudsman be granted a new suite of powers, accompanied by appropriate resources, to perform the function of individual merits review, enabling Victorians to seek expedited merits review of the application of instruments to their circumstances. Possible outcomes of merits review would include the affirmation, variation or setting aside of the exercise of powers under directions in individual cases.

10. Exemption from the *Equal Opportunity Act 2010* (Vic)

Under s 165AK(4)(a) of the Bill, a pandemic order may "*apply to, differentiate between or vary in its application to persons or classes of person identified by reference to an attribute within the meaning of the Equal Opportunity Act 2010*". These attributes, set out at s 6 of that Act, include such matters as race and political and religious beliefs (amongst many others).

We recognise that a pandemic order may operate in such a way that it differentiates between people with a certain attribute (either directly or indirectly). For instance, differentiation based on *vaccination status* may indirectly discriminate on the basis of *age* (eg it will indirectly discriminate against those under 16 years of age who are not able to access a vaccine).

The preferable means to deal with this under law is not to stop the operation of Equal Opportunity legislation but to require the relevant decision-maker to justify the differentiation on health grounds. We note that this is already reflected in section 86 of the *Equal Opportunity Act 2010* (Vic) which provides that

(1) A person may discriminate against another person on the basis of disability or physical features if the discrimination is reasonably necessary— (a) to protect the **health or safety** of any person (including the person discriminated against) or **of the public generally**; ...

Therefore, there is no need to override the Equal Opportunity Act. In light of the fact that there is no need to override the Act, one should be very cautious about doing so: as we have already seen, this engenders real fear in the community and serves to undermine the proposed legislation.