



**Victorian Equal Opportunity
& Human Rights Commission**



**2021 Report on
the Operation
of the Charter
of Human
Rights and
Responsibilities**

Published by the Victorian Equal Opportunity and Human Rights Commission, Level 3, 204 Lygon Street, Carlton VIC 3053.
September 2022.

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2021 Charter Report

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ISBN 978-0-6480882-8-8

Published by order, or under the authority, of the Parliament of Victoria

December 2022

2021 Report on the Operation of the Charter of Human Rights and Responsibilities

Letter to the Attorney-General

30 August 2022

Dear Attorney-General

On behalf of the Victorian Equal Opportunity and Human Rights Commission, I am pleased to present to you our 14th annual report on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) in the 2021 calendar year.

In accordance with section 41(a) of the Charter, this report examines the operation of the Charter, including its interaction with law and policy. During 2021, the Supreme Court of Victoria did not make any declarations of inconsistent interpretation and the Victorian Parliament did not pass any override declarations. Accordingly, it has not been necessary for this report to examine matters under section 41(a)(ii) and (iii) of the Charter.

As with 2020, the year 2021 was dominated by human rights issues related to the COVID-19 pandemic. This report is a continuation of the COVID-19 impact focus of the 2020 Charter report and provides an update on the Charter issues that emerged in 2021 in relation to additional measures the Victorian Government took to protect Victorians.

The Charter has continued to support and improve public sector decision-making in 2021, with public authorities using the Charter's decision-making framework to balance individual rights with public health and safety. The Commission recognises that introducing public health measures designed to safeguard human life, while upholding other human rights, is a delicate balancing act. To this end, we have worked with the government to ensure that the Charter continues to guide decision makers throughout the exercise of pandemic-specific powers.

One key milestone for 2021 was the development and passage of the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021*. This Act provides Victoria with a tailored framework for managing pandemics including COVID-19 and any potential future pandemics. Importantly, the Act makes clear that the Charter will continue to apply when pandemic-specific powers are exercised, and I am pleased that human rights will remain at the forefront of government decision-making when managing pandemics.

The Commission has identified and provided advice on a range of emerging human rights issues related to the pandemic response, such as border closures, mandatory vaccinations, and the impacts of response measures on children and young people. As we build on our strong foundation for long-term pandemic recovery, the Commission will continue to highlight the human rights impacts of the pandemic response, including for vulnerable groups already affected by disadvantage and inequality in our community.

Recovery from the pandemic will require care, compassion and close cooperation across all sectors. I look forward to continued work with government and civil society to ensure an ongoing focus on human rights and providing support to those who need it most.

Yours sincerely



A handwritten signature in black ink, appearing to read 'Ro Allen'.

Ro Allen
Victorian Equal Opportunity
and Human Rights Commissioner



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Snapshot of this report

2021 was another year of major upheaval in the lives of Victorians as they adapted to the Victorian Government’s public health responses to the COVID-19 pandemic. The Charter once again provided an important framework to guide good lawmaking, develop and implement policy, make government decisions, and guide the courts’ interpretation of laws. It also proved to be a critical instrument for determining what can be considered ‘reasonable and proportionate’ amid an emergency.

The first part of this report provides an overview of the operation of the Charter in 2021, including how it was used by the Victorian community in the courts, and in enquiries and complaints made by people to the Commission and other relevant agencies. Even Victorians with less familiarity with the Charter invoked its protection throughout 2021. In particular, this was a year that saw street protests surge in response to lockdowns, vaccination mandates and the development of new pandemic-specific emergency legislation.

The most significant advance in the government’s response to the pandemic was the passage of new legislation to govern the state response to pandemics. The report explores the role the Charter played in the development of the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021*. Like the emergency powers that were previously used to respond to COVID-19, orders made under the provisions introduced by this Act can include measures that curtail Charter rights. The Commission commends the government for clarifying exactly how the Charter would continue to apply to pandemic powers and thereby safeguard human rights going forward. The Commission is very pleased that the new pandemic management framework established through this Act upholds the Charter’s human rights principles through additional safeguards, reports, accountability and scrutiny. This will better protect the rights of all Victorians, not only for this pandemic, but for any future pandemics.

Although the Charter continued to operate in 2021, many of the public health measures imposed in response to the pandemic disproportionately impacted vulnerable communities and exacerbated existing inequalities. The second part of this report highlights three areas where this impact was significant in 2021:

		
<p>Border closures</p> <p>Section 2.1 looks at the Victorian Ombudsman’s investigation into the Department of Health’s decision making around the Border Directions and the provision of exemptions.</p>	<p>Mandatory vaccinations</p> <p>Section 2.2 examines vaccination mandates imposed to protect lives and promote health and safety, highlighting vaccination supply and access issues, and the experience of different cohorts in obtaining the vaccine.</p>	<p>Children and young people</p> <p>Section 2.3 considers the impact of public health issues on children and young people in 2021 and centres on the role the Charter plays in supporting decision-making that is in the best interest of children and young people.</p>

THE CHARTER IN 2021



1.1 Lessons learned

Lesson 1: The Charter promotes human rights during public emergencies

During the COVID-19 pandemic, the Charter has continued to operate. The ongoing operation of the Charter has been important, especially given the increased concern expressed by community members that public health measures such as lockdowns and mandatory vaccination requirements unfairly limited their human rights.

The operation of the Charter ensured that public authorities considered and acted in accordance with human rights in decisions made by them to introduce and update public health measures, as well as in the implementation of the public health orders. It was important, for example, that the Chief Health Officer (CHO) considered whether limitation of rights was necessary and proportionate when making public health orders. It also meant that parliament continued to scrutinise new laws for Charter compliance.

Critically, the operation of the Charter has meant that people with concerns about their Charter rights received information on their rights from the Commission, could complain to the Victorian Ombudsman and, where necessary, even challenge government decisions in the courts on Charter grounds.

Lesson 2: The new pandemic framework law improves transparency, scrutiny and accountability

In December 2021, Victoria introduced a new legal framework to manage pandemics, which included a number of new checks and balances that further embedded human rights considerations when responding to pandemics. The new pandemic framework improved the transparency, scrutiny and accountability of public health measures when compared with the emergency powers that had previously been used. The new framework is also clear on how the Charter applies to the making of pandemic orders. The improvements to the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 were a result of deep consultation with civil society and public discourse relying on the Charter.

Lesson 3: The community wants to understand the reasons for limiting rights

Throughout 2021, some groups within the community expressed their concern that pandemic measures were unfair restrictions on their human rights. However, the government's assessment of the fairness of the limitations was not publicly available. An improvement in the pandemic framework is that where a pandemic order limits rights, the Minister for Health will be required to publish a statement outlining whether the pandemic order limits Charter rights, and if so, the Minister's assessment of the proportionality of the orders. The Commission notes that this is already happening, which is a positive change. Decision making in an emergency is challenging, and the impact of those decisions is considerable. It is important that when people have their movement restricted or their kids kept home from school that they are given access to the full reasoning behind those decisions, including the consideration of their human rights. The Commission encourages government to explain in human rights terms why decisions to limit rights are being made, to build trust and confidence.



Lesson 4: The pandemic has a disproportionate impact on communities who are already experiencing disadvantage

In 2021, public health measures continued to disproportionately impact communities with existing inequalities. For example, Victoria's border closures exacerbated disadvantage for people who needed access to medical treatment, people with mental health conditions, people who were already socially isolated, people with caring responsibilities and people with family members who were unwell or had passed away. For this reason, it is critical that decision makers are aware of the disproportionate impact of public health measures on vulnerable communities and proactively assess the human rights impacts of any measures on a case-by-case basis. This includes considering any less restrictive options available in the circumstances, to ensure that the implementation of any public health measures does not exacerbate disadvantage.

The Commission is pleased that the newly established Independent Pandemic Management Committee (IPMAC), which has the ability to review public health measures and recommend changes. Importantly, IPMAC's composition includes people with knowledge and experience on the interests and needs of vulnerable communities. IPMAC will be a considerable source of advice that the minister should utilise.

Lesson 5: Children and young people must be at the heart of public health measures that impact them

In 2021, a range of public health measures were introduced that profoundly impacted children and young people's mental and physical health and development. These measures included the closures of schools and playgrounds, and limits on home visits and private gatherings.

To mitigate these impacts, the Commission encourages decision makers to prioritise the rights of children and young people (including the right to protection in their best interests), in future pandemic responses. This includes by:

- acting compatibly with and properly considering the rights of children and young people when making decisions about how to respond to a pandemic
- consulting children and young people about decisions that will impact them (such as school closures) and taking their views into account
- communicating information to children and young people in an accessible and engaging way (including asking them how they would like to receive information)
- considering the specific needs of vulnerable children and young people, including those who are known to child protection and/or youth justice, live in out-of-home care, experience homelessness, are disconnected from the education system or live with complex needs and/or disability.



1.2 Protection and promotion of human rights in 2021

At a glance

- During 2021, the COVID-19 pandemic continued to dramatically impact the lives of Victorians. The State of Emergency declared in 2020 was extended for most of 2021, enabling parliament and public authorities to impose emergency public health measures to respond to the pandemic. These measures safeguarded public health and promoted the right to life but also significantly limited other human rights of Victorians.
- Importantly, the Charter continued to operate throughout 2021, ensuring that people retained their ability to challenge government decisions in the courts on Charter grounds and complain about rights-inconsistent treatment to relevant authorities. Some members of the community also continued to critique new pandemic laws through the framework of the Charter and engage in protest and other speech around the impact of health measures on their lives.
- In December 2021 Victoria introduced specific legislation to respond to pandemics, such as COVID-19, which was the first legislation of its kind in Australia.

The 2021 COVID response

“During 2021, ongoing waves of COVID-19 and public health restrictions meant we had to carefully navigate the balance between public health needs and the human rights of all Victorians. Luckily, the continued operation of the Charter supported us during this period.”

— *Ro Allen, Victorian Equal Opportunity and Human Rights Commissioner*

At the beginning of 2021, Victorians were breathing a sigh of relief. With the lockdowns of 2020 over, many people were enjoying freedoms not felt since before the pandemic began. However, in February 2021, this changed when a hotel quarantine worker tested positive for a UK strain of COVID-19, sparking Victoria’s third lockdown. During the snap lockdown, there were only four reasons to leave home: essential shopping, medical care, exercise and essential work. Schools moved to remote learning and the five-kilometre travel limit was reintroduced. This was a sign of further lockdowns to come, as Victorians experienced frequent stay-at-home orders during winter and much of spring.

On 24 May 2021, Victoria’s 86-day streak with no community transmission was broken, and the Chief Health Officer tightened restrictions in response. But by 28 May, stay-at-home orders were reintroduced, schools were closed and the whole of Victoria went into lockdown again for two weeks, with a slight easing of restrictions for regional Victoria one week earlier.

2021 saw every student in Victoria have their schooling impacted in some way, with school closures commencing in February 2021; schools in metropolitan Melbourne and regional Victoria were closed intermittently for most of the year with learning taking place remotely online.

By the middle of 2021, Delta had become the more dominant COVID-19 variant globally, and was more virulent and contagious. On July 12, Victoria closed its borders to New South Wales and Australian Capital Territory residents to prevent the spread of the more deadly strain.

On 16 July, Victoria entered its fifth lockdown; initially a five-day snap lockdown which was then extended to 10 days. After 27 July, some restrictions remained. However, just under 10 days later, Victoria once again entered a lockdown- its sixth and longest lockdown for 2021 – lasting from 5 August to 22 October. Throughout this period, the Victorian Government extended the end date of Melbourne’s lockdown three times and reinstated the overnight curfew, while restrictions were intermittently eased and tightened in regional Victoria.

The COVID-19 vaccine became available to most people in August 2021 and on 7 September vaccines became mandatory for people working in aged care. In September and October 2021, further directions introduced vaccination mandates in construction, healthcare and education by imposing similar obligations on operators of construction sites, healthcare facilities and education facilities.¹ In October 2021, the Victorian Government issued a vaccination mandate for all workers on the Authorised Worker list, which was estimated to be around one million people.² By 31 October 2021, Victoria reached its target of 80 per cent of people aged 16 years and above having received a double dose of a COVID-19 vaccination.

In November several aged care facilities experienced large outbreaks of COVID-19. However, by the end of the month, attention turned to the emerging Omicron variant.

As the year drew to a close, the Victorian Government put forward pandemic specific legislation to govern its response to the pandemic and replace the reliance on broad emergency powers in the Public Health and Wellbeing Act. By 2 December 2021, the Victorian Parliament successfully passed this legislation, the *Public Health and Wellbeing Amendment Act 2021*, providing a new framework for managing the COVID-19 pandemic going forward, as well as future pandemics.

By the end of the year, community transmission in Victoria was starting to rise sharply, and the government reintroduced mandatory mask wearing in indoor settings.

COVID-19 Response Timeline in 2021

STATE OF EMERGENCY – 1/1/2021 – 15/12/2021

NEW PANDEMIC FRAMEWORK 15/12/2021 – ONGOING

11 JANUARY

Victoria introduces a 'Traffic Light System' to classify other states when there is an outbreak.

13 FEBRUARY

Victoria enters a five-day snap lockdown, its first for 2021 and third overall.

22 FEBRUARY

First COVID-19 vaccine doses are administered in Australia.

24 MAY

Victoria's 86-day streak with no community transmission is broken with 4 new cases reported.

28 MAY

Stay-at-home orders reintroduced – schools are closed and the whole of Victoria goes into its fourth lockdown.

3 JUNE

Lockdown measures ease in regional Victoria but remain in metropolitan Melbourne until 11 June 2021.

JULY

Delta becomes the more dominant COVID-19 variant in the middle of the year.

12 JULY

Victoria closes its borders to NSW and ACT residents to prevent the spread of the more deadly strain.

16 JULY

Victoria enters its fifth lockdown; initially a five-day snap lockdown (similar to the one in February) which is then extended to 10 days.

23 JULY

The Chief Health Officer issues directions closing Victoria's border with NSW and the ACT.

27 JULY

Victoria's fifth lockdown ends, but some restrictions remain.

5 AUGUST

Victoria's sixth lockdown commences.

10 AUGUST

Regional Victoria is released from lockdown.

21 AUGUST

Regional Victoria enters lockdown.

7 SEPTEMBER

First vaccination mandate is announced for workers in aged care.

9 SEPTEMBER

Restrictions eased for regional Victoria but remain for metropolitan Melbourne and Shepparton.

15 SEPTEMBER

Lockdown ends for the City of Greater Shepparton.

17 SEPTEMBER

Easing of restrictions in metropolitan Melbourne. Ballarat goes into a seven-day lockdown.

19 SEPTEMBER

Anti-vaccination mandate protests take place out the front of the CFMEU in Melbourne.

1 OCTOBER

The City of Greater Shepparton enters another seven-day lockdown.

4 OCTOBER

Melbourne marks 245 days of lockdowns and became the city with the longest cumulative time in lockdown in the world.

8 OCTOBER

The City of Greater Shepparton is released from lockdown.

22 OCTOBER

Metropolitan Melbourne's sixth lockdown ends.

NOVEMBER

Protests against the proposed pandemic management legislation continue throughout November and December.

2 DECEMBER

The Victorian Parliament passes the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (new Pandemic Framework).

JAN/FEB

MARCH/APRIL

MAY/JUNE

JULY/AUGUST

SEPTEMBER/OCTOBER

NOVEMBER/DECEMBER

The Charter and the community

The Charter continued to operate throughout 2021 and also applied to decision-making under the State of Emergency (which ended on 15 December 2021) by ensuring that human rights were central to public health decisions and balancing competing interests.

Appendix A includes an overview of Victoria’s human rights system.

The community was able to invoke the Charter in a number of ways, including through protesting against public health measures, public debate on the legitimacy of limiting rights, and challenging potential breaches of rights through litigation and complaints with the relevant regulators. The extreme impact of COVID-19 pandemic measures on peoples’ lives created an opportunity for many people, including those who had not previously interacted with the Charter, to engage and talk about how their rights were affected.

Part 2 of this report explores some of the areas where public health policy decisions interacted with human rights considerations.

DEMONSTRATIONS

The protection of human rights became a core theme of community concern about various measures to manage COVID-19 and this was reflected in increased protest activity. During 2021, parts of the Victorian community demonstrated against lockdowns, school closures, vaccination mandates, restrictions on the construction industry and the new pandemic legislation, often informally invoking the Charter.³ Many protesters believed that the pandemic measures throughout 2021 were incompatible with various human rights protected by the Charter, and therefore illegitimate.

However, Charter rights can be limited in certain circumstances.

When can rights be limited?

The Charter recognises that human rights are not absolute and can be limited in certain circumstances. However, any limitation must be reasonable in order for it to be lawful – which means it must be ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’. The following factors are relevant in determining whether a limitation on rights is reasonable and justified in the circumstances:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- any less restrictive means reasonably available to achieve the purpose.

In September 2021, the Commission updated its *Explainer* on protesting during COVID-19.⁴ The *Explainer* provided information on Charter rights that support the ability to protest and enable people to gather peacefully to speak on issues and explained that these rights can lawfully be limited under section 7(2) of the Charter. The relevant rights include:

- the right to peaceful assembly and freedom of association (section 16) and
- the freedom of expression (section 15).

The *Explainer* outlined that these rights related to protest could be limited where the limitations are necessary, justified, and proportionate – and that protest activities must themselves comply with public health orders in force at the time.

In late 2021, protest activity increased again as parts of the community voiced concern that the newly introduced Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 (see Section 1.3) would provide the government with broad power to limit human rights.⁵ The Victorian Bar expressed their concerns regarding the “extraordinarily broad” powers proposed in the first iteration of the Bill, and called for amendments to make clear that any powers exercised through the Bill would be invalid if they were not compatible with the Charter.⁶

Community feedback and engagement with the Commission and stakeholders including the Human Rights Law Centre and the Law Institute of Victoria, as well as crossbench negotiations in parliament, led to the Bill being improved. The amended Bill introduced stronger checks and balances to the exercise of decision-making and clarified the ongoing operation of the Charter, ensuring that human rights will be at the forefront of pandemic decision-making.

There is clearly an interest in the community in understanding how and why their human rights are being limited. This period of protest highlights an opportunity for the government to rely on the Charter more explicitly in its public statements, particularly where measures will limit rights. This would help to educate the community on the necessity and reasonableness of decisions that limit human rights, as well create an understanding of how decisions promote rights. This improved communication would enable more people to understand why these important decisions are being made, and how any necessary limitation on their rights is being continually monitored.

LITIGATION

Victorians can claim relief in Victorian courts for unlawfulness under the Charter if they also bring a claim of unlawfulness for non-Charter grounds.

In the *Harding v Sutton* case⁷ (discussed below in Section 2.1), 129 people working in various industries, including healthcare, construction and education, brought a claim alleging that the public health orders that required them to be vaccinated were unlawful, including because the orders were a breach of their Charter rights.⁸ This case demonstrated the way in which members of the public relied on the Charter to address their concerns regarding the pandemic measures and their limitations on human rights.⁹

Appendix B sets out all the court and tribunal cases that raised or considered the Charter in 2021.

ENQUIRIES AND COMPLAINTS

During 2021 there was a significant surge in the community accessing human rights information and making complaints about potential human rights breaches. There are three main pathways for people to seek information and enforcement of human rights outside the courts:

- The Commission provides information and advice about Charter rights, as well as assists people with complaints of discrimination, victimisation, sexual harassment and vilification (see Section 2.2 for detailed discussion of complaints and enquiries received in relation to the vaccination mandate).
- The Victorian Ombudsman can seek to informally resolve or investigate complaints about administrative actions and decisions by public authorities. The Ombudsman can also conciliate and mediate individual complaints.
- The Independent Broad-based Anti-Corruption Commission (IBAC) can also review Victoria Police investigations into allegations of police misconduct, including human rights violations.



COVID-19-related Charter enquiries and complaints in 2021

The Commission experienced a significant surge in enquiries related to vaccinations, government directions and face masks in the second half of 2021. From 1 July 2021 to 22 February 2022, the Commission received 2510 enquiries relating to the impact of COVID-19 on people's human rights, which represents 25% of overall enquiries (n=9973). This was an increase of 1908 COVID-19 related enquiries since 2020 (n=602). The Commission also received 1687 enquiries related to vaccination requirements, or 17% of all enquiries, whereas 589 enquiries related to face mask requirements, or 6%. Many enquiries were outside the scope of the Commission's service as they pertained to the personal view of the individual rather than a protected attribute under anti-discrimination laws. The Commission was able to assist with relevant information on lawful exceptions, information about what is considered to be a protected attribute under the Equal Opportunity Act, and referrals to our dispute resolution service and employment law services.

Complaints increased by approximately 17% from 1 July 2021 to 22 February 2022. Of the total number of complaints received, 41% related to the impact of COVID-19. There were 267 complaints relating to the impact of COVID-19; six related to vaccination requirements and 264 related to face mask requirements. The dispute resolution service successfully responded to the ongoing increase in demand by being flexible, adaptive and putting the needs of clients at the centre of service design and delivery.

The Victorian Ombudsman received over 1400 complaints relating to the COVID-19 pandemic and the Victorian Government's response. This figure is down from 2020 when there were over 2000 complaints. However, the 2020 COVID-related complaint numbers included a large number of complaints about the COVID Business Support Fund (BSF) administered by the Department of Jobs, Precincts and Regions. While the Victorian Ombudsman continued to receive complaints about the BSF into 2021, most were received in 2020.¹⁰

IBAC experienced a significant increase in complaints and notifications in 2021, with 768 complaints and notifications about the COVID-19 pandemic response and policing of directions. This was around three times as many as those reported in 2020. IBAC identified 223 matters as having a potential human rights violation or implication, with 175 of these relating to freedom of movement and recognition and equality before the law.

1.3 COVID-19 response powers legislation

At a glance

- In December 2021 Victoria introduced specific legislation to respond to pandemics, including COVID-19, which is the first legislation of its kind in Australia and ensures that human rights will be central to future pandemic responses.
- This legislation allows the Minister for Health to make pandemic orders during a pandemic that the minister believes are reasonably necessary to protect public health, if a pandemic declaration has been made by the Premier. These orders can include measures that limit Charter rights; therefore, appropriate safeguards are crucial to ensuring human rights are still protected during a pandemic, even where decisions need to be made (and altered) rapidly.
- In response to concerns raised by several stakeholders about the human rights impacts of the initial draft legislation, the government improved the Bill to clearly articulate how the Charter would continue to apply to pandemic powers and include mechanisms to better safeguard human rights.
- The amended legislative framework improves upon the State of Emergency framework under the *Public Health and Wellbeing Act 2008* which was used to manage and respond to the first 21 months of the COVID-19 pandemic.
- The framework better reflects human rights principles, improves transparency, accountability, oversight and scrutiny, safeguards private information, and introduces positive changes to fines and detention requirements.

“Recovery from the COVID-19 pandemic will require care, compassion and close cooperation across all sectors. With the now strengthened transparency, scrutiny and accountability for decision-making, we can maintain an ongoing focus on protecting the rights of all Victorians and continue to provide support to those in our community who need it most.”

— *Ro Allen, Victorian Equal Opportunity and Human Rights Commissioner*

The introduction of the first pandemic legislation

On 15 December 2021, the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Pandemic Management Act) came into effect in Victoria. The Pandemic Management Act amended the *Public Health and Wellbeing Act 2008*, by introducing a new Part 8A (Pandemic Framework) to give the government powers to respond to pandemics, including the COVID-19 pandemic. It is the first legislation of its kind in Australia.¹¹

From March 2020 to December 2021, the government used the State of Emergency framework in Part 10 of the *Public Health and Wellbeing Act* to manage and respond to the challenges it faced during first 21 months of the COVID-19 pandemic. During the declared State of Emergency, authorised officers, including the state’s Chief Health Officer (CHO), had extraordinary powers to make all directions reasonably necessary to eliminate or reduce a serious risk to public health. The State of Emergency declaration was renewed at least every four weeks but had an outer limit of 6 months. The outer limit was extended for COVID-19 via legislative change to 21 months, ending 15 December 2021. However, as the government neared the 21-month outer limit on the total duration for use of those emergency powers, it needed new powers to continue to manage the COVID-19 pandemic.

While the State of Emergency framework was designed to allow the Minister for Health and CHO to respond to any serious risks to public health, the Pandemic Framework is more narrowly tailored to respond to a pandemic disease, such as COVID-19, which may last for a prolonged period of time.¹²

The Pandemic Framework now ensures there is a continued legal basis for any public health measures needed to protect Victorians during a pandemic.¹³ It gives the Minister for Health many of the extraordinary powers that the State of Emergency placed in the hands of the CHO. However, following community concern about the breadth of power vested in the hands of the minister and through consultation with civil society, the government ensured that the Pandemic Framework provided better transparency, accountability, oversight and scrutiny mechanisms than apply to the State of Emergency. Importantly, the Charter clearly applies to the new Pandemic Framework to safeguard the rights of Victorians during a pandemic.

Pandemic Management Bill 2021 – A case study of the Charter in lawmaking

The Charter requires that every bill introduced into parliament must be accompanied by a statement outlining the bill's compatibility with human rights.¹⁴ The Scrutiny of Acts and Regulations Committee (SARC) considers all bills and reports to parliament on the compatibility of a bill with human rights.¹⁵ Depending on the contents of a bill, SARC may comment or seek clarification from the minister or member on the provisions and report these to parliament.

SARC's engagement with the minister and parliament's consideration of community stakeholder feedback during debate on the Pandemic Management Bill reflects Victoria's dialogue model of human rights in action.

SARC referred a number of human rights questions to the minister before the Pandemic Management Bill passed, including whether¹⁶:

- the minister's powers in the Act are limited to areas where the pandemic declaration applies and public health risks arising from the disease to which a public health direction relates
- pandemic orders must be interpreted in a way that is compatible with human rights and whether it is unlawful for the minister to fail to give proper consideration to a Charter right
- the Independent Pandemic Management Advisory Committee is a public authority.

The Ministerial response to SARC observed that pandemic orders can only be used in relation to the relevant pandemic disease or disease of pandemic potential for which a declaration has been made.¹⁷ The minister also confirmed that pandemic orders made under the Act are likely to be instruments of a legislative character and therefore, they must be interpreted in a way that is compatible with human rights in accordance with section 32 of the Charter.¹⁸ In response to the question of whether section 38 of the Charter applies to making pandemic orders, the Minister's response noted that a similar matter was before the Supreme Court in *Harding v Sutton*¹⁹ albeit concerning directions made under the Public Health and Wellbeing Act.²⁰ However, the minister also noted that the obligation to properly consider and to act compatibly with human rights is practically fulfilled by provisions that ensure that relevant Charter rights are thoroughly considered in the making of pandemic orders which must not unjustifiably limit human rights.²¹ The minister also stated that it is likely the Independent Pandemic Management Advisory Committee is a public authority.²²

During the passage of the Bill through parliament, Members of Parliament referred to feedback from the legal community and bodies including the Law Institute of Victoria, the Human Rights Law Centre, Liberty Victoria and the Victorian Ombudsman that raised points of concern during the Bill's development, including²³:

- the need to ensure the framework clearly set out how the Charter would apply once a pandemic declaration was in place
- the proposed introduction of increased penalties for aggravated non-compliance with pandemic orders and the lack of appropriate safeguards for these offences
- the lack of an outer limit on the total duration of a pandemic declaration once made
- the lack of external review of detention orders and the ability of the minister to make orders applying to specific people or classes of people.²⁴

The Victorian Government's amendments to the Bill addressed many of these issues. For example, the Bill:

- ensured the Charter would continue to apply and operate during a pandemic
- removed the proposed introduction of increased penalties for aggravated non-compliance with pandemic orders entirely
- ensured that, while there is no limit on the number of times a pandemic declaration may be extended, the Premier must be satisfied *on reasonable grounds* that there continues to be a serious risk to public health arising from a pandemic or disease of pandemic potential to make a pandemic declaration. Further, there is a requirement that the Premier must revoke a pandemic declaration as soon as they are satisfied that the circumstances giving rise to the declaration are no longer a serious risk to public health. Finally, the Bill already provided that each period of extension must not be longer than three months.
- introduced changes to the review of detention orders.*

The government also introduced the requirement for an independent review of the Pandemic Framework no later than 18 months after its commencement.

In addition, an important reform noted in parliament is that the legislation contains an expansion of the special circumstances test that will mean people facing disadvantage can have their fines removed, which will apply to all fines, not simply fines related to COVID.²⁵

The stakeholders have since acknowledged that the government's amendments have addressed many of their concerns.²⁶ The Commission, in particular, supports these changes and is pleased that human rights will remain at the forefront of government decision-making when managing this and any future pandemics.

Appendix C includes a summary of key bills raising human rights issues in 2021.

* For example, a person who is subject to a detention order can apply to the Detention Appeals Registrar for review of the decision by a Detention Appeals Officer. Once an application for review is received, it must be referred to a Detention Appeals Officer immediately and a decision on the application must be made within 72 hours. The Detention Appeals Officer can decide to vary or cease (stop) a detention order, however before doing so it must consider the advice of the Chief Health Officer about the proposed variation or cessation.

Human rights principles to inform the pandemic response

Throughout the COVID-19 pandemic, the Commission has recognised that introducing public health measures designed to safeguard human life while upholding human rights is a delicate balancing act. To this end, we have advocated that the Victorian Government's response to pandemics should be based on six key human rights principles:

1. Any limitations on rights should be necessary and proportionate, and the justification for those limitations should be backed by evidence.
2. Pandemic specific laws that allow rights to be restricted should be time-bound.
3. The Charter should continue to apply throughout the exercise of pandemic-specific powers.
4. The exercise of pandemic specific powers should be transparent and provide accessible, timely, clear and comprehensive information about limitations on human rights in a manner the public can understand.
5. There must be appropriate scrutiny of pandemic responses, including the decision to engage pandemic-specific powers and the exercise of them. Scrutiny ought to come from a range of sources, including parliament and the courts.
6. There should be additional safeguards and supports built in to minimise the limitation on human rights, prevent the abuse of power and mitigate the risk of entrenching inequality.

The Commission played an important role in shaping the Pandemic Framework to ensure the Pandemic Framework reflected these six key human rights principles.



The new Pandemic Framework

Under the Pandemic Framework, the Premier of Victoria may make a pandemic declaration, if satisfied on reasonable grounds that there is a serious risk to public health arising from a pandemic or a disease of pandemic potential. The Premier must consult with, and consider the advice of, the Minister for Health and the Chief Health Officer (CHO) before making a declaration. Once a pandemic declaration is made, the Minister for Health is responsible for making pandemic orders where the minister believes it is reasonably necessary to protect public health.

Once a pandemic declaration is made, the Minister for Health has extraordinary powers to make pandemic orders to detain, restrict movement and prohibit business activity, among other things. For example, among other things, the minister can require a person to quarantine for a set period of time (that is, not leave their home), prohibit or limit the number of people in venues or the ability of people to gather, require the use of personal protective equipment (e.g. wearing face masks) in certain settings, require a person to demonstrate proof of vaccination for entry to venues and close schools or playgrounds.²⁷

The Pandemic Framework introduces the following changes to the way in which Victoria will respond to pandemics that improve on the existing State of Emergency provisions. In many ways, the safeguards on the Minister's exercise of powers under the Pandemic Framework reflect the Commission's human rights principles for pandemics to safeguard the rights of Victorians in the future.

Consultation with the CHO and other people the minister considers relevant

The Pandemic Framework embeds a consultation process that promotes considerations of proportionality and reasonableness between the minister and the CHO (and any other person the minister considers appropriate) so that the minister is advised on:

- the seriousness of the risk to public health
- the public health measures the CHO considers necessary or appropriate to address the risk.

The minister must have regard to the CHO's advice in making a pandemic order and may have regard to any other matter the minister considers relevant, including social and economic matters. The minister's ability to consult with others and consider social and economic factors gives the minister more flexibility than the old framework regarding what can be taken into account when making pandemic orders. This process will also inform the proportionality analysis required under the Charter where rights have been limited.

Transparency and accountability	<p>The Pandemic Framework improves transparency and accountability by requiring that:</p> <ul style="list-style-type: none"> • pandemic orders are published on a publicly available Pandemic Order Register • the Department publish on its website, within 7 days of the making the order: <ul style="list-style-type: none"> • the public health advice received from the Chief Health Officer • a statement of reasons for the making of the order • a statement on whether the pandemic order limits human rights in the Charter, and if so, an explanation of the justification for that limitation.
Independent advisory committee	<p>The Pandemic Framework establishes an Independent Pandemic Management Advisory Committee (IPMAC) which will be comprised of members with a broad range of expertise, including public health, infectious diseases, primary care, emergency care, critical care, law, human rights, and the interests and needs of traditional owners, Aboriginal Victorians and vulnerable communities. The composition of the Committee will enable advice to the minister on how the exercise of pandemic powers will impact on communities already facing entrenched inequality.</p> <p>Importantly, IPMAC can review and provide advice to the minister in relation to their exercise of pandemic powers, and provide reports that include non-binding recommendations. The reports will be public and must be tabled in parliament. The Committee can conduct reviews on its own initiative or on request by the minister. IPMAC's review and advice powers facilitate independent advice to government informed by a broad range of disciplines and life experiences.</p>
Oversight and scrutiny	<p>The Pandemic Framework improves oversight and scrutiny in three ways:</p> <ol style="list-style-type: none"> 1. The introduction of IPMAC's review and advice role is an important new mechanism for oversight and scrutiny of the exercise of pandemic powers, including from the point of view of communities disadvantaged by pandemic measures. 2. The Pandemic Framework also improved oversight by establishing a joint Parliamentary investigative committee, called the Pandemic Declaration Accountability and Oversight Committee (PDAO), which can review pandemic orders, including for their compatibility with human rights, and make recommendations to parliament, including: <ul style="list-style-type: none"> • changes to a pandemic order • that a pandemic order be disallowed (stopped), where it considers the order is incompatible with human rights. However, it can only recommend this if it has first requested and considered the advice of IPMAC. 3. The government also introduced the requirement for an independent review of the Pandemic Framework no later than 18 months after its commencement.
Safeguards for private information	<p>The Pandemic Framework introduces safeguards for private information obtained through contact tracing (including QR code data), making it an offence to use or disclose the information other than in very limited circumstances.</p>

Fairer response to fines	<p>The Pandemic Framework introduces a fairer response for pandemic-related fines, by allowing people experiencing financial hardship to receive a reduced fine amount. It also changes the 'special circumstances' test under the general infringement scheme to make it easier for people with special circumstances to seek review of a fine.</p> <p>In addition, the Department of Health, Department of Justice and Community Safety and other agencies may also develop and publish a compliance and enforcement policy, including guidance in relation to the issuing of fines and guidance for those in compliance and enforcement roles to consider impacts upon vulnerable people and communities.²⁸</p>
Changes to detention requirements	<p>The Pandemic Framework has different detention requirements to those in the State of Emergency provisions. Before a person is detained, they must be provided with a notice in a form they can understand, explaining the purposes of the detention and its terms, their rights and entitlements (including the right to make a complaint, such as to the Victorian Ombudsman), the availability of exemptions and that refusal or failure to comply with a pandemic order or a direction or requirement given or made in the exercise of a pandemic management power may be an offence.</p> <p>The Minister for Health may also make and publish guidelines and standards in relation to the welfare of persons detained. The minister must consult the Chief Health Officer before making guidelines or standards. These guidelines and standards must be considered by any decision maker performing a function under the Act (including the minister), in relation to the welfare of persons who are detained.</p>

How the Charter applies to the Pandemic Framework

The Commission appreciated the opportunity to consult with Government on the development of the Pandemic Management Bill, to ensure that human rights are protected to the fullest extent possible in future responses to pandemics. The Commission and other stakeholders worked with government and other members of parliament on the proposed Bill's interaction with the Charter. As a result of stakeholder engagement, the Pandemic Framework has stronger safeguards against the abuse of extraordinary powers than those previously used under the State of Emergency declaration within the *Public Health and Wellbeing Act 2008* and the 'state of disaster' declaration made under the *Emergency Management Act 1986*.

As a result of this deep public consultation, the government provided clarification in the Pandemic Framework of exactly how the Charter will apply, as set out below.

Objectives	The objectives of the part of the <i>Public Health and Wellbeing Act 2008</i> containing the Pandemic Framework expressly state how the Charter applies to the framework. It recognises the importance of protecting human rights in managing the serious risk to life, public health and wellbeing presented by the outbreak or spread of pandemics and intends that the framework will not displace the operation of the Charter. It is intended that the Charter will apply to the interpretation of the provisions in the framework as well as well as any acts done, or decisions made under the framework by public authorities. ²⁹
Government's justification for human rights limitations	When a pandemic order is made, varied or extended, the Minister for Health must publish a statement on whether the order limits any Charter rights. If the minister is of the opinion that a Charter right is limited, the statement must include an explanation of: <ul style="list-style-type: none"> • the nature of the human right limited • the importance of the purpose of the limitation • the nature and extent of the limitation • the relationship between the limitation and its purpose • any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.³⁰
Acts done, and decisions made, under pandemic orders	The objectives of the part of the <i>Public Health and Wellbeing Act 2008</i> containing the Pandemic Framework, and the framework itself, clearly state that they intend the Charter to apply to acts done, and decisions made, by public authorities under the Pandemic Framework, including pandemic orders. ³¹ <p>Additionally, under section 38 of the Charter, public authorities (which includes public sector workers, government departments, ministers including the Minister of Health, and Victoria Police) must act compatibly with human rights and consider human rights before making decisions.</p>

Parliament's response to human rights concerns	The PDAOC can report to parliament if it considers a pandemic order, or any instrument varying or extending an order is incompatible with human rights. ³² This Committee can also, after requesting and considering the advice of the IPMAC, recommend that a pandemic order be disallowed (stopped) or amended (for example, if the Committee considers the pandemic order is incompatible with human rights). ³³ If disallowance is recommended, an absolute majority of a joint sitting of the Legislative Assembly and the Legislative Council must vote to stop the order from continuing. ³⁴
Interpretation	Under section 32 of the Charter, pandemic orders must be interpreted compatibly with Charter rights as far as is possible to do so consistently with their purpose. Where there are a range of potential interpretations that limit Charter rights, section 32 requires courts to adopt the interpretation that does not limit, or least limits, Charter rights. ³⁵
Declaration of inconsistency	Pandemic orders are subordinate instruments. It is unlikely to be possible to seek judicial review of the making of pandemic orders (whereas it was previously possible to seek judicial review of public health directions). However, the Supreme Court of Victoria may make a declaration of inconsistency if a pandemic order is not compatible with the Charter.

Remedies for people affected

The Pandemic Framework does not provide a statutory mechanism for individuals to challenge or otherwise seek review of pandemic orders. Pandemic orders are likely legislative in character so it is unlikely that people who believe that their Charter rights have been unjustifiably limited by a pandemic order could challenge the pandemic orders.

However, people can challenge decisions made that implement pandemic orders. The Victorian Ombudsman retains her ability to receive and investigate complaints about human rights breaches and investigate. Judicial review might be also available to challenge a decision implementing the pandemic orders in certain circumstances.

In addition, under section 32 of the Charter, pandemic orders must be interpreted compatibly with Charter rights as far as is possible to do so consistently with their purpose.

THE CHARTER AND PUBLIC HEALTH MEASURES IN 2021



2.1 Border closures

At a glance

- In July 2021, the Victorian Government closed Victoria’s borders with New South Wales and the Australian Capital Territory in response to the increasing number of Delta cases. The Department of Health was inundated with applications from people wishing to cross the border.
- The border closures impacted the lives and human rights of thousands of Victorians, separating families and limiting access to their homes and existing supports, which had the effect of exacerbating hardships for many people.
- The Victorian Ombudsman investigated the border closures permit system and found that the overall scheme was justifiable in terms of limiting human rights. However, the ombudsman found that the narrow way in which the department’s decision makers implemented the permit system resulted in unjust outcomes. This was particularly so once Victoria accepted that there would be community transmission of the virus and shifted the public health focus from eliminating the virus to containing it.
- The new Pandemic Framework will help to limit the human rights impacts of any future border closures by allowing the Independent Pandemic Management Committee to review and advise the minister on the human rights impacts of border closures. The Pandemic Declaration Accountability and Oversight Committee can also recommend that orders be disallowed if they are incompatible with human rights. The Victorian Ombudsman will retain its powers to investigate the exercise of discretion under the pandemic orders.

Closure of Victoria’s borders

Issuing Border Directions

On 23 July 2021, in response to the increasing number of Delta cases in New South Wales (NSW), the Chief Health Officer (CHO) issued directions under the *Public Health and Wellbeing Act 2008* (Vic) closing Victoria’s border with NSW and the Australian Capital Territory (ACT) (Border Directions). These Border Directions were intended to prevent transmission into Victoria and were updated throughout the year to respond to changing circumstances. However, the closure of Victoria’s borders impacted the lives of thousands of Victorians, locking thousands out of their home state.

Under the Border Directions, NSW and the ACT were declared ‘extreme risk zones’ and no one in NSW or the ACT was permitted to enter Victoria without an exemption or unless they were an ‘excepted person’. The Border Directions focused on persons seeking to enter Victoria from any other state or territory in Australia and did not provide explicit restrictions on people leaving the state. However, during this time, there were stay-at-home orders in force.

‘Excepted person’ versus exemptions

‘Excepted person’ had 21 categories under the Border Directions, including people who were receiving emergency medical care, emergency service workers, people escaping harm such as family violence, students whose bus route travelled through Victoria without stopping, and those with other essential reasons for border crossing.³⁶

Exemptions under the Border Directions could be applied for in circumstances including to attend a funeral, to care and sustain the life and wellbeing of animals, to return to the person’s ordinary place of residence for health, wellbeing, care or compassionate reasons, to return to a cross-border community area, and to effect an emergency relocation.³⁷

In 2021, the Victorian Ombudsman investigated the Department of Health’s decision-making under *Border Crossing Permit Directions*, in particular the exercise of discretion involving decisions on interstate travel permits, exceptions and exemptions. The ombudsman found that although the CHO properly considered human rights when issuing the Border Directions, the department’s narrow exercise of discretion resulted in unjust outcomes (see breakout box on page 44).



The issuing of Border Directions and proper consideration of human rights

Each time the Border Directions were updated and reissued, the CHO (or Acting CHO) received detailed advice justifying their necessity, including information about community transmission of COVID-19 and current outbreaks, and consideration of the human rights implications.

The Department consistently identified the following rights as being engaged by the Border Directions:

- **Section 8** right to recognition and equality before the law
- **Section 9** right to life
- **Section 10(c)** protection from medical treatment without full, free and informed consent
- **Section 12** right to freedom of movement
- **Section 13** right to privacy, family and home
- **Section 14** right to freedom of thought, conscience, religion and belief
- **Section 17** right to protection of families and children
- **Section 19** cultural rights
- **Section 21** right to liberty
- **Section 22** right to humane treatment when deprived of liberty.

In the context of deciding to issue the Border Directions in order to give proper consideration to human rights the CHO had to:

- understand the rights engaged above
- give serious consideration to the impact of the decision to issue the proposed Border Directions on the human rights of persons in Victoria
- identify countervailing interests or obligations in a practical and common-sense way, and
- balance the competing private and public interests (including the public health risk interests).

The department's human rights advice provided detailed analysis for the CHO to understand how the Border Directions may limit human rights and reasons why such limitations would on balance likely be 'demonstrably justified' in the circumstances of the pandemic and the relevant risks to public health at the time.

The fact that the Border Directions included both specific and general exemption powers to take individual circumstances into account was referenced as a measure to strengthen human rights safeguards.

Overall, the investigation did not receive any evidence to suggest the CHO (or Acting CHO) failed to properly consider human rights in deciding to issue the Border Directions or deciding to update or revise the directions from time to time.

Finally, the human rights advice also noted that any decision – whether to grant an exemption or not – would also be required to be compatible with and properly consider human rights.

Implementing Border Directions

The Border Directions were implemented by the Department of Health, which assessed thousands of applications for exemptions in a short period of time. The department received 33,252 exemption applications between 9 July and 14 September. In early August 2021, almost 8000 exemption applications were open, and the department's team responsible for managing the requests was scaled up from 20 staff in early July, to 285 in early September.³⁸ According to the Operations Guide, staff within the department responsible for categorising and prioritising applications were expected to complete 50 per hour during peak periods, which worked out to be one every 30 seconds.³⁹ The evidence required for exemptions was extensive, and could include statutory declarations, proof of residence, proof of ownership of animals, letters from medical professionals, bank or financial statements, and statements of relationship to people who were dying or funeral notices.

Most of the applications received by the department were not accepted or rejected but rather were 'closed for other reasons'.⁴⁰ This includes applications that were duplicates, applicants that qualified for an exception (rather than needing to go through the process of being granted an exemption/permit), applicants who could not be contacted, applications where insufficient evidence was provided and where the applicant decided against proceeding with their plans.⁴¹

While the Department of Health was under significant pressure to process exemption applications quickly, the implementation of the Border Directions impacted directly on the lives of many Victorians. In many cases, this exacerbated existing hardships for groups of people such as people who needed to access medical treatment, people with mental health conditions, people who were already socially isolated, people with caring responsibilities and people with family members who were unwell or had passed away.⁴²

For example, a study into the impacts of COVID-19 on domestic and family violence in Australia found that, although individuals could leave home in an emergency or if there was family violence⁴³, the closure of interstate borders created multiple challenges for women and children experiencing family violence.⁴⁴ Family violence service providers commented that border closures, travel restrictions and a lack of access to transport created barriers for victim-survivors to be able to leave. Complexities associated with border restrictions also affected custody arrangements, exacerbating the hardship experienced by women impacted by family violence.

The case studies below demonstrate the significant negative impacts of border closures on the health and wellbeing of Victorians.

Case study: Inability to access medical treatment⁴⁵

After enduring Victoria's second-wave lockdown, Marianne and her husband Ross decided to visit family in Queensland and NSW. Marianne was diagnosed with cancer in March 2020, but the couple were 'quite stunned' when their request to travel from Tweed Heads to Castlemaine, both of which had not had a COVID-19 case in more than a year, was rejected. Marianne's oncologist and gastroenterologist both wrote letters of support to enable her and husband Ross to return home from northern NSW for medical treatment, but their application for an exemption was rejected.

Marianne said when she received the simple email rejecting their application to return home, she was "totally and utterly dismayed" and said that "we're dealing with people's lives here, not just life or death, but lives and families and all the rest of it."

Case study: Impact on mental health and ability to care for family⁴⁶

Maya (not her real name) is a single mother of two children with disabilities. Maya had a long history of family violence, experienced poor mental health and cognitive issues. Maya was experiencing financial hardship and relied on the NDIS and a disability support pension. The NSW-Victoria border closure had a major impact on Maya's mental health. Maya was isolated from her support networks which were on the other side of the border. This included the close-knit family support given by her grandmothers. The closure also prevented her from caring for her elderly mother who had mental health issues. Maya said "the people I am closest to are across the border, so I became very isolated and had no one."

Maya's ability to fully parent her children also diminished, as she struggled on her own. She ended up seeing a psychiatrist and her medication was increased to a high dose to keep her from needing to be hospitalised. Maya reflected, "I became depressed, felt devastated and couldn't cope." Maya found the permit system and application process overwhelming. A local legal service worked with Maya to ensure that she understood the border closure rules and the exemptions that were available to her in order to access essential services. The legal service raised the impact of the border closure and the constant rule changes on clients as part of their advocacy, including Maya's story, and in doing so gave her a voice at a time when she felt disempowered.

Case study: Impact on healthcare⁴⁷

Terry and his sister Judy obtained a permit to leave Victoria and travel to NSW on 15 July 2021 to attend Judy's sister-in-law's funeral. Judy is 82 years old and has significant heart issues. She is also a carer for her adult daughter who suffers from stage four cancer.

They applied for an exemption to return home to Victoria on 1 August 2021, but their application expired when the Department of Health did not assess the application before their proposed travel date. A second application submitted on 10 August 2021 was rejected for the same reason. A third application was then rejected because the Department decided insufficient medical evidence was supplied. Terry and Judy lodged two further applications, but these were rejected as duplicates.

The Victorian Ombudsman made enquiries with the Department of Health after receiving a complaint from Terry. On 1 September 2021, the department requested further evidence from Terry and Judy to prove that they had attended a funeral in NSW. Terry raised concerns about the department's communication:

If the only reason to grant a travel permit is for urgent or emergency purposes then why is that not clearly stated in the material published by the department and why does the published material include health and wellbeing exceptions and why do refusal notification[s] invite further applications?

Terry said he spoke with a member of the Domestic Exemptions Team and that it was agreed he and Judy would travel on 9 September 2021. Despite this, the department emailed Terry approval to travel on 4 September 2021 or up to 72 hours after that date. Terry contacted the department again and was told the email was sent to him in error and that he and Judy should still seek approval to enter Victoria on 9 September 2021. The permit was then issued on 8 September 2021 and Terry and Judy flew to Melbourne the following day.

Terry complained to the department and later told the ombudsman:

I am still seeking a response from Department of Health regarding my complaint. If anything the fact that I got an [exemption] highlights for me that the system being followed by the department is highly prone to inconsistency and is causing unreasonable distress and hardship to many individuals. I note that the letter of approval we got does not state the reasons or category under which approval was granted.



The Charter and border closures

Which Charter rights are engaged by border closures?

- **Section 9: right to life** - the purpose of the border closures was to prevent the spread of disease and protect the health and lives of Victorians.
- **Section 12: right to freedom of movement** – the right to freedom of movement is limited where a person is prevented from moving to, or from, a particular place. For Victorians in NSW and the ACT, this right was limited by the Border Directions that prevented people travelling or returning to Victoria unless they were an ‘excepted person’ or had an exemption.
- **Section 17: right to protection of families and children** – an act or decision that unlawfully or arbitrarily interferes with a family is likely to limit the family’s entitlement to protection under section 17. For families separated during the operation of the Border Directions, their right to protection as a family or for children was limited where the directions prevented reunification or adequate care for children.
- **Section 13: right to privacy** – a person has the right not to have their privacy or that of their family unlawfully or arbitrarily interfered with. For those affected by the Border Directions, their inability to cross the border or return home had a direct impact, or interference, on their private life.
- **Section 19(1): right to protection of cultural rights** – there may be certain cultural activities that can only be done face-to-face or in specific locations. Where such events are time sensitive (e.g. a burial or cultural event), border closures prevent attendance.
- **Section 19(2): Aboriginal cultural rights** – if an Aboriginal person is prevented from returning to their home in Victoria, it may prevent them from being able to maintain their kinship ties.
- **Section 8: right to recognition and equality before the law** – where the Border Directions placed a more burdensome requirement on people imputed to have a higher risk of infection, this could amount to unfavourable treatment on the basis of disability.

As seen above, the border closures engaged a number of Charter rights, including freedom of movement, protection of families and children and the right to privacy. Any limitation on these rights as a result of decisions made by the Department of Health had the potential to significantly impact the health and wellbeing of Victorians, including those already experiencing hardship. Under the Charter, decision makers, including the Department of Health, have an obligation to give proper consideration to human rights when making decisions. This includes decisions required to implement the permit system.⁴⁸

The Charter provides an important mechanism for assessing the human rights impacts of policy decisions. The CHO made public health orders every four weeks or so, and every decision must be made in the context of the policy, evidence and public strategies in place at the time it is made, including whether the purpose of the order is to eliminate or contain the disease. If the purpose is containment and not elimination, it may be less reasonable and proportionate to maintain strict border closures that limit the movement of people.

As noted in the Victorian Ombudsman’s investigation, the Department of Health provided new advice on compatibility with the Charter each time the directions were updated.

For instance, by the end of August 2021, the Victorian Government announced that it was unlikely that the Delta outbreak would be beaten back to zero cases in the community.⁴⁹ This signalled the abandonment of the elimination strategy in Victoria, meaning there was acceptance that cases would continue to spread within the community. The policy shift can be seen as a response to the public health risks at the time, in particular the epidemiological situation in NSW and Victoria and the rate of vaccination in the community.⁵⁰ Nonetheless, this was a significant departure from the strict zero cases elimination approach which had previously underpinned the strict controls on the border. This policy shift raises the question whether the Border Directions continued to be a reasonable and proportionate limitation on human rights. When the directions were updated and reissued after the policy shift to COVID containment rather than COVID elimination, there was a requirement for the CHO (or Acting CHO) to receive advice from the Department of Health on the impact of these changes to the justification and necessity of the limitation on rights, under s 7(2) of the Charter. The advice provided to the CHO is not publicly available, however the Victorian Ombudsman ultimately found in her investigation that advice regarding the justification of the Border Directions was provided each time they were updated and that these advices were appropriate.

⁵⁰ Victorian Ombudsman, Investigation into decision-making under the Victorian Border Crossing Permit Directions (Report, December 2021), Appendix 1.

The Victorian Ombudsman's investigation

On 15 September 2021, the Victorian Ombudsman announced her investigation into the Department of Health's decision-making under the Border Directions, following complaints from people wishing to return to Victoria who had been refused exemptions.⁵⁰ This included considering the department's exercise of discretion in relation to decisions on interstate travel permits, exceptions and exemptions and relevant human rights considerations.⁵¹

Findings on the role of the Charter in issuing Border Directions

The Victorian Ombudsman found that the CHO's decisions to issue the Border Directions (and subsequently update and revise them) gave proper consideration to human rights. It found that the department's human rights advice provided detailed analysis for the CHO to understand how the Border Directions may limit human rights and reasons why such limitations would on balance likely be 'demonstrably justified' in the circumstances of the pandemic and the relevant risks to public health at the time.⁵²

The Department of Health's advice provided analysis of how the updated Border Directions may have limited human rights (including freedom of movement and the right to protection of children and families) and the reasons why the limitations were justified in the circumstances, including the risks to public health at the time.

The Department of Health's advice noted that the fact that the Border Directions included specific and general exemptions powers to take individual circumstances into account was a measure to strengthen human rights safeguards. The advice also noted that the Border Directions aimed to continue to facilitate the return home of Victorians where it could be achieved safely, without imposing excessive risk to the wider community.

Findings on role of the Charter in issuing exemptions

As a public authority, the Department of Health was required to act compatibly with the Charter when it made discretionary decisions about exemptions under the Border Directions. However, the Victorian Ombudsman found that although the Border Directions appeared to provide for broad decision-making discretion, in practice, the exemption decision-making process was exercised narrowly by the Department of Health. This meant that the decision makers for the exemption scheme placed too high an emphasis on whether an applicant could prove they had 'compelling circumstances' for travel and not enough on whether the public health risks of the applicant entering Victoria could be sufficiently mitigated.⁵³

The Department of Health referenced the broad nature of the Border Directions' exemptions scheme and the ability to take individual circumstances into account as a measure to strengthen human rights safeguards. However, in practice, in applying the scheme, the Department took a narrow or strict approach, and the threshold required for individuals to establish their need for a permit was high. This meant that the way in which the exemption scheme was implemented, limited the effectiveness of the intended human rights safeguards.

The Department of Health provided the Victorian Ombudsman with a copy of a 'Charter Flow Chart' that was used to assist decision makers when deciding whether to grant or refuse exemption applications, to ensure decisions were compatible with and gave proper consideration to human rights. The ombudsman considered the Charter Flow Chart was generally useful. However, she was not satisfied that a decision to refuse an exemption application would be a reasonable limit on the right to freedom of movement if the applicant was fully vaccinated, consistently tested negative, was willing and able to self-quarantine for 14 days and could reach their destination without interacting with anyone.⁵⁴

The investigation concluded that the department put significant resources towards keeping Victorian residents out, rather than facilitating safe ways for them to return.⁵⁵

The investigation did not review all decisions and did not suggest all were unfair. That being said, on the evidence, including the complaints and data reviewed by the investigation, the ombudsman found the narrow exercise of the department's decision-making discretion under the Border Directions resulted in unjust outcomes.

Among other things, the ombudsman recommended a clarifying amendment to the right to freedom of movement under the Charter to assist decision makers going forward. The provision currently states, "Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live." This amendment would align the right to freedom of movement under the Charter with the equivalent provision in the *Human Rights Act 2004 (ACT)*, to state that "Every person has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live".

Government response to the Victorian Ombudsman's recommendations

The Department of Health has publicly reported on steps taken in response to the ombudsman's recommendations. The reporting is published on the department's website⁵⁶ and includes responses to steps taken as part of the department's commitment to continuous improvement in future decision-making.

Safeguarding rights into the future

“I welcome recent amendments to legislation which provide greater transparency and accountability during a pandemic... If there is a next time – we cannot let this happen again.”

– Deborah Glass, Ombudsman

The Border Directions were made under the *Public Health and Wellbeing Act 2008* (Vic) before it was amended by the Pandemic Management Act at the end of 2021 (see Section 1.2). The Pandemic Framework provides a new process for making public health orders in a pandemic, including orders to close Victoria’s borders.

Increased transparency of decision-making

The minister has made pandemic orders that limit border crossings following the introduction of the Pandemic Framework.⁵⁷ Under the Pandemic Framework, any pandemic order that closes borders is now open to the public, including the evidence and rationale behind it. The border closure pandemic order is now published on [a public register](#) and the minister now publishes on the Department of Health’s website:

- a statement of reasons for closing the border
- a statement outlining whether border closures limits Charter rights and if so, the Minister’s assessment of the proportionality of the orders
- the **CHO’s advice** on whether border closures were necessary to protect the risk to public health.

This transparency around pandemic orders is very different to the information provided around public health orders under the State of Emergency provisions, that require only very limited publicly available information about the public health justifications for the pandemic. The Pandemic Framework enables people outside government to better understand the extent to which limitations on their rights are justified and necessary.

Advice and accountability

As stated in section 1.2, if pandemic orders that close borders raise concerns about human rights, the Pandemic Framework provides two new bodies that might act to provide advice to, or accountability for, the human rights impacts of decisions of the minister.

The first is IPMAC which can provide advice to the Minister for Health, with non-binding recommendations. This committee facilitates advice from a broad range of disciplines and lived experiences that will help ensure the minister is adequately briefed to balance the competing issues and interests that arise in responding to a pandemic. The human rights and public health advice from IPMAC will be crucial to rigorously test any assumptions, assertions, and evidentiary bases relied on by the minister in their assessment that measures such as border closures are demonstrably justified. It can also ensure that decisions to close the border continue to be a justifiable limitation of those rights as facts and circumstances change.

The Commission would encourage the minister to ask for and consider the advice of IPMAC when making pandemic orders ongoing. IPMAC can provide advice relating to, for example, the disproportionate burdens that border closures have on particular groups, for example, parents, carers, or people seeking medical treatment interstate.

If there is concern in the future that border closures are incompatible with human rights, the pandemic orders to close the borders are now subject to disallowance in parliament. This requires PDAOC to recommend disallowance to the parliament, following the advice of IPMAC, and requires a majority vote from a joint sitting of parliament. While the threshold for disallowance is high, it is nonetheless an important mechanism to guard against pandemic orders that are incompatible with human rights.



2.2 Mandatory vaccinations

At a glance

- In September 2021, the Victorian Government introduced mandatory vaccinations for certain workers and over the next few months, the number of workers who were required to be vaccinated grew.
- Vaccination mandates were introduced in light of the significant health risk posed by COVID-19 but do limit some human rights. As vaccination rates increased and Omicron emerged as the new dominant variant, it was important to reassess the balance between the limitation on rights and the reasonableness of the mandates.
- Challenges with access to vaccinations also made vaccine take-up for vulnerable groups more difficult, including people with disabilities and those working in aged care, throughout 2021.
- The Commission received a significant number of enquires and complaints about mandatory vaccinations and human rights and developed an ‘explainer’ to help people understand their rights in relation to vaccinations.
- The introduction of the new Pandemic Framework will provide transparency and accountability for decision-making and ensure human rights are considered before any new vaccination mandates are introduced.

The Victorian Government’s vaccination mandate

The Victorian Government first introduced vaccine mandate directions to people working in aged care on 7 September 2021.⁵⁸ The directions required an operator of a residential aged care facility to collect, record and hold vaccination information about workers scheduled to work at the facility, and to take reasonable steps to prevent unvaccinated workers from entering or remaining on their work premises. In September and October 2021, further directions introduced vaccination mandates in construction, healthcare and education by imposing similar obligations on operators of construction sites, healthcare facilities and education facilities.⁵⁹

In October 2021, the Victorian Government issued a vaccination mandate for all workers on the Authorised Worker list, which was estimated to be around one million people.⁶⁰ The list of authorised workers included workers who performed work essential for the continued operation of a business on a list provided by the Victorian Government across a wide range of industries.⁶¹

All of the government’s mandatory vaccination directions made exceptions for people with acceptable certification from a medical practitioner that the person is unable to receive a dose, or a further dose, of a COVID-19 vaccination due to a medical contraindication or an acute medical illness.

Vaccination mandates can be and have been imposed by governments and private businesses. This section considers mandates imposed by the Victorian Government as a public authority bound by the Charter to act compatibly with human rights.

Vaccinations have been a critical measure to both saving lives and reinstating freedoms during a pandemic, and this was particularly the case in 2021. In making the directions, the Chief Health Officer (CHO) stated that the directions were ‘reasonably necessary to eliminate or reduce the risk to public health – and reasonably necessary to protect public health’.⁶² As set out below, mandatory vaccinations engage a number of different (and competing) rights and interests. The Charter provides a tool for ensuring that any limitation or balancing of rights is reasonable and proportionate in the circumstances.

The Charter and mandatory vaccinations

Which Charter rights are engaged by mandatory vaccinations?

- **Section 9: right to life** – the right to life and the right not to be arbitrarily deprived of life was engaged and promoted by the mandate. COVID-19 is a life-threatening virus, particularly for vulnerable members of society, and the mandate reduced the risk of transmission of the virus, as well as of experiencing severe symptoms (noting this is not the case for people with medical contraindications, as the vaccine itself can also create a life and health risk). However, medical exemptions from vaccination also sought to protect the right to life for people with medical contraindications to the vaccine.
- **Section 14: right to freedom of thought, conscience, religion and belief** – although vaccination mandates do not compel individuals to receive a vaccination, they may experience negative outcomes (such as losing a job) if they choose not to get vaccinated because of their personal beliefs about vaccinations.
- **Section 10(c): right not to be subjected to medical or scientific treatment without full, free and informed consent** – people may feel pressured to get vaccinated without their full, free and informed consent (for example, to keep their job).
- **Section 13: right to privacy** – people may need to share personal information about their vaccination status to work and access some goods and services.
- **Section 8: right to recognition and equality before the law** – the right to equality may be limited where discrimination occurs on the basis of a protected attribute (such as disability) as a result of a vaccination mandate. However, vaccination status itself is not a protected attribute.

In 2021, the Commission received thousands of enquiries and complaints about vaccinations and mandatory vaccinations from people who were concerned about their rights (see Complaints and enquiries about vaccinations on page 57). In response, the Commission developed an explainer – *Explainer: Mandatory COVID-19 vaccination and your rights*.⁶³ As of 7 April 2022, the *Explainer* was accessed by 207,289 people, out of a total of 732,640 unique views over the same period. The *Explainer* accounted for 28% of all visits to the Commission’s website – making it the most accessed piece of content.

As outlined in the *Explainer*, under the Charter, any limiting or balancing of Charter rights in the context of mandatory vaccinations must be:

- **necessary** – was there a justification for making the vaccinations mandatory? For example, is requiring employees or customers to be vaccinated necessary to stop the spread of COVID-19 or protect the health of employees or others?
- **proportionate** – was the mandatory vaccination requirement proportionate to the purpose it was seeking to achieve? For example, does the risk posed by COVID-19 spreading in the workplace or service outweigh the impact on individuals whose rights are limited? Are there people in the workplace or service who are likely to be at increased risk of severe symptoms if they contract COVID-19? Does the requirement to vaccinate take into account the differing needs of people with disabilities, health conditions or who might otherwise have valid reasons for not wanting to be vaccinated?
- **the least restrictive means available** – meaning whether there is another less restrictive option reasonably available than vaccination mandates? For example, measures other than vaccination that would effectively stop the spread of COVID-19 in the workplace or service?

Vaccination status and opposition to vaccinations are not protected attributes under the Equal Opportunity Act and, therefore, unfavourable treatment on this basis does not amount to discrimination. In some circumstances, demanding proof of vaccination to work or access a service could amount to discrimination.⁶⁴



Simon Harding & ors v Brett Sutton (in his capacity as Chief Health Officer) & ors 2021

In October 2021, Simon Harding, a Corrections Officer, commenced a challenge to the legality of the mandatory vaccination directions in the Supreme Court. The matter involved 129 plaintiffs who worked in various industries, including healthcare, construction and education. They were seeking relief in relation to the public health directions imposed by Brett Sutton in his capacity as the Chief Health Officer, that made it mandatory for the plaintiffs to be vaccinated.

The plaintiffs argued that a number of their human rights were engaged and limited by the directions, including:

- the right to enjoy human rights without discrimination – section 8(2) to equal protection of the law without discrimination and the right to equal and effective protection against discrimination – section 8(3)
- the right not to be subjected to medical or scientific experimentation or treatment without full, free and informed consent – section 10(c).

Before the hearing, a question of law was raised by the Defendants in relation to the interpretation of s 38(1) of the Charter, specifically whether the requirement of a public authority to act compatibly with human rights or, in making decisions, to give proper consideration to relevant human rights, applies to the CHO making or deciding to make public health directions under s 200 of the *Public Health and Wellbeing Act 2008* (Vic) (PHW Act).

The Commission intervened in this matter to make submissions regarding this question of law. However, the Commission withdrew from the case following the enactment of the new *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) in December 2021. Under the Pandemic Framework it is the minister, not the CHO, who makes public health directions in a pandemic. This Act changed the way in which public health directions are made during COVID-19, altering the Commission's interest in the determination of the question of law raised.

All of the plaintiffs discontinued their claims in 2022, and the proceeding is now dismissed entirely.

Ongoing proportionality of vaccine mandate

The CHO made mandatory vaccination orders regularly – a new order was made approximately every four weeks. For each of these decisions, the CHO was required to determine whether the mandate was reasonable and proportionate in the circumstances, and whether each decision to limit rights was justifiable at that point in time. As circumstances evolved, it was appropriate to reassess the justification for limiting rights in light of new information.

Original justification

Vaccine mandates were introduced to limit the spread of COVID-19 within the population of workers and people with whom they came into contact.⁶⁵ The justifications within the human rights statement asserted that there was a rational connection between the limits imposed on human rights and this purpose.

As set out below, two major circumstances shifted as the pandemic evolved that were relevant to the CHO in his reassessment of orders, namely the increasing vaccination rate and the spread of the Omicron variant. The human rights assessment in relation to these orders was not made public, therefore the Commission cannot comment on what the CHO considered.

Increasing vaccination rate

Obtaining high vaccination rates was an important goal in protecting not only those who can be vaccinated, but also those who cannot get vaccinated for health reasons, or for people who are vulnerable despite vaccination (for example, immunocompromised or older people). This is because unvaccinated people are much more likely to both catch COVID-19 and transmit it.⁶⁶ Monitoring the vaccination rate was a tool used for monitoring public health more broadly, with vaccinations seen as the most important way to ensure hospitals and the healthcare system was not overrun and could remain functional.

Some academics have asserted that as the vaccination rate climbed in 2021 beyond 80%, the justification for continuing to require vaccination waned.⁶⁷ This is because as the double vaccination rate increased, the safer society was from the health impacts of COVID-19, and the less necessary further vaccination mandates were to overall public health and the continued functioning of Victoria's healthcare system. The CHO in his December advice to the minister, recognised that although the Victorian community had achieved full vaccination coverage for at least 91% of the population over the age of 12, it was still necessary to maintain the mandate to control the rate at which COVID-19 could spread given the high levels of community transmission.⁶⁸

The new Omicron variant

Towards the end of 2021, the Omicron variant began spreading throughout Victoria. While the vaccination mandate required two doses of a COVID-19 vaccination, which was an effective measure against Delta, experts warned that the chances of contracting Omicron were much higher for those with just two vaccinations, compared to three.⁶⁹ Therefore, as Omicron was fast becoming the dominant virus, the rationale for a two-dose mandate changed. Given the justification for the initial two-dose vaccination mandate was preserving public health and safety, it was relevant for the CHO to consider the shifting efficacy of the two-dose vaccination against Omicron and the extent to which Omicron's emergence may have had a material impact on the necessity, and therefore justification, of a two-dose vaccination mandate. The CHO may have also considered that the new variant meant that a three-dose vaccination mandate would have been justified in the circumstances.

Unequal access to vaccinations

A key element in the lead up to introducing a vaccination mandate is to build community trust and confidence – where people have the opportunity to ask questions and raise concerns. The Medical Journal of Australia cautioned that Aboriginal and culturally and linguistically diverse populations needed to be considered in planning and policies developed in consultation with targeted groups.⁷⁰ This aids the communication process and can help build trust and buy-in with the vaccination programs. It is also important that mandatory vaccination programs do not contribute to re-traumatisation of Aboriginal people, given the history of past state and federal policies that discriminated against Aboriginal people, as well as systemic racism that is embedded in the delivery of health services still to this day.⁷¹

Australia's vaccination supply was limited for much of 2021, noting that problems securing vaccines were at least in part due to decisions about mandatory vaccinations that were made or endorsed by National Cabinet.

People with disabilities and their carers, and people in aged care were meant to have priority access to COVID-19 vaccines. However, these cohorts reported ongoing difficulty accessing the vaccine.⁷² It was reported in May 2021 (during a Victorian outbreak) that although aged care residents and workers were a priority in the roll out, some aged care homes had not received their first dose of the vaccine.⁷³ Despite the head start and expectation that all people with a disability have the opportunity to be fully vaccinated as a priority, in October 2021, it was reported that the vaccination rate for Victorians with disability was still lower than the general population, with 80% vaccinated compared to 84.4% of the general population.⁷⁴

Early inequities in access also affected Aboriginal and culturally and linguistically diverse communities disproportionately,⁷⁵ with the vaccination rate for Aboriginal people in Victoria over ten percentage points lower than the average as of 30 September 2021 (see breakout box below).⁷⁶

Strengthening vaccination rates for Aboriginal Victorians

In September 2021, the COVID-19 vaccination rate for Aboriginal people in Victoria was significantly lower than the total population. Where 45% of Aboriginal people in Victoria had had their first dose of the vaccine, nearly 70% of the total population had received their first dose.⁷⁷

In August 2021, the Victorian Aboriginal Community Controlled Health Organisation (VACCHO) launched two dedicated COVID-19 Vaccine Vans, which administered hundreds of vaccinations to members of the Aboriginal community in Mildura, Shepparton, Warrnambool, Seymour, Wodonga, Benalla, Morwell, Drouin and Warragul.⁷⁸ The vans played a critical role in helping make the vaccination available to Aboriginal and Torres Strait Islander community members across Victoria. VACCHO partnered with Star Health and the Department of Health to roll out the vans across the state. In addition, to ensure Aboriginal children and young people were able to make informed decisions about vaccinations in a culturally safe manner, COVID-19 yarning sessions were held in partnership with VACCHO where young people were able to ask any questions they had about COVID-19 vaccines. Aboriginal young people were supported by Aboriginal Liaison Officers during the vaccination program. By 22 November 2021, 80 per cent of the Aboriginal and Torres Strait Islander population in Victoria who were aged 12 years and over were fully vaccinated.⁷⁹



Complaints and enquiries about vaccinations

Enquiries

The Commission received 9,973 enquiries in 2021 and of those, 17% were about vaccines and mandatory vaccines (n = 1667). This represents a significant proportion of overall enquiries. Of these, 30% (n = 500) were related to the operation of the Charter. Three examples of enquiries relating to mandatory vaccination policies are outlined below.

Example one: The enquirer worked in the construction industry and did not wish to get the COVID-19 vaccine. They called to obtain information on what rights they had to refuse the vaccination, specifically regarding political beliefs. The Commission provided information regarding their right to equality before the law, advising that only personal characteristics listed under the Equal Opportunity Act are protected regarding vaccinations, and that political activity has a narrow definition.

Example two: The enquirer was concerned about vaccination mandates as her husband worked in an industry with a mandate in place, and she feared he was at risk of losing his job. The enquirer wanted to know how long the State of Emergency would last and whether it could be extended, as well as whether the vaccination mandate would still apply. The enquirer also wanted to know the basis of the Victorian Government's powers to be able to legislate a vaccination mandate. The Commission provided information regarding their right to equality before the law, stating that vaccination status and personal views are not protected attributes under the Equal Opportunity Act.

Example three: The enquirer had a blood clotting disorder and was advised by her GP not to take the COVID-19 vaccine. She repeatedly asked for an exemption from her GP, who told her that he couldn't provide an exemption and referred her to a haematologist. When she asked the specialist, he told her he couldn't provide this and that her GP should have given this to her. She had multiple health issues and was dissatisfied that her GP had declined to provide the exemption. The Commission provided advice regarding her right to equality before the law and a referral to the Health Complaints Commissioner.

Complaints

In 2021, the Commission received a total of 310 complaints of discrimination under the Equal Opportunity Act regarding mandatory vaccinations, which is 19% of all complaints received (n=1592). Of the 310 complaints regarding mandatory vaccinations, only six were accepted for dispute resolution (see breakout box below), which is a small fraction (0.005%) of the 1,239 complaints that were accepted overall in 2021. 304 complaints were not accepted by the Commission for a range of reasons, including that there was no ground of discrimination available and no basis for claiming they had an exemption to be vaccinated.

Complaints made to the Commission in 2021 about vaccinations

- **Age discrimination in goods and services** – a barber instituted a policy that they would not cut the hair of those under 16 years of age if they were not vaccinated. The complainant’s child was seven years of age and at the time, was not eligible for a vaccination. This complaint was resolved by changing the business policy to remove the requirement for children under 16 to be vaccinated.
- **Age discrimination in employment** – the complainant was in their 70s and worked in retail. Their employer informed them that even though they had their first vaccination, they were not allowed to work until three weeks after they had received their second vaccination. Other employees of a younger age did not have the same requirements placed on them. This complaint was resolved by the employee being permitted to work remotely until their second vaccination.
- **Authorising and assisting disability discrimination** – the complainant was denied a placement in an aged care facility to complete their course as they were not vaccinated. They had an authorised medical exemption. This complaint is still in the process of being resolved.
- **Disability discrimination in employment** – the complainant was stood down indefinitely by their employer for not being vaccinated, despite providing an authorised medical exemption. This complaint is still in the dispute resolution process.
- **Disability discrimination in education** – the complainant was barred from attending their Year 12 graduation despite providing an authorised medical exemption. This complaint is still in the dispute resolution process.
- **Disability discrimination in employment** – the complainant was denied entry into a staff raffle as they had not been vaccinated on medical grounds. This complaint was withdrawn by the complainant.

Safeguarding rights into the future

“...[H]uman rights are generally not absolute and can be limited in certain circumstances. The question is whether this is reasonable, justified and proportionate – balanced against the public health objectives. We need to ask: what is the evidence base for the [vaccination] mandate; and are there any less restrictive means reasonably available.”

– Bruce Chen, Senior Lecturer, Deakin Law School.⁸⁰

Increased transparency of decision-making

As with the Border Directions, the Victorian Government’s first vaccination mandates were made under the *Public Health and Wellbeing Act 2008 (Vic)* before it was amended by the Pandemic Management Act at the end of 2021. Since the Pandemic Framework was introduced, pandemic orders have now been made governing the vaccination mandates.⁸¹

Any pandemic order that creates a vaccination mandate is now open to the public, including the evidence, proportionality assessment and rationale behind it. The vaccination mandate pandemic order is published on [a public register](#) and the minister publishes on the department’s website:

- a statement of reasons for the vaccine mandate
- a statement outlining whether the vaccination mandate limits Charter rights and if so, the Minister’s assessment of the proportionality of the orders.
- the **CHO’s advice** on whether vaccination mandates were necessary to protect the risk to public health.

Advice and accountability

As stated above at 1.2, the new Pandemic Framework establishes two bodies that can provide advice and greater accountability for decisions by the minister that limit human rights – the IPMAC and the PDAOC.

IPMAC can provide advice to the minister on pandemic orders that mandate vaccination, and robustly test the evidence base relied upon by the minister to justify rights limitations. The human rights and public health advice from IPMAC will be crucial to rigorously test the evidence base and assumptions relied on by the minister in their assessment that a vaccination mandate is justified.

The Commission would encourage the minister to ask for and consider the advice of IPMAC when making pandemic orders ongoing. Relevantly, IPMAC can provide advice relating to the disproportionate burdens that vaccination mandates have on particular groups, for example, people with disability, people of culturally and linguistically diverse backgrounds, Aboriginal people, etc.

If there are concerns that vaccination mandates are incompatible with human rights, the pandemic orders to mandate vaccines can then be subject to disallowance in parliament. This would require that PDAOC recommend disallowance to the parliament, following advice of IPMAC, as well as an absolute majority vote from a joint sitting of parliament.

2.3 Children and young people

At a glance

- In 2021, Victoria closed schools to manage the spread of COVID-19. While the measure was taken to preserve the life and health of children and their families, it significantly affected children and young people's mental and physical health, academic development, and risk of abuse and neglect.
- The Charter recognises that people under 18 are particularly vulnerable because of their age. As such, it enshrines children's rights, without discrimination, to protection that is in their best interests and by reason of being a child.
- The Commission encourages public authorities making rights limiting decisions, to consult with children and young people about how those decisions will affect them, especially children and young people with other vulnerabilities.
- The Commission heard that children and young people want information communicated to them in simple and accessible ways.
- The new Pandemic Framework provides an important opportunity to ensure that any impact on children and young people is minimised by considering children's rights in line with the Charter.

Public health measures and children and young people

Throughout 2021, the Chief Health Officer implemented a vast range of measures to reduce the health impacts of COVID-19. Some of these measures primarily or disproportionately impacted children and young people, including:

- school closures
- closures of playgrounds and other community facilities
- limits on home visits and private gatherings
- some social distancing measures.

Children and young people aged 19 and under make up almost a quarter of Victoria's population.⁸² During the pandemic, many children and young people have been disproportionately impacted by COVID-19 restrictions. Victoria's Principal Commissioner for Children and Young People Liana Buchanan summarised:

*"The pandemic has exposed profound inequality in our community and the precarious circumstances too many live in. The broader social, physical and psychological impacts of prolonged lockdowns are yet to unfold."*⁸³

VicHealth also has highlighted that during the pandemic, people in this age group *"have been heavily impacted through job loss, disrupted education, reduced social connection and increased anxiety about the future."*⁸⁴



The Charter rights of children and young people

Which Charter rights protect children and young people?

All of the rights under the Charter apply to children and young people. Public health directions limited many Victorian children's human rights including:

- **Section 8: right to recognition and equality before the law** – all Victorians have the right to be recognised as a person, to enjoy their rights without discrimination, to be treated equally under the law and protected from discrimination. This provides a right of children to non-discrimination in the enjoyment of their rights on the basis of their age. This was limited by the closure of schools and amenities more often used by children such as playground and sporting facilities.
- **Section 12: right to freedom of movement** – a person has the right to move freely within Victoria and to enter and leave the state. This impacted children as lockdown measures prevented them from meeting friends and family, attending school or traveling between regular activities.
- **Section 22: right to humane treatment when deprived of liberty** – a person deprived of liberty must be treated with humanity and dignity. Health restrictions within the prison system meant that children and young people who were detained were, on occasions, detained on their own in quarantine and denied access to in-person visits with loved ones.
- **Section 23: rights of children in the criminal process** – a child who has been convicted of an offence must be treated in a way that is appropriate for their age. Health restrictions in youth detention facilities led to children and young people being denied in-person social interactions at a critical stage in their lives.
- **Section 19: cultural rights** – a person with a particular cultural, religious, racial or linguistic background must not be denied the right to enjoy their culture, to declare and practise their religion and to use their language. Lockdown measures prevented children from these backgrounds from experiencing important cultural activities at a formative time in their development.

Further, **section 17(2) of the Charter specifically protects the rights of children.** It states 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 child. The term 'best interests' includes the need to protect the child from harm and promote the child's development.⁸⁵

Finally, the right to not have family/home unlawfully or arbitrarily interfered with under section 13(a) and the right to protection of families under section 17(1) (raised above in the border closure section) are rights limited by other pandemic orders due to the impact of restrictions on families and therefore children by an extension.

While we still do not have a full picture on how measures introduced to curb the spread of COVID-19 have impacted on children and young people in the long term, there have been some clear indications of the effects so far. These impacts demonstrate the critical need to keep the best interests of children and young people at the heart of policy-making and ensure that any limits on Charter rights

are justified, reasonable and proportionate. In this way, the rights of children and young people can be balanced effectively with other interests, such as public health, in the least restrictive way possible.

Mental health impacts

Constantly stressed and anxious. I hate being stuck at home and my depression skyrockets.

– 18-year-old Aboriginal or Torres Strait Islander person,
Commission for Children and Young People's 2021 COVID snapshot⁸⁶

During the pandemic, public health measures (including school closures, stay at home directions, restrictions on gatherings and limitations on freedom of movement) had specific negative effects on the mental health of many children and young people.

Some innovations introduced during the pandemic (including access to telehealth services and online education delivery) have positively impacted the mental wellbeing of some children and young people.

According to research conducted by Victoria's Commission for Children and Young People, impacts on mental health included "experiences of loneliness and isolation, disruption to routines and coping mechanisms, worry for loved ones and increased stress associated with remote learning."⁸⁷ The impacts were exacerbated by multiple lockdowns experienced in Victoria. This is consistent with the national experience, with Australian children who faced a second lockdown having poorer mental health outcomes than those who did not.⁸⁸

Even before the first Stage Four lockdown restrictions were introduced in Victoria, the Royal Children's Hospital (RCH) National Child Health Poll showed that over a third of parents reported that the COVID-19 pandemic had negatively affected their child's mental health.⁸⁹

While referrals for services such as Headspace declined in early 2020⁹⁰, the implementation of lockdowns saw demand on services increase to unprecedented levels. For instance, in one week of lockdown in Melbourne in August 2021, calls to Kids Helpline increased state-wide by 47% on pre-pandemic levels.⁹¹ Common reasons for contacting the services included mental health (4.6% monthly increase) and suicidal ideation or self-harm (5.7% monthly increase).⁹²

Physical and developmental impacts

Exhausted and tired, not looking forward to anything or getting my hopes up because lockdown or restrictions constantly get in the way. It's just day by day at the moment doesn't really feel exciting or like I'm living, basically have missed out on the best years of my life.

–17-year-old culturally diverse young person,
Commission for Children and Young People's 2021 COVID snapshot⁹³

While public health measures made in response to COVID-19 promoted the right to life and protected our health systems, restrictions on children's freedom of

movement, such as the ability to gather with friends and family or to attend school in person for much of the year, caused social isolation and restricted learning opportunities. The Commission has heard that some children and young people have experienced physical and developmental impacts as a result.

The 2021 Australian Early Development Census showed a decrease in the proportion of children who were on track in the areas of physical health and wellbeing, social competence, emotional maturity, language and cognitive skills and communication skills – the first decrease recorded since the study was first conducted in 2009. In 2021, there was also an increase in the proportion of children who were assessed as developmentally vulnerable.⁹⁴

The RCH National Child Health Poll into the effects of COVID-19 on the lives of Australian children and families found that more than half of Australian children spent more time on screens for entertainment, 42% spent less time being physically active and a quarter ate more unhealthy food.⁹⁵ Professor Sharon Goldfield, Director of the Centre for Community Child Health at Melbourne’s Royal Children’s Hospital, warned that “reduced opportunity to be outside and to engage in daily physical activity, increased screen time, snacking, and weight gain can have long-term impacts on children’s physical health.”⁹⁶

The Commission has heard that the physical impacts of public health measures were more acute for young people with disabilities or those requiring medical care, with large waiting lists for specialists and many services unable to take on new patients.⁹⁷

Despite the reported benefits (such as better accessibility, especially for those living in regional and remote locations), the move to telehealth services brought additional challenges for patients with complex needs. One study found that only 30% of parents of children with neurodevelopmental disabilities felt that telehealth worked well for their child.⁹⁸

Academic impacts

Being in year 12 is hard enough as it is, but COVID-19 has only exacerbated a very trying year. The constant back and forth between lockdown and freedom has been tough, putting pressure on me and my teachers to remain always flexible with assignments. Essentially, I have had to work twice as hard to make sure that I’m prepared for the worst.

– 17-year-old,

Commission for Children and Young People’s 2021 COVID snapshot⁹⁹

During 2021 every student in Victoria had their schooling impacted in some way. Many Victorian schools were closed for a large part of 2021 with learning taking place online. During times when schools were open, onsite learning was often interrupted by COVID-19 outbreaks and requirements for children and teachers to isolate in accordance with public health requirements. Interestingly, although the Commission heard from some stakeholders that remote learning was not in the educational best interests of many children and young people, not all students were adversely impacted.

National Assessment Program – Literacy and Numeracy (NAPLAN) results from 2021 showed that, on average, students were performing at a similar or higher

level than they were before COVID-19,¹⁰⁰ demonstrating that many students benefitted from increased access to remote learning. However, a lack of face-to-face education led to clear negative impacts on other children and young people from lower-socioeconomic backgrounds. With students in these cohorts more likely to be negatively impacted by remote learning, the estimated achievement gap between disadvantaged and advantaged students grew at triple the rate during lockdowns compared with onsite learning.¹⁰¹

The impacts on more vulnerable students were also seen in government school expulsion data. While there was a significant drop in the number of students being expelled between 2019 and 2020, the proportion of expelled students who had a disability more than doubled.¹⁰² Mija Gwyn, manager of the Youth Disability Advocacy Service, said that the rise in the proportion of expelled students with disabilities “shows that disabled young people are being denied their right to education”.¹⁰³ Mija Gwyn also reported that “in situations where young people are not expelled or suspended, disabled students have still reported that they have often discontinued their education due to the stress associated with disability discrimination perpetuated by their education providers.”¹⁰⁴

There is also evidence to suggest that the increase in school refusals because of lockdowns was a broader trend that was not limited to students with disabilities.¹⁰⁵

As pointed out in the Medical Journal of Australia, these impacts will have longer-term adverse consequences on children’s developmental potential unless governments address the gap in access to remote learning tools, including access to technology and options for onsite learning.¹⁰⁶

Increased risk of child abuse and neglect

My parents are in an abusive relationship where my dad is the perpetrator. On the days when things are bad, home is tense, interactions with him are less than comfortable and sometimes they verge on threatening. In the past year we (myself, mum and my brother) have had to leave home twice and stay at a friend’s house until we felt it was safe to come back.

– 17-year-old,

Commission for Children and Young People’s 2021 COVID snapshot¹⁰⁷

The Commission has heard that measures requiring people to spend more time at home placed some children at higher risk of abuse and neglect.

Risk factors for child abuse and neglect include, among other factors, socioeconomic disadvantage and parental unemployment or underemployment. With many families experiencing increased financial and emotional stress, as well as more spending more time within the family home, the likelihood of child abuse and neglect increased during the pandemic in 2021.¹⁰⁸

Australian data shows that child protection notifications dropped during COVID-19 lockdowns but spiked after stay-at-home restrictions were eased. This suggests that children were less visible to school personnel for a longer period, potentially limiting opportunities for child abuse and neglect to be detected and reported.¹⁰⁹

Young people in detention

The Commission's 2020 Charter Report looked at the impact of measures to curb the spread of COVID-19 on the Charter rights of people in prison and youth justice settings. The rights considered included rights to family and social connections, rights to fair hearings and criminal proceedings, and rights to humane treatment when deprived of liberty. The report found that while these measures successfully protected life and health, they impacted on the rights of young people in prison settings, particularly those with existing vulnerabilities.

We note that while the youth detention population has fallen in Victoria from 2017 to 2021¹⁰, young people in detention during the pandemic have continued to face the increased challenges around human rights safeguards in closed environments and in protective quarantine, as well as connection with family and loved ones outside detention.

Youth Justice has advised that management of COVID-19 in Youth Justice custody is based on current health advice and supported by a Management Plan (which was implemented on 4 April 2020 and has been revised regularly to remain up to date with current health advice). Youth Justice also notes that particular measures were put in place in to promote rights, such as training of Youth Justice case managers to improve mental health care and initiatives to address the specific impact of COVID-19 on Aboriginal children and young people in contact with the justice system.

Children and young people experiencing disadvantage

The most profound impacts of the pandemic have been on people who are already vulnerable, because of their socio-economic circumstances, physical or cognitive disabilities, existing mental health issues or other factors of entrenched disadvantage. This raises issues under the right to equality found in the Charter.

As Principal Commissioner for Children and Young People Liana Buchanan has said:

the pandemic has exposed profound inequality in our community and the precarious circumstances too many live in. The broader social, physical and psychological impacts of prolonged lockdowns are yet to unfold.¹¹

The former Commissioner for Aboriginal Children and Young People of Victoria Justin Mohamed pointed out that:

the impact of pandemic-related challenges fell heavily on children and young people and was particularly acute for Aboriginal children and young people already burdened by systems ill-equipped to meet their needs.¹²

However, former Commissioner Mohamed also said, "despite these challenges, we witnessed the strength and leadership of Aboriginal communities across the state rising to meet them."

Leading practice to uphold the rights of children and young people

The Commission encourages decision makers, when making decisions that will affect children and young people during pandemics, to do the following:

- consult children and young people to understand the impact of your decision, before making decisions
- communicate information in a simple and accessible way
- consider the specific needs of vulnerable children and young people
- ensure that any limitation of rights is mitigated, where possible, with safeguards to protect the human rights of this cohort.

Consult children and young people

A human rights-based approach to policy making requires meaningful input from children and young people in decisions that directly affect them. While this is not always possible when the realities of a pandemic require immediate decisions, this input should be sought at the earliest stage possible and must be ongoing. The Commission for Children and Young People highlighted the importance of effective consultation with children themselves, including government engaging in regular reviews of public health directions, with specific consideration given to the efficacy of the orders, compared with the impact on children and young people's psychological and physical safety.¹³

Communicate information in a simple and accessible way

Information about policies that impact children and young people should be communicated in a way that is accessible to children and young people, in multiple languages.

According to the Commission for Children and Young People, 'messaging about public health order directions should be worded simply, use graphics and illustrations where possible and be distributed widely'.¹⁴ This will have added benefits for many people in the community, including people whose first language is not English and people who are neurodiverse or have cognitive disabilities.

Information relating to COVID-19 should also be accessible to children and young people and include details about where to go if they have concerns about their school, home, health, safety or wellbeing in relation to the pandemic.

Focus on vulnerable children

The Charter requires public authorities to properly consider Charter rights when they make decisions. Using the Charter to focus resources on vulnerable children and young people will help to ensure that the long-term impacts of the pandemic are minimised. This includes considering the rights of all children and young people who may be impacted by a decision, including vulnerable children and young people who may be disproportionately impacted.

Safeguarding rights into the future

[we should] take every opportunity during this time of profound change to invest in a model of society that honours the future of our children and young people and gives them cause for genuine optimism.

Liana Buchanan, Principal Commissioner for Children and Young People¹¹⁵

While decisions during the height of the COVID-19 crisis had to be made efficiently and in accordance with emergency powers, it is important that we learn from the lessons of this pandemic to minimise the ongoing impact of the COVID-19 pandemic on children and young people and apply them to the new Pandemic Framework to safeguard their rights going forward.

Involve children and young people in the designing phase of the recovery from the pandemic. It offers a sense of control and agency for young people as ultimately, they are the experts in their own lives. The way Australia recovers will be deciding their future and they should therefore have a role to play in decision-making.

- 18-year-old,
Commission for Children and Young People's 2021 COVID snapshot¹¹⁶

Increase transparency of decision-making

The Pandemic Framework provides a new process for making public health orders during pandemics, including orders that directly affect children and young people. The Minister for Health has a requirement to publish a statement of reasons for the order, as well as a statement on how pandemic orders impact Charter rights and the justification for doing so. The minister must also publish the CHO's advice on whether the orders are necessary to protect the risk to public health. In addition, as highlighted by the Commission for Children and Young People, information about orders that curtail the Charter rights of children should be communicated accessibly.¹¹⁷

Advice and accountability

As discussed at 1.2, the Commission considers that, as with pandemic orders relating to border closures and vaccine mandates, under the Pandemic Framework IPMAC can provide advice to the minister to support decision-making that is consistent with the Charter, including on:

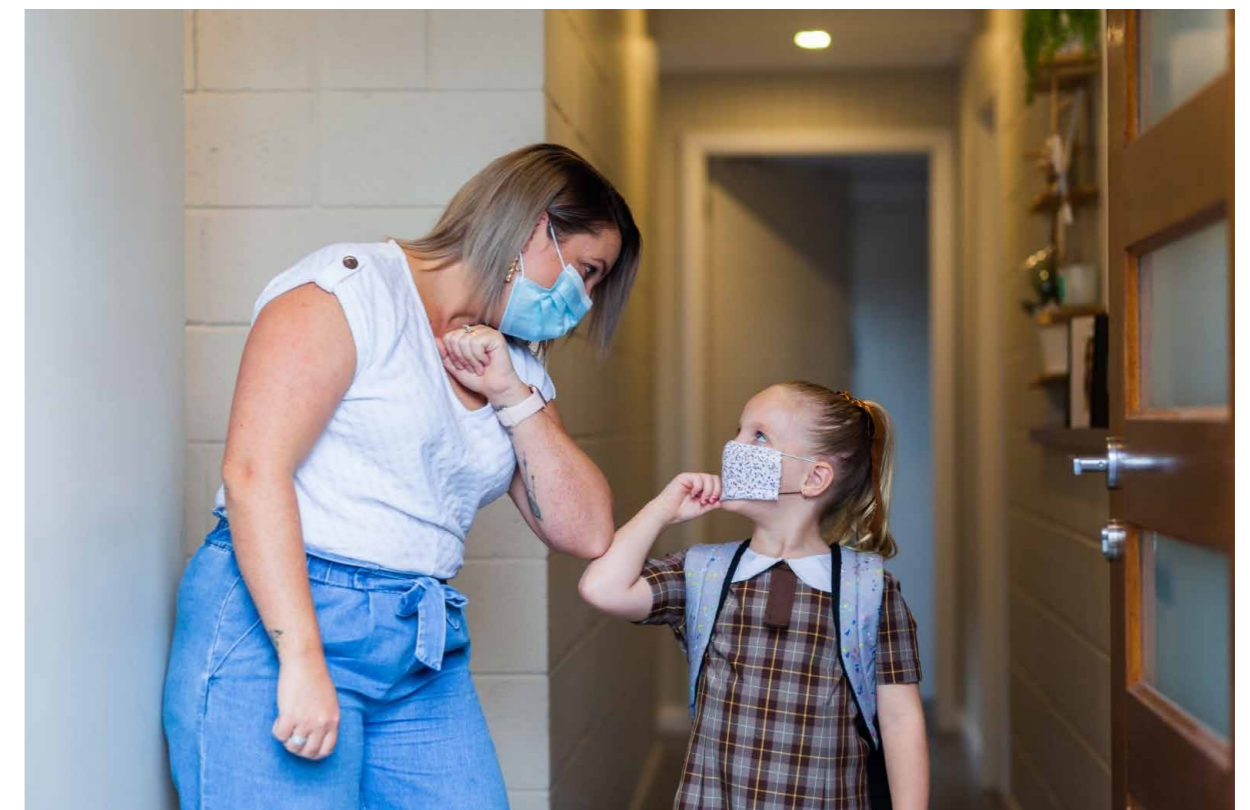
- the availability of vaccines for children and young people
- any differentiated impacts on their health and wellbeing from school closures, social isolation or other pandemic health measures
- research supporting or challenging the bases for differentiated COVID-19 measures as between children and adults.

IPMAC is an important vehicle for providing advice on matters to be taken into consideration to ensure the protection and promotion of the human rights of children and young people in relation to the making of any pandemic orders. Aside from expertise in public health and human rights, the Pandemic Framework requires the Minister of Health to appoint members such that, as far as reasonably practicable, include skills, knowledge and experience relevant to 'the interests and needs of vulnerable communities'.¹¹⁸ In the Commission's view, 'vulnerable communities' includes children and young people, given the recognised disproportionate impact of pandemic measures on them as a cohort, and on specific sub-cohorts of children (see above), as well as the importance of including children and young people in relevant consultations (as noted above). Importantly, the content of children's rights under s 17(2) of the Charter is guided by ss 10(2) and 10(3) of the *Children, Youth and Families Act 2005* (Vic), which lists 'the child's views and wishes' as among the considerations necessary to determine what is in the best interests of a child.¹¹⁹

Give children more of an opinion on things that do affect us. It feels like everything we say is ignored.

- 13-year-old,
Commission for Children and Young People's 2021 COVID snapshot¹²⁰

The Commission considers that PDAOC will also be able to ascertain whether measures such as school closures, playground closures, or limitations on social/family gatherings are reasonably justified and are proportionate limitations on children's rights protected by sections 8, 12, 17(2), 19, 22, and 23 of the Charter. Further, its ability to review and make recommendations (including disallowing or amending the pandemic order) provides greater accountability and recourse where Charter rights are unreasonably limited.





Appendices

Appendix A: Victoria's human rights system

Charter rights

Human rights are a basic entitlement of every one of us, regardless of our background, culture, sex, age or what we believe. The Charter enshrines more than 20 civil, political and cultural rights into Victorian law. These rights reflect the fundamental values of freedom, equality, respect and dignity. These values are important for our wellbeing and our ability to live a dignified life where we are treated fairly and can make genuine choices in our daily lives. This report outlines the effect the Charter has had on the protection and promotion of the human rights of Victorians during the COVID-19 pandemic in 2021.

Section 8	The right to recognition and equality before the law
Section 9	The right to life
Section 10	The right to protection from torture and cruel, inhuman or degrading treatment
Section 11	The right to freedom from forced work
Section 12	The right to freedom of movement
Section 13	The right to privacy and reputation
Section 14	The right to freedom of thought, conscience, religion and belief
Section 15	The right to freedom of expression
Section 16	The right to peaceful assembly and freedom of association
Section 17	The right to protection of families and children
Section 18	The right to take part in public life
Section 19	Cultural rights, including Aboriginal cultural rights
Section 20	Property rights
Section 21	The right to liberty and security of person

Section 22	The right to humane treatment when deprived of liberty
Section 23	Rights of children in the criminal process
Section 24	The right to a fair hearing
Section 25	Rights in criminal proceedings
Section 26	The right to not be tried or punished more than once
Section 27	The right to protection from retrospective criminal laws

Charter responsibilities

The Charter places responsibilities on the three arms of government – parliament, courts and tribunals, and public authorities – to uphold human rights. It encourages each part of our democratic system to play a role in protecting and promoting human rights. While each arm of government is subject to checks and balances, ultimate sovereignty rests with the parliament. This report outlines the role the Charter has played in ensuring that human rights were considered in the development of laws and policies, in the delivery of public services and in government decision-making in relation to the COVID-19 pandemic in 2021.

Parliament	The Parliament of Victoria must assess all new laws to see whether they are consistent with human rights. Parliament must explain which human rights a law has an impact on, if any, and how the anticipated impact on human rights is reasonable and justified.
Courts and tribunals	Courts and tribunals must interpret Victorian laws to uphold human rights to the extent it is possible while maintaining consistency with the purpose of the law.
Public authorities	Public sector workers, government departments, local government, ministers and police must take human rights into account in their day-to-day work. They must act compatibly with human rights and consider human rights before making decisions. If a public authority fails to do so, then a claim for a breach of the Charter may be able to be brought alongside another legal claim.

Appendix B: Cases raising or considering the Charter ***

Charter rights and the Charter's operative provisions were raised in the following significant cases in 2021:

HYY (GUARDIANSHIP) [2022] VCAT 97

This was a case was brought by the Office of the Public Advocate (OPA) in the Victorian Civil and Administrative Tribunal (VCAT) under the *Guardianship and Administration Act 2019 (Vic)* (the Act).

The case involved HYY, an older woman who was appointed a guardian from the Office of the Public Advocate (OPA). HYY was under a guardianship order and was voluntarily admitted to hospital for treatment of psychological and physical health conditions. HYY needed daily anticoagulant medication to reduce a serious risk of stroke, however, HYY sometimes refused to take the anticoagulant medication. The hospital asked HYY's guardian whether the treating medical staff could use physical restraint against HYY to administer the medication. In response, OPA sought advice from VCAT about the scope and extent of its powers to authorise restraint.

There are no express provisions in the Act that govern the use of restrictive practices, unlike the *Disability Act 2006 (Vic)* and the *Mental Health Act 2014 (Vic)*. The Act provides for appointed guardians to make decisions about the "personal matters" of a represented person, which includes medical treatment decisions. HYY was not subject to a compulsory treatment order under the Mental Health Act. VCAT invited the Commission, the Attorney-General and the Secretary of the Department of Health to make submissions in the case because of the potentially far-reaching consequences of a decision.

OPA asked VCAT for advice on questions regarding the scope of the guardian's power to make decisions about restraint, and other matters relevant to this question.

Commission intervention

The Commission intervened in this case because it raised important human rights questions about whether and in what circumstances a guardian can authorise the use of restraint against a person in order to administer medication.

The Commission submitted this issue engages many important Charter rights including:

- Right to enjoy one's human rights without discrimination (s 8(2))
- Right to equality before the law and equal protection against discrimination (s 8(3))
- Right to life (s 9)
- Right to protection from cruel, inhuman or degrading treatment (s 10(b))
- Right to protection from being subjected to medical or scientific experimentation or treatment without full, free and informed consent (s10(c))
- Right to freedom of movement (s 12)
- Right to privacy (s 13(a))
- Right to liberty and security of person (s 21)
- Right to human treatment when deprived of liberty (s 22(1)).

The Commission:

- set out OPA and VCAT's obligations as public authorities under s 38(1) of the Charter to properly consider human rights when making decisions and act compatibly with human rights and
- submitted that only VCAT can empower a guardian to authorise the use of restrictive practices and must impose appropriate safeguards on the use of restrictive practices that would best protect the person subject to the guardianship orders.

Submissions of the Attorney-General and Secretary to the Department of Health

The Attorney-General submitted that the scope of a guardian's power in making decisions about medical treatment extends to making decisions about restraint and the term 'personal matters' is sufficiently broad to include decisions about restraint if this is required to provide medical treatment. The secretary submitted that it was open to the tribunal to find that the scope of the guardian's power to make decisions about medical treatment, including regarding restraint, could fall within decisions about the personal matters of a person.

What VCAT decided

- The Commission's submissions assisted VCAT to understand and perform its obligations as a public authority under s 38 of the Charter to properly consider and act compatibly with human rights. VCAT accepted all of the Commission's submissions.
- VCAT stated that the guardian's power to make decisions about medical treatment decisions does not extend to making decisions authorising forcible physical restraint in order to overcome resistance to medical treatment.
- VCAT considered that guardians cannot rely on their broad powers in the Act to make decisions about "medical treatment", "personal matters" or "thing necessary to be done to give effect to the power of the guardian" to consent to the use of physical restraints.
- If a person under a guardianship order does not consent to medical treatment and restraint is required to be used in order to administer the medication, an appointed guardian must seek an order from VCAT under the Guardianship and Administration Act 2019 to authorise the use of forcible physical restraints.

*** This table includes published decisions reports at www.austlii.edu.au. Not all court and tribunal decisions are reported on Austlii (Australasian Legal Information Institute).

THOMPSON V MINOGUE [2021] VSCA 358 (COURT OF APPEAL DECISION)

Dr Minogue, a prisoner serving a term of life imprisonment at Barwon Prison, was required to undergo strip searches before two random drug tests and before and after a contact visit from his lawyer. At the time of the events that were subject to the litigation, all prisoners at Barwon Prison were subjected to random alcohol and drug testing, conducted by way of random urine tests and strip searches. At the time proceedings commenced, 5% of the total prisoner population was required to submit to random urine testing each month, irrespective of prison placement or history of drug use. Refusal to submit to random urine testing results in disciplinary action. Strip searches are also performed before a contact visit with any external visitors.

Dr Minogue challenged the lawfulness of the random urine testing and strip search regime, arguing among other things that these procedures breached certain human rights under the Charter. Dr Minogue also argued that when deciding to order the tests, the prison General Manager had not given proper consideration to his human rights, specifically, the right to privacy (section 13) and the right to humane treatment when deprived of liberty (section 22(1)).

This case was heard on appeal to the Court of Appeal, from a supreme court decision of Justice Richards. Dr Minogue had successfully challenged the lawfulness of these directions in the Supreme Court.

In the Supreme Court, Justice Richards found that directions made at Barwon Prison to Dr Craig Minogue to submit to random urine tests and strip searches before urine tests were incompatible with his human rights, including the right to humane treatment when deprived of liberty and the right to privacy. Directions given to submit to strip searches before and after contact visits were found to be lawful and compatible with human rights. Further, Justice Richards found that prison management failed to give proper consideration to relevant rights when developing and implementing the urine testing procedure because they did not consider the human rights impacts of mandatory strip searching before a random urine test, the effectiveness of the random testing regime or less restrictive options, such as less intrusive testing methods or less frequent random testing. The court found that when organisation-wide policies are being assessed for compatibility with rights at a senior level, a 'more exacting' standard of proper consideration is required.

Decision

The Court of Appeal found that:

- directing Dr Minogue to submit to random urine tests did not limit Dr Minogue's right to privacy because the procedure was lawful and not arbitrary
- the random urine testing regime was highly intrusive and limited Dr Minogue's right to humane treatment when deprived of liberty; however, this limitation was justifiable because the testing regime was reasonable and proportionate to protect the rights to life and personal safety and security of prisoners by addressing the serious drug-use problem at the prison
- a public authority does not have to establish that they have taken into account the factors in s 7(2) – a clause which provides that human rights protected under the Charter can be limited if it is justified and proportionate in the circumstances

– in order to satisfy that they have given proper consideration to human rights under s 38(1) of the Charter

- the General Manager at Barwon prison, Mr Thompson, gave proper consideration to relevant human rights even though he only considered the privacy and dignity rights of prisoners with a fairly high level of generality when assessing the impact of the random urine tests and strip searches upon prisoners' human rights. The Court of Appeal accepted that Mr Thompson's Charter assessment was not self-contained but also relied on the State-wide assessment conducted by DJCS and Corrections Victoria, and so his assessment should be viewed in this context.

However, the Court of Appeal found that the manner in which the strip searches were conducted before the random urine tests was extremely invasive and demeaning and thus constituted a severe and unjustifiable limitation upon Dr Minogue's privacy and dignity. The directions that he undergo the two strip searches were incompatible with his privacy and dignity rights, in breach of s 38(1) of the Charter. The Court noted that the strip searches were highly intrusive and may not be necessary for the effectiveness of the urine testing program, given the prisoner is required to urinate into a container in front of two prison officers.

The court also found that the prison General Manager did not sufficiently explore less intrusive alternatives which, the evidence presented to the Court indicated, might have reasonably been available including, for example, a low-dose x-ray body scan or alternative procedures for conducting the strip search. However, the Court did not make any findings that the alternative means were reasonable or would have achieved the purpose sought.

THORPE V HEAD, TRANSPORT FOR VICTORIA & ORS [2021]

Background

In late 2020, a senior Djab Wurrung woman, Marjorie Thorpe, made an application to the Supreme Court of Victoria for an interim injunction (a temporary pause) on the proposed construction of part of the Western Highway Duplication – Section 2b Buangor to Ararat Project (proposed road). The Victorian Government sought to build the proposed road on what Ms Thorpe argued was sacred Aboriginal land. She argued that the proposed road was unlawful under the *Aboriginal Heritage Act 2006* and the Charter.

In order for the state parties to develop the proposed road, they were required to obtain approval for a cultural heritage management plan. In 2013, a cultural heritage management plan was sponsored by VicRoads for the proposed road. However, Ms Thorpe argued the construction of the proposed road would involve harm to Aboriginal cultural heritage – in particular, six culturally significant trees, as well as other areas, which were not protected by the plan. She also claimed that the approval of the 2013 plan was invalid, and therefore the plan could not be relied upon to complete the proposed road.

The court granted Ms Thorpe an interim injunction, and the matter was then adjourned for a final hearing to determine whether a final injunction (a permanent pause) should be granted to Ms Thorpe.

Charter of Human Rights and Responsibilities Act 2006

Ms Thorpe argued that the proposed road was incompatible with her human rights, in particular her cultural rights under the Charter. As an Aboriginal person with distinct cultural rights, she has the right, with other members of her community to enjoy her culture and maintain her distinctive spiritual and material relationship with the land and other resources with which her people have a connection under traditional laws and customs. She argued that the proposed road would limit her cultural rights under the Charter.

As the matter progressed, another key Charter issue that arose was whether Ms Thorpe's Charter claims could continue if Ms Thorpe's claims under the *Aboriginal Heritage Act* were dismissed. This required consideration of the meaning and scope of s 39(1) of the Charter, which is the section that deals with legal proceedings, and sets out when a person can seek relief or remedy for a breach of a Charter right. This section is currently unsettled in the law, meaning that it is not entirely clear what its meaning and scope is.

Commission's involvement

In relation to s 39(1) of the Charter, the Commission intervened, arguing for a broad interpretation which would allow Ms Thorpe's Charter claims to continue, even if her claims under the *Aboriginal Heritage Act* did not.

Section 39(1) is a complicated and not well understood section of the Charter. There are two possible interpretations; one is narrow and one is broad. The narrow approach means that to seek a remedy for breach of the Charter, a person must seek a remedy under the non-Charter ground. The broad approach means that to seek a remedy for breach of the Charter, a person must only establish that they have legal standing to seek the same remedy under the non-Charter ground, they

do not have to actually seek it. This is a broader interpretation because a person would not need to rely on the non-Charter ground to access the court for a breach of their human rights under the Charter. The Commission argued in favour of the broader interpretation, asserting that the words 'may seek' in s 39(1) are akin to the legal concept of standing. In order for a person to access a remedy under the Charter, they just need to establish they have standing.

Interlocutory hearing

Shortly before the final hearing, a short hearing took place in which Ms Thorpe sought the court's permission to amend her claim. The state parties also filed an application seeking to dismiss Ms Thorpe's proceeding entirely. The reason they sought to dismiss the proceeding was because they said they would no longer rely on the 2013 cultural heritage management plan for the proposed road and they would not continue with the proposed road until a new plan was approved and lodged under the *Aboriginal Heritage Act*.

The state parties argued that if they were successful in showing that there was no longer a threat to Aboriginal cultural heritage under the *Aboriginal Heritage Act*, then Ms Thorpe's claims under that Act could not continue. The state parties also argued that this would mean her Charter claims could not continue because of s 39(1) of the Charter, which they argued, required Ms Thorpe's *Aboriginal Heritage Act* claims to be on foot in order for her to be able to access a remedy under the Charter.

The Commission made detailed submissions at the interlocutory hearing regarding s 39(1) of the Charter.

Outcome

Ultimately the court decided not to allow Ms Thorpe to amend her claim, and it also found in favour of the state, and decided to dismiss Ms Thorpe's proceeding. In relation to the Charter, and whether the narrow or broad interpretation of s 39(1) is the better interpretation, the court left this question open for determination in a future case.

Other cases raising or considering the Charter:

1. 5 Boroughs NY Pty Ltd v State of Victoria; Roberts v State of Victoria [2021] VSC 785 (2 December 2021)
2. ARF (a pseudonym) v Director of Housing [2021] VSC 199 (23 April 2021)
3. *Austin v Dwyer* [2021] VSCA 306 (12 November 2021)
4. Baker v Department of Health and Human Services [2021] VSC 673 (18 October 2021)
5. Barnsley v Darebin CC [2021] VCAT 104 (10 February 2021)
6. BEZ (Guardianship) [2021] VCAT 1543 (20 December 2021)
7. *BKS v Mental Health Tribunal (Human Rights)* [2021] VCAT 1381 (18 November 2021)
8. *BlueScope Steel Limited (Human Rights)* [2021] VCAT 651 (24 June 2021)
9. Carroll v Goff [2021] VSCA 267 (21 September 2021)
10. *Chief Municipal Inspector - Local Government v Mohamud* [2021] VSC 787 (29 November 2021)
11. Collis & Anor v Bank of Queensland Limited & Ors [2021] VSC 724 (11 November 2021)
12. Collis v Bank of Queensland Ltd [2021] VSCA 17 (12 February 2021)
13. Commissioner of State Revenue v Tucker (Review and Regulation) [2021] VCAT 238 (19 March 2021)
14. *Cotterill v Romanes* [2021] VSC 498
15. *CZH v Mental Health Tribunal (Human Rights)* [2021] VCAT 1302 (10 November 2021)
16. *D'Arcy v Emergency Services Superannuation Board (Review and Regulation)* [2021] VCAT 952 (20 August 2021)
17. Daher v Bell [2021] VSCA 192 (29 June 2021)
18. *Director of Housing v Finlayson (Residential Tenancies)* [2021] VCAT 8 (5 January 2021)
19. Douglas v Harness Racing Victoria [2021] VSCA 128 (13 May 2021)
20. DPP v CS [2021] VSC 686 (26 October 2021)
21. DPP v Vlahos (Ruling No 2) [2021] VCC 1519 (13 October 2021)
22. Dudley v Secretary to the Department of Justice and Community Safety [2021] VSC 567 (15 September 2021)
23. Dun (A Pseudonym) v The Queen [2021] VSCA 286 (15 October 2021)
24. Eaves v Medical Board of Australia (Review and Regulation) [2021] VCAT 772 (14 July 2021)
25. Fidge v Medical Board of Australia (Review and Regulation) [2021] VCAT 273 (25 March 2021)
26. Foster v Department of Health (Review and Regulation) [2021] VCAT 742 (9 July 2021)
27. Gilmore v Victoria Police (Human Rights) [2021] VCAT 1250 (25 October 2021)
28. *Griffiths v Victorian Workcover Authority - WorkSafe Victoria (Review and Regulation)* [2021] VCAT 561 (1 June 2021)
29. Grooters v Chief Commissioner of Police [2021] VSC 329
30. *Hallett v Robert James Lawyers* [2021] VSC 363 (24 June 2021)
31. *Hallett v Robert James Lawyers* [2021] VSC 363 (24 June 2021)
32. Harding v Sutton (No 2) [2021] VSC 789 (29 November 2021)
33. Harding v Sutton [2021] VSC 741 (11 November 2021)
34. Hassan v van Diemen [2021] VSC 839 (16 December 2021)
35. HJ (a pseudonym) v IBAC [2021] VSCA 200 (21 July 2021)
36. HYY (Guardianship) [2022] VCAT 97
37. IJW v Swinburne University of Technology [2021] VSC 846 (17 December 2021)
38. Ivanhoe Grammar School - Exemption (Human Rights) (Corrected) [2021] VCAT 1452 (10 December 2021)
39. JL v Mental Health Tribunal [2021] VSC 868 (23 December 2021)
40. Kralcopic Pty Ltd (admins apptd) v Minister for Resources [2021] VSC 101 (9 March 2021)
41. Kritsidimas v Dimitrakakis (No 2) [2021] VSC 677 (19 October 2021)
42. Lissenden v Dellios [2021] VSC 520 (23 August 2021)
43. LVZ (Guardianship) [2021] VCAT 115 (22 February 2021)
44. Mackenzie v Head, Transport for Victoria (Ruling) [2021] VSCA 24 (18 February 2021)
45. Marke v Victoria Police [2021] VSC 483 (13 August 2021)
46. Markiewicz v Crnjac [2021] VSCA 290 (25 October 2021)
47. Mccrohan v Marantelli (Residential Tenancies) [2021] VCAT 556 (8 June 2021)
48. Midson v State of Victoria (Ruling) [2021] VSC 120 (16 March 2021)
49. Minogue v Thompson [2021] VSC 56 (16 February 2021)
50. Minogue v Falkingham [2021] VSC 185 (20 April 2021)
51. *Minogue v Thompson (No 2)* [2021] VSC 209 (29 April 2021)
52. Mokbel v County Court of Victoria & Anor [2021] VSC 191 (30 April 2021)
53. MOT (Human Rights) [2021] VCAT 895 (10 August 2021)
54. Pentridge Village Pty Ltd (in liq) v Construction, Forestry, Maritime, Mining and Energy Union & Ors (Self-executing order ruling) [2021] VSC 848 (17 December 2021)
55. PEZ v Mental Health Tribunal (Human Rights) [2021] VCAT 90 (11 February 2021)
56. R v Frank (No 2) [2021] VSC 7 (5 March 2021)
57. Re GG [2021] VSC 12 (22 January 2021)
58. Re Shea [2021] VSC 207 (27 April 2021)
59. *RGM v Mental Health Tribunal (Human Rights)* [2021] VCAT 73 (29 January 2021)
60. Russell v Murrindindi Shire Council (No 3) [2021] VSC 116 (16 March 2021)
61. *Salleh v Director of Housing (Residential Tenancies)* [2021] VCAT 1203 (14 October 2021)
62. She v RMIT University & Anor [2021] VSC 2 (19 January 2021)
63. Simon Harding Ors v Brett Sutton Ors (in his capacity as Chief Health officer) – trial on 21 Feb 2022
64. *Sloan v State of Victoria (Human Rights)* [2021] VCAT 933 (19 August 2021)
65. Thompson v Minogue [2021] VSCA 358 (17 December 2021)
66. Thorpe v Head, Transport for Victoria & Ors [2021] VSC 750 (23 November 2021)
67. *Thorpe v Transport of Victoria* [2020] VSA 804
68. Tomasevic v All States Legal Co Pty Ltd t/as Nowicki Carbone & Anor [2021] VSC 815 (9 December 2021)
69. Tucker v State of Victoria [2021] VSCA 120 (12 May 2021)
70. *Tucker v State Revenue Office (Human Rights)* [2021] VCAT 503 (24 May 2021)
71. Vlahos v DPP (Vic) & Anor (Ruling No 1) [2021] VCC 1520 (8 October 2021)
72. W Everton Park Pty Ltd v Minister for Planning [2021] VSC 465 (5 August 2021)
73. *XJY v Mental Health Tribunal (Human Rights)* [2021] VCAT 83 (4 February 2021)
74. XXA v Mental Health Tribunal (Human Rights) [2021] VCAT 1024 (2 September 2021)
75. YWCA Housing - Exemption (Human Rights) [2021] VCAT 1464 (16 December 2021)

Appendix C: Key Charter Bills

Bill	Summary	Consideration of human rights by parliament and SARC
Children, Youth and Families Amendment (Child Protection) Bill 2021	This Bill amends various provisions to the <i>Children, Youth and Families Act 2005</i> including to modernise the legislative framework and promote early intervention, prevention and diversion, elevate the rights of child's, advance Aboriginal self-determination and self-management, promote permanency for children by reducing adversarial court proceedings and delays, strengthen the system that protects children and make technical and clarifying amendments to enable the effective operation of the legislation.	<p>The Scrutiny of Acts and Regulations Committee (Alert Digest. No 13, 2021, P1) indicated that it would need to write to a Minister to seek more information regarding concerns about a child's wellbeing or need for protection arising from the effect of clause 39 and 81 of the Bill.</p> <p>Response received (Hon Luke Donnellan MP- Alert Digest 13 of 2021)</p>
Equal Opportunity (Religious Exceptions) Amendment Bill 2021	This Bill amends the <i>Equal Opportunity Act 2010</i> ('EO Act') to limit the exception relating to employment matters in respect of religious bodies and educational institutions, limit the exemption in relation to the provisions of government funded goods and services by religious bodies, limit the exceptions that apply in the course of establishing, directing, controlling or administering educational institutions and remove the general exception on religious grounds in respect to discrimination by individuals.	<p>The Scrutiny of Acts and Regulations Committee (Alert Digest. No 13, 2021, P1) indicated that it would write to the Minister to seek further information about the effect of Clause 9 of the Bill which may be able to prohibit an individual from discriminating against another person when providing services in ways that are reasonably necessary to conform with the doctrines, beliefs or principles of his or her religion.</p> <p>Response received (Hon Jaclyn Symes MP- Alert Digest 15 of 2021)</p>

Non-Emergency Patient Transport Amendment Bill 2021	The Bill amends the <i>Non-Emergency Patient Transport Act 2003</i> to provide for the licensing and regulation of first aid providers, to further provide for the licensing and regulation of non-emergency patient transport to or from medical services, abolish the accreditation scheme for licence holders who operate stand-by services and increase penalties for various offences and introduce new offences.	<p>The Scrutiny of Acts and Regulations Committee (Alert Digest No 5, P9) indicated that it would write to the Minister seeking further information as to whether or not new section 60(1)(d) permits the Secretary to take account of spent convictions when assessing whether a person is fit and proper when making decisions about licensing non-emergency patient transport and first aid.</p> <p>Response received (Hon Martin Foley MP- Alert Digest No 5 of 2021)</p>
Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021	<p>This Bill amends the <i>Public Health and Wellbeing Act 2008</i>. It seeks to establish a contemporary, fit-for-purpose regulatory framework to enable the effective management of pandemics, including COVID-19. The Bill requires the Premier of Victoria to declare a pandemic, and the Minister for Health to make pandemic orders.</p> <p>Parliament intends that the Charter will apply to the interpretation of new pandemic framework, and to the acts or decisions made by public authorities pursuant to the new framework.</p> <p>Note: A full analysis of this Bill is outlined in the body of the report.</p>	<p>The Scrutiny of Acts and Regulations Committee (Alert Digest No 15, P32) indicated that it would need to write to the Minister to determine if the Minister for Health and officers authorised by the Chief Health Officer may take any order, action or direction believed to be reasonably necessary to protect public health.</p> <p>Response Received (Hon Martin Foley MP- Alert Digest 15 of 2021).</p>
Sex Work Decriminalisation Bill 2021	This Bill seeks to decriminalise sex work and transition the sex work industry to existing regulatory environments. This Bill also seeks to introduce a new protected attribute to the <i>Equal Opportunity Act 2010</i> , of 'profession, trade or occupation'.	<p>The Scrutiny of Acts and Regulations Committee (Alert Digest No 14 2021, P6) indicated that it would need to write to the Minister to determine if the effect of clause 34 when read with ss64 and 65 is compatible with every person's Charter right to freedom of association with others.</p> <p>Response Received (Hon Melissa Horne MP- Alert Digest No 14 of 2021).</p>

<p>Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020</p>	<p>This Bill amends the <i>Summary Offences Act 1966</i> to repeal offences relating to public drunkenness. The Bill was introduced following the Victorian Government's commitment to repealing the public drunkenness offence following the death of Tanya Day and was a key recommendation of the Royal Commission into Aboriginal Deaths in Custody. The amendment seeks to alter the arrest and infringement notice powers applicable to public drunkenness offences and consequential amend the <i>Bail Act 1977</i> and the <i>Liquor Control Reform Act 1998</i>.</p>	<p>In 2021, the Scrutiny of Acts and Regulations Committee (Alert Digest No 1 2021, P8) raised concerns about the commencement provision in the Bill. The Committee however, determined that the commencement provision was justifiable as the Bill positively impacts on the disproportionate rate of Aboriginal Victorians affected by the offence of public intoxication.</p> <p>Hon Jill Hennessy MP- Alert Digest No 1 of 2021.</p>
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<p>Terrorism (Community Protection) Amendment Bill 2021</p>	<p>The Bill amends the <i>Terrorism (Community Protection) Act 2003</i> (Terrorism Act). The Bill establishes the Countering Violent Extremism Multi-Agency Pane and provides for an early intervention scheme: a voluntary countering violent extremism case management scheme as well as an early intervention scheme. The bill expands the scheme that provides for the protection of counter-terrorism intelligence, requires a further review of the Terrorism Act, delays the expiry of the Terrorism Act and amends the <i>Victorian Institute of Forensic Medicine Act 1985</i> to update a redundant reference.</p>	<p>The Scrutiny of Acts and Regulations Committee (Alert Digest No 12 2021, P18) The observes that the effect of clause 6 may be that a person over 10 who is at risk of coming to support the commission of seriously harmful, dangerous or destructive acts as a means of advancing a political, religious, ideological or public intimidatory goal may be asked (together with a parent or guardian, for a child under 15) to either consent to engage in services to address the underlying causes or (if the person is over 14 and a court finds that the risk has eventuated and the services are appropriate) be required to engage in those services and comply with further necessary conditions or face a potential \$1800 fine.</p> <p>Response received (Hon Natalie Hutchins MP - Alert Digest No 12 of 2021)</p> <p>The Committee reported on the Bill as originally introduced in Alert Digest No. 12 of 2021 tabled on 5 October 2021. The Committee now provides a further report on the House amendments. The amendments were passed in the Legislative Assembly and the Legislative Council on 28 October 2021.</p> <p>The Scrutiny of Acts and Regulations Committee (Alert Digest No 15 2021, P58) will write to the Attorney-General seeking further information as to whether or not the Juries Commissioner may exempt classes of persons from all jury service (e.g. for the remainder of the pandemic) under new sub-section 27(4) and whether the Juries Commissioner may exempt a person under new sub-section 27(4) for a reason other than a public health reason, including a safety concern related to the content of a trial. The Committee will also ask whether the Commissioner will inform litigants of decisions made under new sub-section 27(4).</p>
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Endnotes

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