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The Victorian Government introduced the Public Health and Wellbeing Amendment Bill 2021:

Legal Background-On March 16th 2020, the Victorian Government officially declared a 'Covid-19' 'State of Emergency' (SoE), under *The Public Health and Wellbeing Act (2008)*. This gave the Chief Health Officer (CHO) expansive powers to make 'Orders' (essentially emergency 'laws') to restrict and override 'normal' rights and freedoms in any area deemed necessary to deal with 'Covid-19'.

Originally, *The Public Health and Wellbeing Act (2008)* granted a State of Emergency for a maximum of one month, with each proposed month-long extension having to pass through both Houses of Parliament, renewable for a maximum of 6 months. Thus, in order to retain the State of Emergency powers after the first six months of monthly extensions, the Government had three options: a) amend the Act to extend the 6 month maximum limit, b) amend the Act to permanently remove the maximum limit of an SoE, or c) end the Covid-19 pandemic and declare a new and different 'State of Emergency'.

The Victorian Government extended the four-week SoE, twenty times. Twice, this required the Government to negotiate with Upper House MPs Fiona Patten (Reason Party), Samantha Ratnam (Greens) and Andy Meddick (Animal Justice) to amend the Act, extending the maximum continuous period for the 'Covid-19 pandemic' SoE. Initially the Government sought an 18-month maximum limit, but settled on 12 months. The second time, the Government sought an additional 12 months, but settled on 6 months with the proviso that rather than seeking another extension for the 'Covid-19 Pandemic State of Emergency', they would drastically amend the Health and Wellbeing Act to create new, permanent pandemic powers.

This deal meant that the 'Covid-19 pandemic SoE' would end on the 15th of December, and that prior to this date, if the Government failed to pass an amended 'Health and Wellbeing Act' for the permanent management of 'Covid-19', all the CHO 'orders' would cease to have legislative force, meaning that all Covid-19 vaccine 'mandates', lockdown rules and 'passport' requirements would suddenly be illegal.

Political background

Civil unrest over the Victorian Government's perceived misuse and mismanagement of 'emergency powers' during the Covid-19 pandemic has been steadily growing over the past 12 months. However, as the expiry date for those emergency powers loomed, the Government tried to pass their HWBA, which critics argued, granted the Premier "unchecked permanent pandemic powers to rule by decree". This (and a worldwide movement against segregation and coerced Covid-19 vaccination), resulted in the largest public protests against a sitting government in Victoria's history.

Sharp criticism of the Government's Bill also arose from typically neutral legal and human rights bodies, including the Victorian Equal Opportunity & Human Rights Commission, the Victorian Bar Association the Victorian Institute of Law. All argued that democratic governments can only enact emergency powers to make laws without parliamentary approval or regard to ordinary rights and freedoms, whilst also maintaining legitimacy, by honouring two principles; they must only be used in exceptional circumstances as a last resort, and they must only ever be temporary in nature. "The remarkable trait of a liberal democracy is that while the powers to cope with emergency provide the potential for authoritarian rule, such powers are terminated with the restoration of normalcy".^[1]

In short, the general consensus amongst critics was that the Government's Bill failed on both counts because the 'urgency and need' to bypass parliament to create 'rapid-response' laws to deal with the Covid-19 pandemic, as well as the 'exceptionality' or 'uniqueness' of the pandemic environment had long-since passed.^[2]

The Government and their supporters disagreed, arguing that the proposed HWBA was necessary and proportionate considering that Covid-19 was a permanent feature of life and that other types of emergencies were likely to arise. Further, recent research indicated that the government has popular support; 75% approved of segregation laws such employees being banned from entering their employer's workplace unless fully vaccinated and over 63% approved of the way the Premier was handling his job.^[3] In order to pass their HWBA, the Government only needed the same three cross-benchers who had granted them the extensions (Patten, Ratnam & Meddick). However, when ex-Labor MP Adem Somyurak announced his intention to attend the parliament and vote against it (which would sink the Bill entirely), the Government struck a deal to make 6 minor changes to their HWBA with 'Transport Matters' MP, Rodney Barton, in exchange for his vote. Critics said the changes did not address the fundamental dangers inherent in the HWBA, supporters applauded them as magnanimous.

The Premier announced that within weeks, the circumstances wherein

Summary of the final Public Health & Wellbeing Amendment Act (2021):

The PHWA(2021) law shifts responsibility for declaring pandemics from health officials to the Premier.

“The overriding concern is that the Bill confers on the Health Minister what is, in a practical sense, an effectively unlimited power to rule the State by decree, for an effectively indefinite period, and without effective judicial or parliamentary oversight. The Bill confers powers that can be appropriately described as draconian in authorising virtually unlimited interference with the liberties of Victorian citizens. Yet the Bill lacks the appropriate checks and balances to ensure the proper exercise of these powers. This represents the biggest challenge to the rule of law that this State has faced in decades.”

Emergency Powers are triggered

The Minister’s power is available when a pandemic declaration made by the Premier is in force. It can be expected that such a pandemic declaration will be in force for the foreseeable future.

The scope of the power is extremely broad. The Minister may make “any order” that the Minister “believes is reasonably necessary to protect public health”. The content of the orders is effectively unlimited.

-The Bill expressly allows the Minister’s orders to discriminate on the basis of an attribute within the meaning of the Equal Opportunity Act. These attributes include, among many others, political beliefs. Thus, the Bill enables the Minister to make orders targeting people on the basis of their political beliefs if the Minister believes this is reasonably necessary to protect public health.

The practical ability to challenge these orders in the Supreme Court is likely to be very limited because the Bill confers a very broad discretion premised on the subjective belief of the Minister that the order is “reasonably necessary”.

The orders are subject to disallowance by Parliament only if the Scrutiny of Acts and Regulations Committee recommends it. The Committee can only recommend disallowance on narrow grounds, effectively confined to the order being beyond power or breaching the Charter of Human Rights and Responsibilities Act. The Committee has no power to recommend disallowance because it disagrees with the order. Further, the government of the day may have a majority on the Committee, as is the case presently.

The Bill also contains many other problematic provisions, including conferring very broad power on “authorised officers” without effective review or oversight, granting police powers to enter premises without a warrant and abrogating privilege against self-incrimination.

WHAT ARE THE 'BAD BITS'?

The concerns listed by groups such as the Law Institute of Victoria, which represents the majority of the lawyers in VIC, listed 32 recommended changes but we’re going to focus on the main issues

> On the basis of the Premier’s personal opinion of risk, he/she may declare a pandemic even if the disease is only of 'pandemic potential', isn't actually in VIC at the time and there's no clear definition of what a 'pandemic' is, only that the Premier must be reasonably certain there is a risk. This is a low bar legally and given it's worded as the Premier's opinion of risk, it's difficult to challenge in court.

> Once declared the Health Minister can then make 'any Pandemic Orders they deem reasonably necessary'. To quote a QC: "any means any". These are incredibly broad powers that are in no way specific to managing a pandemic disease response and since they're also an opinion on 'reasonably necessary' also very hard to challenge in court.

> The 'Independent Oversight Committee' will be picked by the current government and has literally no power to do anything but look at what is being done. If they disagree, they can't do anything. They offer a checkbox option and literally nothing else.

> Although SARC is a Parliamentary committee made up of current VIC MPs, it's only got 7 members and of those 7 the government holds 4 seats, as well as the Chair being a Labor MP. You'd need the government to vote against itself to recommend a Pandemic Order be cancelled.

On the off chance this happens, they have then made it so that it must be approved by BOTH houses of Parliament - one of which the government controls. This is also unusual - normally it can be cancelled by only a single house of Parliament voting to do so.

This is a key difference to NSW who have a COVID oversight committee that is NOT government controlled and is chaired by a Greens MP.

> The penalties available through this legislation are being considered disproportionate and extreme when positioned as 'health response'.

The maximum penalty for basic breaches are \$21,000 for an individual and \$109,000 for a business. It also creates 'aggravated' offences that are if you 'fail to comply with a pandemic order' (which means of any kind) or if you 'ought to know' (actual words) that failing to comply is likely to cause a serious risk of health to another individual. The maximum penalty for aggravated offenders is \$90,000 for individuals, \$454,000 for businesses and up to 2 years of jail time. It's very questionable how effective a "discount" fine would be at levels even half of that.

> The clause that allows Pandemic Orders to be based of attributes protected under the Equal Opportunity Act. In no uncertain terms they have taken protection legislation and enabled it to be used as a checklist for who can be targeted with Pandemic Orders, without explanation.

We've seen VERY loose attempts to explain why it's in there, they may need to do 'by industry' mandates, but this does not explain why they needed to include the entire list as an option including race, religion, sexual orientation, disability and political beliefs. Then add in a clause that any Pandemic Order made targeting these isn't discrimination.

EG If they determined people of certain race or disability were at higher risk, they can make Pandemic Orders targeting them. If you had a HIV2.0 happen in 10 years, whoever happens to be Premier and hold these powers could literally make rules based on sexuality and there's nothing anyone could do to call it discrimination if it's a 'risk to others health'.

These powers STAY. No matter who the Premier is. Intent means literally nothing in the eyes of what is technically capable under laws, that's why not having them be sloppy, rushed messes is important.

> There's currently nothing specific that legally ensures all Pandemic Orders must comply with our Human Rights Charter. This has been a key feedback from all Human Rights groups that it must be amended.

The overriding concern is that the Bill confers on the Health Minister what is, in a practical sense, an effectively unlimited power to rule the State by decree, for an effectively indefinite period, and without effective judicial or parliamentary oversight:

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HOW DO THE PANDEMIC LAWS WORK?

- * The laws give the premier the power to declare a pandemic "on reasonable grounds" after consulting the CHO and extend it for three months at a time.
- * Once declared, the health minister can make pandemic orders after consulting with the CHO.
- * The orders can differentiate between classes of people based on characteristics such as age and vaccination status, relevant to the public health risk.
- * Reasons behind the orders and the CHO's advice must be published. If orders differ from health advice, the reasons must be published.
- * An expert Independent Pandemic Management Advisory Committee will review orders and provide advice to the health minister, which will also be published.
- * The bill also introduces safeguards for the collection and use of QR code and contact tracing data, and a reduction in fines for those who meet eligibility and hardship criteria.

6 amendments

- Creation of a cross-parliamentary 'Pandemic Declaration Accountability and Oversight committee' led by a non-government MP, which can recommend orders be disallowed.
- Ability for orders to be blocked by a majority of both houses of parliament if recommended by the committee and/or the panel of experts.
- A two-year review by legal and health experts.
- A new independent merits review scheme for appeals against detention orders.
- Victorian Ombudsman empowered to receive complaints about detention orders. Confirms the parliament or a committee can refer matters to the Ombudsman for investigation.
- Removal of an aggravated, jailable offence for intentionally or recklessly breaching health orders.

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