VICTORIAN BAR

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

Via email: helen.mason@parliament.vic.gov.au

Dear Mr Gepp,

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

The Victorian Bar (**the Bar**) welcomes the opportunity to provide comment on the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill* 2020 (**the Bill).**

The Bar, in conjunction with its Human Rights Committee, has had the opportunity to consider the Bill, which was passed at legislative assembly on 17 September 2020.

We wish to raise a number of concerns after having considered the Bill, in particular, in relation to the temporary changes proposed to the *Public Health and Wellbeing Act 2008:*

1. In general, we have no objection to Part 3, Divisions 1, 2 and 3[1] or to the extension in Part 4 of the Bill of expiry dates of the authorising powers for special measures, originally enacted in April 2020 for a period of 6 months – the expiry dates are, in the main, now to be 26 April 2021.[2]

2. Clause 15 - WorkSafe powers

2.1 Under proposed sections 190 and 191 of the *Occupational Health and Safety Act 2004*, a failure to comply with a direction relating to the COVID-19 pandemic given under section 200(1)(d) of the *Public Health and Wellbeing Act 2008* is taken to be 'an activity that involves an immediate risk to the health or safety of a person'.

2.2 Section 200 of the *Public Health and Wellbeing Act* lists 'emergency powers' that the Chief Health Officer may authorise when a state of emergency has been declared under s198 of that Act. A direction under

1 Amendments to *Children, Youth and Families Act 2005*, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* and *Magistrates' Court Act 1989*, respectively.

2 Some measures (such as permitting municipal council meetings by electronic means) could even be made permanent, but that it is a policy choice, not a human rights issue: Bill, clause 34; *Local Government Act 2020*, s393.

s200(1)(d) is any direction (not being detention or a restriction on movement, given under ss200(1)(a)-(c)) that 'the authorised officer considers is reasonably necessary to protect public health'.

2.3 Failure to comply with an emergency power direction will thus be defined as satisfying the trigger for the exercise of powers in ss112 and 120 of the *Occupational Health and Safety Act 2004*. Under those existing sections, WorkSafe inspectors may issue prohibition notices or give directions where they 'reasonably believe' that an activity is occurring at a workplace that involves an immediate risk to the health or safety of a person.

2.4 In analysis of the above, the proposed sections 190 and 191 of the *Occupational Health and Safety Act 2004* are consequential on:

a) the declaration of a state of emergency under the *Public Health and Wellbeing Act 2008*;

b) the exercise of emergency powers under that Act; and

c) failure to abide by a direction under that Act considered reasonably necessary to protect public health.

2.5 In these circumstances, the proposed amendments to the *Occupational Health and Safety Act* are not themselves objectionable, provided the powers under the *Public Health and Wellbeing Act 2008* are appropriately defined and exercised.

3. Clause 16 - Public Health and Wellbeing Act

3.1 The Bar's chief concerns arise with proposed amendments to the *Public Health and Wellbeing Act.* Under proposed section 250 of the *Public Health and Wellbeing Act*, the Secretary of the state Department of Health and Human Services will be authorised to appoint non-public servants as 'authorised officers' under s30 of the *Public Health and Well-being Act* for the purposes of that Act. It appears that it is intended that this might permit appointment of police officers, protective service officers (**PSOs**) and interstate persons.[3]

3.2 The criteria for these special appointments are to be (s 30(1A)):

a) "a person the Secretary considers appropriate for appointment based on the person's skills, attributes, experience or otherwise; or

b) a person included in a prescribed class of person."

[3] The Attorney-General stated this in the Compatibility Statement under the Charter of Human Rights and Responsibilities accompanying the introduction of the Bill (Victoria, *Hansard,* Legislative Assembly, 17 September 2020 (Ms Jill Hennessy): 'potentially including health service staff, WorkSafe inspectors, sworn Victoria Police members and Protective Services Officers (PSOs).' And 'It is contemplated that police officers and PSOs could be appointed as authorised officers under the PHW Act.'

3.3 The words '*or otherwise*' in proposed s 30(1A) are too broad and non-specific – if a person cannot satisfy the requirement of appropriate *skills, attributes or experience*, they should not be vested with the powers of an authorised officer.

3.4 Otherwise, the only constraint on who is appointed as an authorised officer will be the present requirement in s30(2) of the *Public Health and Wellbeing Act* governing appointment of authorised officers, that will remain:

> 'the Secretary must not appoint a person to be an authorised officer under this section unless the Secretary is satisfied that the person is *suitably qualified or trained to be an authorised officer for the purposes of this Act*.'

3.5 The requirements in s30(2) (generally expressed as they are) thus will have a very significant role in the exercise of the power to appoint authorised officers.

3.6 Recalling that the function of authorised officers under the *Public Health and Well-being Act* is to exercise a discretion to give any direction which the authorised officer 'considers is reasonably necessary to protect public health', the capacity to appoint persons who are not trained health professionals is of concern.

3.7 More particularly, the appointment of PSOs would be of special concern. Considerable criticism has been made of PSOs by the Independent Broad-based Anti-corruption Commission (IBAC) in its report in 2016,[4] to which no detailed public response has been made. As is well-understood, PSOs have limited training, much less than police. Neither Police nor PSOs are trained in health matters.

3.8 Proposed section 252 will introduce a power of detention as temporary section 200A. The pre-conditions to its exercise will be:

a) the declaration of a state of emergency under s198 of the Act;

b) in the belief by the Chief Health Officer that it is necessary to eliminate or reduce a serious risk to public health, the authorising under s199 of the Act of authorised officers to exercise emergency powers;

c) the exercise of those powers under ss200(1)(a)-(d) of the Act by detaining persons 'in the emergency area *for the period reasonably necessary to eliminate or reduce a serious risk to public health*' [an objective standard], or restricting movement or giving 'any other direction that the authorised officer considers is reasonably necessary to protect public health' [ancillary directions, on a subjective standard]. These are existing powers; and

d) failure to abide by a direction considered reasonably necessary to protect public health;

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4 *Transit Protective Services Officers: An exploration of corruption and misconduct risks* (Independent Broad-based Anti-Corruption Commission; December, 2016).

e) the authorised officer reasonably believes that a person who is required to comply with the direction

i) is a *high risk person*; and

ii) is likely to refuse or fail to comply with the direction' [a new condition];

f) the person is *high risk* if—

i) the person has been notified that they have been diagnosed with COVID-19 and have not been given clearance from self-isolation; or

ii) they have been notified that they are a close contact of a person who has been diagnosed with COVID-19 [a new condition].

3.9 The duration of detention is conditioned on the officer's reasonable belief that the detained person — (i) is a high risk person; and (ii) is likely to refuse or fail to comply with the direction. Thus, in the usual circumstance, when the self-isolation period expires, the basis for the reasonable belief that supported detention would expire. However, the legislation does not fix any maximum period of detention or set out any objective standard by which to measure it.

3.10 There is no provision for external review of such detention or objective assessment of the authorised officer's belief. Under international human rights law and the Charter of Human Rights and Responsibilities (**the Charter**), 'reasonable belief' is not a safe or sufficient basis for the imposition of detention lasting up to 14 days (i.e. the conventional quarantine period), unreviewable by any objective standard or by external person, but for the Supreme Court's capacity to grant an order in the nature of *habeas corpus*.

3.11 Just as detention in custody following arrest, there should be a statutory requirement for a person detained under proposed s200A to have the grounds for the detention objectively evaluated and able to be reviewed.[5] The new power picks up the existing process of review every 24 hours of a detention order made under s 200A(1)(a)[6], but continues to base it on the subjective, reasonable belief of an authorised officer (not necessarily the original officer). The test on internal review will be changed to:

'because a designated authorised officer reasonably believes that the [detained] person —

(i) is a high risk person; and

(ii) is likely to refuse or fail to comply with the direction.'

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5 Compare s 464A of the *Crimes Act 1958* (which provides that every person taken into custody for an offence must be released (either unconditionally or on bail) or brought before a bail justice or the Magistrates' Court within a reasonable time of being taken into custody.

6 There is regular review of a primary detention order made under existing s 200(1)(a) in s 200(6), which provides: 'An authorised officer must at least once every 24 hours during the period that a person is subject to detention under subsection (1)(a) review whether the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.' This imports an objective standard of review.

3.12 Once an extraordinary and personal detention order has been made, this should be reviewed by fresh eyes and on an objective basis.

3.13 Otherwise, the detention would be arbitrary and contrary to s21(2) of the Charter ('*a person must not be subjected to arbitrary … detention'*) and the limitation on the right to freedom of movement (s12 of the Charter: '*every person lawfully within Victoria has the right to move freely within Victoria …'*) would not be a reasonable limit that can be demonstrably justified in a free and democratic society, under s7 of the Charter. Likewise the right to privacy (s13 of the Charter) is engaged (*right not to have privacy, family [or] home … arbitrarily interfered with*).

3.14 The Statement of Compatibility tabled with the Bill on 17 September 2020 does not descend to the level of detail necessary to address these impacts properly. It states, frankly, that

> 'It is not possible to foresee every potential use of the powers under any declaration of a state of emergency. The full scope of the rights that will be engaged by the exercise of authorised officers' powers will depend on exactly how the powers are used and implemented.'

3.15 This is unsatisfactory. Accepting, as the Statement of Compatibility notes, and as s38(1) of the Charter requires[7], 'At the time the powers are exercised, decision-makers will be required to give proper consideration to the precise ways in which rights will be limited', it is not sufficient to rely on s38 of the Charter to control individual, potentially untrained and unprofessional authorised officers, if the head of power that is to be exercised itself cannot be justified under the Charter. Unconstrained and undefined subjective powers naturally invite the tendency to exercise them to the fullest, and in breach of human rights.

4. Summary of recommendations

4.1 **Recommendation 1**: Clause 16 of Bill, proposed s250 of the *Public Health and Wellbeing Act***,** to insert temporary s 30(1A) in that Act. Proposed s 30(1A)(a) should be amended by deleting 'or otherwise'.

These persons will be able to exercise extraordinary and wide ranging powers; the qualifications for appointment should be specified in the Act and these qualifications should be relevant to the public health functions which authorised officers are to serve.

4.2 **Recommendation 2**: Clause 16, proposed s253 of the *Public Health and Wellbeing Act*, to insert temporary s200A in that Act. The powers of detention for failure to abide by a public health direction are exercisable on the basis of only an authorised officer's 'reasonable belief'. This should be amended as follows:

[7] 'It is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a human right'.

a) Any exercise of the powers under s200A should be reviewed by the Chief Health Officer or senior delegate within a short specified period (e.g. within a reasonable time and in any case no longer than 24 hours).

b) The initial exercise of the powers under s200A and any continued detention should be reviewed against an objective standard (e.g. reasonable likelihood), not the reasonable belief of an authorised officer.

c) The power should be expressly conditioned on a test of the least restrictive means reasonably available in the circumstances to achieve public health and safety.[8]

Please do not hesitate to contact me if you have any queries in relation to this matter.

Yours sincerely,

Katherine Lorenz

Chief Executive Officer

The Victorian Bar Inc.

[8] As per Charter s 7(2)(e).