

7 October 2020

Members of the Legislative Council of Victoria
Parliament of Victoria
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

Dear Members of the Legislative Council,

THE COVID OMNIBUS BILL WOULD BE THE MOST SIGNIFICANT VIOLATION OF HUMAN RIGHTS IN AUSTRALIAN HISTORY

Victorians have been living through a period of social and political restrictions on the Australian way of life that is unprecedented in our history. Since March 2020, Victorians have been required to comply with strict stay at home orders and restrictions on public activities and gatherings. These restrictions have been issued under the State of Emergency declared under the *Public Health and Wellbeing Act 2008* ('the PHW Act') and through powers exercised by the Chief Health Officer and other authorised officers.

Research by the Institute of Public Affairs has highlighted how the state government's response to COVID-19 has undermined the rule of law and in some cases has been potentially unlawful:

- In July, the Institute of Public Affairs obtained legal advice from Stuart Wood AM, QC that revealed that Victoria Police potentially acted unlawfully by refusing to enforce the Stay at Home and Restricted Activities directions against protesters at a Black Lives Matters march in the Melbourne CBD. The advice also notes that Victoria Police—and therefore Victorian taxpayers—could be exposed to civil claims that would add to the enormous cost of the state government's pandemic response.¹
- Research by the Institute of Public Affairs has also highlighted the government's arbitrary treatment of protesters. The Victorian Police Chief Commissioner argued in September that the decision to not enforce the directions against Black Lives Matters protesters was made on the basis that protesters were likely to become violent if the law was applied to them in the same way they were applied to every other Victorian. This was not a decision about law enforcement but a subjective policy decision.²

¹ Morgan Begg, 'Victoria Police potentially acted unlawfully in allowing Black Lives Matter protest' (Institute of Public Affairs Media Release, July 2020).

² Morgan Begg, 'Covid totalitarianism,' *The Spectator Australia*, 17 September 2020.

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- Research by the Institute of Public Affairs has demonstrated that the arrest of Ballarat woman Zoe Buhler was probably unlawful because posting a political opinion on social media about a lockdown protest does not constitute the criminal offence of incitement.³
- Research by the Institute of Public Affairs has highlighted the excessive restrictions which have not been proportionate to the public health risk. In April, the Institute of Public Affairs highlighted how emergency powers were being used to issue social and economic restrictions which exceeded social distancing requirements, and that Victoria was the jurisdiction which was by far the most draconian in its response.⁴ These restrictions included unnecessary bans on solitary recreational activities such as golfing or fishing, and inconsistent treatment of social visits to immediate family members, which was banned, and intimate visits to partners, which was allowed.

Economic analysis by the Institute of Public Affairs published in September estimated that 260,000 Victorians will be put out of work as a direct result of the state government's *Roadmap*, in addition to the 432,000 Victorians who have already lost their jobs because of the lockdown restrictions put in place since March. The total of just under 700,000 unemployed Victorians is equivalent to one-fifth of the entire Victorian workforce.⁵

It is clear that the concept of shared sacrifice has been completely discarded in Victoria. Research by the Institute of Public Affairs has highlighted how the private sector has paid the costs of the harsh lockdown measures while the public sector has been relatively insulated from the effects of the restrictions. A survey commissioned by the Institute of Public Affairs in May found at least 60% of Australians between the ages of 18 and 34 have either lost their job or had their pay or hours cut, while the Victorian government gave public sector workers a 2% pay rise plus an additional 'mobility payment' worth between \$757 and \$2,800 each.⁶ This has also been illustrated by how the restrictions have shut down private sector gardeners and mowers, while leaving local council gardeners and mowers free to continue operating.

A perception shared by many Victorians is that the State of Emergency has given the authorities licence to harshly enforce laws in a not proportionate manner as they relate to the emergency directions and have raised serious questions about potential abuses of power.

It is in this context that the Victorian state government has introduced the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020* ('the COVID Omnibus Bill'). The state government is seeking to give itself the power until 26 April 2021 to appoint any person to be an authorised officer to exercise emergency powers, and to give these authorised officers the additional power to detain 'high risk' individuals for an effectively indefinite period of time.

Institute of Public Affairs research and analysis has identified that the COVID Omnibus Bill is the most significant violation of human rights in Australian history for three key reasons:

³ Morgan Begg, 'Covid totalitarianism,' *The Spectator Australia*, 17 September 2020.

⁴ Morgan Begg, 'States of Emergency: An Analysis of COVID-19 Petty Restrictions' (Institute of Public Affairs Research Report, April 2020).

⁵ Cian Hussey, '260,000 jobs destroyed by Daniel Andrews' *Roadmap*' (Institute of Public Affairs Media Release, 8 September 2020).

⁶ Cian Hussey, 'We're not all in this together,' *The Spectator Australia*, 10 August 2020.

- 1) The COVID Omnibus Bill would give the Secretary of the Department of Health and Human Services the ability to appoint any person to be an ‘authorised officer’ who would have the authority to exercise arbitrary and draconian powers without accountability or oversight,
- 2) The COVID Omnibus Bill would give authorised officers the power to indefinitely detain Victorians based on subjective criteria, and
- 3) The COVID Omnibus Bill would abolish the ancient right of *habeas corpus*.

The Legislative Assembly introduced the COVID Omnibus Bill on 17 September 2020 and passed it on 18 September 2020. It is alarming that the Legislative Assembly introduced and passed legislation of this nature in less than two full sitting days. The Institute of Public Affairs notes that the Legislative Council is not scheduled to sit until 13 October 2020. Before that time each member of the Legislative Council should consider whether they want to be responsible for the most significant violation of human rights in Australian history.

1) The COVID Omnibus Bill would give the Secretary of the Department of Health and Human Services the ability to appoint any person to be an ‘authorised officer’ who would have the authority to exercise arbitrary and draconian powers without accountability or oversight

Under section 30 of the PHW Act, authorised officers are appointed by the Secretary of the Department of Health to exercise the powers under the PHW Act as per directions issued by the Secretary. The PHW Act currently limits the appointment of authorised officers to public servants who fall under Part 3 of the *Public Administration Act 2004*, but does not include any person unless the Secretary is satisfied that the person is suitably qualified or trained to be an authorised officer for the purposes of the PHW Act.

Where a State of Emergency has been declared under section 198 of the PHW Act, the Chief Health Officer can confer additional authority on authorised officers to exercise ‘emergency powers.’ The emergency powers, defined under section 200 of the PHW Act, include the power to detain or restrict the movement of any person or group of people in the emergency area; prevent any person from entering the emergency area; or give any other direction that the authorised officer considers is reasonably necessary to protect public health.

The COVID Omnibus Bill would dramatically expand the power of the Secretary to appoint authorised officers under section 30 of the PHW Act by inserting into the PHW Act the following provision under section 250:

Section 30 has effect as if the following subsection were inserted after section 30(1)—

(1A) In addition to the persons who may be appointed under subsection (1), the Secretary by instrument may appoint any of the following to be an authorised officer for the purposes of this Act—

- (a) a person the Secretary considers appropriate base on the person’s skills, attributes, experience or otherwise;
- (b) a person included in a prescribed class of person.

The power to appoint authorised officers would be unlimited and entirely at the discretion of the Secretary, who is only required to be satisfied that a person possesses the right ‘attributes’

or 'otherwise'. There is no requirement that the authorised officer would be trained or qualified in health control issues in any way.

Any person could be designated to exercise the powers of authorised officers, including multicultural community leaders. Jill Hennessy, the Attorney-General of Victoria, said 'leaders' of multicultural community organisations are specifically intended to be the kinds of people that would be suitable for appointment as an authorised officer. In Parliament on 17 September 2020, the Attorney-General stated in her Second Reading Speech to the COVID Omnibus Bill that the Secretary would be 'able to appoint individual employees of the Aboriginal Controlled Community Organisations' and 'individuals from appropriate multicultural health organisations' to assist, and where relevant and needed, to enforce public health directions. The creation of a separate class of Victorians on the basis of their racial or cultural identity is radical and unprecedented in this State.

2) The COVID Omnibus Bill would give authorised officers the power to indefinitely detain Victorians based on subjective criteria

Ordinarily, a person can be arrested by the police under a warrant or under reasonable suspicion that the person has committed a serious criminal offence, and only for the purposes of bringing the detained person before a magistrate.⁷ The COVID Omnibus Bill seeks to dramatically expand the circumstances in which a person can be detained for an effectively indefinite period of time for suspected breaches (including possible future breaches) of health regulations, which would themselves not normally amount to serious criminal offences.

The present scope of an authorised officers' power to detain any person for a public health purpose is already excessively broad. Under section 200 of the PHW Act, authorised officers are presently allowed to exercise emergency powers, including the power to 'detain any person or group of persons in the emergency area for the period reasonably necessary to eliminate or reduce a serious risk to public health.' Additionally, there are no external oversight mechanisms over how this power is exercised under the PHW Act. For instance, section 200(6) of the PHW Act requires the authorised officer to, at least every 24 hours during the period that a person is detained, review whether the continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.

However, the COVID Omnibus Bill will dramatically expand the emergency powers further by allowing an authorised officer to detain:

- any person that the authorised officer reasonably believes is likely to fail to comply with an emergency direction and is a close contact of a person diagnosed with COVID-19 not given clearance from self-isolation, and
- for so long as the authorised officer reasonably believes the person in detention is likely to fail to comply with an emergency direction.

What an authorised officer 'reasonably believes is likely' is an entirely subjective assessment about an event that may or may not happen in the future. Because of this subjective calculation of an undetermined future event, the time limit of any detention period effected

⁷ *Crimes Act 1958* (Vic) s 457-459.

under these proposed laws is effectively only limited to the whim of an authorised officer who may not be trained in law enforcement or health control.

3) The COVID Omnibus Bill would abolish the ancient right of *habeas corpus*

Habeas corpus is a fundamental common law right that secures the right of a detained person to be brought before a court to determine whether the detention is lawful. It is essential to the administration of justice because the right to be heard by a judicial officer makes it more difficult for the people exercising powers of arrest and detention to abuse those powers.

Alarming, there is no provision in the PHW Act or the COVID Omnibus Bill requiring a person who is detained by an authorised officer to be brought before a magistrate. While Order 57 of the *Supreme Court (General Civil Procedure) Rules 2015* provides, in ordinary circumstances, a power to issue a writ of *habeas corpus*, it is entirely untested in terms of how this would apply to the exercise of the extraordinary emergency powers under the PHW Act. It is possible that, in the absence of a specific protection in the PHW Act, the power to detain abolishes a right that predates the *Magna Carta*. The right of *habeas corpus* was first identified in the 1166AD *Assize of Clarendon* during the reign of Henry II, who wanted to phase out trial by ordeal in favour of evidence-based trials. Specifically, Clause 4 of the *Assize of Clarendon* provided that a robber, murderer, or thief when detained shall be brought before a justice and ‘there, before the Justice, they shall do their law.’⁸

An abolition or limitation of the right of *habeas corpus* would mean that a person may be detained by an authorised officer under a subjective determination about whether a person is likely to breach a direction in the future, but the detained person would not be able to appeal to a court to test whether the power was properly exercised. It is deeply dehumanising, degrading, and undignifying for a person to not only have their freedom arbitrarily removed, but to also be denied any right of review or appeal.

Due to this analysis the IPA believes the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020* is an unprecedented proposal to give the Secretary of the Department of Health and Human Services the ability to appoint any person to be an ‘authorised officer’ who would have the authority to exercise arbitrary and draconian powers, including the indefinite detention of Victorians, without accountability or oversight.

Kind regards,



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⁸ *Assize of Clarendon* (1166) c1 4.