

We are deeply concerned about the *Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (Bill)*.

The overriding concern is that the Bill, if passed, may allow the Victorian government effectively to rule the State of Victoria by decree for the foreseeable future, without proper Parliamentary oversight or the usual checks and balances on executive power.

A key feature of the Bill is that the Minister of Health will have the power to make “pandemic orders” (s 165AI). This effectively confers an unlimited and practically unreviewable power on the Minister to rule Victoria by decree on a long-term basis:

- The Minister can make a pandemic order while a “pandemic declaration” made by the Premier is in force. Given the low threshold for the making of this declaration (s 165AB) and the fact that COVID-19 is unlikely to be going away any time soon, we can expect a pandemic declaration to be in force for the foreseeable future. Thus, the Minister’s power to make pandemic orders will remain in place for the foreseeable future.
- Once a pandemic declaration is in place, the only other requirement for the Minister to make a pandemic order is that he or she must believe that the order is “reasonably necessary to protect public health”. Not only is this threshold low, but it does not need to be satisfied objectively — it is enough if the Minister subjectively believes that the order is “reasonably necessary”. This will make it practically impossible to challenge the merits of the order in a court. A person wishing to challenge the order on the merits will need to establish legal unreasonableness. This is a very high bar that might catch only the most extreme forms of overreach.
- The content of a pandemic order is unlimited — the Minister can make “any order” (s 165AI(1)). The Minister is effectively given plenary legislative power. To avoid any argument that the words “any order” should be read down, the Bill then lists an extremely broad list of examples of matters that the orders can contain (this list is expressly stated not to limit the generality of the power to make “any order”). These include, among many others, orders requiring detention of persons, restricting movement, regulating public or private gatherings, requiring provision of information and requiring testing and medical examination of persons (s 165AI(2)).
- Pandemic orders are expressly allowed 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*” (s 165AK(4)). The latter includes a wide range of protected attributes including “political belief or activity” (*Equal Opportunity Act 2010* s 6). Thus, the Bill expressly contemplates that the Minister can make a pandemic order targeting persons on the basis of their political beliefs or activities if the Minister forms the view that this is “reasonably necessary to protect public health”. It is not difficult to imagine how some future Health Minister might form this view in respect of political beliefs or activities that involve questioning or opposing the government public health measures.
- Pandemic orders can be disallowed by Parliament only upon recommendation by the Scrutiny of Acts and Regulations Committee (**SARC**) or if the government has failed to table the order (s 165AU). But SARC cannot inquire into the merits of the order — it can only recommend disallowance on narrow grounds, effectively limited to the order being beyond power or being

incompatible with human rights under the *Charter of Human Rights and Responsibilities Act 2006* (s 165AS). In any event, the governing party may command a majority in the SARC, as is the case at the moment. Thus, in reality, Parliament's ability to control the Minister's power through disallowance is going to be very limited or non-existent.

- The Bill's Independent Pandemic Management Advisory Committee is not a significant check on the Minister's power. The Committee will be wholly appointed by the Minister him or herself (s 165CE) and will have no power to rescind or amend the Minister's orders.

The Bill also confers extremely broad and unchecked powers on authorised officers:

- Without seeking to in any way denigrate their important work, it is to be remembered that authorised officers are numerous and unelected, and include relatively low-level officials, including officers appointed by local councils and other public servants (*Public Health and Wellbeing Act 2008* s 31). As at late 2020, there were as many as 382 authorised officers in Victoria: *Loiello v Giles* [2020] VSC 722; (2020) 63 VR 1 at [52]-[53].
- Yet the Bill confers on these authorised officers extraordinary powers, again effectively for the foreseeable future. If authorised by the CHO, they will be able to, among other things, "take any action or give any direction, other than to detain a person, that the authorised officer believes is reasonably necessary to protect public health" (s 165BA(1)(a)). These directions can target multiple people in certain circumstances, including if the direction "relates to a particular activity at a particular location and is given to persons undertaking that activity (including, but not limited to, a direction to restrict movement, require movement or limit entry)" (s 165BA(4)(b)). Thus, an individual authorised officer will single-handedly have the power to shut down a political protest if the officer subjectively believes that this is "reasonably necessary to protect public health".
- These directions are, again, effectively unreviewable.

The Bill also contains many other troubling elements, including abrogating privilege against self-incrimination (s 112A) and entrenching the system where administrative detention is reviewable not in a court but by Detention Review Officers appointed by the Department (ss 165BI and 165BJ).

It is, in our view, no answer to these criticisms to say that the Bill contains more safeguards than presently exist for the emergency powers under the *Public Health and Wellbeing Act 2008*. The emergency powers are just that — extraordinary powers that are available to be exercised for only a very short period (originally 6 months, though this period was extended). It is one thing to allow temporary rule by decree to deal with an unforeseen and extraordinary emergency in circumstances of extreme urgency. It is something else altogether to entrench rule by decree as a long-term norm. In our view, this is antithetical to basic democratic principles and should not be allowed to happen.

We are now more than 18 months into the pandemic. It has become clear what sort of powers might be required to deal with it. There is no need to give the government of the day a blank cheque to rule by decree. Instead, the Bill should give the Minister specific powers to do specific things (such as border closures, lockdowns, mask and vaccination mandates, etc), subject to specific and prescriptive requirements listed in the Bill, and subject to unconditional Parliamentary disallowance (i.e. without requiring any SARC recommendation). If these powers prove inadequate, the Minister can come back to Parliament and seek additional powers. This is how a Parliamentary democracy is meant to work.

If there is a need for a general power to make orders in the case of some new unforeseen development requiring urgent action before Parliament has a chance to consider the proposed measures, such power should be restricted to orders that lapse after a very brief period unless confirmed by both Houses of Parliament. At the very least, the power to make general pandemic orders must be subject to unconditional disallowance by Parliament (i.e. without requiring any SARC recommendation).

We call on the Parliament to amend the Bill or vote against it.

The Hon James Judd QC

Jeff Sher QC

The Hon Neil Brown QC

Andrew J Kirkham AM RFD QC

Ross H Gillies QC

P Gerard Nash QC

Christopher J Canavan QC

Paul Willee RFD QC

George H Golvan QC

John T (Jack) Rush QC

Noel Magee QC

David Shavin QC

Peter J Jopling AM QC

William T Houghton QC

Patrick Tehan OAM QC

Michael W Shand AM QC

Paul A Scanlon QC

Nunzio Lucarelli QC

Jennifer J Batrouney AM QC

Vincent A Morfuni QC

James W S Peters AM QC

Peter W Collinson QC

Christopher J Wren QC

Gavin Silbert QC

Craig W R Harrison QC

David L Brustman QC

Philip D Crutchfield QC

Peter Chadwick QC
Albert Monichino QC
Daryl J Williams AM QC
Georgina L Schoff QC
David J Batt QC
Stuart Wood AM QC
Mark A Robins QC
Michael G Roberts QC
Nicholas D Hopkins QC
Gregory P Harris QC
Roísín N Annesley QC
Robert Hay QC
Jeremy A F Twigg QC
Jonathan P Brett QC
Áine M Magee QC
Chris B O’Grady QC
Gerard D Dalton QC
Michelle Britbart QC
Daniel D Gurvich QC
Penny A Neskovic QC
Marcus Clarke QC
Paul J Hayes QC
Michael G R Gronow QC
Suresh Senathirajah QC
Stewart J Maiden QC
Richard P P Dalton QC
Dr Andrew Hanak QC
Anthony T Strahan QC
Cam H Truong QC
Eugene F Wheelahan QC
Matthew N C Harvey QC
Donald J Farrands QC

Julianne E Jaques QC

Darryl J Burnett

Robyn W Sweet

Dimitri Ternovski