

Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 2) 2022

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, the Honourable Yvette D'Ath MP, Minister for Health and Ambulance Services and Leader of the House provide this human rights certificate with respect to the *Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 2) 2022* (Regulation) made under the *Public Health Act 2005*.

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Chapter 8 of the Public Health Act deals with public health emergencies. Under section 319 of the Act, the Minister may declare a public health emergency by a signed written order. The public health emergency takes effect from its declaration by the Minister.

A declared public health emergency activates a range of powers and functions under chapter 8 of the Public Health Act. For example, emergency officers have wide ranging powers under chapter 8 to assist in responding to a public health emergency, including powers of entry and a range of powers to compel persons to do or refrain from certain activities. Emergency officers (medical) have additional powers relating to the detention of persons.

Under chapter 8 of the Public Health Act, the Chief Health Officer has the power to make public health directions to assist in containing, or responding to, the spread of COVID-19 within the community. The Chief Health Officer may give any direction which is considered necessary to protect public health, including directions to restrict the movement of persons; require persons to stay at or in a stated place, or not to enter or stay in a stated place or restrict contact between persons.

Background

In December 2019 and January 2020, a new coronavirus emerged in Wuhan City, in the Hubei Province of China and was given the temporary name of 2019-nCoV (renamed on 11 February 2020 by the World Health Organization as COVID-19).

On 29 January 2020, a public health emergency was declared under section 319 of the Public Health Act due to the outbreak of COVID-19 within China, its pandemic potential due to cases spreading to other countries and the public health implications within Queensland resulting

from recently arrived travellers from the epicentre of the outbreak. The public health emergency was declared for all of Queensland. A copy of the public health emergency order was published in the Government Gazette on 31 January 2020.

Prior to 7 February 2020, under sections 322 and 323 of the Public Health Act, a declared public health emergency ended seven days after the day it was declared, unless extended by regulation.

On 7 February 2020, the *Public Health (Declared Public Health Emergencies) Amendment Act 2020* amended the Public Health Act to allow a declared public health emergency to be extended by regulation for a period of up to 90 days. However, this amendment was subject to a sunset clause that took effect one year from assent of the Amendment Act. On 7 February 2021, the extension period reverted to a period of up to seven days.

On 8 March 2021, the *Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Act 2021* reinstated the amendments that provide the Governor in Council with powers to extend the declared public health emergency for up to 90 days. The *Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Act 2022* extended the effect of these amendments until 31 October 2022.

The Regulation extends the public health emergency to 22 September 2022 to ensure the public health emergency powers can continue to be exercised to prevent and minimise the adverse effects of COVID-19.

Public health risks

COVID-19 continues to pose a significant risk to the Queensland community and health system. In recent months, there has been widespread and sustained COVID-19 transmission in Queensland, peaking in two waves dominated by the Omicron variant in December 2021 to early-March 2022 and in mid-March to mid-April 2022. As at 3 June 2022, there have been 1,168,925 reported cases of COVID-19 in Queensland, and 1,037 deaths relating to COVID-19 have been recorded.

Following the most recent wave, Queensland's reported case numbers have slowly trended down. In the week to 3 June 2022, Queensland averaged 3,873 reported cases per day. However, not all COVID-19 cases are tested and reported, and the true number of cases of COVID-19 in the community is likely to be significantly higher. This is evident in the number of COVID-19 hospitalisations in Queensland, which is following a slower trajectory than case numbers. As at 3 June 2022, Queensland has 305 COVID-19 hospital inpatients, with 3 of these in intensive care.

COVID-19 continues to pose risks to communities and the health system. It will remain of particular concern in areas with comparatively low vaccination rates and more limited health care resources, such as rural and remote areas and First Nations and culturally and linguistically diverse communities.

It is expected there will be ongoing widespread COVID-19 transmission punctuated by multiple waves over the coming year. Case numbers during the first two waves have remained within health system capacity. However, each subsequent wave is commencing from a higher baseline, as COVID-related hospitalisations are not reaching zero between waves. However, high levels

of vaccine and infection-induced immunity will continue to help protect against more severe outcomes requiring hospitalisation.

Future waves of COVID-19 over the winter period are expected to coincide with waves of influenza infections, with both influenza and COVID-19 having the potential to put significant pressure on the health system during the period from June to September 2022. Queensland experienced very low rates of flu transmission in 2020 and 2021 causing the natural level of immunity to wane. This year's influenza season is predicted to be severe, with the flu season starting earlier in the year. Co-infection of influenza and COVID-19 is of additional concern. Queensland Health is planning for the possible impacts on the health system of simultaneous waves of COVID-19 and influenza, as well as the potential for co-infection in greater numbers than seen previously.

A number of other uncertainties around the development of the pandemic remain. This includes what protections Omicron infection may present against reinfection, and the potential emergence of new variants of concern, particularly with eased international border restrictions and the effectiveness of vaccines over time. For example, while Queensland's initial waves were dominated by the BA.1 and BA.2 sublineages of Omicron, the BA2.12.1, BA.4 and BA.5 sublineages have since been detected in Australia. These are likely to be more transmissible than previous sublineages and the potential for reinfection is not yet well-understood.

For these reasons, extending the public health emergency is necessary and appropriate to prevent or minimise serious adverse effects on human health. Continuing the public health emergency will ensure the emergency powers in the Public Health Act can be exercised when necessary to manage the impacts of COVID-19 in Queensland.

Managing the public health risk

While Queensland is well-positioned to manage the current levels of COVID-19 transmission among a highly-vaccinated population, the current global epidemiological situation, with sustained growth in new cases and the spread of highly transmissible COVID-19 variants, continues to present a significant risk to Australia and Queensland.

Since late 2021, Queensland has been moving away from an elimination approach, to a suppression approach, and more recently into living with the risks of COVID-19, monitoring transmission levels and protecting vulnerable cohorts. Restrictions have been eased in a gradual and considered manner. Remaining measures are targeted at protecting the hospital system capacity and vulnerable cohorts from COVID-19.

As Queensland continues this transition to living with the risks of COVID-19, some restrictions may still need to be activated or maintained, such as mask-wearing in areas of increased community transmission. Queensland's two Omicron waves, and the emergence of potentially more transmissible sublineages of Omicron, serve as a clear reminder of how rapidly COVID-19 can spread, with the potential to significantly impact hospital systems. A rapid and flexible public health response is still required to protect the health, safety and welfare of Queenslanders and mitigate the spread of COVID-19 in the community. Ongoing COVID-19 responses are likely to be driven by local epidemiological conditions, vaccination coverage and health system capacity, as well as any measures needed to respond to the emergence of new variants of concern or other unforeseen circumstances.

It is critical that flexibility is retained to ensure that, as restrictions are eased and normal social and economic activity resume, appropriate public health measures can continue to be put in place if necessary to address ongoing public health risks and protect the health system. Extending legislative measures to support the public health response to the COVID-19 public health emergency will ensure Queensland remains well placed to respond to the changing nature of the pandemic. It will also support the government's long-term objective of safeguarding our health contained in *Unite and Recover – Queensland's Economic Recovery Plan*.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

The Regulation extends the declared public health emergency, which provides for the continuation of the emergency powers given to the Chief Health Officer and emergency officers under the Public Health Act.

In my opinion, the human rights that are relevant to the subordinate legislation are:

- Right to life (section 16);
- Freedom of movement (section 19);
- Freedom of thought, conscience, religion and belief (section 20);
- Freedom of expression (section 21);
- Peaceful assembly and freedom of association (section 22);
- Taking part in public life (section 23);
- Property rights (section 24);
- Privacy and reputation (section 25);
- Protection of families (section 26(1));
- Protection of children (section 26(2));
- Cultural rights – generally (section 27);
- Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28);
- Right to liberty and security of person (section 29);
- Right to humane treatment when deprived of liberty (section 30); and
- Right to education (section 36).

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Right to life

The right to life imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life. The Regulation promotes the right to life by extending the length of the declared public health emergency until the end of the day on 22 September 2022, which provides for the continuation of the powers given to the Chief Health Officer and emergency officers to issue directions and exercise powers under the Public Health Act to contain the spread of COVID-19, which is fatal in some cases. Therefore, the right to life is not limited by the regulation.

Freedom of movement

Section 19 of the Human Rights Act provides that every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it and has the freedom to choose where to live.

The Regulation has the potential to limit this right as it provides for the continuation of the powers given to the Chief Health Officer and emergency officers under the Public Health Act, which include the ability to: require a person to not enter or not remain within a place; stay in a stated place; and stop using a place for a stated purpose. Failure to comply with these requirements without reasonable excuse is an offence with a maximum penalty of 100 penalty units. Emergency officers (medical) also have the power to order detention of a person if that person has or may have a serious disease or illness. As soon as practicable after a person is detained, an emergency officer (medical) must request that the person be medically examined. Failure to comply with a detention order is an offence with a maximum penalty of 200 penalty units.

Freedom of thought, conscience, religion and belief; Freedom of expression; Peaceful assembly and freedom of association; Cultural rights – generally; Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

The Regulation provides for the continuation of the powers given to the Chief Health Officer and emergency officers under the Public Health Act to make public health directions to: prohibit a person from entering or remaining within a place; stay in a stated place; and stop using a place for a stated purpose. Failure to comply with these requirements without reasonable excuse is an offence with a maximum penalty of 100 penalty units. In addition, emergency officers (medical) have the power to order detention of a person if that person has or may have a serious disease or illness. As soon as practicable after a person is detained, an emergency officer (medical) must request that the person be medically examined. Failure to comply with a detention order is an offence with a maximum penalty of 200 penalty units.

The right to freedom of thought, conscience, religion and belief includes the freedom to demonstrate the person's religion or belief 'either individually or as part of a community, in public or in private' (section 20(1)(b) of the Human Rights Act). The right to hold a belief is so important that it is an absolute right, however, limits on how a person manifests their belief can be justified. As the Regulation provides for the continuation of the powers given to emergency officers to order a person to self-isolate or to otherwise restrict a person's or group's movements, this may limit the ability of people to publicly demonstrate and practice their religion or beliefs.

The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds. It protects almost all kinds of expression, as long as it conveys or attempts to convey a meaning. Ideas and opinions can be expressed in various ways, including in writing, through art, or orally. While the concept of freedom of expression is broad, the way people can exercise it can be limited. As the Regulation provides for the continuation of the powers given to the Chief Health Officer and emergency officers under the Public Health Act to restrict a person's movement and contacts with others, this may limit the ways in which people can express their opinions and ideas.

The right to peaceful assembly is the right of individuals to gather for a common purpose or to pursue common goals. It protects both participants and organisers of peaceful assemblies. The Regulation provides for the continuation of the powers given to the Chief Health Officer and emergency officers, which may restrict a person's movements and limit the ability of people to peacefully assemble.

Cultural rights protect the rights of all people with particular cultural, religion, racial and linguistic backgrounds to enjoy their culture, declare and practice their religion, and use their language in the community. It promotes the right to practise and maintain shared traditions and activities and recognises that enjoying one's culture is intertwined with the capacity to do so in connection with others from the same cultural background. In addition to the general cultural rights, the Human Rights Act recognises that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's first people. They have the right to enjoy, maintain, control, protect and develop their culture, language and kinship ties with other members of their community. The right also protects Aboriginal peoples' and Torres Strait Islander peoples' right to maintain and strengthen their distinct spiritual relationship with the land, territories, waters, coastal seas and other resources, and to conserve and protect the environment.

The Regulation provides for the continuation of the powers given to the Chief Health Officer and emergency officers under the Public Health Act, including the power to order persons to self-isolate, or to otherwise restrict the movement of groups and individuals. As a result, this may limit cultural rights generally and the rights of Aboriginal peoples and Torres Strait Islander peoples to engage with the community and their traditionally owned or otherwise occupied lands and waters.

Taking part in public life

Every person in Queensland has the right to take part in public life. This includes the right to participate in the conduct of public affairs and the right to vote and be elected at periodic State and local government elections. Being part of community consultations with government, attending local council meetings, participating in public debate, and taking part in referendums or other electoral processes are important aspects of taking part in public life.

The Regulation has the potential to limit this right, as it provides for the continuation of the powers given to the Chief Health Officer and emergency officers, which include the ability to restrict the movement of persons; require persons to stay at or in a stated place; require persons not to enter or stay at or in a stated place; and restrict contact between persons. For example, individuals subject to directions to self-isolate or otherwise restrict their movements, or who are affected by restrictions placed on access to facilities, will be temporarily limited in the ways in which they can take part in public life.

Property rights

Section 24 of the Human Rights Act provides that a person must not be arbitrarily deprived of the person's property. The Regulation has the potential to limit this right as it provides for the continuation of the emergency powers given to the Chief Health Officer and emergency officers under the Public Health Act to respond to the declared public health emergency.

In particular, emergency officers have the power to: demolish stated structures or other property; remove an animal, substance or thing from a place; dispose of an animal, substance or thing at a place; destroy animals at a place or remove animals at a place for destruction at another place; and take action in relation to property including, for example, to allow the officer to take control of a building for the purposes of the emergency.

Privacy and reputation

The nature of the right to privacy and reputation is very broad but contains internal limitations. The protection against interference with privacy is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

The Regulation provides for the continuation of the powers given to the Chief Health Officer and emergency officers under the Public Health Act for the purpose of protecting the health of the public by managing the potential spread of COVID-19. It is reasonable, necessary and proportionate to limit the rights of a person in order to protect the health of the public in the context of a public health emergency. The powers ensure Queensland Health can implement strategies to protect public health.

Right to liberty and security of person

The nature of the right to liberty and security is to protect personal liberty, but it is focused on the requirement that due process is followed when state authorities exercise their powers of detention. It is not the deprivation of liberty that is prohibited but that which is arbitrary or unlawful.

The right to freedom of movement is based upon Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR states in part that the right shall not be subject to any restrictions except those which are provided by law and are necessary to protect public health.

The Regulation provides for the continuation of the emergency powers given to the Chief Health Officer and emergency officers under the Public Health Act, including, the power to restrict the movement of persons; require persons to stay at or in a stated place; require persons not to enter or stay at or in a stated place; and restrict contact between persons. For example, a direction to self-isolate at home or at another premises, or to otherwise restrict a person's movements, may limit the right to liberty and security as it prevents people from leaving their homes or other premises.

This right is subject to several internal limitations and qualifications. Relevantly, the detention must not be arbitrary in the sense that it must not be capricious, unpredictable or unjust or otherwise disproportionate to the legitimate aim that is sought. The powers of emergency officers are clearly defined and subject to limits, for example, the person giving the direction or order must reasonably believe that it is necessary to assist in containing or responding to the spread of COVID-19.

Right to protection of families

Queensland recognises families as the fundamental unit of society entitled to protection. This right encompasses more than non-interference; it is a guarantee of institutional protection of the family by society and the state. 'Family' is interpreted broadly, extending to different cultural understandings of family. Internal limitations of lawfulness and arbitrariness apply to the right of the family.

The Regulation provides for the continuation of the emergency powers given to the Chief Health Officer and emergency officers under the Public Health Act, including, the power to restrict the movement of persons; require persons to stay at or in a stated place; require persons not to enter or stay at or in a stated place; and restrict contact between persons. This may limit this right due to physical separation of families, whereby a person may be ordered to self-isolate or a facility, such as an aged care facility, is directed to restrict access to visitors.

This limitation would be temporary and would not restrict other means of communication and engagement among family members, for example through phone calls, video conferencing or social media. The limitation on the right to protection of families would also not be arbitrary, as the actions would be taken to protect the health and safety of family members and the wider community.

Right to protection of children

Every child has the right, without discrimination, to the protection that is in their best interests as a child. The right recognises that special measures to protect children are necessary given their vulnerability due to age. The best interests of the child should be considered in all actions affecting a child, aimed at ensuring both the full and effective enjoyment of all of the child's human rights and the holistic development of the child. What is in the best interest of a child depends on the individual circumstances of the child.

The Regulation provides for the continuation of the emergency powers given to the Chief Health Officer and emergency officers under the Public Health Act, including, the power to restrict the movement of persons; require persons to stay at or in a stated place; require persons not to enter or stay at or in a stated place; and restrict contact between persons. These powers may impact children through, for example, temporarily restricting their movement, restricting the movement of family or other contacts, or restricting their access to certain facilities or events. Also, directions may not consider the child's views or give their views due weight, which does not respect their capacity to influence the determination of their best interests. However, there are other aspects of the child's best interests which weigh in favour of their right to life and their health and wellbeing.

Right to humane treatment when deprived of liberty

The Human Rights Act states that everyone must be treated with respect when deprived of liberty. The use of force to enforce self-isolation or other directions could potentially implicate this right.

The Regulation has the potential to limit this right, as it allows the Chief Health Officer to continue to make public health directions to assist in containing, or responding to, the spread of COVID-19 within the community. For example, prohibiting a person from entering or remaining within a place; staying in a stated place; and to stop using a place for a stated purpose. Failure to comply with these requirements without reasonable excuse is an offence with a maximum penalty of 100 penalty units.

Emergency officers (medical) also have the power to order detention of a person if that person has or may have a serious disease or illness. As soon as practicable after a person is detained, an emergency officer (medical) must request that the person be medically examined. Failure to comply with a detention order is an offence with a maximum penalty of 200 penalty units.

However, these public health directions constitute lawful orders and the use of force required will only extend to what is necessary and reasonable to enforce compliance under the Public Health Act.

Right to education

The right of every child to access primary and secondary education appropriate to their needs is protected in Queensland. The right to education also says that every person has the right to have access, based on their abilities, to equally accessible further vocational education and training.

The right to education is intended to be interpreted in line with the *Education (General Provisions) Act 2006* and to provide rights in relation to aspects of Queensland's responsibilities for education service delivery. Internationally, this right has been interpreted as requiring that education be accessible to all people without discrimination. Individuals may be temporarily restricted from attending schools or other educational institutions if they are subject to a direction to self-isolate in order to assist the containment of or arrest the spread of COVID-19 to the broader community.

The Regulation provides for the continuation of the powers given to the Chief Health Officer and emergency officers under the Public Health Act which include the power to restrict the movement of persons; require persons to stay at or in a stated place; require persons not to enter or stay at or in a stated place; and restrict contact between persons. This may limit certain educational activities, such as school assemblies or performances may also be temporarily restricted, however such restrictions would be without discrimination and for the broader purpose of protecting the community from COVID-19.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Protecting the health and safety of the public is a fundamental responsibility of government and is consistent with a free and democratic society based on human dignity, equality and freedom. The purpose of the limitations on human rights to be imposed by the Regulation, if enacted, is to protect the Queensland public from serious risks to health and safety, including the potential for loss of life that could occur without an effective public health response to the COVID-19 pandemic.

The declaration of the public health emergency and the amendments to public health legislation have enabled an effective public health response to the COVID-19 pandemic in Queensland and allowed time for a large proportion of the population to be vaccinated to minimise transmission, illness and hospitalisations. However, despite reaching high levels of vaccination in the community, flexibility to deliver ongoing public health responses is an important safeguard to ensure the pandemic can continue to be managed safely and effectively. There are a number of ongoing uncertainties about how the pandemic will continue to develop, including risks of reinfection, the potential emergence of new variants of concern, vaccine effectiveness over time and possible increased transmission during the winter months. A further extension of the declared public health emergency enables operation of key public health powers under the Public Health Act to continue to provide the flexibility to continue to respond to ongoing community transmission and to adapt the public health response to new variants which may be more infectious or vaccine resistant or other unforeseen circumstances that emerge.

To ensure the Queensland Government can continue to appropriately adapt the public health response to COVID-19 in Queensland, it is considered necessary to extend the declared public health emergency until the end of the day on 22 September 2022.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The limitation of human rights is necessary to ensure that public health officials can implement effective ongoing measures to respond to the COVID-19 pandemic. These measures will help to minimise transmission to COVID-19 and respond to developments in the pandemic, including new variants of concern or particular outbreaks.

The limitations are incidental to the provision of emergency powers under the Public Health Act to implement restrictions, including requiring people with COVID-19 to isolate. The limitations help to ensure that Queensland's public health system is able to cope with serious cases and hospitalisations as community transmission continues.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

The Public Health Act requires that a Regulation be made to extend the declared public health emergency for a further period. Therefore, the extension of the declared public health emergency by the making of a Regulation, which provides for the continuation of the powers given to the Chief Health Officer and emergency officers, cannot be achieved through any less restrictive means.

Given the risks to public health, the economy and other social impacts arising from COVID-19 in Queensland, it is critical the emergency powers given to the Chief Health Officer and emergency officers under the Public Health Act continue. If the declared public health emergency is not extended and the powers lapse, the ability for the Queensland Government to continue to respond to COVID-19 would suffer significant detriment and could not be achieved through other less restrictive means, such as public messaging alone.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The benefits of significantly reducing Queenslanders' exposure to disease and preserving access to emergency and life-sustaining treatment for persons who develop serious health complications as a result of COVID-19 substantially outweigh the limitations on human rights.

Although the Regulation potentially limits many rights, these limitations are minor in nature and the need to protect the right to life for all Queenslanders substantially outweighs the limitations on human rights.

Throughout the pandemic, the Queensland Government has actively assessed and reviewed the need for restrictive measures to continue, such as social distancing restrictions and the requirement to close some non-essential businesses.

As shown with the emergence of the Omicron variant, widespread community transmission can occur even in highly vaccinated populations. The nature of the virus and the potential for new variants are such that targeted responses to particular outbreaks may still be required.

The Public Health Act states that the Regulation can extend the declared public health emergency and related powers of emergency officers for a period of no more than 90 days. This requirement is an important safeguard as it places an obligation on the Queensland Government to repeatedly assess the need for the declared public health emergency to continue, based on the current threat of COVID-19 in Queensland.

If the need for the declaration of the public health emergency is no longer considered necessary, the Public Health Act also provides for the Minister for Health to declare that the public health emergency has ended, which immediately extinguishes the emergency powers given to the Chief Health Officer and emergency officers under the Public Health Act. This safeguard requires the Queensland Government to assess the need for the public health emergency, not just prior to the expiry of the declaration period, but on a continual basis.

On balance, any limitations on human rights are reasonable and justified to ensure the preservation of life and protection of the community from the worst impacts of a pandemic.

Conclusion

I consider that the *Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 2) 2022* is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with human rights, but the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP
MINISTER FOR HEALTH and AMBULANCE SERVICES
and LEADER OF THE HOUSE

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