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Liberty Victoria Comment on the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021

Introduction

1. The last 18 months of the COVID-19 pandemic have been unprecedented. Around the world, restrictions have been imposed on communities where a careful balance has had to be struck between different human rights: on the one hand, the right to life and the right to health; and, on the other, rights such as freedom of movement, freedom of association and peaceful assembly, and the right to privacy.

2. Throughout the pandemic, Liberty Victoria has been monitoring restrictions and how they have limited the human rights of Victorians. In our view, some restrictions on human rights may be required to avoid a serious risk to public health (which is compatible with the right to life and the right to health). However, where other human rights are limited for that purpose, those limitations must be reasonably necessary, proportionate and evidence-based.

3. Where limitations have been a proportionate response to risks to public health, Liberty Victoria has supported those measures. In circumstances where we

consider restrictions have not been proportionate, we have opposed them. Some examples have included the 'hard lockdown' imposed on Flemington and Kensington public housing towers, the inflexible approach to issuing infringement notices, the failure to provide evidence supporting the curfew, and the improper use of personal data obtained from QR codes.

4. Our support for or opposition to restrictions, as the case may be, over the past 18 months has been expressed in the media, and to Parliamentary inquiries by making submissions and giving evidence. As further outlined below, we have also advocated for change by consulting with and providing advice to the government and various politicians from across the political spectrum. All of this work is done by unpaid volunteers.

About Liberty Victoria

5. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for over eighty-five years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

6. The members and office holders of Liberty Victoria include people from all walks of life, including lawyers, policy and advocacy experts, businesspeople, academics, community advocates and students. Liberty Victoria is a proudly apolitical organisation. More information about our organisation and activities can be found at: libertyvictoria.org.au.

7. The focus of our comments and recommendations reflect our experience and expertise as outlined above.

Consultation

8. Liberty Victoria routinely consults and provides comment to members of Parliament, from all political parties, on a range of issues which affect human

rights and civil liberties. This has been no different during the COVID-19 pandemic.

9. Liberty Victoria participated in the consultation process with the Department of Health (**the Department**) and the Expert Reference Group (**ERG**) appointed in respect of the pandemic-specific legislation. This included attending a workshop held via Teams in July 2021, with some other stakeholders. At that workshop, Liberty Victoria expressed its views on what should be included in the new pandemic legislation (outlined below). Liberty Victoria and other stakeholders were invited to provide further written feedback at the workshop and Liberty Victoria provided the Department and ERG with a letter which set out Liberty Victoria's views and recommendations. A copy of that letter is included at the end of this comment.

10. Liberty Victoria also participated in a meeting with Fiona Patten MP where we raised the matters referred to in our letter to the Department and advocated for a strengthening of the *Charter of Human Rights and Responsibilities* (**the Charter**).

11. Liberty Victoria is grateful to have been invited to be part of the extensive consultation process.

The Need for Pandemic-Specific Legislation

12. Liberty Victoria has been particularly concerned about the accountability for, and transparency of, decisions made under the state of emergency powers. These powers have been expansive and generally undefined, and have significantly burdened human rights in different ways.

13. Under the present legal framework, decisions and restrictions are made under the emergency powers found under Part 10 of the *Public Health and Wellbeing Act 2008* (Vic) (**PHWA**). This Part empowers the Health Minister (**Minister**) to declare a state of emergency. Once declared, the Chief Health Officer (**CHO**) is given wide-ranging powers to implement restrictions in order to prevent a serious risk to public health. These powers are usually available for four weeks, but can

be extended for up to six months. Legislation passed in January 2021 allowed for extensions to last for up to 21 months in the context of the COVID-19 pandemic.

14. The PHWA does not expressly prevent the Minister from declaring another state of emergency at the end of that period. There are few checks or balances on the exercise of state of emergency powers — including by Parliamentary oversight or scrutiny. This is the framework under which the COVID-19 response in Victoria has existed for the past 18 months.

15. It appears that the state of emergency powers were not framed with ongoing pandemics in mind, and the purpose of those powers was designed for short-term crises. This means that the emergency powers have been a blunt instrument and not fit-for-purpose in respect of more long-term dangers to public health.

16. Neither the public health advice nor the human rights analysis which is said to underpin and justify these restrictions has been made public. Liberty Victoria has advocated for the publication of health advice, and greater transparency in the decision-making processes that inform the making of directions, including a more express focus on the importance of human rights.

17. In a healthy working democracy, legislation passed by Parliament (and amended as needed) which sets the limits of powers given to the government during a pandemic is far more desirable than enabling the executive branch of government to determine the limits of its expansive and undefined powers as is presently the case. In Liberty Victoria's view, the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (**Bill**) goes some way to address issues about the accountability and transparency of decision making.

18. The Bill provides greater regulation of the powers to make a pandemic declaration, and permits Parliament to disallow an order if the Scrutiny of Acts and Regulations Committee (**SARC**) makes a report with such a recommendation. The Bill also includes greater transparency measures than

those that exist in the PHWA currently, by requiring the publication of public health advice and human rights considerations in respect of pandemic orders. This is to be commended.

19. The Bill is not perfect and there are aspects of it that can be improved, as outlined below. Some commentators have suggested that the Bill grants "unprecedented" powers to the Premier and Minister. However, the Bill is an improvement in regulating the very extensive executive powers that already exist.

20. Our letter to the Department outlines some of the concerns we have had about the way in which the emergency powers have been exercised in the last 18 months (concerns that we still hold). In that letter, we stated that:
    - Human rights needed to be a central consideration of decision-making;
    - There has been a lack of transparency in some of the decision-making, with the public health advice underpinning decisions not published and human rights assessments not made available to Victorians;
    - There should be clearer communication to the public about restrictions;
    - There is a need for effective and accessible avenues of review, particularly for individuals who are subject to detention under the emergency powers;
    - Victoria needs clearer protections of private information and limits on how that information can be used. Such information should only be used for public health reasons and should not be made available to Victoria Police or other entities;
    - The right to protest and peaceful assembly should only be limited where strictly necessary and not limited if protest or peaceful assembly can occur safely (such as with social distancing and mask wearing);
    - The rights of adults and children in custody needed to be better protected and the use of quarantine for those in custody limited;
    - The focus of a pandemic response should be a health response, and not a policing-based response;
    - There should be an increased focus on police discretion and warnings;

- There should be independent and accessible review mechanism of fines and the ability for people to have their fines reduced if they fall into particular categories;
- There should be a permanent moratorium on evictions where the reason to evict is caused by a pandemic reason; and
- There should be greater oversight of private operators of public services and the way in which they impose restrictions.

21. Our comments on the Bill should be understood in the context of those concerns.

22. Liberty Victoria is not commenting on every aspect of the Bill, but will focus on the aspects as they relate to our expertise. This does not mean that Liberty Victoria approves or opposes the aspects of the Bill where it has not commented.

Declaration of a Pandemic and Pandemic Orders

23. Presently, under s 198 of the PHWA, the Minister may declare a state of emergency. The declaration may last for four weeks and it may be extended for four weeks, and continually so for no longer than six months or, in the case of the COVID-19 pandemic, 21 months. As outlined above, there is no express provision prohibiting another declaration of emergency being made at the end of that period and there is no express provision requiring the Minister to end a state of emergency. There are also no express criteria for the making or extension of a declaration of emergency, other than to receive advice from the CHO and consult with the Emergency Management Commissioner. While there are likely to be some limitations on the making of such a declaration, a statutory power with such significance should clearly establish criteria which the Minister must satisfy in order to exercise it.

24. The new proposed s 165AB is, in this sense, an improvement. That section permits the Premier to make a pandemic declaration. Similar to s 198 of the PHWA, the Premier must consult and consider the advice of the CHO before making the declaration. Unlike s 198, however, the new power more clearly sets out the state of satisfaction that the Premier must arrive at before making a

declaration — that is, the Premier must be satisfied that there is a serious risk to public health from a pandemic disease or disease of pandemic potential. In addition, the Premier *must revoke* a pandemic order if satisfied that there no longer continues to be a serious risk to public health caused by a pandemic disease or a disease of pandemic potential. This is preferable to the current regime in which there is no express requirement to revoke a state of emergency if the risk is no longer present (although the Premier *may* do so). It is also preferable that the leader of the government of the day makes this decision as it ensures that accountability for any declaration rests at the highest level.

25. Under the Bill the pandemic declaration may only last for four weeks initially but may be extended for up to three months. There is no limit as to how many times the order can be extended. Each time the pandemic declaration is extended, the Premier must again be satisfied that there continues to be a serious risk to public health arising from a pandemic disease (including a disease of pandemic potential which has become a pandemic disease). The Premier must also consult with and consider the advice of the Minister and the CHO.

26. This means that if a pandemic disease or disease of pandemic potential no longer poses a serious risk to public health (for example, because most of the population is vaccinated enabling sufficient protection against the serious risks of that disease), there would be no power to extend the pandemic declaration. Further, if the advice of the Minister or CHO is that extending the declaration is not necessary to protect public health, it is difficult to see how the Premier could be satisfied that it is reasonably necessary to extend the declaration.

27. The new proposed s 165AG means that the Premier must prepare a report to Parliament which states the reasons for the pandemic declaration, variation, extension or revocation, and include a copy of the advice of the Minister and the CHO in respect of the making, variation, extension or revocation. The report must also include a summary of the powers that have been exercised and reasons for the exercise of those powers where the declaration is being extended. This retains improvements made to the PHWA which requires the Minister to table a similar report about state of emergency declarations.

28. In respect of pandemic orders, the proposed s 165AP of the Bill requires the Minister to publish within 14 days a copy of the health advice from the CHO in relation to the making, variation, extension or revocation of an order, a statement of reasons for the making of an order, an explanation of the human rights that are protected by the Charter that are or may be limited by the order, and how those limitations are demonstrably justified in accordance with s 7(2) of the Charter. Again, this is different to the current powers that the CHO has under the state of emergency sections of the PHWA.

29. There is currently no requirement for the CHO or the Minister to publish the public health advice, nor for the CHO or Minister to explain how the limitations of human rights are demonstrably justified. This new kind of report is welcome as an additional form of transparency and accountability. The report should enable Parliament and the public to learn the evidence and advice which underpins the restrictions and purported justification for limitations on human rights.

30. However, to further promote these principles, the report should be published at the same time or shortly after the making, variation, extension or revocation of a pandemic order. This advice will have been prepared in order for the Minister to make a decision in respect of a pandemic order, so it seems there is no good reason why there is to be a 14 day delay for that advice to be made public.

31. Another new accountability measure is the ability of SARC to scrutinise pandemic orders made under a pandemic declaration. The role of SARC is expanded upon at 43 to 51 below.

32. It is preferable that matters such as a declaration of a pandemic and pandemic orders are decisions made by elected members of Parliament, such as the Premier and the Minister, rather than by a public servant. This is because ultimately the Premier and Minister are accountable to Parliament and voters. If Victorians are unhappy with the decisions made, they have the opportunity to remove the Premier and Minister at the ballot box.

Human Rights and Decision-Making

33. Liberty Victoria welcomes the inclusion of principles in proposed s 165A of the Bill that expressly require that decisions are made and informed by public health advice, transparency and accountability is promoted, contact tracing information is protected, and that any limitations on the human rights protected by the Charter should be demonstrably justified in accordance with s 7(2) of the Charter. These kinds of clear principles are not made express in the current PHWA.

34. Liberty Victoria also welcomes the requirement for the Minister to provide an explanation of the human rights that may be limited by a pandemic order and how such limitations are demonstrably justified by any restrictions under the order. Again, this requirement does not exist under the current PHWA.

35. The focus in the Bill on transparency, accountability, decision-making informed by public health advice and the central focus on the Charter is a positive development and a significant improvement on the current state of emergency powers.

36. However, those principles should not apply only in respect of the protection of life and public health during pandemics. Those principles should be embedded in the objectives of the PHWA *as a whole*, and not just the new proposed Part 8A of the PHWA. As we have seen over the last 18 months, the state of emergency powers that currently exist under Part 10 of the PHWA have had wide-ranging and significant impacts on the human rights of Victorians. The new pandemic-specific part of the PHWA is not intended to replace the existing state of emergency powers, but to be an addition to those powers. Therefore, powers may still be exercised in response to a public health emergency under a state of emergency declaration. This may occur, for example, if a disease is not a 'pandemic disease' or 'disease of pandemic potential', but still poses a serious risk to public health. A focus on transparency, accountability, human rights and decision-making informed by public health advice should apply equally to that Part.

37. Further, the responsible person (whether it is the Minister or CHO) should be required to report to Parliament on *any* order made under the PHWA which limits human rights, and not just pandemic orders. As noted above, the ability to declare a state of emergency will continue and impose restrictions which limit human rights under Part 10 will continue. There is no reason why the requirement to report on human rights limitations under Part 8A should not be extended to the PHWA as a whole.

Differentiation between Classes of Persons in a Pandemic Order

38. Proposed subs-sections 165AK(3)(d) and s 165AK(4) of the Bill state, in summary, that a pandemic order can apply to or differentiate between persons or classes of persons identified by, amongst other things, attributes. 'Attributes' are defined to include an attribute within the meaning of the *Equal Opportunity Act 2010* (Vic) (**EOA**).

39. Understandably, some commentators have expressed concern about the prospect of pandemic orders differentiating between persons on the basis of 'attributes' within the meaning of the EOA. In our view, however, it is unlikely that these provisions alter the existing law of discrimination in Victoria. This is principally because it is unlikely that the EOA relevantly constrains the Minister's power to make a pandemic order, even without these provisions. The EOA only prohibits discrimination in relation to particular activities and services, such as education and employment.

40. In cases where businesses and other institutions implement the terms of a pandemic order, such as requiring people to wear a mask and use QR codes to check in, or excluding unvaccinated persons from their premises, it is unlikely that the EOA constrains those institutions from doing so. This is because the EOA permits discrimination where it is necessary to comply with another Act, which includes the PWHA.

41. There will be circumstances in which pandemic orders must differentiate between categories of persons, and these categories may overlap with protected attributes under EOA (such as age). In many cases, the objective would

seemingly be to protect that group on the basis of the vulnerability of its members. As foreshadowed in the statement of compatibility, a pandemic order may also place restrictions on the activities of unvaccinated persons in order to prevent the spread of a pandemic disease.

42. Problems arise where such differentiation is unjustified, oppressive, or disproportionate. In our view, there are two relevant constraints on the Minister's capacity to misuse this 'power to differentiate'. First, as the Explanatory Memorandum points out, the Minister may only make a pandemic order where it is reasonably necessary to protect public health. This means that if the Minister proposes to differentiate between classes of persons, such differentiation must be explained by reference to a public health purpose, and not by an ulterior purpose (such as punishing the unvaccinated or those who disagree with a pandemic order). Second, the pandemic order has to be demonstrably justified in accordance with the rights established by the Charter.

The Role of SARC

43. The Bill envisages a role for the SARC in scrutinising pandemic orders. Presently, directions made under the state of emergency powers are not subject to any form of similar scrutiny. The SARC is an all-party Joint House Committee, which means that its members are elected representatives and come from different political parties. Therefore, the members of the SARC are directly accountable to voters.

44. The proposed ability of the SARC to review a pandemic order is arguably broad. The SARC may report on a pandemic order including if the order does not *appear* to be within the powers conferred by the PHWA and if the order is not compatible with the Charter. In other words, the SARC can review the order if the order is considered to be unreasonable, unnecessary, made for an improper purpose or unjustifiably limits human rights.

45. If the SARC is of the view that a pandemic order is not consistent with human rights protected under the Charter, or not made in accordance with the Act, its report can recommend disallowance or amendment of a pandemic order. In the

case of a recommendation to disallow a pandemic order, the pandemic order ceases to be in force (in whole or in part) if a disallowance is voted for by both Houses of Parliament. A report may also recommend a pandemic order be suspended. A suspension takes effect within 7 days unless the Governor in Council, on the recommendation of the responsible Minister, declares the order is not suspended.

46. The role of the SARC in scrutinising the pandemic orders is welcome. There is currently no scrutiny by any parliamentary committee of the directions made by the CHO. There is no power of any parliamentary committee to recommend disallowance of a direction made by the CHO.

47. However, the role of the SARC to provide oversight could be improved.

48. First, Liberty Victoria believes that, in order to improve the role played by the SARC in scrutinising pandemic orders, the tabling of a report under s 165AP should operate as a trigger for the SARC to inquire into, consider and report to the Parliament on a pandemic order (similar to a referral under s 33 of the *Parliamentary Committees Act 2003* (Vic)). This ensures the pandemic orders are scrutinised as a matter of course, rather than leaving it to whether the SARC "considers" an inquiry should take place.

49. Secondly, Liberty Victoria believes that, in order to ensure effective Parliamentary oversight of pandemic orders, a disallowance should be possible when one House of Parliament votes for the disallowance. The Bill only proposes disallowance of a pandemic order if both Houses of Parliament vote for it. This means that the Government of the day, which usually has a majority in the lower house, can prevent a disallowance.

50. Thirdly, Liberty Victoria believes that, for the avoidance of doubt, the Bill should clarify that *any* recommendation for disallowance or amendment in the report of the SARC should be sufficient for Parliament to debate and vote on a recommended disallowance. This should include any minority reports.

51. Lastly, in relation to suspensions of pandemic orders, Liberty Victoria believes that the Bill should clarify who the "responsible Minister" is. For example, if the SARC recommends a suspension of a pandemic order made by the Minister for Health, it would appear to undermine the function of the SARC if the same minister could advise the Governor in Council to declare the order not be suspended.

Proposed Section 165CR of the Bill - Certain Instruments are not Legislative Instruments

52. Proposed s 165CR of the Bill outlines that a number of instruments are not legislative instruments within the meaning of the *Subordinate Legislation Act 1994* (Vic), including a pandemic declaration and a pandemic order. There is some uncertainty at law as to whether this would mean that a pandemic declaration or a pandemic order have to be interpreted in accordance with s 32 of the Charter.

53. It is clear that the intention of the Bill is that the human rights protected by the Charter should be central to decision-making. To avoid any doubt, the Bill should make clear that the instruments referred to in s 165CR of the Bill have to be interpreted in accordance with the Charter.

Independent Pandemic Management Advisory Committee

54. Liberty Victoria welcomes the introduction of an Independent Pandemic Management Advisory Committee (**IPMAC**), which will require members to include experts with a range of skills, knowledge and experience, including human rights, the interests and needs of traditional owners and Aboriginal Victorians and the interests and needs of vulnerable communities.

55. Liberty Victoria also welcomes that reports made by the IPMAC are laid before both Houses of Parliament within six sitting days of the report being provided to the Minister. This is another transparency and accountability measure that presently does not exist in respect of the emergency powers. Once those reports are provided to Parliament, they will also become available to the public. This

means that if the Minister is not following the advice of the IPMAC, the public will know about it and Victorians will be able to read the IPMAC reports themselves.

56. In order for the IPMAC to function properly, there must be an assurance that the IPMAC will be given adequate funding and resources to carry out its functions.

Privacy Protections

57. Liberty Victoria has advocated throughout the pandemic for the protection of private information gathered for public health purposes. We have opposed that information being made available to Victoria Police or other agencies, such as Border Force. The safeguarding of this information is fundamental to ensure that individuals feel comfortable with being open and honest in disclosing their information, including for contact tracing purposes.

58. The Bill has a number of provisions that expressly include the protection of information gathered for the purposes of public health and limits their use. The Bill limits the availability of that information and expressly prohibits its dissemination to bodies such as Victoria Police. This is a great improvement to the current state of affairs, in which the protection of such information was left to the more general privacy regime established by the *Privacy and Data Protection Act 2014 (Vic)*. That regime leaves open the possibility of information being provided to bodies such as law enforcement, whether in response to a court order or in response to a request to the agency holding the information (although it has been reported that the Department has tended to refuse such requests).

Offence Provisions, Enforcement and Fines

59. The Bill includes a new aggravated offence of failing to comply with a pandemic order, direction or requirement where the person knows or ought to know that the failure to comply is likely to cause a serious risk to public health of another individual. The maximum penalty for an individual for that offence is 500 penalty units (over $90,000) and imprisonment of 2 years. A proceeding for the new

aggravated offence can only be brought with the approval of the Secretary or the Chief Commissioner of Police.

60. Liberty Victoria opposes the introduction of an aggravated offence which includes imprisonment as penalty. Although there is a type of safeguard in that a proceeding for such an offence has to be approved by the Secretary or the Chief Commissioner, we have seen throughout the pandemic that more vulnerable people, including those who are homeless, suffer from mental health issues, Aboriginal Victorians, young people, and people who don't speak English as their first language, have been disproportionately fined for alleged breaches of the CHO directions. Liberty Victoria is concerned about the likelihood that more vulnerable people will be subjected to prosecution for the aggravated offence in disproportionate numbers.

61. The Bill includes proposed s 165BB which requires that a person exercising a pandemic management power must, before giving a direction, warn the person who is being directed that a failure to comply without a reasonable excuse is an offence. Liberty Victoria welcomes the inclusion of a warning provision such as this. A provision such as this emphasises the role of warnings and discretion when exercising powers. The provision could be strengthened by an express inclusion that a person who has been given a warning should have a reasonable opportunity to comply so that a warning is effective.

Concessional Infringement Scheme

62. Liberty Victoria welcomes the introduction of a concessional infringement scheme for eligible persons. However, the concessional infringement scheme in the Bill only applies in respect of offences related to the exercise of powers under the new Part 8A pandemic regime. It appears that the scheme will only be available for offences that relate to breaches under the pandemic-specific part of the PHWA and will not apply to infringements that have already been given to persons who have breached CHO directions made under the state of emergency powers.

63. The introduction of a concessional infringement scheme is a positive development, however it should also be available for offences that relate to breaches CHO directions made under the emergency powers in the PHWA. The concessional infringement scheme should be made available to those who have already been fined. This would promote equal treatment of Victorians and address the disproportionate way in which more vulnerable people have been fined since March 2020.

64. The concessional infringement scheme requires, among other things, that applications be made in writing and the evidence is provided by the applicant as to whether they fit within the prescribed class of persons. Knowing how to make such an application will be difficult for many Victorians and the burden will likely fall on community legal centres or other organisations to assist individuals in making these applications.

65. In order for the concessional infringement scheme to be available to all equally, there should be specific funding provided to community legal centres and Victoria Legal Aid to assist individuals in making such applications.

Privilege Against Self-Incrimination

66. The Bill introduces new provisions which abrogate the privilege against self-incrimination. The new proposed s 212A(1) provides that a person is not excused from complying with a requirement to give information under Part 8A on the basis that the information might incriminate the person or expose the person to a penalty. Much like other legislative provisions which interfere with the privilege, s 212A(2) renders any information provided in compliance with Part 8A inadmissible in a criminal proceeding, and prohibits the use of that information in any proceeding or process which may expose that person to a criminal penalty (except for proceedings relating to the provision of false or misleading information). The Explanatory Memorandum states that the abrogation of the privilege “facilitate[s] and support[s] the provision of information important to the prevention and management of the outbreak”.

67. Contrary to what is stated in the Explanatory Memorandum, the abrogation of the privilege against self-incrimination does not itself "facilitate" and "support" the provision of information which may be of assistance to health officials. Rather, that objective is achieved by the correlative guarantee, contained in s 212A(2), that such information cannot be admitted into evidence in a criminal proceeding or used in any process that might expose a person to a criminal penalty. The abrogation of the privilege is a further step which converts "facilitation" and "support" into coercion. It does so by rendering the refusal to provide incriminating information an offence (under new proposed s 165BN).

68. Criminalising the refusal to provide self-incriminating evidence is a significant step. This is so irrespective of any restrictions placed on the use of that information. Generally speaking, where such measures are adopted in other legislative regimes, this occurs in a formal adjudicative setting, such as before a commission of inquiry or before the Office of the Chief Examiner.). There are also generally protections in place as to the person to whom information is provided and how the information can be disclosed and used (including its use to obtain derivative material).

69. Liberty Victoria recognises that there is a public interest in obtaining information from a person who may have committed an offence under the PHWA. Indeed, knowledge of the precise circumstances of a person's conduct (that might constitute an offence) can, in some cases, be critical to controlling the spread of a pandemic disease. This is quite different from other circumstances in which the sole or dominant purpose of gathering incriminating evidence is to determine whether an offence has been committed.

70. For this reason, Liberty Victoria accepts that a pandemic is one of few extreme scenarios in which the privilege against self-incrimination can be justifiably abrogated, provided there is strict prohibition on the use of that information against the person's interests. Information which may be self-incriminating should be used, and only used, for the purpose of responding to a public health crisis. Use of that information, *including derivative use*, for any other purpose should be expressly prohibited.

71. We are also concerned that the power to compel the provision of such information may be exercised by a potentially large number of officials, such as authorised officers and, in some cases, police officers (where a request for assistance is made). As we have seen during the COVID-19 pandemic, these officials directly interact with members of the community, many of whom are disadvantaged, and many of whom are justifiably concerned about providing information to public officials. There is scope for the misuse or disproportionate use of a power to compel incriminating information and to charge individuals for an alleged refusal to provide information.

72. This risk could be mitigated by introducing notice requirements which require a direction to give potentially incriminating information to be made in writing and to a senior officer or health official. The notice should state the reasons why the direction is being made and explain to the person in plain language that the information cannot be used against their interests.

73. Further, an additional layer of protection should be included in the Bill, so that proceedings against an individual who is alleged to have refused to provide information, can only be commenced with the approval of the Secretary or the Chief Commissioner of Police.

Warrantless Entry Into Private Premises

74. Liberty Victoria is concerned about references to warrantless entry onto private premises in the Bill, which may cause confusion about whether these powers are being expanded. Currently, under the PHWA, an authorised officer may only enter onto private premises without a warrant, and without the occupier's consent, where the authorised officer believes on reasonable grounds that there is an 'immediate' risk to public health, and where entry is necessary to investigate, eliminate or reduce that risk (see s 169(2)). A lower threshold for warrantless entry applies in respect of certain types of businesses or activities involving a greater risk to public health (see s 169(1)).

75. The new s 227B states that if a request for assistance is made of a police officer in relation to the exercise of a power under the Act, the police officer may enter into premises without a warrant provided:
    a. it is reasonably necessary to assist the authorised officer in the exercise of the power; and
    b. the authorised officer has specifically requested that the police officer enter into the relevant premises without a warrant.

76. Based on the language of this provision, it appears that the drafters do not intend to confer *new* substantive powers of warrantless entry on police officers but, rather, to grant them the capacity to exercise powers which are already conferred on the authorised officer in order to assist them (for example, the powers conferred under s 169, referred to above).

77. For the avoidance of doubt, the new proposed s 227B should make clear that the scope of a police officer's power to enter into premises without a warrant is limited by the scope of the authorised officer's power to take that action (that is, limited by the "immediate risk" and necessity tests outlined above). Further, the Bill should clarify that the procedures for warrantless entry imposed by s 171 of the PHWA apply equally to a police officer when exercising that power in response to a request for assistance.

Ability to Seek Independent Merits Review

78. There has been some commentary that the proposed Bill seems to limit judicial review of decisions made. However, the Bill does not contain a privative clause which would limit the availability of judicial review. Nevertheless, judicial review is out of reach of most people and the ability to seek independent merits review should be included in the Bill.

79. Presently, the only real avenue that a person has to seek independent review of a direction made under the emergency powers which affects their human rights is by seeking judicial review of decisions. Judicial review is usually costly, both in time and expense, making it inaccessible for the vast majority of Victorians. Moreover, for those who may be able to access judicial review, the length of time

it can take for a judicial review matter to finalise may defeat the purpose of the review. For example, the judicial review of a 14-day isolation direction may not be heard until after the conclusion of the isolation period. This would render any review moot. Lastly, the grounds of review are also generally limited to whether a decision is lawful as opposed to whether a decision, on review, is correct and preferable when considering the facts, law and relevant policies.

80. These issues remain present in the Bill. In order to address this, the new pandemic legislation should include a practical and effective ability to seek review from an independent body, such as the Victorian Civil and Administrative Tribunal (**VCAT**), or another specialist tribunal. This review mechanism should be independent, accessible in a timely manner, and a no-cost jurisdiction.

81. Various international human rights instruments to which Australia is a signatory (which, by extension, applies to Victoria) stipulate that a person has a right to an effective remedy where their human rights are unjustifiably violated. This includes art 2(3) of the *International Covenant on Civil and Political Rights.* The enactment of the Charter is a reflection of that fundamental right. An "effective" remedy includes one which is sufficient, accessible and promptly provided to the affected person. Facilitating a person's right to an effective remedy entails ensuring that a person has access to a competent authority which is sufficiently independent and impartial from the body which has allegedly violated the person's rights.

82. The PHWA and the Bill provides for a person subject to detention to seek a review of that detention by a Detention Review Officer (**DRO**). The application is made to the Department which must immediately refer any (seemingly valid) application to the DRO. A person can make more than one application but only if the "new and materially different circumstances have arisen" since the earlier application was determined. The Department decides if such circumstances exist. Under s 200B and proposed s 165BI, an application for review must be in writing and specify the grounds on which the application is made. If the application is a further application, it must also specify the new and materially different circumstances that have arisen.

83. The DRO does not have the power to cancel the detention decision. They may only affirm a detention decision or refer the decision back to the CHO with a non-binding recommendation. The CHO then decides whether to affirm, vary or end the person's detention.

84. The DRO review process is problematic for several reasons:
    a. The process lacks sufficient independence from the Department and the CHO. The bodies responsible for implementing a person's detention in the first place are ultimately responsible for deciding if that same decision should continue;
    b. The requirement that applications be in writing may limit some people's access to the review process including people with limited literacy skills and people with English as a second languages. Applications should be capable of being made informally and orally;
    c. Given the decision involves impacts on a person's freedom of liberty and movement, there should be no limit imposed on seeking a further review; and
    d. If a condition is imposed on seeking a further review, the Department should not determine whether that threshold condition has been met.

85. Liberty Victoria repeats its call for the introduction of an effective independent and accessible merits review mechanism for decisions which involve detention and other significant alleged violations of human rights.

86. We recognise that seeking merits review of all decisions which involve some form of restriction (such as mask-wearing) may be impractical and time-consuming. However, at a minimum, merits review by an independent body should be available where decisions involve the detention of a person. Restrictions on other important human rights, such as the right to protest or peaceful assembly or prohibition from entering or leaving the State of Victoria, should also be reviewable. The review process should also include the ability to seek reconsideration of a refusal to exempt a person from restrictions such as, for

example, the ability to visit a sick or dying family member in hospital, to attend a funeral, or to travel for some special purpose.

87. Lastly, as to the form of independent merits review, Liberty Victoria considers that VCAT may be an appropriate body to conduct these reviews. A possible alternative could be a separate specialist tribunal. Using the Mental Health Tribunal established under the *Mental Health Act 2014* (Vic) as an example, the tribunal could be a panel comprising a qualified legal practitioner, a relevant expert (for example, in public health) and another member who would ideally represent a cross-section of the Victorian community including from communities which may be disproportionately affected by restrictions (for example, First Nations people and some multicultural groups).

Housing

88. The new pandemic legislation should introduce a permanent moratorium on evictions where the reason to evict is caused by pandemic restrictions. The right to housing is particularly important during pandemics of infectious diseases. The ability of Victorians to self-isolate or quarantine requires lodging. Even though restrictions may be easing now, the risk of infection from COVID-19 remains. Therefore, evictions should be prohibited if the reason for giving a notice to vacate is based on hardship caused by restrictions.

89. Restrictions on a person's movement, such as stay-at-home directions, can affect a person's ability to pay their rent. The person may not be able to attend work and there may be little, if any, government financial assistance available to supplement lost income.

90. The *COVID-19 (Emergency Measures) Act 2020* (Vic) introduced a suite of provisions to amend the *Residential Tenancies Act 1997* (Vic) (**RT Act**). This included imposing a moratorium on evictions if renters are unable to comply with their obligations under a rental agreement or the RT Act, such as the payment of rent, because of a 'COVID-19 reason'. This protection acted as a moratorium on evictions but was only temporary, lasting while an 'emergency period' was in effect. The recent decision of the Victorian Court of Appeal in *Markiewicz v Crnjac*

[2021] VSCA 290 effectively confirms that the temporary protection of renters against eviction for a COVID-19 reason is deferred until the end of the emergency period. At the end of that period, a person can be evicted, for example, for the non-payment of rent accrued during the moratorium period.

91. For many renters, the adverse effects of emergency powers (including financial hardship, family or carer responsibilities or other personal issues) will continue to have an impact on their lives. With the eviction moratorium ending, renters are now exposed to housing insecurity and uncertainty and, at worst, the risk of imminent eviction.

92. Reintroducing the protections from adverse action where the failure to comply with an obligation under a tenancy agreement of the RT Act is due to a "COVID-19 reason" (or other pandemic reason) would be consistent with human rights and better promote public health.

For further information, please contact Liberty Victoria via email info@libertyvictoria.org.au or phone 03 9670 6422.

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14 July 2021

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Department of Health

[redacted]
[redacted]
Department of Health

By email: [redacted]@health.vic.gov.au
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Dear [redacted] and [redacted],

Thank you for arranging the workshop on 5 July 2021 with the Pandemic Legislation Reform team at the Department of Health and for the opportunity to provide our comments in writing.

About Liberty Victoria

1. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

2. The members and office holders of Liberty Victoria include persons from all walks of life, such as legal practitioners, policy and advocacy experts, businesspeople, and students. More information on our organisation and activities can be found at: https://libertyvictoria.org.au. The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

Decision-making principles in new legislative provisions, human rights considerations and transparency

3. Liberty Victoria is of the view that the new legislative provisions which will enable the exercise of emergency powers should include two key components: a set of specific matters — within those empowering provisions — of which a decision-maker must be satisfied when exercising a power; and a requirement to make and publish a 'statement of compatibility' to complement the decision. These components would ensure decision-making is principled, transparent and accountable.

4. The *Biosecurity Act 2015* (Cth) (**Biosecurity Act**) provides a helpful illustration of how a specific set of matters may guide the exercise of emergency powers. Under s 477(4) of the Biosecurity Act, the Health Minister must be satisfied of the following matters *before* determining any requirement under the emergency powers:

   *(a) that the requirement is **likely to be effective** in, or to contribute to, **achieving the purpose** for which it is to be determined;*
   *(b) that the requirement is **appropriate** and **adapted** to achieve the purpose for which it is to be determined;*
   *(c) that the **requirement** is **no more restrictive or intrusive** than is required in the circumstances;*
   *(d) that the **manner** in which the requirement is to be applied is **no more restrictive or intrusive** than is required in the circumstances;*
   *(e) that the period during which the requirement is to apply is **only as long as is necessary**.*

5. Broadly speaking, these matters can be divided into principles including:
   (a) necessity;
   (b) proportionality;
   (c) effectiveness;
   (d) least restriction;
   (e) time limited; and

(f) evidence based.

In addition to these matters, Liberty Victoria considers that transparency, accountability, collaboration and the protection of human rights to the greatest extent possible are equally important principles which should guide decision-making.

6. Although the *Public Health and Wellbeing Act 2008* (Vic) (**PHWA**) contains general principles within ss 5 to 10, Liberty Victoria is of the view that the provisions permitting the exercise of emergency powers during a pandemic should themselves contain the specific principles which the decision-maker and the authorised officers must be satisfied of when exercising any emergency powers.

7. First, the exercise of emergency powers during a pandemic may require consideration of specific principles which may not apply generally to other parts of the PHWA. Therefore, introducing a similar set of specific principles of which a decision-maker must be satisfied, similar to how s 477(4) of the Biosecurity Act operates, ensures all pertinent matters are considered before decisions are made. This approach would be harmonious with other parts of the PHWA such as Parts 8 and 9A which already require a specific set of principles to be applied in those respective parts.

8. Secondly, containing a specific set of matters within these new provisions would create a clear decision-making framework and assist the public to better understand how decisions are made which, in turn, promotes transparency and confidence in the process.

9. Finally, consideration and protection of human rights under the *Charter of Human Rights and Responsibilities* (***Charter***) should be central to the exercise of an emergency power. Emergency powers can and do limit human rights in some ways. The specific set of matters should include a requirement to consider and protect human rights to the greatest extent possible.

10. Further, to complement decision-making in accordance with clear principles, Liberty Victoria is of the view that the exercise of any directions made under emergency powers should be accompanied by a publicly accessible 'statement of compatibility' in respect of the relevant human rights that may be limited by directions and to explain how and why the limitation of the right is necessary and proportionate. The statement of compatibility would further increase transparency and accountability of decisions made under emergency powers and would help communicate to the public in a clear way that

human rights are considered as part of the decision-making process. Further, the requirement of a statement of compatibility would help foster decision-making that is compatible with the principles set out at paragraph 5 above.

11. The general position should be that a statement of compatibility is published at the same time as the making of a decision and any directions. We acknowledge, though, that the responding to an emergency may be urgent and time-sensitive. In those exceptional cases, a statement of compatibility should be published at the soonest practicable time after the decision and any directions are made.

Ability to seek review

12. The new pandemic legislation should include a practical and effective ability to seek review from an independent body, such as the Victorian Civil and Administrative Tribunal (**VCAT**), or another specialist tribunal. This review mechanism should be accessible in a timely manner, low or no cost and independent.

13. At present, the only real avenue to review a direction made under the emergency powers to a non-executive body is by seeking judicial review of decisions. Judicial review is usually a process that takes time and expensive. The length of time it can take for a matter to be concluded may defeat the purpose of the review. For example, the judicial review of a 14-day isolation direction may not be heard until after the conclusion of the isolation period. This would render any review moot. Judicial review is also expensive and inaccessible for the vast majority of Victorians. The grounds of review are also generally limited to whether a decision is lawful as opposed to whether a decision, on review, is correct and preferable when considering the facts, law and relevant policies.

14. The existing review powers in the PHWA are also limited and arguably lack sufficient independence. Although s 200B of the PHWA enables the review of a detention order by a Detention Review Officer (**DRO**), the DRO does not have the power to cancel the detention decision, but is only able to refer the decision back to the Chief Health Officer[1] (**CHO**) with non-binding recommendations.[2] Practically speaking, these provisions are not a proper merits review as it is understood in administrative law terms. Further, as the DRO is appointed by the Secretary of the Department of Health — the same Department within which the CHO sits — the review is not necessarily independent.

[1] PHWA s 200D.
[2] PHWA s 200C.

15. Given the extraordinary emergency powers available in respect of a risk of public health, it is important that there is an effective and accessible review mechanism to an independent body. This kind of mechanism is likely to increase transparency and accountability, which is important to establish trust in the system.

16. Liberty Victoria recognises that seeking merits review of any decision which involves some form of restriction (such as mask-wearing) may be impractical and time-consuming. However, decisions which restrict or limit certain civil liberties and human rights should be reviewable. Merits review by an independent body should include the ability to review any decision which involves the detention of a person. Restrictions on other significant restrictions on important human rights, such as the right to peaceful protest. The review process should also include the ability to seek reconsideration of a refusal to exempt a person from restrictions such as, for example, the ability to visit a sick or dying family member in hospital, to attend a funeral, or to travel for some special purpose.

17. Lastly, as to the form of independent merits review, Liberty Victoria considers that VCAT may be an appropriate body to conduct these reviews. A possible alternative could be a separate specialist tribunal. Using the Mental Health Tribunal established under the *Mental Health Act 2014* (Vic) as an example template, the tribunal could be a panel comprising of a qualified legal practitioner, a relevant expert (for example, in public health) and another member who would ideally represent a cross-section of the Victorian community including from communities which may be disproportionately affected by restrictions (for example, First Nations people and some multicultural groups).

Privacy – QR and other contact tracing information

18. It is of fundamental importance that the new pandemic legislation include express provisions that limit the use that can be made of the information gathered under emergency powers. Data such as QR data and other contract-tracing information (for example, from interviews with those who have tested positive with an infectious disease) should be protected and not made available to other organisations including Victoria Police.

19. An express protection of this information in legislation would be most compatible with the *Charter* (such as the right to freedom of movement in s 12 and the right to privacy in s 13) and public health purposes. The purpose of gathering the information is solely for

public health reasons. That purpose should not be expanded after the information has been gathered.

20. It should also be made clear to people that the information in contact-tracing interviews will not be used to prosecute or penalise individuals. People are more likely to be circumspect with contact tracers if they are concerned that what they say will get them into trouble. This circumspection may cause some people to be less open and honest with contact tracers. This puts in place unnecessary hurdles to contact-tracing and may undermine the process.

21. There should also be a protection of the information of people who have breached public health directions. "Naming and shaming" in a public health context is likely to be very damaging to the trust that Victorians have in handing over their private information and movements to contact tracers.

22. There also ought to be more protection of "check-in" data by private companies who are collecting information as part of the public health directions. Businesses are currently using hard copy sheets for people to sign in if they do not have a mobile phone. Despite these sheets listing individuals' private information, they are often kept in public places. This creates the risk that some people may copy that information (for example, by taking a photograph) and use it for an improper purpose.

23. Liberty Victoria gave evidence at the Inquiry into the Victorian Government's COVID-19 Contact Tracing System and Testing Regime in 2020, which discusses some of these issues in further detail. The transcript of that evidence is available here.

Right to protest

24. Liberty Victoria is opposed to the criminalisation of people who exercise their right to peaceful demonstration and assembly. The use of incitement laws to prosecute individuals is particularly troubling.

25. The right to peaceful protest and public assembly should only be limited where strictly necessary and only subject to necessary limitations such as social distancing and mask wearing. Depending on the number of uncontained COVID-19 (or other infectious disease) spread in the community, COVID-safe forms of protest should be encouraged, with the 2020 BLM protest and the Mantra Car Convoy being examples of peaceful

protest and assembly where the risk of spreading infection was limited through actions taken by protest organisers.[3]

26. If it is safe for larger numbers to gather in venues such as the MCG, similar reductions of restrictions to peaceful protest and assembly should occur.

27. Ensuring that the right to peaceful assembly and protest is protected by legislation will ensure that any emergency powers are compatible with the *Charter*, such as the freedom of thought, consciences, religion and belief (s 14), the right to freedom of expression (s 15) and the right to peaceful assembly and freedom of association (s 16).

Quarantine and isolation of prisoners and children in detention

28. Liberty Victoria has been concerned throughout the pandemic about the widespread use of 14-day quarantine of prisoners and children in detention, even when there are no community cases of COVID-19.

29. Although attempts are made by Corrections to alleviate the damaging effect of mandatory quarantine, such as by increasing phone calls with family, there are still damaging effects of quarantine, in particular to mental health. Many of the prisoners and children in detention are vulnerable and have a history of trauma, which is compounded by the widespread use of isolation and quarantine. At present, there is no requirement to give prisoners and children some access to fresh air whilst in quarantine, which is also likely to affect physical health.

30. Not only is the use of quarantine damaging to individuals' mental health (despite the availability of phone calls with family and lawyers), it also affects their right to a fair trial and proper participation in their legal proceedings (which are protected under ss 23, 24 and 25 of the *Charter*). At present, prisoners and children are required to quarantine if they request to be brought to court in person, even if they have been in custody for months without access to the community. This has resulted in prisoners choosing to appear by audio-visual link (**AVL**) instead. The availability of AVLs between courts and prisons is limited. This means that longer court hearings, such as committals and contested hearings, are delayed. It also means that there are pressures for shorter

[3] Some reports suggest that there is no link between these demonstrations and the spread of COVID-19. See RMIT ABC Fact Check, 'There's still no evidence Black Lives Matter protesters caused Melbourne COVID-19 surge', *ABC News* (online, 24 July 2020): https://www.abc.net.au/news/2020-07-24/coronacheck-black-lives-matter-melbourne-andrew-bolt-masks/12481360

hearings to be done more quickly. In plea hearings, these time pressures can affect an accused's ability to put all facts before a judge or magistrate. Further, there are no facilities at a court for lawyers to speak privately with their clients over AVL about privileged matters. The only way to speak with clients is through other participants being sent out of the courtroom or into the virtual lobby. However, court staff have to remain present and are able to listen to conversations, which affects the ability of lawyers to seek proper instructions and to protect legal professional privilege.

31. Given the damaging effects of quarantine, not only to mental and physical health, but also to the rights of accused to properly participate in their proceedings, the use of quarantine in prisons should be limited and only implemented when strictly necessary. At all times, there must be a human-rights centred focus in respect of the use of quarantine.

32. Limiting the use of isolation and quarantine would be consistent with s 22 of the *Charter* (the right to humane treatment when deprived of liberty).

Health, and not policing, response

33. The response to a public health emergency should always focus on health, rather than policing. Early data has shown that the majority of fines were issued in areas where there was little correlation to the spread of the disease (i.e. policing neighbourhoods which were not hotspots).[4]

34. Where policing is necessary, to increase transparency and encourage a human-rights centred approach, demographic data, including information about age, race or ethnicity, and suburb, should be collected and published by Victoria Police (and other authorised officers). The purpose of this data collection and publication is to guard against potentially discriminatory policing practices which disproportionately affect certain communities.

35. There should be an increased emphasis on police discretion and the use of warnings where individuals may have breached public health directions, rather than the issuing of fines immediately. There should also be an independent and accessible fine review

[4] M McGowan, A Ball and J Taylor, 'COVID-19 lockdown: Victoria Police data sparks fears disadvantaged unfairly targeted', *the Guardian* (online, 6 June 2020): https://www.theguardian.com/world/2020/jun/06/covid-19-lockdown-victoria-police-data-sparks-fears-disadvantaged-unfairly-targeted

mechanism for people to challenge their fines instead of having to rely on internal Victoria Police policies or taking fines to the Magistrates' Court (which may result in a criminal record). Children in general should not be fined.

36. There also ought to be the ability of individuals to seek that their fines be reduced or waived if they fall into particular categories of vulnerability such as financial hardship, victims of family violence, mental or physical health issues, homelessness, and alcohol or drug dependency issues.

37. The fines presently being issued are very high and there is a real risk that vulnerable people will end up in custody for unpaid fines (i.e. imprisonment-in-lieu orders) because they cannot afford to pay them.

Housing

38. The new pandemic legislation should introduce a permanent moratorium on evictions where reason to evict is caused by restrictions. The right to housing is particularly important during pandemics of infectious diseases. The ability of Victorians to self-isolate or quarantine requires lodging. Evictions should be prohibited if the reason for giving a notice to vacate is based on hardship caused by restrictions.

39. As was noted in Liberty Victoria's submission to the Inquiry into the Victorian Government response to the COVID-19 Pandemic, adequate housing plays a particularly important role in the front-line defence against a pandemic and those without adequate housing are at greatest risk of contracting the virus.[5]

40. The *COVID-19 (Emergency Measures) Act 2020* (**Omnibus Act**) introduced a suite of provisions to amend the *Residential Tenancies Act 1997* (**RT Act**). This included imposing a moratorium on evictions if renters are unable to comply with their obligations under a rental agreement or the RT Act, such as the payment of rent, because of a 'COVID-19 reason'. While the adverse effects of emergency powers (including financial hardship, family or carer responsibilities or other personal issues) may — and often do — continue to affect renters after restrictions have eased, this moratorium was only temporary and is no longer in force.

[5] Liberty Victoria's submissions can be found here.

41. Liberty Victoria believes that renters should not be evicted if their inability to comply with their obligations is because of the impacts of emergency powers. Adequate housing is a fundamental human right, enshrined under s 13(a) of the *Charter*, and steps should be taken to protect that right. In addition, the prospect of homelessness may encourage some people to act in a way which could jeopardise public health strategies. For example, a renter may choose to attend work while waiting for test results instead of isolating if faced with the prospect of eviction, thereby risking infecting other people.

42. Reintroducing the protections from adverse action where the failure to comply with an obligation under a tenancy agreement of the RT Act is due to a 'COVID-19 reason' (or other infectious disease pandemic) would be consistent with human rights and better promote public health.

Greater oversight of private operators of public services, such as prisons, aged care, disability care providers and mental health wards

43. The new pandemic legislation should include clear duties for private operators of public services to ensure that human rights are only limited to the extent that is necessary and proportionate to any public health risk.

44. During the COVID-19 pandemic, private operators of some facilities denied residents complete access to family and friends without exploring less restrictive alternatives or making reasonable adjustments. In one reported example, aged care residents were subject to complete lockdowns despite Care Facilities Directions made under the PHWA permitting daily visits from family and friends.[6] It appears this kind of decision occurred in the absence of investigation into alternative arrangements to facilitate contact with family or friends, was not time-limited, and was incapable of being challenged. While this example occurred in an aged-care facility, it is conceivable that similar restrictions could be improperly imposed in other facilities including mental health and disability care facilities.

45. Imposing restrictions that go over and above what is strictly necessary and proportionate can affect individuals' right to health (physical and mental) as well as their rights to the protection of families (s 17 of the *Charter*), right to equality (s 8 of the *Charter*) and the right privacy (s 13 of the *Charter*).

[6] S Martin, 'Business and Human Rights during the COVID-19 Pandemic', *VicBar News* (ed 167, October 2020), p57-58.

46. The new pandemic legislation ought to include specific and clear guidance to assist private operators understand their human rights obligations in the context of a pandemic.

Communication of information to the public

47. Any new pandemic legislation should expressly require that information to the public should be published in a timely and accessible manner.

48. At present, new directions issued by the CHO are not published online until 11.59 pm, or when they are enforced. This means that people will go to bed under one set of restrictions and wake up under another. The directions are also often expressed in language that is difficult to understand and are not available in translated versions.

49. The risk of a lack of accessible communication is two-fold: either there is "overcompliance" with people not leaving their homes and accessing necessary and vital services through fear of breaking the rules; or people inadvertently breaching rules because they changed overnight in a way that they were not aware of.

50. Where possible, there ought to be a minimum notice period for directions to be communicated to the public. These directions should be available in plain and easy English and different languages. They should also be accessible to people with disability including in forms of communication for those who are vision impaired.

51. Thank you for considering this letter. We would be more than happy to further discuss Liberty Victoria's concerns and suggestions.

Yours faithfully,

Julia Kretzenbacher

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