FEDERATION
OF COMMUNITY LEGAL CENTRES VIC

SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC ON THE PUBLIC HEALTH AND WELLBEING (PANDEMIC MANAGEMENT) BILL 2021

November 2021

ABOUT THE FEDERATION

The Federation is the peak body for Victoria's Community Legal Centres. Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem.

For over 40 years, community legal centres have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy.

We pursue our vision of a fair, inclusive, thriving community through challenging injustice, defending rights and building the power of our members and communities.

WE WANT A COMMUNITY THAT IS FAIR, INCLUSIVE AND THRIVING: WHERE EVERY PERSON BELONGS AND CAN LEARN, GROW, HEAL, PARTICIPATE AND BE HEARD.

The Federation:

- Enables a strong collective voice for justice and equality;
- Mobilises and leads community legal centres in strategic, well-coordinated advocacy and campaigns;
- Works with members to continuously improve the impact of community legal services;
- Drives creativity and excellence in the delivery of legal services to communities;
- Helps make justice more accessible.

Read our strategic plan online
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EXECUTIVE SUMMARY

The Federation of Community Legal Centres (Vic) Inc (**the Federation**) recognises that the Public Health and Wellbeing (Pandemic Management) Bill 2021(Vic) (**the Bill**) makes welcome changes to Victoria's pandemic response. The Bill inserts the new section (8A) into the *Public Health and Wellbeing Act* (Vic). The Federation welcomes the intention of the new legislation to increase accountability, transparency, community oversight and proportionality to pandemic management in Victoria.

We also welcome the move away from the blunt, but previously necessary, instrument of the State of Emergency powers. The complexity in balancing the protection of public health, human rights and access to justice cannot be underestimated and the Federation commends all involved for initiating this important legislation.

The following are recommendations and feedback from consultations conducted by the Federation with member community legal centres, including Inner Melbourne Community Legal, Human Rights Law Centre, Youthlaw, Justice Connect Homeless Law, WestJustice and Tenants Victoria. Our members include specialists as well as centres which have significant and valuable experience in ensuring access to justice during this challenging time. We recommend to you their insights and experience to further refine pandemic management in Victoria.

Areas of support for the Bill from the community legal sector

- Increased human rights accountability and communications.
- Increased public access to health reasons for orders and declarations.
- Increased community engagement and oversight with new government-appointed *Independent Pandemic Management Committee*, which legislates for diversity and community representation.
- Increased equity in infringements.
- Increased mechanisms for review of pandemic orders.
- Increased Ministerial accountability.
- More 'fit for purpose' legislation directed at pandemic outbreaks.
- Insertion of 'social and economic' considerations into reasons for pandemic orders.

Recommended areas for amendment for the Bill from the community legal sector

- Infringements.
- Tenancy.
- Pandemic Orders: Detention.
- Classification of Powers.

RECOMMENDED AMENDMENTS TO THE BILL FROM THE COMMUNITY LEGAL SECTOR

The Federation makes the following recommendations to the Public Health and Wellbeing (Pandemic Management) Bill 2021:

Infringements

The Bill should be amended to:

1. Substitute the word 'impracticable' with 'substantially diminishes' in s.56 to ensure the aims of the Explanatory Memorandum and Fines Reform Advisory Board recommendation 7 are fully realised.
2. Remove s.165CY(1)(a) so that all offences under Bill are eligible for the concessional fines rate scheme, irrespective of whether new offences are introduced.
3. Specify that the categories of eligible person and class of persons for the concessional rate scheme will be defined in the Regulations.
4. Make people who hold or have an income level that would make them eligible for a low-income Healthcare Card or who are in receipt of social security benefits (such as JobSeeker, Parenting Payment, Disability Support Pension, Aged Pension, or Carer's Payment) eligible for the concessional scheme.
5. Determine the concessional rate or formula in the Regulations. Further, we recommend 20 per cent for an adult and 10 per cent for a child as reasonable amounts that would balance the need for deterrence with a fine that is capable of being paid by a person in financial hardship.
6. Treat the concessional fines model as a pilot for introduction to the wider fines system.

In addition, the Governor in Council should exercise the regulation making power under s.95 of the *Road Safety Act 1986* (Vic) to improve road safety by providing that demerit points be recorded following a successful enforcement review based on special circumstances.

RECOMMENDATIONS

Tenancy

7. The Bill should be amended to include protections for renters against eviction during a pandemic by enabling the Victorian Civil and Administrative Tribunal (**VCAT**) or a court to deem certain breaches of the *Residential Tenancies Act 1997* (Vic) or a rental agreement connected to a pandemic or emergency, as non-breaches.

Pandemic Orders: Detention

The Bill should be amended to:

8. Include in subsection 165BI that, following a review by a Detention Review Officer, a person has a right to apply to the Chief Health Officer or VCAT for the review of a detention decision.
9. Add a new subsection 165BG, that has the following protections:
    a) The person detained should have access to the reasons for a decision as soon as practicable after a review has been made.
    b) Reviews not made in timely manner as specified in subsection (2) and (3) must be automatically referred to the Detention Review Officer to review whether the Detention Review Officer is satisfied that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
    c) Urgent applications to VCAT for review can be made if there is no compliance with subsection 165BG(2), (3) or (5).
10. Substitute 'may' with 'must' in s.165BM; and insert a new subsection 165BM(7) that sets out minimum welfare standards anticipated by the Minister and recommended by the Victorian Ombudsman, such as: 'the guidelines will ensure a detained person is: a) provided with regular and meaningful access to fresh air and outdoor exercise; and, b) food, medicine and medical attention and care.'

Clarification of Powers

The Bill should be amended to:

11. Delete subsections 165AK (3)(d) and (4) regarding the suspension of the *Equal Opportunity Act 2010* (Vic).
12. Increase accountability and review of Authorised Officers' power; and clarification as to whether statutory immunity applies to Authorised Officers enforcing delegated power under pandemic orders.

13. Insert in 212A a widening of the disallowance for the use of evidence due to the abrogation of the right of self-incrimination to include derivative use of evidence (not only direct use).

DETAIL OF RECOMMENDATIONS

1. Infringements: Protecting vulnerable community members.

1.1. Amendment of special circumstances test

We welcome the proposed amendment to the definition of special circumstances in the *Infringements Act 2006* (Vic) by inserting s.3A through s.56 of the Bill. We note that this proposed amendment implements recommendation 7 of the Fines Reform Advisory Board's (**FRAB)** 2020 report on Victoria's fines reform process and the wider-fines system.[1] Based on insights from Victoria's community legal sector, which annually helps thousands of people facing fines with complex vulnerabilities, this amendment would make the special circumstances nexus test fairer for those who should not be required to pay their fines.

Fines often regularly have an adverse impact on Victorians with special circumstances, including people experiencing family violence, homelessness, mental health issues and substance dependence issues. The Victorian Sentencing Advisory Council has noted:

> *there is a tension in the infringements system between the desire to ensure that the system does not operate unfairly against vulnerable people and, at the same time, ensuring that recalcitrant offenders do not escape its effect.*[2]

The special circumstances test provides a way for community members who are caught in the fines system because of their vulnerabilities to exit the system fairly and efficiently. The Victorian Sentencing Advisory Council has referred to these community members in their typology of infringement penalty recipients as the 'shouldn't pay', who should be identified and filtered out of the system as early as possible.[3]

To access enforcement review on the grounds of special circumstances and exit the fines system, applicants are presently required to submit supporting evidence which shows that, because of their condition or circumstance, they could not control the conduct constituting the offence or understand that it constituted an offence. That is,

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[1] Fines Reform Advisory Board (2020), *Summary Report on the Delivery of Fines Reform,* 8.
[2] Sentencing Advisory Council (2014), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria, Report*, xxxi.
[3] Ibid, 77.

they must evidence the nexus between their condition or circumstance and their offending.

From the day-to-day experience of the Federation's member community legal centres, the current special circumstances test excludes many marginalised fines recipients from accessing the scheme. Key reasons for this include:

- Fines are often historical and finding a treating practitioner willing to speak retrospectively about a person's condition or circumstance from many years before can be very challenging.
- People experiencing special circumstances regularly face barriers in terms of accessing a regular, consistent treating health practitioner.
- Health and other practitioners are often reluctant to or cannot comment on the nexus (even when they were treating or assisting the person at the time the fines were incurred), as the causation that is required to be proven is too exact and rigid, and the standard of proof often unrealistically high.

As seen through Ricky's story below, s.56 of the Bill is an important amendment with the potential to resolve these issues.

Disability support pensioner with mental health issues has enforcement review rejected due to lack of regular doctor

Ricky[4] has struggled with acute and disabling symptoms of bipolar disorder and drug dependence for many years, but his engagement with services has been sporadic. He did not have a regular doctor, but when he was on Community Treatment Orders or in hospital, he was subject to involuntary treatment from a psychiatrist and a case manager. He was recently accepted onto the National Disability Insurance Scheme and receives the Disability Support Pension.

Ricky connected with a Federation member community legal centre after he had received twelve fines for public transport offences over a two-year period, including for travelling without a valid ticket, smoking on the platform, and having his feet on the seats. The period of the fines pre-dated his mental health treatment.

Ricky's case manager identified the fines and asked his psychiatrist to write a support letter. The psychiatrist wrote a letter detailing the history of Ricky's condition and his level of impairment. This included referencing that the stress from the fines, which Ricky was not able to pay, was exacerbating Ricky's condition. However, the psychiatrist refused to comment on the nexus because Ricky was not in their care at the time. Despite Ricky's special circumstances, his enforcement review application was rejected by Fines Victoria.

Thanks to the amendment contained in s.56 of the Bill, Ricky and others like him will now likely be able to resolve their fines through enforcement review and exit the fines system.

[4] All names of clients in this submission have been changed.

While s.56 of the Bill is a welcome reform to improve the ability for vulnerable community members to access the special circumstances scheme, the language of 'impracticable' that is inserted through s.3A(1)(e)(ii) into the Infringements Act creates too high a threshold. Instead, FRAB's recommendation that the language of 'substantially diminishes' should be adopted to replace the term 'impracticable'.

The Explanatory Memorandum provides an example of the kind of extremely serious circumstances that might come under the new special circumstances category as a person being subject to an inpatient treatment order for mental illness under the *Mental Health Act 2014* (Vic). As the current threshold stands with the wording 'impracticable', it is doubtful if such a person could access this important amendment. It is also unclear if a person subject to a long-term involuntary treatment order – which was provided as an example in FRAB for the need for this reform – would be able to make use of this amendment. Changing the word 'impracticable' to 'substantially diminishes' would ensure that those who need this amendment most, including those on involuntary treatment orders under the Mental Health Act, will be able to access it.

1.2. Introduction of concessional fines scheme for people in hardship

We welcome the proposed introduction of a concession-based fines scheme for people experiencing financial hardship who are unable to pay their COVID-19 fines. This measure – to introduce a reduced penalty amount for people in financial hardship at a rate which is fair, proportional and of equal impact – would substantially increase the fairness, effectiveness and credibility of the fines system,[5] as well as revenue for the state government.

The Sentencing Advisory Council has compared the infringement penalty system with the approach taken by a court, which would consider a person's financial and other circumstances when determining the amount of a court fine and how it is to be paid. The Sentencing Advisory Council stated it was likely the establishment of a concessional penalty rate of infringement penalty could shift a significant number of people from cohorts of 'can't pay' to 'will pay', thus avoiding the cost of enforcement, and the impact on the court and support services.[6] Previous research has also suggested that:

> *[f]ixed-rate infringement penalties disproportionately impact on those who are financially disadvantaged. Therefore, provisions should be implemented that allow those in financial hardship to apply for a standard concession rate. Those who*

[5] Sentencing Advisory Council (2014), *Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria*, 242.
[6] Ibid, 244.

have a concession card and receive their fine in person should be immediately issued with a concession fine amount.[7]

Currently, the only option for people on low incomes who cannot afford to pay their fines but are ineligible for other social justice initiatives is to ask for more time to pay, either through an extension of time to pay or an instalment order. Some enforcement agencies offer extensions of time to pay only. Both are inadequate because they cannot overcome the sheer weight of the quantum of the fine for a person on a low income, and because these options call into question the integrity of the fines system, where an economically disadvantaged person is asked to repay a fine for many years, with all the social consequences this entails.

Single mother experiencing severe financial hardship has her car sold due to fines

Sonia[8] had six fines for parking offences. She was reliant on the Centrelink parenting payment and did a few hours of disability support work to supplement her meagre income. Her 9 year-old son has autism and needs extra support, including being driven to school. Sonia was also reliant on her car for her work as a disability support worker. Sonia had put her fines on a payment plan but defaulted a number of times when her expenses overtook her capacity to pay.

Sonia's fines escalated through the system and eventually her car was sold to recoup her fines debt. This meant she could no longer work or drive her son to school. The family was plunged into homelessness and is still couch-surfing with family.

Had Sonia been able to pay her fines at a concessional rate she would have more quickly and fairly exited the fines system without the life-changing event of losing her vehicle.

The calculation of the quantum of infringements in Victoria is based on the principle of an equal fine for equal offending, thereby ostensibly being based in equality.

But in fact, this approach is profoundly unequal, with people with very low or no incomes being asked to pay the same amount as people on extremely high incomes.

For those on very high incomes a fine of $200 for failing to wear a face mask, or even the higher COVID-19 fines of several thousand dollars, may impose no burden; whereas the impact of the same fine for someone on JobSeeker or another social security payment is extremely harsh and crushing. This also means that fines are essentially unrecoverable

[7] Bernadette Saunders (2013), *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System –Towards a Best Practice Model,* Monash University, 12.
[8] All names of clients in this submission have been changed.

for people on very low incomes, reducing revenue and necessitating the expenditure of vast amounts of taxpayer money on fine enforcement.

The purpose of the infringements system – specific and general deterrence for minor offending – is lost when there is one fine for all, irrespective of income The punitive weight of an infringement on a high income earner is minimal, thereby failing to actualise the principles of specific and general deterrence. For a person experiencing financial hardship, the deterrent effect may be lost entirely if the person is unable to pay the fine and enters the labyrinthine infringement enforcement system, or if the person is forced to forgo essentials to pay a fine off extremely slowly via a payment arrangement. This can have serious health and social impacts on financially disadvantaged community members.

In the experience of the Federation's community legal centre members, unpaid fines further compound existing disadvantage. The accumulation of fines-related debt makes it harder for people to escape poverty, and can also lead to consequences such as licence or registration suspension, which can significantly impact on Victorians who need to drive for reasons including work, study, health or caring for dependents. Julia, who was assisted by a Federation member community legal centre, explains how financial penalties only serve to increase the strain for those who are struggling financially:

> *The effect of having the fines is very stressful because when you are unemployed or on a pension, it is pretty difficult to survive as it is... You don't have a spare $200 just to give to a fine and if you're homeless as well it's more stressful because it is already incredibly hard not having a place of your own.*

The Financial and Consumer Rights Council (now Financial Counselling Victoria) surveyed a number of Victorians in receipt of JobSeeker benefits (then Newstart Allowance) as their only income and found 84 per cent had accessed emergency relief, 69 per cent regularly skipped meals, 91 per cent were in housing stress and 63 per cent spent more than 50 per cent of their income on housing costs.[9]

In this context, it is difficult to see how timely payment of a high infringement penalty before extra costs are added is possible without risking homelessness and other serious detriment to health and wellbeing.

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[9] Financial & Consumer Rights Council Inc (2019), *The Experience of (Not) Living on Newstart.* Available at http://www.fcrc.org.au/Content/PDF_downloads/FCRC%20The%20Experience%20of%20(Not)%20Living%20on%20Newstart%20Sept%202019.pdf

We recognise that the following questions will be answered through the making of Regulations; and highlight them here to support that process as they are essential to the operation of the concessional scheme. We recommend that the legal assistance and financial counselling sectors be consulted when the Regulations are being considered.

What is an eligible offence?

All COVID-19 related offences capable of being dealt with by way of infringement notice should be regulated as eligible offences. Were eligible offences limited only to mask offences, for example, this would seriously undermine the value of the proposed reform. Therefore, s.165CY(1)(a) should be removed so that all offences under the Bill are eligible. This would mean that if a new offence was created, the Regulations would not need change each time.

Who is an eligible person?

The current Bill does not define an eligible person or class of persons. Nor does it refer to the definition existing in the Regulations. We recommend that the Bill specifies that the categories of eligible person and class of persons be defined in the Regulations.

Persons who hold, or have an income level that would make them eligible for, a low-income Healthcare Card; or who are in receipt of social security benefits such as JobSeeker, Parenting Payment, Disability Support Pension, Aged Pension, or Carer's Payment should be eligible for the concessional rate.

Eligibility for the concessional rate will need to be closely considered. It must be broader than just people in receipt of social security, because this will exclude many people in extreme financial hardship such as people on temporary visas and New Zealand citizens without work, and people in immediate financial crisis. Therefore, we recommend an eligibility test similar to the one to qualify for a Work and Development Permit under the category of financial hardship.[10]

Children should immediately qualify for a concessional rate.

What is the concessional rate?

The concessional rate or formula should be determined in the Regulations. We recommend 20 per cent for an adult and 10 per cent for a child as reasonable amounts that would balance the need for deterrence with a fine that is capable of being paid by a person in financial hardship.

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[10] Department of Justice and Community Safety (2020), *Work and Development Permit Guidelines*, 11–12.

The introduction of a concessional rate does not obviate the need for options to pay by instalments or for an extension of time to pay, and these existing measures should continue to operate.

Place of the concessional scheme in the broader infringements ecosystem

The rollout of a concessional fines rate is a tremendously important development for the Victorian fines system, and we congratulate the government on taking this step. However, limiting this measure to COVID-19 fines only in the long-term is too restrictive. The COVID-19 fines concessional fines model should be treated as a pilot for the introduction of this option for all infringements.

2. Introduction of tenancy protections

The Bill should be amended to include protections for renters against eviction during a pandemic by enabling VCAT or a court to deem certain breaches of the *Residential Tenancies Act 1997* (Vic), or a rental agreement connected to a pandemic or emergency, as non-breaches.

During a pandemic, protecting housing security for renters is an essential part of ensuring individual and community-wide health.

In April 2020, in response to the impact of the COVID-19 pandemic, the Victorian Parliament enacted Part 16 into the Residential Tenancies Act. These amendments provided significant protections to renters during the COVID-19 pandemic, including by preventing evictions into homelessness and keeping family violence victim survivors safely housed. While such an extensive range of protections may not be appropriate in all pandemics, providing a baseline of protections in the Bill for renters during a pandemic is necessary.

Our proposed reform would enable VCAT or a court to deem limited breaches of the Residential Tenancies Act or rental agreements to be non-breaches where there is a sufficient connection to a pandemic or emergency, and where:

- the Premier has made a pandemic declaration pursuant to s.165AB of the Bill (pandemic declaration); or
- the Minister has made a state of emergency declaration pursuant to s.198 of the Public Health and Wellbeing Act (emergency declaration).

This would prevent renters from being evicted in circumstances sufficiently connected to a pandemic, such as being unable to pay rent due to a loss of work because of a

quarantine direction. It would also support residential rental providers, such as where stay at home directions prevented them from arranging non-urgent repairs to a property.

The Victorian Parliament's Legal and Social Issues Committee (**the Committee**) has recognised the devastating impact that pandemics and emergencies can have. In the 2020 Inquiry into Homelessness, the Committee noted:

> *[d]uring the course of this inquiry, we saw how emergencies such as bushfires and the COVID-19 pandemic can have a devastating effect on the most vulnerable in our community.*[11]

Where someone is evicted into homelessness particularly during a pandemic, that eviction not only has an impact on public health, but will also have a lasting and often traumatic effect on that individual and their family.[12] COVID-19 created and intensified a diverse range of issues for many community members, creating a new cohort of 'future homeless' and financially insecure, who directly benefited from Victoria's rental protections at that time.

Targeted protection in the Bill would reduce the impact of future pandemics on community members facing housing insecurity, financial stress and job-loss, and better support renters and their families to prioritise their health and wellbeing.

Single mother protected from eviction because rent arrears had accrued as a result of a COVID-19 reason

Amy[13] is a single parent of two children aged under 10. In late 2020, Amy fell behind in rent. Although she had never had trouble paying rent before the COVID-19 pandemic, she lost her part-time job in May 2020 and relied solely on Centrelink income. Her ex-partner, who had been the 'bread winner' lost his job. Their relationship broke down because of family violence perpetrated by her ex-partner, exacerbated by the financial and mental stresses of COVID-19. Her ex-partner left the property and refused to provide any financial support. Amy contacted the real estate agent and advised them of her circumstances but received no response.

Amy received family violence counselling support services from Orange Door and an offer for $2,000 from WAYSS for arrears payment if a payment plan was set up. However, Amy was unable to access the Rent Relief Grant because her ex-partner was still on the lease and because her rental provider offered her a rent deferral rather than a rent reduction. Further, the offer of a deferral was only made on condition that she signed a fixed term lease for 12 more months.

[11] Victorian Parliament of Victoria's Legal and Social Issues Committee (4 March 2021), *Inquiry into Homelessness in Victoria*, xvi.
[12] Ibid, xvii.
[13] All names of clients in this submission have been changed.

Amy's rental provider applied to VCAT for termination and possession orders to evict her and her children on the basis of the rent arrears.

A Federation member community legal centre appeared in VCAT on Amy's behalf and successfully argued that the application should be dismissed on the basis that her failure to pay rent was due to a COVID-19 reason. Amy and her children were able to remain at the property as a result. In the absence of the protection afforded by s.542 of the Residential Tenancies Act, which was then in force, Amy and her children may have been evicted due to rent arrears that accrued as a direct result of personal and financial hardship related to the COVID-19 pandemic.

Through introducing into the Bill a targeted baseline protection for renters during pandemics, there is an opportunity to implement the Committee's finding that early intervention in homelessness benefits individuals and can produce financial savings for the Victorian Government.[14] This prevention-focused approach is even more critical in pandemics, particularly as it also assists with public health goals by improving compliance with stay-at-home directives, quarantine directives or other related-directives.

3. Pandemic powers and offences.

Community Legal Centres have also expressed concern about the following components of the proposed legislation. These concerns will also be addressed in their separate submissions with greater detail. (These concerns may be addressed in the consultation with the Expert Reference Group scheduled for 10 November 2021, as they have been previously bought to the Group's attention).

Independent oversight of Detention Orders

Detention and the deprivation of a person's liberty, are serious provisions that under the Bill can be exercised by a public servant. Any other laws which enable people to be detained (such as *Mental Health Act 2014* (Vic) or *Terrorism (Community Protection Act 2003* (Vic)) provide specific mechanisms for independent judicial oversight. These laws should be no different.

While people subject to detention orders can file a writ of habeas corpus in the Supreme Court this is not an accessible form of review, particularly for those in vulnerable communities that might be targeted by these powers. Judicial review can be just as swift

[14] Victorian Parliament of Victoria's Legal and Social Issues Committee (4 March 2021), *Inquiry into Homelessness in Victoria,* xxxi (finding 15).

as any internal review process, with all courts and tribunals having the ability to hear urgent matters (especially for urgent injunctions).

Our legal centres assisted their communities who were affected by the hard lockdown of the public housing estates in July 2020. Following the lockdown, the Victorian Ombudsman conducted a thorough investigation. A key recommendation of the Victorian Ombudsman was to amend the Public Health and Wellbeing Act:

Rec 2(a)

> *'allow a person subject to detention … to apply to both the Chief Health Officer and VCAT for review of the decision'*[15]

In response to the recommendation, the Government introduced the Detention Review Officer in March 2021. The appointment of Detention Review Officers, under Section 32A of the current Public Health and Wellbeing Act, is by the Secretary. Appointment within the Department is not independent.

The recommendation for a person subject to detention to be able to apply to both the Chief Health Officer and VCAT for review, should be implemented in the Bill.

Ongoing review of detention orders

The Bill provides in section 165BG for detention orders to be reviewed every 24 hours, which is a necessary safeguard. However, there do not appear to be adequate protections in place if reviews are not being conducted in a timely and genuine manner.

The current provisions that require an Authorised Officer to review detention every 24 hours are echoed in the Bill in section 165BG. However, the Victorian Ombudsman investigation found that the Department of Health and Human Services failed to meet their legislative requirement to conduct reviews every 24 hours.[16][.

The Bill proposes to address this issue by extending the period in which reviews can be conducted, allowing them to occur in a period greater than 24 hours, if 'not reasonably practicably' (s165GB(3)).

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[15] Victorian Ombudsman (2020), *Investigation into the detention and treatment of public housing residents arising from a COVID-19 'hard lockdown' in July 2020*. Available at: https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/Public-housing-tower-lockdown/Victorian-Ombudsman-report-Investigation-into-the-detention-and-treatment-of-public-housing-residents-arising-from-a-COVID-19-hard-lockdown-in-July-2020.pdf

[16] Ibid.

There must be capacity to hold the Authorised Officers to account; and for people detained to know their detention has been reviewed and the decision why ongoing detention is needed.

Protections for people while in detention

For people held in police custody or by Corrections, there are minimum legislative standards. No equivalent provisions exist for people detained in relation to a pandemic order. The Bill provides for the Detention Guidelines; however, these are optional for the Minister and there are no specifications about what protections the guidelines should include.

Minister Foley states in his second reading speech that the Guidelines are essential element to addressing 'community concern' and 'vital in preserving the welfare' of people in detention. In order to ensure the Guidelines can fulfil the Minister's intention, the Guidelines must be requirement under the Bill and specify essential welfare elements the community would expect if they were detained.

The Government should implement the Victorian Ombudsman's recommendation 2 (c) produced in relation to the detention of people in public housing estates:

Rec 2 (c)

> *require that a person subject to detention under section 200(1)(a) be provided with regular and meaningful access to fresh air and outdoor exercise, wherever practicable.*

During the hard lockdown of the public housing estates, many people also struggled access food, medicines and appropriate medical care. Putting guidelines in place could help prevent this occurring again.

Discrimination

The provision 165AK (3)(d) & (4) removes the protection against discrimination under the *Equal Opportunity Act 2010* (Vic). If this is required in relation to employment status and vaccination, then it should be specified. The current drafting allows for discrimination on all attributes, particularly concerning for us is the ability to discriminate on race, gender and sexual orientation.

Already community legal centres are concerned about the over policing of Aboriginal and racialised communities in relation to the current public health orders. Aboriginal people were five times more likely to be fined than non-Aboriginal and Torres Strait Islander

people. It would be concerning if communities who already experience racialisation or marginalisation could be the target of specific orders.

The risk of the provision being misused and discriminate on basis of protected attribute is too great. In concerns us greatly that had these provision existed during the AIDS pandemic the consequences that could have had on the LGBTQI+ community.

Power Of Authorised Officers

Authorised Officers are appointed by the Secretary of the Department of Health and can enforce their power to 'give any direction considered reasonably necessary to protect public health' with police assistance via a request to Chief Commissioner of Police or delegate.

The Bill introduces Statutory Immunities for Chief Health Officers and delegates including Authorised Officers and Detention Review Officers. This may give Authorised Officers powers for warrantless entry into premises, requiring personal details and other information, and the capacity to use reasonable force to assist power being exercised.

We recommend that there is increased accountability and review of the Authorised Officers power and clarification as to whether statutory immunity applies to Authorised Officers enforcing delegated power under pandemic orders.

Abrogation of Privilege against Self Incrimination

The Bill allows Authorised Officers to compel people to provide information for contract tracing purposes and abrogates the privilege against self-incrimination. Section 212A attempts to balance the need for public health information against the abrogation of a right by disallowing the use of the evidence obtained in any subsequent criminal proceedings except for providing false and misleading information.

The public health need for correct contact tracing information and capacity during a pandemic has been balanced against right against self-incrimination. To avoid misuse of this abrogation, disallowance of derivative use of evidence is also needed.

We recommend s.212A clarify that the disallowance of use of evidence also includes derivative use, not only direct use.

CONCLUSION

The Federation of Community Legal Centres supports the intention and substance of the Public Health and Wellbeing (Pandemic Management) Bill (Vic) and the increased human rights, public health and community oversight. This is a nuanced approach to pandemic management enabled by two years of hard experience.

The Federation and its members look forward to opportunities to clarify the proposed recommendations in order to ensure that equity and access to justice is maintained during times of pandemic and emergency.

We appreciate the difficulty in creating such important legislation during a time of multiple crises and stressors and equally appreciate any opportunity for further consultation to ensure the difficult policy balance is achieved.