

## STATEMENT OF COMPATIBILITY

### *Charter of Human Rights and Responsibilities Act 2006*

#### **Public Health and Wellbeing Amendment (Quarantine Fees) Bill 2020**

##### Opening paragraphs

In accordance with section 28 of the *Charter of Human Rights and Responsibilities Act 2006*, (the Charter), I make this Statement of Compatibility with respect to the **Public Health and Wellbeing Amendment (Quarantine Fees) Bill 2020**.

In my opinion, the **Public Health and Wellbeing Amendment (Quarantine Fees) Bill 2020**, as introduced to the Legislative Council, is compatible with human rights as set out in the Charter. I base my opinion on the reasons outlined in this statement.

##### Overview

The Bill seeks to make amendments to the *Public Health and Wellbeing Act 2008* to allow the charging of fees for mandatory quarantine for international travellers.

Importantly, the Bill enables the Victorian Government to make regulations relating to the prescribing of fees payable in relation to a quarantined person's period of detention, which must be reasonably referable to costs incurred by the State, and to the waiving and paying of those fees. The amendments will be made by inserting new sections 238A to 238E, 247 and 248, and a new Part 14 into the *Public Health and Wellbeing Act 2008*, to enable these regulations to be made. As the amendments are specific to the impacts of COVID-19 on the State, the amendments will be temporary and will be repealed on 31 December 2021.

The Bill provides that a 'quarantined person' is liable to pay to the State prescribed fees relating to their detention at a specified place of detention. The fees will be payable in manner, or method, as specified in the regulations which will be made at a future date. This includes allowing the regulations to make provision for instalment or payment plans, concessional fees, waivers, the imposition of conditions for instalment or payment plans, and manner in which applications may be made relating to those matters.

A quarantined person is defined as a person:

1. who has arrived in Victoria from overseas, or another State or a Territory after travelling directly to Victoria after arriving from overseas in that State or Territory, and

2. who, for the purpose of eliminating or reducing the serious risk to public health posed by the COVID-19 pandemic, is detained under section 200(1) of the *Public Health and Wellbeing Act 2008* at a place specified by an authorised officer pursuant to that section on or after the commencement of that clause of the Bill.

The majority of the charter impacts will be assessed when the regulations are made.

### **Human Rights Issues**

For the following reasons, I am satisfied that the Bill is compatible with the Charter and, if any rights are limited, those limitations are reasonable and demonstrably justified having regard to the factors in section 7(2) of the Charter.

The Bill itself will only have minimal effects on the Charter rights of persons. However, the regulations imposed under the powers may have an effect on the Charter rights of persons when the regulations are made. The impact that any regulations made under the Bill might have on the rights of individuals will be considered when a human rights certificate is developed for the regulations.

The measures in the Bill are designed to support the State's overall public health framework by allowing the State to recover the reasonably referable costs of services provided by the State to 'quarantined persons' to manage public health risks from the COVID-19 pandemic. The government is obliged to use all means necessary to protect the health and life of all persons in Victoria and these reforms support the State's obligations to do so.

Where the Bill may have impacts on Charter rights, an overview is provided below.

#### *Right to life*

The amendments in the Bill promote the right to life in Victoria by supporting the State's response to the risks posed by COVID-19. Section 9 of the Charter provides that every person has the right to life and has the right not to be arbitrarily deprived of life.

In the present circumstances, the COVID-19 virus is life threatening and continues to be a present and real threat to life. The Bill furthers these rights, particularly in relation to vulnerable members of society who are at particular risk from a broad and unrestricted spread of COVID-19, by supporting the State's existing regulatory framework to enforce mandatory quarantine on them by ensuring the State can recover the reasonable cost of providing mandatory quarantine imposed on 'quarantined persons'. The Bill therefore supports the

State's overall regulatory framework which allows for the promotion of individuals' right to life, health, and the broader public health of the Victorian community.

The impact of the reforms is reasonable and proportionate in all the circumstances and compatible with the right to life, and the impact of the regulations on the right to life will be considered when a human rights certificate is developed for the regulations.

I consider the Bill to be consistent with the right to life in section 9 of the Charter.

### *Right to property*

Section 20 of the Charter provides that a person must not be deprived of their property other than in accordance with law. There are three elements to this right:

1. the interest interfered with must be 'property', which includes all real and personal property interests recognised under the general law;
2. the interference must amount to a 'deprivation' of property, that is, any 'de facto expropriation' by means of a substantial restriction in fact on a person's use or enjoyment of their property; and
3. the deprivation must not be 'in accordance with law' in that the law must be adequately accessible and formulated with sufficient precision to enable the person to regulate their conduct.

The regulations made under the reforms in the Bill may require the payment (deprivation) of fees in the form of money, which is a form of property interest recognised by law. However, as the regulations will require the payment of the fees in accordance with the law, and there will be significant flexibility as the Bill provides for the ability for the regulations to allow fees to be waived (in part or full), and for the payment of fees by way of payment plans or instalments, this will be 'deprivation' in accordance with law. The flexible payment arrangements will minimise the impacts on the right to property held by quarantined persons. The fees imposed by the regulations must also be reasonably referable to the costs of goods and services incurred by the State in detaining a quarantined person at a specified place in detention.

While the fees may be collected retrospectively under the regulations from 7 December 2020, this will not be an unreasonable or disproportionate impact because the Government will have announced the imposition of the fees ahead of the commencement of this Bill. The announcement allows the fees to be generally accessible in a way so that persons who may be required to pay fees, and know this in advance before the implementation of the regulations that they will need to pay fees if they are a returning overseas traveller to Victoria, or if they need to be detained for the purpose of eliminating or reducing the serious risk to

public health posed by the COVID-19 pandemic.

Any such measures imposed under the regulations will need to be reasonable and proportionate in all the circumstances in order to be compatible with the right to property under the Charter and the impact of the regulations on the right to property will be considered when a human rights certificate is developed for the regulations.

In addition, the retrospective operation of any regulations to be made will not impose retrospective criminal laws (section 27 of the Charter).

I consider the Bill to be consistent with the right to property under section 20 of the Charter.

### *Right to Equality*

Section 8(2) of the Charter provides that every person has the right to enjoy their human rights without discrimination. Section 8(3) of the Charter provides that every person is entitled to equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. The purpose of this component of the right to equality is to ensure that all laws and policies are applied equally, and do not have a discriminatory effect. 'Discrimination' under the Charter is defined by reference to the definition in the *Equal Opportunity Act 2010* (EO Act) on the basis of an attribute in section 6 of that Act, which includes age, race, sex, disability and parental status amongst many others.

It is possible that the fees imposed under regulations made under the Bill on 'quarantined persons' may potentially amount to either direct or indirect discrimination under the EO Act because of the differential effect that their use may have on certain groups of people. Indirect discrimination occurs where there is a requirement, condition or practice imposed that is the same for everyone but disadvantages a person, or is likely to disadvantage a person, because they have one or more of the protected attributes, and the requirement, condition or practice is not reasonable. Direct discrimination occurs where a person treats a person with an attribute unfavourably because of that attribute.

As any imposition of fees under any proposed regulations under the Bill's reforms may give rise to direct or indirect discrimination and they will need to be reasonable and proportionate in all the circumstances in order to be compatible with the right to equality. The Bill provides for the ability for the regulations to allow fees to be waived, in part or full, and for the payment of fees by way of payment plans or instalments. This provides significant flexibility to minimise direct or indirect discrimination against 'quarantined persons'. The fees imposed by the regulations must also be reasonably referable to the costs of goods and services incurred by the State in detaining a quarantined person at a specified place in detention. It is also reasonable that these costs may vary depending on the relevant needs of different quarantined persons. The Bill allows the regulations to include minimum, maximum or scaled

fees as appropriate to minimise the effects of any direct or indirect discrimination caused by the regulations.

Therefore, the impact of the reforms are reasonable and proportionate in all the circumstances and compatible with the right to equality, and the impact the regulations on the right to equality will be considered when a human rights certificate is developed for the regulations.

I consider the Bill to be consistent with the right to equality in section 8(3) of the Charter.

### *Freedom of movement*

The right to freedom of movement is contained in section 12 of the Charter and applies generally to a person's movement within Victoria. It applies to persons lawfully within Victoria and is made up of the following components: the right to move freely within Victoria, the right to enter and leave Victoria, and the right to choose where to live. The right has been described as providing protection from unnecessary restrictions upon a person's freedom of movement. It extends, generally, to movement without impediment throughout the State and a right of access to places and services used by members of the public, subject to compliance with regulations legitimately made in the public interest.

Relevantly, the right to freedom of movement will be engaged where a person is: required to move to, or from, a particular place or is prevented from doing this; subject to strict surveillance or reporting obligations relating to moving; or directed or ordered where to live.

The powers in the Bill to make regulations for fees for the quarantine of persons in specified places will not directly impact on the right to freedom of movement, but the regulations that are made under the power may indirectly impact on the right when the imposition of fees under the power are combined with the impact of public health orders under *Public Health and Wellbeing Act 2008* on 'quarantined persons'. However, this impact is reasonable and proportionate in all the circumstances and compatible with the right to movement, and the impact the regulations on the right to freedom of movement will be considered when a human rights certificate is developed for the regulations.

I consider the Bill to be consistent with the right to movement in section 12 of the Charter.

### *Rights to privacy, family and home*

Section 13(a) of the Charter provides that a person has the right not to have their privacy unlawfully or arbitrarily interfered with. Section 13(a) contains internal qualifications; namely, interferences with privacy only limit the right if they are unlawful or arbitrary. An interference

will be lawful if it is permitted by a law which is precise and appropriately circumscribed, and will be arbitrary only if it is capricious, unpredictable, unjust or unreasonable, in the sense of being disproportionate to the legitimate aim sought.

'Privacy' is a right of considerable amplitude. The fundamental values which the right to privacy expresses are the physical and psychological integrity, individual and social identity, and autonomy and inherent dignity, of the person. It protects the individual's interest in the freedom of their personal and social sphere. Relevantly, this encompasses their right to establish and develop meaningful social relations. The right to privacy may also potentially incorporate a right to work of some kind and in some circumstances.

The 'family' aspect of section 13(a) is related to section 17(1) of the Charter, which states that families are entitled to protection by society and the State. However, whilst the two rights overlap, they are not co-extensive. Section 13(a) is a negative obligation that only prohibits unlawful or arbitrary interferences with family; whereas section 17(1) is a positive obligation on society and the State.

The 'home' aspect of section 13(a) refers to a person's place of residence, regardless of whether they have a legal interest in that residence. What constitutes an interference with this aspect of the right to privacy has been approached in a practical manner and may cover actions that prevent a person from continuing to live in their home, as well as interferences with the home itself.

The powers in the Bill to make regulations for fees for quarantine of persons in specified places will not directly impact on the three aspects of this right but the regulations that are made under the power to impose fees may indirectly impact on the right when the imposition of fees under the power are combined with the impact of public health orders under *Public Health and Wellbeing Act 2008* on a 'quarantined person'. This is because the imposition of fees will contribute to overall impacts on personal autonomy and private relationships, may require the disclosure of private information (particularly for the making of statutory declarations for waivers of fees or for the instalment or payment plans), affect the ability of families to gather with members who are quarantined due to diagnosis with an infectious disease (including COVID-19), and the ability of people to reside in their own homes if they are quarantined at another location.

However, this impact is reasonable and proportionate in all the circumstances in order to be compatible with the right to privacy, family and home, and the impact the regulations on the right to privacy, family and home will be considered when a human rights certificate is developed for the regulations.

I consider the Bill to be consistent with the rights to privacy, family and home in section 13 of the Charter.

### *Right to liberty*

Section 21 of the Charter protects the right to liberty. The liberty rights in section 21 reflect aspects of the common law right to personal liberty, which has been described as the most elementary and important of all common law rights. In particular, section 21(2) prohibits a person from being subjected to arbitrary detention, whilst section 21(3) prohibits a person from being deprived of their liberty except on grounds, and in accordance with procedures, established by law. Together, the effect of section 21(2) and (3) is that the right to liberty may legitimately be constrained only in circumstances where the deprivation of liberty by detention is both lawful, in that it is specifically authorised by law, and not arbitrary, in that it is reasonable or proportionate in all the circumstances.

The scope of the right in section 21 extends beyond detention as part of the criminal justice system to protective or preventative forms of detention, including to prevent the spread of infectious diseases. Whether a particular restriction amounts to a 'deprivation of liberty' for the purpose of the right in section 21 is a question of degree or intensity. Detention or deprivation of liberty does not necessarily require physical restraint; however, the right to liberty is concerned with the physical detention of the individual, and not mere restrictions on freedom of movement.

The powers in the Bill to make regulations for fees for the quarantine of persons in specified places will not directly impact on the right to freedom of liberty, but the regulations that are made under the power may indirectly impact on the right when the imposition of fees under the power are combined with the impact of public health orders under *Public Health and Wellbeing Act 2008* on 'quarantined persons'. As set out elsewhere in this Statement of Compatibility, there is significant flexibility in the Bill to allow the regulations to be flexible in their application to individuals. However, this impact is reasonable and proportionate in all the circumstances and compatible with the right to freedom of liberty, and the impact of the regulations on the right to liberty will be considered when a human rights certificate is developed for the regulations.

I consider the Bill to be consistent with the rights to liberty in section 21 of the Charter.

### *Humane treatment when deprived of liberty*

Section 22(1) of the Charter recognises that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. Further, section 22(3) recognises that a person who is detained must be treated in a way that is appropriate for a person who has not been convicted.

The powers in the Bill to make regulations for fees for the quarantine of persons in specified places will not directly impact on the rights in relation to human treatment in section 22 of the Charter, but the regulations that are made under the power may indirectly impact on the rights when the imposition of fees under the power are combined with the impact of public health orders under *Public Health and Wellbeing Act 2008* requiring a 'quarantined person' to quarantine in a specified place. However, this impact is likely to be reasonable and proportionate in all the circumstances and compatible with the rights in section 22 of the Charter, and the impact the regulations on those rights will be considered when a human rights certificate is developed for the regulations.

I consider the Bill to be consistent with the rights in section 22 of the Charter.

### *Protection of families and children*

Section 17(1) of the Charter recognises that families are the fundamental group unit of society, and entitles families to protection by the society and the State. Section 17(1) is related to the section 13(a) privacy right and an act or decision that unlawfully or arbitrarily interferes with a family is also likely to limit that family's entitlement to protection under section 17(1).

The Charter does not define the term 'family'; however, it is given a broad interpretation. It at least includes ties between near relatives, with other indicia of familial relationships including cohabitation, economic ties, and a regular and intense relationship. Cultural traditions may be relevant when considering whether a group of persons constitute a 'family' in a given case. In this respect, the cultural right in section 19(2)(c) of the Charter, which states that Aboriginal people must not be denied the right to maintain their kinship ties, is also relevant.

Section 17(2) of the Charter provides that every child has the right, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child. It recognises the special vulnerability of children, defined in the Charter as persons under 18 years of age. 'Best interests' is a complex concept which must be determined on a case-by-case basis. However, the following elements may be taken into account when assessing the child's best interests: the child's views; the child's identity; preservation of the family environment and maintaining relationships; care, protection and safety of the child; situations of vulnerability; the child's right to health; and the child's right to education.

The powers in the Bill to make regulations for fees for the quarantine of persons in specified places will not directly impact on the rights in relation to protection of families and children, but the regulations that are made under the power may indirectly impact on the rights when the imposition of fees under the power are combined with the impact of public health orders under *Public Health and Wellbeing Act 2008* on 'quarantined persons'. However, as set out



elsewhere in this Statement of Compatibility, there is significant flexibility in the Bill to allow the regulations to be flexible in their application to individuals. This will include the ability for the regulations to prescribe fees, payment methods or waivers to differentiate between individuals, families and the broad variety of different personal or familial relationships that exist. Therefore, this impact is reasonable and proportionate in all the circumstances and compatible with the right in relation to protection of families and children, and the impact the regulations on those rights will be considered when a human rights certificate is developed for the regulations.

I consider the Bill to be consistent with the rights in relation to the protection of families and children in section 17 of the Charter.

I consider that the amendments in the Bill only affect or limit Charter rights in ways that are reasonable and demonstrably justifiable.

**Hon Gayle Tierney MP**  
**Minister for Higher Education**  
**Minister for Training and Skills**  
**Deputy Leader of the Government in the Legislative Council**