

Submission to Health and Environment Committee, Queensland Parliament concerning Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Bill 2020

1. Summary of Submission

- 1.1. Given that Queensland is likely to need to rely on the advice of the CHO for some time, the Bill is an inadequate response to the government's responsibility for good governance including: accountability, transparency, and publicity.
- 1.2. This submission urges Parliament to adopt in the Bill a balance between desirable manoevrability in government decision-making and the principles of good governance.
- 1.3. The Bill should be reconsidered to acknowledge the development beyond an emergency situation, to a 'new normal', and incorporate effective measures to:
 - a. Provide oversight of and accountability for directions to Parliament;
 - b. Record and publicise directions in accordance with legislative norms; and
 - c. Provide transparency of law-making overall.

2. From emergency to long term law-making

- 2.1. As a Western liberal democracy in the Westminster tradition, Queensland enjoys a high standard of accountability within governance. Our law making and enforcement systems are designed with checks and balances whose purpose is to distribute power and thereby hold decision-makers to account. Part of the function of government, however, is to be responsive to the needs of the population. In the case of emergency, this can entail a suspension of regular processes in favour of manoevrability.
- 2.2. The *Public Health Act 2005* provides for emergencies, with associated powers. Declarations are expected to last for seven days, unless extended. This gives a clear indication of the originally anticipated temporal limitations on the Chief Health Officer's (CHO) powers under the Act—the CHO being a member of the executive branch of government.
- 2.3. An emergency declaration under the *Public Health Act* involves a host of powers in a range of officers. Since the initial declaration of the COVID pandemic as an emergency, the Queensland Parliament has passed amendments to the *Public Health Act* and various regulations to give the CHO additional powers including, under s362B, the power to give directions. In addition, the emergency has been extended by regulation on a number of occasions and Parliament now seeks a further extension via the Bill.
- 2.4. In short, the CHO has been given expanded powers for an extended period of time, well beyond the 'emergency' framework contemplated within the public health statute, and beyond the paramountcy of Parliament.
- 2.5. It is not surprising that the CHO has authority to take charge of public health. The challenging feature of the current regulatory arrangement is the enormous scope and consequences of the directions *in the absence of parliamentary scrutiny*. This is especially so in terms of how we ordinarily understand the checks and balances of law-making.

There are three factors of the regulatory framework, in particular, that stand out and that are *not addressed by the Bill*, but should be: the breadth of powers; the extended period of operation of the powers; and the failure of adequate publicity of the laws promulgated by CHO's direction.

3. Extent of CHO's emergency power

- 3.1. The borders have been closed, people have faced criminal prosecution for leaving their homes without 'valid' reason, and businesses have been shut down—all by order of the CHO and without Parliamentary debate.
- 3.2. These measures constitute radical incursions into existing rights and assumptions about the way that Queenslanders live. These have been imposed solely through the authority of the CHO, as a member of executive arm of government, without Parliamentary oversight or transparency.
- 3.3. The remit of the CHO's directions has gone to the heart of society in almost every way, for an already extended period of time.

3.4. The Bill should articulate a sustainable means of holding these law-making powers to account, recognising the desirability of checks and balances, and the paramountcy of Parliament beyond a short-term emergency situation.

4. Duration of CHO's emergency power

- 4.1. While generally emergency measures might subsist within a seven, or 14, day window, these laws have been made operational for the duration of a declared emergency that is soon to enter its second year.
- 4.2. The extent of the power may be considered a feature of the manoeuvrability of law-making that is essential in a short-lived crisis. However, the duration of the power brings us beyond a state of emergency, into an ongoing normality. Ongoing extensions of the duration of the power enhances the power in the hands of the CHO without processes of accountability or transparency.
- 4.3. The extension proposed under the Bill must be seen in the context of the already considerable duration of the emergency powers.

4.4. Given the longevity of the pandemic, it behoves Parliament to articulate in the Bill a sustainable means of governing public health, that accords with principles of good governance.

5. Publicity of directions

- 5.1. Compounding the absence of transparency in law-making is the manifest inadequacy of the promulgation of the CHO's directions in terms of:
 - publication;
 - version control; and
 - publicity.

5.2. Publication

- 5.2.1. Generally, legislation, including subordinate legislation, is published on the official Queensland legislation website. Other notices and declarations are generally published in the Queensland Government Gazette. While neither of these sources may be appealing reading for the general public, they are authoritative sources of law that are properly promulgated.
- 5.2.2. By contrast, directions concerning the COVID pandemic are issued by the CHO on the Queensland Health website. They appear there pursuant to amendments to the *Public Health Act* passed in March 2020. In the beginning, they featured as 'tiles' on the web page. As more directions issued, and some were superseded, a more advanced system evolved. Now they are listed alphabetically. All directions appear as html (ie as a web page).
- 5.2.3. Originally, superseded directions did not appear on the face of the website. They could only be accessed if one knew to search online for 'superseded directions'.

- 5.2.4. Superseded directions can now be found at the foot of the Queensland Health web page ie they are now transparently public.
- 5.2.5. That the site operated for some months, amidst a flurry of new *and expansive* laws but without effective publicity, points to the importance of paying attention to principles of transparency and accountability in the architecture of a regulatory environment.
- 5.2.6. Publishing the directions on the Department of Health website is a good means of making them accessible to the public. However, this process has failed in terms of keeping track of authoritative law. The directions are not available as PDF documents, as is normally the case for legislation and regulations. They are simply part of a website. The implication of this is that when the departmental website changes, unless steps are taken to preserve the information, they will be lost to the public. Because they do not appear in the Government Gazette, or on the Queensland legislation site, the directions break with the regular protocols concerning preservation of authoritative sources of law.
- 5.2.7. The Bill should provide for processes that reflect authoritative and long term publication and retention of directions as laws.

5.3. Version control

- 5.3.1. There is no transparent version control in the published directions. On occasion, changes have been made *in real time* without notice on the face of the directions, resulting in potential for manifest injustice.
- 5.3.2. By way of example, Figures 1 and 2 below show the change from a restriction of ‘up to 10 visitors’ to ‘up to 10 people’. This was not advertised and the change is not apparent from the face of the direction as would be customary in promulgation of laws.

Figure 1: screen grab of Movement and Gathering Direction (No. 3), s16, at 10:56am on Saturday, 22 August 2020

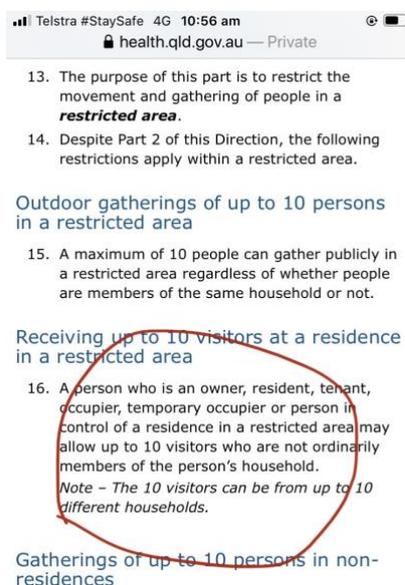
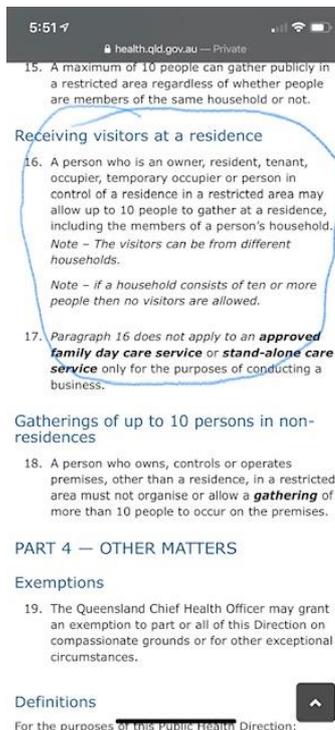


Figure 2: screen grab of Movement and Gathering Direction (No. 3), s16, at 5:51pm on Monday, 24 August 2020



5.3.3. A further, unadvertised and unacknowledged change was made to the same direction on the same day. See Figure 3 below.

Figure 3: extract of Movement and Gathering Direction (No. 3), s10, before 9am on Saturday, 22 August 2020

PART 2 — MOVEMENT AND GATHERING IN NON-RESTRICTED AREAS

Outdoor gatherings of up to 100 persons

10. A maximum of 100 people can gather publicly.

5.3.4. The change was made on or about 9am on the day of publication, 22 August 2020 and remains recorded in the superseded version of the direction on the Queensland Health website:

‘Outdoor gatherings of up to 30 persons

10 A maximum of 30 people can gather publicly in a **non-restricted area.**’

5.3.5. Given the professed seriousness of the pandemic and given the seriousness of the legal consequences of failure to comply with directions, these examples display an inexcusable disregard for the most basic principles of transparency of the law. That such provisions might be altered without notice or publicity is emblematic of the problem with extending the CHO’s powers without adequate governance processes.

5.3.6. The Bill must embed adequate standards of version control of public health laws, that represent high standards of transparency to ensure justice.

6. Conclusion

It is not sufficient simply to extend the duration of powers of the CHO to issue public health directives concerning the COVID pandemic. Parliament must:

- design appropriate checks and balances reflecting the norms of Queensland’s system of governance;
- consider the ongoing role of Parliament, appropriate limitations on the powers of the CHO, and rigorous processes for promulgation of laws, given their generally punitive nature; and
- enhance the possibility of public engagement with the processes involved to generate better outcomes for governance and for our democracy.

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12 January 2021