

30 September 2020

Mark Gepp
Chair
Scrutiny of Acts and Regulations Committee
Level 26, 121 Exhibition St
Melbourne Vic 3000

BY EMAIL: mark.gepp@parliament.vic.gov.au

Dear Mr Gepp

COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 (Vic)

We refer to the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 (Vic)* (the **Bill**) that has passed through the Legislative Assembly and will now go to the Council.

We are writing to express concerns in relation to the amendments that would temporarily allow pre-emptive detention under the *Public Health and Wellbeing Act 2008 (Vic)* (**PHWB Act**). These provisions engage the right not to be subjected to arbitrary detention, freedom of movement and the right to enjoy human rights without discrimination (*Charter of Human Rights and Responsibilities Act 2006 (Vic)*, ss 21, 12 and 8.)

As a threshold issue, in the absence of data on non-compliance we continue to have questions about the justification for the additional powers. The Scrutiny of Acts and Regulations Committee is well placed to inquire into the relevant data on non-compliance to provide some transparency and an assessment of the necessity and justification for limitations on human rights.

We also have concerns about the operationalisation of the powers and the nature by which 'high risk' individuals may be characterised.

More particularly, we are concerned about the amendments that:

1. expand the categories of individuals who may be appointed as authorised officers by the Secretary; and

2. expand the existing detention powers under the emergency powers provisions of the PHWB Act.

Expanding categories of individuals appointed as authorised officers

The amendments expand the categories of people who can be authorised by the Secretary as authorised officers for the purpose of exercising emergency powers under the PHWB Act (section 30). We understand that the amendments will be used, among other things, to allow Victoria Police and WorkSafe inspectors to enforce public health directions, as well as to authorise people from outside of the public service.

Our concern is that some people appointed under the new criteria may not have the public health skills and experience necessary to carry out the functions prescribed to them under the PHWB Act, including to authorise detention on public health grounds. We have raised these concerns with the Department of Justice and Community Safety, and understand that the government's intention is that only appropriately trained DHHS officers will be granted powers to detain. This is a welcome approach, however, there is currently nothing in the statute itself that would ensure that is the case.

We recommend:

- more precision in the legislation regarding the types of people who can be authorised under section 30, and the limitations on who can be authorised to exercise particular powers.

Expansion of the emergency powers to detain

We are also concerned about the pre-emptive nature of the new detention powers, which would allow designated authorised officers to detain 'high risk' individuals based on a suspicion of future non-compliance with public health directions.

The Bill only requires that the officer *reasonably believe* the individual is likely to be non-compliant but does not guide the authorised officer in what would constitute that reasonable belief.

Whilst we recognise the need for measures to protect the community from people who are wilfully non-compliant with public health orders, this kind of decision-making raises risks that:

- Authorised officers might form their reasonable belief on discriminatory grounds (such as a protected attribute under the *Equal Opportunity Act 2010*). We are concerned these measures may disproportionately impact certain individuals, such as those with mental illness, people with disabilities, people who are

experiencing homelessness or people from linguistically diverse backgrounds who do not understand the nature of the direction.

- 'High risk people' could be arbitrarily detained in breach of s 21 of the *Charter of Human Rights and Responsibilities Act 2006*.

We recommend:

- Amending the threshold of detention so that it is only triggered where there is *actual* refusal or failure by a person to comply with an emergency direction rather than a mere reasonable belief as well as ensuring that a decision to detain is the least restrictive means available to reduce the serious risk to public health (mirroring the safeguards in Part 8 of the Act).
- Alternatively, if the test of reasonable belief of likely conduct is maintained, authorised officers should be given specific guidance in their formation of a reasonable belief.

Review of decision to detain

We also recommend the inclusion of stronger safeguards, particularly in the form of clear and accessible review rights for people who are detained under the powers. Currently, an authorised officer is responsible for reviewing their own decision to detain (section 200(6), PWHB Act). This process is at odds with good administrative decision oversight which would require the decision to be reviewed by a person other than the original decision maker. We are also concerned about [reports](#) from the Hotel Quarantine Inquiry of widespread failure to discharge the duty to review in section 200(6). Independent oversight is particularly critical where it involves the detention of a person.

We recommend:

- That the decision to detain is reviewed every 24 hours by the Chief Health Officer and that reasons for the ongoing detention are provided to the person subject to detention.
- In keeping with the exercise of detention powers under Part 8 of the PWHB Act we also recommend that there are clear independent review processes set out in the legislation for people who are subject to detention, for example review before the Victorian Civil and Administrative Review Tribunal.

We would welcome the opportunity to discuss our concerns with you further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kristen Hilton', with a stylized flourish at the end.

Kristen Hilton
Victorian Equal Opportunity and Human Rights Commissioner

Cc: Helen Mason, Executive Officer, Scrutiny of Acts and Regulations Committee,
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