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7 July 2021

Committee Secretary
Economics and Governance Committee
Parliament House
BRISBANE QLD 4000

**By email: egc@parliament.qld.gov.au**

Dear Committee

**Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021**

Thank you for the opportunity to make a submission to the inquiry into the Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021.

Please find attached our submission.

Thank you for the opportunity to participate in your Inquiry into the Bill.

Yours sincerely



Scott McDougall
Queensland Human Rights Commissioner

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Submission to Economics and Governance Committee

7 July 2021

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# Introduction

1. Thank you for the opportunity to comment on the Committee’s inquiry into the Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021 (the Bill).
2. Since the declaration of this public health emergency, the Queensland Human Rights Commission has sought to work constructively with the government on legislation and service responses to this crisis, in a way that ensures compliance with human rights and anti-discrimination law.
3. The Commission has consistently acknowledged that even some of the most extraordinary powers that significantly limit rights may be justified, due to the government’s positive obligations under the right to life and the uncertainty about the risks posed by COVID-19, particularly to the most vulnerable people in our community.
4. However, the Commission is becoming increasingly concerned about the lack of justification for limits on human rights that arise from legislation such as the Bill, including consideration of less restrictive measures and/or further safeguards. There is a risk of a culture developing within government that any limitation on fundamental human rights is justified if made in response to the COVID-19 pandemic, without proper consideration of human rights relevant to the particular circumstances.
5. The Commission accepts the rationale for continuing some extraordinary powers in light of the ongoing threat of COVID-19 identified in the Statement of Compatibility (SOC). Relevant considerations include:
* Measures that are still required to protect the health, safety and welfare of Queenslanders, mitigate the spread of COVID-19 in the community, and facilitate the continued functioning of Queensland’s institutions and economy should continue.
* Recent events in Queensland, other Australian states and continued large-scale outbreaks around the world serve as a clear reminder of how rapidly COVID-19 can spread and overwhelm health systems.
* Recent changes to the recommendations for use of the AstraZeneca vaccine.
* Queensland continues to receive significant numbers of overseas arrivals and cases of COVID-19 continue to be detected in hotel quarantine, including highly contagious variants.
1. The Commission also appreciates that some form of restrictions will need to continue into April 2022 to allow for an appropriate assessment of the impacts of the vaccination program and the current situation with respect to key public health risks, such as the continuing number of people contracting the virus overseas and returning to Queensland.
2. Nonetheless, it is critically important for Queensland’s democracy, and the community’s trust in government and its commitment to human rights, that these measures are the least restrictive option and only in place for the shortest time necessary. There is a genuine risk that the pandemic may result in a permanent erosion of parliamentary scrutiny and diminish the culture of respect for human rights.[[1]](#footnote-1)
3. The QHRC suggests further information to that provided in the SOC is necessary to justify all limitations on rights.[[2]](#footnote-2)

# The role of the Queensland Human Rights Commission

1. The Queensland Human Rights Commission (QHRC) has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* (HRA)to promote an understanding and discussion of human rights in Queensland, and to provide information and educative services about human rights.

# Summary of the Commission’s recommendations

1. While there may be value in extending some of the expiring provisions, the Commission has concerns with the proposed approach. In particular, the Commission recommends that the continued extension of the ‘legislative modification framework’, and regulations made under it, is reconsidered, and instead that any measures that remain necessary are introduced via primary legislation.
2. The Commission also recommends that further safeguards be added to the extension of the Chief Health Officer’s powers. Such safeguards could include the publication of human rights considerations for all public health directions, a clear process for a person to seek a review of a decision about a public health direction to quarantine and precise and tailored power for a direction to make vaccination mandatory.
3. In relation to the amendments providing for changes to charging for hotel quarantine in advance via regulation, the Commission is concerned about the broad and imprecise nature of the proposed power. In particular, it is unclear which cohorts will be unable to seek a fee waiver.
4. More fundamentally, the Commission is concerned about the lack of detailed justification in the SOC regarding some of the limitations on rights in the Bill. Such limitations are likely to be among the most significant put before parliament. Throughout the pandemic, the Commission has been concerned that the ongoing extension of extraordinary powers has the potential for complacency about the impact on fundamental individual rights. The SOC for this Bill in several places indicates a lack of detailed consideration about significant human rights limitations.

# Extraordinary regulations

1. The Commission accepts that many of the amendments made via regulation under the ‘modification framework’ contained in the *COVID-19 Emergency Response Act 2020* have resulted in modern, practical solutions that increase inclusion and participation while protecting public health, and should be retained post-pandemic. The Commission also notes the important safeguard that the HRA continues to apply to regulations made under the framework, but do not consider that is sufficient to justify primary legislation being amended in this way.
2. The Commission considers that the immediate urgency that may have justified this so-called ‘Henry VIII’ approach has now passed*.* It is important to reflect on the history of this legislation:
* On 23 April 2020, the *COVID-19 Emergency Response Act* received royal assent. The Act and all regulations and instruments made under it were originally supposed to expire on 31 December 2020.
* On 25 May 2020, further changes were made with the passage of the *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020.*
* On 4 December 2020, the *COVID-19 Emergency Response and Other Legislation Amendment Act 2020* extended the expiry of the new regulation making powers (and regulations made under them) to 30 April 2021.
* On 23 April the *COVID-19 Emergency Response and Other Legislation Amendment Act 2021* extended all relevant provisions until 30 September 2021.
* Under this Bill, the modification framework would be extended again to April 2022.
1. The combined effect is that these extraordinary emergency powers, for which there was insufficient time to legislate through ordinary parliamentary processes, will potentially now be in place for two years in total, and 16 months beyond the original expiry date. This takes place in the context of increasing rates of vaccination and advice from the Chief Health Officer that the quickest path to returning ‘to normal’ is to have more people vaccinated.[[3]](#footnote-3)
2. As the SOC notes, the framework has the potential to limit most, if not all, of the human rights protected by the HRA depending on the nature of the secondary instruments that may be enacted or exercised under the empowering provisions. The original justification provided for this limitation was that the powers would be time limited until 31 December 2020.[[4]](#footnote-4) When this time period was proposed to be extended, the justification provided was that ‘the period covered by the extension includes the Christmas and New Year holiday period where family gatherings and social events are more frequent, and also the Parliamentary holiday period where no Parliamentary sittings are likely.’[[5]](#footnote-5) This justification is no longer relevant, particularly as the SOC to the *COVID-19 Emergency Response and Other Legislation Amendment Act 2020* indicated the four-month period would provide:

Government with an opportunity to reflect on the state of COVID-19 in Queensland, having regard to increased social gatherings during the holiday period and also the impact of any further opening of interstate border restrictions, and reconsider the ultimate necessity of COVID-19 ER Act mechanisms as Queensland transitions into a recovery period.

…It also provides Government with further time to evaluate the COVID-19 ER Act mechanisms which represent valuable business improvements that should be retained as part of business- as-usual practices irrespective of COVID-19 and to commence the work in relation as to how to best transition those improvements into primary legislation to ensure their ongoing use and viability.[[6]](#footnote-6)

1. In light of the lack of justification to continue such extraordinary measures, the Commission recommends that the government (after consultation with those most affected) replace any amendments made by regulation to primary legislation via Bills enacted in the usual way.

# Powers of the Chief Health Officer and emergency officers

## Potential safeguards

1. Generally, the Commission is not opposed to the extension of the measures in Part 14 of the Bill. The Commission has previously congratulated the Chief Health Officer (CHO) for her exemplary work during this pandemic in keeping the community safe and protecting the community from the spread of COVID-19.
2. However, these powers were enacted early in the pandemic, providing ‘increased powers for emergency officers and the Chief Health Officer to limit, or respond to, the spread of COVID-19 in Queensland’.[[7]](#footnote-7) If these extraordinary powers are retained, now that their application is better understood, the Commission suggests further safeguards, as outlined below, should be considered. Such protections can still allow for rapid and effective responses.
3. This is particularly so when the significant limitation on rights that the public health directions represent would ordinarily be enacted through primary or subordinate legislation, and be subject to pre-legislative and parliamentary scrutiny and potentially subject to disallowance. This limitation is compounded by the removal of a statutory right to compensation, extended under the Bill.[[8]](#footnote-8) In contrast, the Victorian *Public Health and Wellbeing Act 2008* retains a limited right to compensation where a relevant direction is based on insufficient grounds.
4. In light of this, relevant safeguards could include:
* The inclusion of a human rights statement of compatibility with public health directions, or a short time thereafter (eg 3 to 5 days);
* Clarity about the extent of specific powers, i.e. what public health directions may cover;
* That COVID-19 public health directions automatically expire when the public health emergency declaration ends;
* A clear process for review or appeal arising from the making of a direction for a person to isolate;
* Requirements in the *Public Health Act* that all directions include exemptions for persons to leave their principal place of residence or move freely to obtain medical treatment or for other essential reasons.
1. The Commission first made several of these recommendations in its submission to the parliamentary review of the Queensland Government’s health response to the pandemic.[[9]](#footnote-9) The SOC does not discuss or justify why these less restrictive options were not adopted.

## Publishing human rights considerations

1. The SOC suggests that the Bill does not limit the right to equality because the Chief Health Officer is a public entity for the purposes of the *Human Rights Act*. Therefore, when making public health directions under section 362B of the *Public Health Act*, the CHO is required to consider the human rights impacts, including whether there is any disproportionate impact on certain classes of people.
2. The Commission suggests this is only a meaningful safeguard if the CHO’s consideration of human rights is published with the relevant direction, or shortly thereafter.
3. Ideally, such published information would include consideration of the purpose, need, data, and other factors that were considered in making each public health direction.It would be akin to the Statements of Compatibility and Human Rights Certificates that Ministers must prepare for primary and subordinate legislation,[[10]](#footnote-10) and detail how relevant human rights have been considered and why any limitation is reasonable. The statement would explain how the needs of at risk communities have been considered, and why particular directions do not contain exemptions - although, we consider that generally all directions should include a process for a person to seek an exemption.
4. The SOC’s discussion about the right to privacy emphasises the need for such public statements. This discussion suggests the right to privacy is not limited because the action is not unlawful or arbitrary, as the ‘Bill only continues the existing framework which authorises restrictions on movement pursuant to a lawful direction predicated on a reasonable belief that the restriction is necessary to assist in containing, or responding to, the spread of COVID-19’. That explanation may render the limitation lawful, but arbitrariness is a broader concept extending to ‘interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust’ and in those circumstances ‘are unreasonable in the sense of not being proportionate to the legitimate aim sought’.[[11]](#footnote-11) On this basis, an individual direction may be lawful but nonetheless represent an arbitrary limitation on the right to privacy.
5. The Commission recommends introducing a further safeguard, to enhance transparency and public understanding of decision-making, by requiring reasons to be provided to individuals when exemption decisions are made concerning public health directions.

## Seeking a review

1. The SOC acknowledges that the procedural protections of the right to liberty and security (s 29) are limited by the making of directions:

These procedural aspects of the right will continue to be limited in relation to the exercise of powers under Chapter 8, Part 7A as there remains no appealable provisions for a person issued a direction to isolate at a particular place by an emergency officer.

1. The SOC does provide justification for why a person subject to a direction to isolate should not be able to apply for a review, including to a court or tribunal regarding the lawfulness of the person’s detention (and potentially the application of other directions to them).[[12]](#footnote-12)In contrast, Victoria recently introduced a review system, through a senior lawyer, for those subject to quarantine. [[13]](#footnote-13)
2. In the absence of such a review process, many people have made complaints to the Commission.[[14]](#footnote-14) While the Commission’s conciliation-based complaints model provides an accessible resolution process, it is not a review of the merits or lawfulness of the direction.
3. The Commission suggests that a merits review process be included under Chapter 8 Part 7A (at least for directions involving detention/isolation), or justification be sought from the Minister for this limitation.

## Duration of public health directions

1. The powers provided under Chapter 8, Part 7A of the *Public Health Act*, including the power of the CHO to make public health directions, do not appear to automatically expire at the end or revocation of a declaration of a public health emergency by the Minister under section 319. The SOC notes that the CHO and emergency officers may only exercise these powers to assist in containing or responding to the spread of COVID-19.[[15]](#footnote-15) The general practice of the CHO is also to place an expiry date on all directions of ‘until the end of the declared public health emergency unless it is revoked or replaced’.
2. Nonetheless, if this analysis is correct, the Commission recommends an amendment of the *Public Health Act* *1995* to limit the exercise of the powers under Chapter 8 Part 7A to apply only during a declared public health emergency. One way of achieving this would be to amend Chapter 8, Part 7A to specify that all directions made under that Part expire automatically if the declaration of a public health emergency is revoked or ends.

## Sufficiently precise powers

1. The Commission also recommends that the extraordinary powers of the CHO remain sufficiently clear and the minimum necessary to respond to the pandemic, as determined by parliament. The Commission’s primary concern is that these existing powers may not be specific enough to cover the recent decisions of the CHO to make public health directions mandating that certain people are vaccinated for COVID-19 and influenza.[[16]](#footnote-16) Section 13 of the *Human Rights Act* requires that any limitation on rights is made ‘under law’. While s 362B of the *Public Health Act* provides the CHO broad powers to ‘any other direction the chief health officer considers necessary to protect public health’, the Commission suggests that to make vaccination mandatory (particularly relatively untested COVID-19 vaccines), there must be a sufficiently clear and precise framework in primary legislation.[[17]](#footnote-17) Such an explicit power (with potential safeguards) for the CHO to make vaccination mandatory, would provide transparency and clarity that the parliament has delegated such a significant power, particularly if there is a possibility that it would be used more widely in future.
2. For example, it seems likely that a public health direction will be made requiring aged care workers to be vaccinated against COVID-19. Such a direction should be accompanied by a detailed human rights analysis including in relation to the right to freedom of thought, conscience, religion and belief (s 20) and the right to equality (s 15).

## Automatic exemptions

1. The SOC suggests that the right to equality before the law (s 15) is not limited by extending the CHO’s powers to make public health directions in response to COVID because:

‘In practice, any restriction on the movement of people made under a direction includes an exemption for a person to leave their principal place of residence or move freely to obtain medical treatment to preserve the person’s quality of life. This measure does not extend to cosmetic or non-urgent medical treatments but to people requiring medical attention or other forms of care, such as people with a disability’.[[18]](#footnote-18)

1. With respect, a suggestion of what future directions may include is not a safeguard. If this is a justification for a limit on the right to equality, the *Public Health Act* should include an exemption for all directions to allow a person to leave their principal place of residence or move freely to obtain medical treatment. We note even then, such an exception may still result in the power to make directions limiting the right to equality. For example, people with protected attributes under s 15 that may be limited include religious belief (if they cannot attend a place of worship), and a person with family responsibilities being unable to travel to care for a family member.

# Humane treatment in detention

1. The SOC notes that the continuation of powers to direct people to isolate, including through the use of hotel quarantine, limits the right to humane treatment when deprived of liberty (s 30), but apart from the generic justification offered regarding all rights, adds only this for the specific right:

Like all rights in the Human Rights Act, the right to humane treatment when deprived of liberty can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

1. With respect, this is no justification at all, and is a simple restatement of the requirements of s 13(1) of the HRA, with no actual justification for the limitation based on the criteria in s 13 (2).
2. This is particularly disappointing in the context of the Commission’s recommendations made in October 2020 that this right is potentially unreasonably limited by the use of hotel rooms that do not provide access to regular fresh air (including through the use of opening windows and balconies).[[19]](#footnote-19) Since that report, several developments further emphasise the Commission’s concerns regarding the humane treatment of those in hotel quarantine:
* the Victorian *COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations*, December 2020, and its findings and recommendations regarding fresh air;[[20]](#footnote-20)
* the *National Review of Hotel Quarantine,* which considered the impact on mental health of hotel quarantine and noted that ‘hotel infrastructure should enable access to open spaces and fresh air independently (that is, without escort)’[[21]](#footnote-21)
* research about the aerosol/airborne transmission of COVID-19 (including emerging variants), particularly in hotel quarantine settings where there has been little or no access to daily fresh air or interaction between guests.[[22]](#footnote-22) These concerns were underscored by reports in June 2021 that a low risk traveller transiting through Queensland for 24 hours, may have contracted COVID-19 while forced into hotel quarantine with those returning from overseas hotspots.[[23]](#footnote-23)
1. The Commission acknowledges the government’s efforts, reflected in the Premier’s recent public comments, regarding replacing the hotel quarantine arrangement with purpose built facilities.
2. Nonetheless, such facilities are still many months away. In the meantime, hotels must be selected with adequate ventilation and access to fresh air to protect the health and wellbeing of all people deprived of their liberty by a public health direction.

# Electronic service of quarantine directions

1. The Explanatory Notes and Statement of Compatibility suggest that ‘minor improvements’ are necessary to confirm that directions under s 362H of the *Public Health Act* may be given by an emergency officer electronically. The SOC suggests that in practice, directions are usually issued electronically, such as by sending a direction to a person’s nominated email address. The SOC suggests this is justified due to the volume of potential close contacts of confirmed COVID-19 cases and the size of the geographical area in which directions must be given, which makes personal service of orders infeasible in many cases. The *Public Health Act* does not explicitly deal with the issue of how a quarantine direction notice may be given in writing. Also, the Act does not specify at what point in time a direction issued to a person via email or other electronic communication is deemed to have been received by the person. The Commission appreciates that clarifying these issues will remove doubt.
2. Nonetheless, as the SOC notes, the Bill limits several rights as it reverses the onus of proof by providing that, unless the contrary is proved, a direction given electronically is deemed to have been received by the person at the time the direction is sent to the person’s nominated email address. A person who is given a direction under section 362H and does not comply with the direction commits an offence and is liable to a maximum penalty of 100 penalty units.
3. The Bill further provides that a quarantine direction under section 362H that was sent by email or other electronic means before the commencement of the Bill is validly issued. The SOC suggests the provision is justified as it ensures there is certainty about the legal validity and effect of quarantine directions that have already been issued. It also ensures that any person who does not comply with a quarantine direction is subject to the penalties for non-compliance in section 362J of the Public Health Act. The SOC acknowledges this amendment may be seen as retrospectively imposing criminal liability on a person engaging the right to fair hearing (s 31) and rights in criminal proceedings (s 32).
4. The SOC discusses a potential limitation on the right to protection from retrospective criminal laws (s 35), but concludes the right is not limited as the changes are procedural in nature and do not form part of the penalty or punishment of an offender. This includes because in practice, a person is first contacted by phone, email, or in person, to advise that they are being issued with a quarantine direction.
5. However, the SOC does not discuss several issues that the Commission suggests require further justification:
* Whether a further safeguard would be to legislate the practice that reasonable efforts are made to contact a person by phone (or in person) as well as by email.
* It is unclear if this amendment will affect any prosecution or related proceedings currently on foot. If so, this would be a significant further limitation on the right to fair trial under s 31 of the HRA. We suggest further clarification is sought from the Minister on this point.
* The potential limitation on the right to equality, in circumstances where a person is unable to read or receive electronic communication in English such as because of a disability or because English is not their first language. The SOC (in the context of the protection against retrospective law) does discuss that in practice an emergency officer ‘may engage a translator or contact a family or friend of the person, to ensure the substance of the quarantine direction is communicated to the person in a way they understand’. While the SOC states that a ‘person must expressly consent to receive the direction electronically and nominate their preferred email or other unique electronic address to the emergency officer’, it does not appear to discuss a situation where a person does not consent to email communication. Based on the Bill and the discussion in Explanatory Notes, it appears any limitation on the right to equality may be reasonable because if a person does not consent to electronic communication, the document must be delivered in person, or by leaving or sending it by post, facsimile or similar means.[[24]](#footnote-24) Preferably, the SOC would have discussed this further.

# Quarantine fees

1. The SOC notes that from 1 July 2020, persons required to undertake hotel quarantine have been required to contribute to the costs of government accommodation by payment of a quarantine fee. The statement suggests that the entry of particular cohorts, such as critical and skilled workers and persons who support service-related industries such as tourism and education, is critical to the State’s economic recovery. To address these challenges, the SOC suggests amendments to the *Public Health Act* are required to improve the State’s ability to recoup quarantine-related expenses and ensure that Queensland’s quarantine system remains sustainable and responsive to changing public health and economic circumstances. In light of a ‘significant proportion’ of fees not being paid, the Bill inserts a power in the *Public Health Act* to allow a regulation to prescribe cohorts of travellers who will be required to pay quarantine fees before arriving in Queensland, and whether a cohort is eligible to apply for a waiver of quarantine fees.
2. The SOC acknowledges the right to equality is limited by these changes, as the regulation-making power contemplates different classes of people being treated differently in having to pay quarantine fees in advance. Similarly, freedom of movement is limited by potentially restricting someone from entering Queensland due to their inability to pay. This is compounded in that the regulation may prescribe particular persons are not eligible to apply for a waiver. No criteria is included for how such cohorts are to be determined.
3. Due to this lack of clear criteria to confine the regulation-making powers, the SOC concludes that ‘the specific impacts on human rights will be addressed in the human rights certificate accompanying any regulation made under the empowering provisions’.
4. It appears these amendments could be used in an arbitrary and discriminatory way. One of the principles cited by the SOC to justify the proposed amendments deeming a public health direction to be received electronically, is certainty of law.[[25]](#footnote-25) In contrast to that approach, the amendments regarding quarantine fees are unnecessarily ambiguous. The SOC acknowledges that the power allows the regulation to determine who, how and when a person may be liable to pay quarantine fees in advance with no clear criteria to guide that power. It is helpful that as subordinate legislation, the regulation will at least have to be accompanied by a human rights certificate. Nonetheless, the SOC acknowledges the lack of clarity, but provides not clear rationale for why such an open-ended approach has been taken:

It is difficult to assess the human rights implications that may arise from these amendments because the human rights implications will not crystallise until:

• a regulation has been made prescribing cohorts of travellers who are required to pay quarantine fees in advance of their arrival in Queensland; or

• the chief executive determines the amount that a person must prepay, the manner in which they must prepay the required amount, and/or the date and time by which the prepayment must be received.[[26]](#footnote-26)

1. The SOC states that the amendments are not arbitrary because:

The fee cannot be considered capricious, unpredictable or unreasonable, as it is directly related and proportionate to the legitimate aim of ensuring that the costs of mandatory quarantine are distributed fairly and are payable primarily by those who receive the benefits of the government services provided

1. Yet, by its open-ended nature, it seems the regulation making power could be used arbitrarily. In applying s 13 of the HRA to the amendments, the Commission is left unsure as to whether there is a clear connection between the purpose (‘to prescribe requirements for prepayment of quarantine fees is to improve the state’s ability to recoup quarantine-related expenses’) and the limitation on rights.
2. Less restrictive options and/or greater safeguards that could have been considered and justified in the SOC include:
* Providing that all persons may seek a waiver (e.g. providing that this cannot be removed via regulation) and specifying relevant considerations to be considered when a person seeks a waiver (which are discussed in the SOC) such as financial hardship and the vulnerability of the traveller.
* Providing for a clear review or appeal process to the decision to require payment in advance and/or not provide a waiver.
* Setting out criteria about which classes of traveller may be required to pay in advance (based on clear and reasonable evidence). The SOC discusses the potential for the power to only be used to seek fees in advance from cohorts who enter under a sponsorship agreement with an employer, but who would otherwise not be able to enter Queensland. The limit on rights would be more proportionate if the regulation-making power were limited to such circumstances. However, such protections have no force unless they are legislated.
1. Further, the ‘protections’ offered in the SOC are arguably not protections at all:
* Enabling full or partial refunds to people who pay in advance and do not come to Australia. As the premise of the legislation is to recoup the costs of hotel quarantine, to do otherwise would be unreasonable and disproportionate.
* Allowing a waiver of fees ‘unless a regulation prescribes that a particular cohort’ is ineligible. It appears the regulation could remove the ability to seek a waiver for all travelers.
1. The proposed approach is also out of step with the approach in other jurisdictions that have human rights legislation. For example, the ACT *Public Health Act 1997* provides in s 137, that the Minister must consider waivers in all situations. Further, that ‘if a person required to pay a quarantine fee asks for payment of the fee to be in instalments, deferred or waived, in considering the request, the Minister must take into account the person's circumstances, including whether they are suffering financial hardship.’. The Victorian Government also offers a process to apply for a waiver due to financial hardship.[[27]](#footnote-27)
2. The Commission recommends further justification be sought for the approach taken.

# The Statement of Compatibility overall

1. As the above discussion indicates, the SOC fails to adequately justify limitations on rights in several areas as per the proportionality assessment set out in s 13 of the HRA. The Commission is concerned that this indicates a lack of meaningful consideration of the significant limits on human rights and a level of complacency in relation to the need to explore potentially less restrictive options. For example the SOC states:

Although the continuation of the amendments made to the Public Health Act to support the Queensland Government’s health response to COVID-19 potentially limits many rights, in many instances the limitations are minor in nature and frequently consistent with internal limitations in the Human Rights Act. It should also be noted that many Queenslanders are already taking voluntary precautions to limit their potential exposure to COVID-19 and avoid spreading this disease to family members, friends and the broader community. The fact that many individuals are already undertaking these measures voluntarily suggests they are unlikely to impose an unjustified burden on human rights.

1. Further, in relation to the changes to quarantine fees, the Statement states:

This is not intended to provide an exhaustive list of how human rights may be limited by the enactment of the empowering provisions.[[28]](#footnote-28)

1. As Justice Ginnane of the Victorian Supreme Court observed when considering a challenge to public health directions, when basic human rights are being restricted during an emergency, it is particularly important that legal procedure is followed.[[29]](#footnote-29) The Commission is concerned that the SOC reflects an eroding of appreciation within government for the extraordinary limitation on human rights that these powers represent. The limitations on the rights contemplated by the Bill have already have applied in the following circumstances:
* Families separated, sometimes in circumstances where a loved one is terminally ill.
* The detention of persons in hotel accommodation that may not be fit for purpose, exacerbating underlying mental health issues.
* Significant restrictions on many areas of Queensland, including the greater Brisbane area being locked down for several days on a number of occasions.
1. The Commission appreciates that a number of safeguards exist to ameliorate these limits on rights. However, this does not mean that such powers can continue to be extended or new powers enhanced, without on every occasion, the government justifying that they remain the least restrictive way of achieving the important purpose of protecting all Queenslanders.

# Privacy of app data

1. The Commission notes the potential limitation on the right to privacy arising from the release of information collected under the government’s COVID-19 ‘Check In Qld’ app to police (and potentially other agencies). The app’s privacy policy along with QPS’ changed processes still provide insufficient safeguards in this respect.
2. The commitment by the government to consider legislating appropriate privacy safeguards is therefore welcome.[[30]](#footnote-30) The Commission suggests such legislation is prioritised.

# Conclusion

1. Thank you for the opportunity to comment on the human rights compatibility of the Bill. The Commission again acknowledges the success of the Queensland Government’s pandemic response in protecting the lives of people in Queensland. However, even when seeking to uphold the right to life, limitations on other human rights must be justified, including considerations of less restrictive options and the inclusion of safeguards to protect against the arbitrary use of such powers.

1. Adam Wagner, specialist adviser to the UK Parliament’s Joint Committee on *Human Rights inquiry into the government’s response to Covid-19* has raised similar concerns regarding the UK Government’s response, which has some elements in common with the approach in Queensland. See Adam Wagner, ‘Taking liberties: Covid-19 and the anatomy of a constitutional catastrophe’ *Prospect Magazine* (online, 26 March 2021) <https://www.prospectmagazine.co.uk/essays/adam-wagner-covid-lockdown-law-democracy-essay> [↑](#footnote-ref-1)
2. When considering other COVID legislation, the Committee recommended the Attorney-General clarify some issues raised regarding COVID-19 legislation in her second reading speech: Economics and Governance Committee, Parliament of Queensland, *Inquiry into COVID-19 Emergency Response and Other Legislation Amendment Bill 2021* (Report No 6, April 2021) 26. [↑](#footnote-ref-2)
3. Public Briefing to the Economics and Governance Committee, Parliament of Queensland, Brisbane, 5 July 2021 (Dr Jeannette Young). [↑](#footnote-ref-3)
4. Statement of Compatibility, COVID-19 Emergency Response Bill 2020, 22. [↑](#footnote-ref-4)
5. Statement of Compatibility, COVID-19 Emergency Response and Other Legislation Amendment Bill, 12. [↑](#footnote-ref-5)
6. Statement of Compatibility, COVID-19 Emergency Response and Other Legislation Amendment Bill, 12. [↑](#footnote-ref-6)
7. Introduced by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* [↑](#footnote-ref-7)
8. Part 12A extends the setting aside of the entitlement to compensation for loss or damage suffered as a result of the exercise of powers under the *Disaster Management Act 2003* related to the COVID-19 emergency. [↑](#footnote-ref-8)
9. Queensland Human Rights Commission, Submission to Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Inquiry into the Queensland Government’s health response to COVID-19* (July 2020) [↑](#footnote-ref-9)
10. *Human Rights Act 2019* s 38 and s 41. [↑](#footnote-ref-10)
11. *PJB v Melbourne Health (Patrick’s Case)* (2011) 39 VR 373, 389-95 [64]-[85]. Similar language is used on page 15 of the SOC when discussing arbitrariness in relation to the right to liberty. [↑](#footnote-ref-11)
12. The person may be able to seek a narrow review under the *Judicial Review Act 1991* [↑](#footnote-ref-12)
13. Via amendments made by the *Public Health and Wellbeing Amendment (State of*

*Emergency Extension) Act 2021* (Victoria), which creates new ‘Detention Review Officers’ [↑](#footnote-ref-13)
14. Under the *Anti-Discrimination Act 1991* or the *Human Rights Act 2019* [↑](#footnote-ref-14)
15. Similarly, the Chief Health Officer must revoke a public health Direction as soon as reasonably practicable after she is satisfied the direction is no longer necessary to assist in containing, or to respond to, the spread of COVID-19 within the community: *Public Health Act 2005* s 362E*.* [↑](#footnote-ref-15)
16. For example the Residential Aged Care Direction and Designated COVID-19 Hospital Network Direction. Mandating vaccination for influenza may be a lesser restriction on rights given the greater evidence base about its application across the population over several years. [↑](#footnote-ref-16)
17. The recent decision of the European Court of Human Rights in *Vavřička v Czech Republic* Applications no 47621/13 and five others may be relevant*.* The court found mandatory vaccination in a child care setting was a reasonable limitation on rights, but in the context of several safeguards that may not be present under existing Queensland law including: the power to make such restrictions was mainly provided in primary legislation, compensation was possible in the case of injury caused by vaccination, and there were exemptions. [↑](#footnote-ref-17)
18. Page 11 of the SOC. [↑](#footnote-ref-18)
19. Queensland Human Rights Commission, *Hotel quarantine: unresolved complaint under s 88 of the Human Rights Act 2019,* 15 October 2020. [↑](#footnote-ref-19)
20. *Board of Inquiry into Hotel Quarantine Inquiry* (Final Report and Recommendations, December 2020) vol 1. [↑](#footnote-ref-20)
21. Jane Halton AO, *National Review of Hotel Quarantine,* 23 October 2020. [↑](#footnote-ref-21)
22. See for example T Greenhalgh and others, ‘Ten scientific reasons in support of airborne transmission of SARS-COV-2’ *The Lancet* (online, 15 April 2021) <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00869-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2821%2900869-2/fulltext)> [↑](#footnote-ref-22)
23. Zach Hope, ‘”Potential to wipe out communities”: Queensland hotel failure dropped pandemic at the bush’, *Brisbane Times* (online,2 July 2021) < https://www.brisbanetimes.com.au/national/queensland/potential-to-wipe-out-communities-queensland-hotel-failure-dropped-pandemic-at-the-bush-20210701-p5860p.html> [↑](#footnote-ref-23)
24. By reference to Part 10 of the *Acts Interpretation Act 1954* [↑](#footnote-ref-24)
25. The SOC suggests that the criminal law ‘must be sufficiently accessible and precise’. [↑](#footnote-ref-25)
26. SOC, 59. [↑](#footnote-ref-26)
27. See <https://www.coronavirus.vic.gov.au/hotel-quarantine-contribution-fee#fee-waivers> [↑](#footnote-ref-27)
28. SOC, 59. [↑](#footnote-ref-28)
29. *Loielo v Giles* [2020] VSC 722 [10] [↑](#footnote-ref-29)
30. Baz Ruddick, ‘Queensland Police Service tightens internal protocols on COVID Check In app access after officers perform “lawful” data search’, *ABC News,* (online, 29 June 2021) <https://www.abc.net.au/news/2021-06-29/queensland-coronavirus-check-in-app-police-data-search/100249624> [↑](#footnote-ref-30)