7 October 2020

Mark Gepp MLC
Scrutiny of Acts and Regulations Committee
Parliament of Victoria, Spring St
East Melbourne VIC 3002

By email only to: Helen.Mason@parliament.vic.gov.au

Dear Mr Gepp,

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

Thank you for the opportunity to provide you with our feedback. The Law Institute of Victoria (‘**LIV’**) provided comments to the Attorney General to indicate our general support of *the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020* (‘**Omnibus Bill**’). We acknowledge that the Omnibus Bill proposes amendments to the *COVID-19 Omnibus (Emergency Measures) Act 2020* (**‘Omnibus Act’**) and other Acts to extend and modify the operation of certain temporary measures enacted for the purpose of responding to the COVID-19 pandemic.

In many regards, we welcome the Omnibus Bill as the LIV has been advocating for the need for certainty around the current Omnibus Act and the extension of many of its provisions. The LIV acknowledges and supports the suspension of certain procedural rules and laws to provide courts and other justice system entities (including tribunals, prisons and youth justice facilities) the flexibility to temporarily modify their practices to minimise the transmission risk of COVID-19 in the community and to prioritise essential matters.

We outlined some concerns in relation to the proposed amendments to the temporary changes to the *Public Health and Wellbeing Act 2008* as outlined in the Omnibus Bill, which the LIV has raised with the Attorney-General on 17 September 2020. The Attorney-General provided a detailed response on 25 September 2020.

Division 2 – Emergency Powers Measures

Authorised Officer

The Omnibus Bill provides for the Secretary to designate an ‘Authorised Officer’, which in turn have extended powers.[1] The expansion for the Secretary to appoint a person as an ‘Authorised Officer’ is quite broad being based on their skills, attributes, experience or a prescribed class of person.[2] Such wording provides concerns over potentially underqualified individuals making assessments over the likelihood of refusal or failure to

[1] *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020* (‘Omnibus Bill’), s 250.

[2] Ibid, s 250.

Law Institute of Victoria ABN 32 075 475 731
Level 13, 140 William Street, Melbourne VIC 3000
GPO Box 263, Melbourne VIC 3001, DX 350 Melbourne
T 03 9607 9311 F 03 9602 5270
E lawinst@liv.asn.au W www.liv.asn.au

comply with the directions, which have the severe consequence of being detained. It is not clear if they have been appropriately trained to understand relevant considerations such as family violence, mental illness, disability, homelessness, and cultural sensibilities for Aboriginal or culturally and linguistically diverse communities ('**CALD communities**').

The LIV raised these concerns with the Attorney-General and received the following response:

'Currently, only public servants employed under the Public Administration Act 2004 can be appointed as Authorised Officers. This doesn't include public servants employed under other legislation, such as Victoria Police officers, Protective Service Officers or WorkSafe Inspectors. The Bill will provide flexibility to appoint other classes of persons as Authorised Officers, where the class is prescribed in regulations and the Secretary DHHS considers the individual is suitably qualified and trained for appointment. This will enable police and others, who are already actively supporting the response to COVID-19, to be given additional powers to support effective monitoring, compliance and other public health response activities. For example, this could enable WorkSafe inspectors to enforce Chief Health Officer directions during workplace inspections, as an additional tool to quickly and effectively respond to COVID-19 risks in the workplace.

The additional flexibility provided for by the Bill would also enable persons not employed in the public service who have specialised expertise, experience or other attributes to be appointed as Authorised Officers to support particular public health response activities. For example, this could enable suitable persons to be appointed to assist with contact tracing with Aboriginal or CALD communities, to ensure this activity is completed in a culturally safe and appropriate way.'

Whilst the LIV accepts these intentions as reasonable, the broad and generic wording within the Bill allows for appointment of an Authorised Officer well beyond the examples provided in the Attorney-General's response. As such, to ensure public confidence in the purpose of the legislation, the LIV recommends a more prescriptive list of criteria to ensure appointments of Authorised Officers are only for those who are appropriately qualified; such as specifically defining Victoria police officers, protective service officers and WorkSafe inspectors.

The LIV also questions whether it might be more appropriate that culturally appropriate persons from Aboriginal or CALD communities who would otherwise not be qualified authorised officers, be engaged to assist qualified authorised officers as opposed to granted broad powers of detention.

Reasonable belief

Under the new section 200A(1), if an Authorised Officer gives a direction they believe is 'reasonably necessary to protect public health',[3] and they 'reasonably believe' the person is a high risk person 'likely to refuse or fail to comply with the direction',[4] the high risk person can be subject to detention.

[3] *Public Health and Wellbeing Act (Vic)* s 200.

[4] Omnibus Bill, ss 200 (A) (2), 200 (3)(ii).

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The LIV find this standard to be too subjective and instead prefer 'reasonable likelihood' as the threshold, due to its objectivity.

Detention

For the purposes of detention,[5] the 'period' is that which the Authorised Officer considers is reasonably necessary to eliminate a serious risk to public health,[6] whereas 'detention' is not clearly defined.

The LIV have voiced our concerns to the Attorney-General that individuals with mental impairments will be disproportionately likely to be detained under these reforms, particularly section 200A(3), as an Authorised Officer may hold a reasonable belief that a person who is mentally impaired 'is likely to refuse or fail to comply' due to their impairment. Detention of persons with mental impairments would ordinarily come under the protection and authority of the *Mental Health Act 2014* (Vic), which affords protections of a person's rights, most notably the right to appeal, review and to be provided with written information about these rights.[7]

However, due to the exclusion of the operation of any Act contrary to the Bill (save for the *Charter,* the Omnibus Act or the *Constitution Act*), the rights afforded under the *Mental Health Act 2014* (Vic) would not be guaranteed and there is no express right to be detained in a hospital. The LIV queried with the Attorney-General whether there were guarantees that a facility for detention of a person with a mental impairment would provide psychiatric care

The Attorney-General's response in regards to our concerns with detention:

'*Persons issued with a detention notice may be detained in a range of suitable locations, such as the person's residence, a hospital (for example, where the person is unwell and requires medical care) or emergency accommodation (for example, where the person cannot be supported to safely isolate or quarantine in their home). The suitability of the accommodation and consideration of supports the person may require could take account of any particular vulnerabilities the person may have – including, for example, mental impairment or other health conditions.'*

These proposals are proportionate in response to a person who is aware they have contracted COVID-19 or been in close contact and yet refuse to isolate, putting the community at risk. However, these forms of detention are not sufficiently defined into the Bill, nor set out clearly in section 200 *Public Health and Wellbeing Act 2008 (Vic).* The LIV would support a clearer definition of 'detention' that aligns with ensuring adherence by Authorised Officers of the Bill's intentions as outlined by the Attorney-General above.

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[5] *Public Health and Wellbeing Act 2008* (Vic), s 200(1)(a).
[6] Ibid, s 200A (3).
[7] *Mental Health Act 2014* (Vic), ss 12-13.

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The LIV recommends the 'mental health principles' under the *Mental Health Act* be referred to in the Omnibus Bill.[8] There should not be a distinction in quality of treatment of a mentally impaired person based on whether due to their mental impairment putting themselves and others at risk, they have been involuntarily detained under the *Mental Health Act* or the *Public Health and Wellbeing Act*.

Additionally, the LIV believes the word 'detain' depicts a negative tone (akin to imprisonment), as the purpose of such detention (containment) is ultimately for the protection of public health. Perhaps "quarantine" or "health quarantine" may have been a better and less threatening word. Currently, people travelling from overseas and even interstate are required to quarantine. This is well understood in the community and does not have the connotation of guilt or offence. It is and should be, a precautionary measure to prevent escalation of Covid-19 in the community.

Detention periods

The LIV understands that Corrections Victoria have successfully kept COVID-19 from spreading through the prison system despite approximately 28 prisoners testing positive on arrival. They have managed to do this by enforcing a 14-day isolation quarantine, based on DHHS guidance. As such, the LIV believes that it is unreasonable for the proposed section 200A(3) to the *Public Health and Wellbeing Act* to not have a defined maximum detention period for 'high risk persons'. The wording can be the same as 1(4) and (5) of the Direction and Detention Notice issued to new arrivals to Victoria from overseas.

The LIV's concerns over emergency power extensions are based upon presumptive assessments which by design, impact upon a citizen's rights and freedoms and must be legal, necessary, proportionate and any reduction in rights must take into account the disproportionate impact on specific populations or vulnerable groups. They must be strictly necessary to achieve a legitimate objective, based on scientific evidence, proportionate to achieve that objective, neither arbitrary nor discriminatory in their application, of limited duration, respectful of human dignity and subject to revision.

The LIV thanks you for this consultation and welcomes any further comments, questions or queries.

Yours sincerely

Sam Pandya
President

Adam Awty
Chief Executive

[8] Ibid, s 11.

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