



**Victorian Equal Opportunity  
& Human Rights Commission**

# **2020 Report on the Operation of the Charter of Human Rights and Responsibilities**

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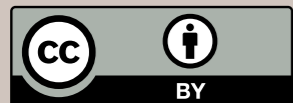
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**2020 Charter Report**

The Victorian Equal Opportunity and Human Rights Commission acknowledges and celebrates the Traditional Owners of the lands throughout Victoria and we pay our respects to their Elders, past and present.

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# 2020 Report on the Operation of the Charter of Human Rights and Responsibilities

# Letter to the Attorney-General

12 November 2021

Dear Attorney-General

On behalf of the Victorian Equal Opportunity and Human Rights Commission, I am pleased to present to you our 13th annual report on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) covering the 2020 calendar year.

In accordance with section 41(a) of the Charter, this report examines the operation of the Charter, including its interaction with other statutes and the common law.

I am pleased to report that, during 2020, the Supreme Court did not make any declarations of inconsistent interpretation and the Parliament of Victoria did not make any override declarations.

The purpose of the annual Charter Report is to examine the operation of the Charter in any given year – how it interacted with law and policy to protect and promote human rights. The year 2020 was overwhelmingly characterised by the COVID-19 pandemic. So this report focuses on the role the Charter played in protecting and promoting the human rights of Victorians particularly in relation to the measures the State Government took to protect Victorians from the COVID-19 pandemic.

I commend the Parliament of Victoria for not limiting the operation of the Charter throughout 2020 in its legislative response to COVID-19. During the pandemic, the Charter's functioning in guiding public decision-making, ensuring human rights are considered in new laws and maintaining the role of courts and tribunals has shown the significance of human rights frameworks to see us through difficult times. The pandemic has also accelerated public interest in the Charter.

In particular, the benefits the Charter provides for public sector decision-making have been demonstrated in 2020. Across the Victorian public sector, public authorities have been assisted by the Charter's decision-making framework to balance and limit individual rights against public health and safety. The Commission's Charter Education Program (CEP) has played a critical role in building the capability of public sector decision-makers to apply the Charter in the pandemic. Since 2017, the CEP has partnered with the Victorian public sector to roll out Victoria's most extensive human rights

education program in the past decade. The success of the CEP has resulted in improved public sector capability to apply the Charter, which in turn has led to better decision-making and improved outcomes for Victorians. To build on this success, the Commission welcomes the opportunity to continue the CEP and ensure that human rights remain central to the pandemic recovery.

The Commission has identified a number of practical ways to uphold human rights during the recovery. One example is to prohibit the QR code data collected for COVID-19 contact tracing purposes from being used for criminal investigations. This will contribute to public confidence in the QR code system as an integral tool protecting health and wellbeing while also protecting the privacy of Victorians.

The Commission will continue to closely monitor the human rights impacts of the COVID-19 pandemic, including for vulnerable people and those groups already affected by disadvantage and inequality in our community. I look forward to working with the Victorian Government in dealing with the pandemic and building a foundation for long-term recovery – one that is focused on human rights and that supports those who need it most.



A handwritten signature in black ink, appearing to read 'Ro Allen', written in a cursive style.

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

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# Overview: The Charter in 2020

## At a glance

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In 2020, the COVID-19 pandemic shaped people's lives throughout Victoria, Australia and the world. The Victorian Government took special measures to protect people's lives and health, and to ensure our institutions continued to operate. Ministers and government officials were granted extraordinary powers under both a State of Emergency and a State of Disaster.

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Special measures taken by the Government promoted the right to life and protected the public health system, but also significantly impacted on the human rights of all Victorians.

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Throughout the pandemic, the Charter continued to operate. This ensured Parliament was able to scrutinise COVID-19 legislative measures for Charter compliance; people retained their ability to challenge government decisions in the courts on Charter grounds; and public authorities remained bound to consider human rights, and to act in accordance with human rights, in their decision-making.

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While there was considerable public scrutiny of government action, including through Parliament, regulatory institutions and tailored inquiries, much of the public health justification for the extraordinary measures was not explained at the time.

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The pandemic has created opportunity for some innovations that should be retained in the recovery, including greater opportunities for flexible work, better digital access for people in rural and regional areas, increased investment in social housing and increased forms of communication for people in prison.

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# Lessons learned

## The Charter is a useful tool in times of crisis

1. The Charter can and should continue to operate in an emergency. In 2020 the Charter provided valuable guidance to Parliament, the courts and public authorities on how to implement emergency measures in ways that were least restrictive of human rights while also protecting Victorians from risks posed to public safety.

## Transparency and oversight can be achieved in an emergency

2. Transparency of government decision-making in times of emergency improves public trust and confidence in government. It is important that accessible, timely, clear and comprehensive information about the justification for any measures that limit human rights is provided, in a way that the public can understand. In this regard, the tabling of the Chief Health Officer's advice on the renewal of the State of Emergency is a welcome initiative.
3. Parliament, regulatory institutions and tailored inquiries scrutinised executive action in relation to COVID-19, demonstrating it is possible to have a level of transparency and accountability of government action throughout a State of Emergency and a State of Disaster. A tiered model of oversight of this nature improves public trust and is particularly important in a State of Emergency or a State of Disaster in which the executive is given extraordinary powers.
4. The Charter requires the Scrutiny of Acts and Regulations Committee to prepare a report on the human rights compatibility of all Bills introduced into Parliament. To the extent possible in times of emergency, SARC's effectiveness would be improved if it had sufficient time and resources to review Bills before they were passed.

## Enforcement of Public Health Orders should not entrench existing inequalities

5. While some enforcement of emergency laws and directions may be necessary to ensure compliance, there is a risk that enforcement will disproportionately affect marginalised communities who are potentially already over-policed, including Aboriginal and Torres Strait Islander Peoples, multicultural communities and people who are experiencing homelessness or sleeping rough. The Commission encourages the flexible enforcement of Public Health Orders and the use of existing policies to maximise police use of cautions, instead of fines, for breaches of laws and public health directions.

## Disproportionate impacts of the pandemic

6. The impacts of the pandemic have been felt more harshly by people and communities who already experience discrimination and disadvantage. These impacts will be important to consider throughout Victoria's pandemic recovery. In particular they provide an opportunity to reflect on some of the learnings from 2020:

### a. **Deep engagement with multicultural communities is needed**

The Commission encourages government to build on the significant work done in 2020 to engage with and learn from multicultural and multifaith communities as we progress into recovery from COVID-19. Deep engagement to actively seek and incorporate community insight and experience will result in better recovery outcomes for multicultural communities.

### b. **There are opportunities to improve entrenched gender inequalities**

The pandemic has exacerbated the already entrenched inequality experienced by women. Women continue to shoulder a disproportionate burden of unpaid caring responsibilities, leading to increased stress and mental health issues, and higher rates of workplace discrimination. There are opportunities to address these issues by applying a gendered lens to government decision-making throughout the remainder of the pandemic and into the recovery.

### c. **People in all forms of detention can and should be treated humanely**

People detained under emergency powers in any setting can and should be treated humanely. This includes people in prisons, youth justice facilities, police custody, mental health facilities, out-of-home care and aged care centres, as well as those in quarantine or otherwise detained at home. Humane treatment includes access to fresh air and meaningful human contact and, where necessary, additional psychological and health support. People in detention should also have clear and accessible review rights set out in legislation.

## Positive innovations should be maintained

7. The pandemic has created opportunity for some important innovations that should be retained in the recovery, including greater opportunities for flexible work, online learning for disengaged young people, better digital access for people in rural and regional areas, increased investment in social housing, decreased prison populations and increased forms of communication for people in prison.

# Introduction

In times of crisis, human rights are more important than ever. Throughout 2020, Victorians faced profound – and in many cases unprecedented – human rights challenges arising from the COVID-19 pandemic. The virus presents a direct threat to the lives and safety of Victorians and, while many lives were tragically lost, we managed to avoid the public health catastrophes experienced in other countries.

The actions of Parliament and the Victorian Government protected the right to life of Victorians, as well as protecting our public health system and ensuring essential services continued to operate. However, the strict measures placed far-reaching limitations on many of our other human rights protected under the Charter, including our freedom of movement, our freedom of association and assembly, our right to take part in public life, our rights to equality and privacy, our cultural rights and the protection of families and children.

For 13 years the Charter has required the Parliament of Victoria to consider the effects of all new laws on the human rights of Victorians. It is a testament to the trust placed in the Charter as a framework for protecting and balancing rights that Parliament did not seek to override the Charter's protections in framing its response to the pandemic.

As a result, in 2020 the Charter guided outcomes in key Supreme Court cases concerning the pandemic, including in relation to the protection of life within the prison system and the restrictions on people's freedom and liberty as a result of the curfew. The Charter also proved to be an effective framework for ensuring human rights were considered in the actions and decisions of public authorities in operationalising the pandemic response, including public health measures. The operation of the Charter in these ways throughout 2020 is outlined in this Overview on the following pages.

Part A of this report goes on to consider the human rights impacts of the following lockdown measures and the role the Charter played in shaping or responding to these restrictions:

- staying at home
- curfew
- compulsory mask-wearing
- protest
- policing response.

The pandemic and the government response disproportionately impacted on some Victorians by exacerbating existing inequalities in our society. This report highlights the particular challenges faced by some people who already experience disadvantage within our community, including adults and young people in custody, people from diverse racial, religious and cultural backgrounds, and women. Part B of this report looks closely at the impacts of COVID-19 on three communities in particular:

- people living in the prison system and youth justice facilities (Chapter 7)
- people from multicultural and multifaith backgrounds (Chapter 8)
- women (Chapter 9)



# Extraordinary measures

**On 25 January 2020, Victoria recorded Australia's first case of COVID-19 in a person returning from overseas.<sup>1</sup> Governments across Australia were quick to respond.**

In February 2020, the Australian Government restricted travel from countries experiencing COVID-19 outbreaks. In March, the National Cabinet was formed, comprised of the Prime Minister and heads of state and territory governments, to coordinate Australia's response.<sup>2</sup> On 18 March 2020, the Australian Government Minister for Health declared COVID-19 a Human Biosecurity Emergency<sup>3</sup> and, two days later, the Australian Government implemented a 'do not travel' ban on Australians travelling overseas and closed Australia's borders to all non-citizens and non-residents.<sup>4</sup>

Victoria also took extraordinary legislative, administrative and policy measures to protect people's lives and health, and to ensure our institutions continued to operate. These measures spanned health, housing, justice, corrections, welfare, industry and business regulation, provision of goods and services, education and childcare.

On 16 March 2020, the Victorian Minister for Health declared a State of Emergency under the *Public Health and Wellbeing Act 2008* (PWA).<sup>5</sup> During a State of Emergency, it is not unusual for Parliament to give the executive government (ministers and government officials) greater powers to respond quickly to the crisis before it. Accordingly, the State's Chief Health Officer was given extraordinary powers to make all directions reasonably necessary to eliminate or reduce a serious risk to public health.

Victoria spent the remainder of 2020 in a State of Emergency and a period of that time also in a State of Disaster, meaning the Chief Health Officer, the Minister for Police and Emergency Services and other public officials were granted significant additional powers.

The directions given by the Chief Health Officer included requiring:

- all Victorians to be in 'lockdown' for 63 days and people in Greater Melbourne and Mitchell Shire to be in lockdown for a further 110 days – 173 days in 2020 in total
- at certain times, people in Greater Melbourne and Mitchell Shire to live under curfew from 8pm to 5am, unable to leave their homes except for limited reasons
- at certain times, people in Greater Melbourne and Mitchell Shire not to travel more than 5 km from their home (with exceptions)
- some people entering the State to enter 14 days of hotel quarantine
- at certain times, people to wear masks in particular situations.

Parliament also passed two emergency measures Bills to ensure the ongoing operation of state institutions. Under these laws, the executive was given powers that would ordinarily reside with Parliament. While this empowered the executive to swiftly respond to the crisis, it also reduced the opportunity for scrutiny and accountability of those decisions through the usual parliamentary processes.

Many of the measures were designed to cease within six months. It is important that measures are time-limited in this way to ensure that the additional powers afforded to executive governments are rolled back when they are no longer required to deal with the threats posed by the COVID-19 pandemic.

The public health measures taken in response to COVID-19 provided the government with a framework within which to consider which measures were the least restrictive on people's freedoms and could achieve the public health purpose. Nevertheless, these measures also had a profound impact on our other fundamental human rights.

By the end of the year in Victoria, 20,368 people had fallen ill with COVID-19 and 820 people had died.<sup>6</sup> Across Australia, there were 28,408 cases of COVID-19 and 909 deaths.<sup>7</sup>



# Lockdown stages and public health measures – a timeline

# Victorian COVID Restrictions

STATE OF EMERGENCY

STATE OF DISASTER

16 - 17 MARCH

17 NEW COVID-19 CASES

23 MARCH

56 NEW COVID-19 CASES

**Stage 1 restrictions implemented nationally**

Sports and entertainment venues close, hospitality takeaway only

25 MARCH 2020

58 NEW COVID-19 CASES

**Stage 2 restrictions implemented nationally**

Further services close, gatherings restricted

30 MARCH 2020

88 NEW COVID-19 CASES

**Stage 3 restrictions implemented in Victoria**

Stay at home restrictions implemented. Only four permitted reasons to leave

12 APRIL 2020

8 NEW COVID-19 CASES

Victorian schools move to remote learning

13 MAY 2020

7 NEW COVID-19 CASES

**Easing of Stage 3 restrictions in Victoria**

Stay at home restrictions remain, but now also allowed to leave home to visit friends and family

26 MAY 2020

8 NEW COVID-19 CASES

Victorian schools begin a phased return to the classroom

1 JUNE 2020

4 NEW COVID-19 CASES

**Victoria moves back to Stage 2 restrictions**

Restaurants and pubs open with limits, gatherings of up to 20 allowed at home and in public

22 JUNE 2020

17 NEW COVID-19 CASES

Tightening of restrictions on gatherings

2 - 4 JULY 2020

62 NEW COVID-19 CASES

**Melbourne 'hotspot' postcodes return to Stage 3 restrictions**

**Nine Melbourne public housing towers placed into 'hard lockdown'**

9 JULY 2020

287 NEW COVID-19 CASES

Masks added to Stage 3 restrictions

Ring of steel enacted, creating a border between Greater Melbourne and regional Victoria

23 JULY 2020

143 NEW COVID-19 CASES

**All of Melbourne and Mitchell Shire return to Stage 3 restrictions**

1 - 5 AUGUST 2020

687 NEW COVID-19 CASES (MAXIMUM ON 4 AUGUST 2020)

**Stage 4 restrictions implemented in Melbourne and Mitchell Shire**

**Regional Victoria to Stage 3 restrictions + masks**

Curfew from 8pm-5am, exercise 1 hour a day within 5km, only one person per household allowed to shop within 5km

14 SEPTEMBER 2020

39 NEW COVID-19 CASES

Melbourne and Mitchell Shire: First Step of reopening, including two person "bubble" for people living alone and single parents; curfew changed to begin at 9pm

Regional Victoria: Second Step of reopening

17 SEPTEMBER 2020

25 NEW COVID-19 CASES

Regional Victoria: Third Step of reopening, including "household bubbles" and increased numbers for gatherings

28 SEPTEMBER 2020

9 NEW COVID-19 CASES

Melbourne and Mitchell Shire: Reopening Second Step, including childcare and early educators re-open

5 OCTOBER 2020

14 NEW COVID-19 CASES

Schools in regional Victoria begin a staggered return to the classroom

12 OCTOBER 2020

11 NEW COVID-19 CASES

Schools in Melbourne and Mitchell Shire begin a staggered return to the classroom

19 OCTOBER 2020

3 NEW COVID-19 CASES

Melbourne and Mitchell Shire: Second Step easing, including travel up to 25km allowed within Melbourne, and into regional Victoria for permitted purposes.

Regional Victoria: Third Step easing, including household visits of 2 people per day and some public facilities opening

26 OCTOBER 2020

0 NEW COVID-19 CASES

Schools in Melbourne continue a staggered return to the classroom

28 OCTOBER 2020

2 NEW COVID-19 CASES

Melbourne: Reopening Third Step. Regional Victoria: Third Step restrictions easing, including cafes, restaurants and pubs reopening

8 NOVEMBER 2020

0 NEW COVID-19 CASES

Border between Melbourne and regional Victoria is removed

30 NOVEMBER 2020

0 NEW COVID-19 CASES

Victoria: Last Step of reopening, including 15 household visitors a day, 150 people at outdoor weddings and funerals, phased return to offices of 25% capacity

14 DECEMBER 2020

0 NEW COVID-19 CASES

Households can now host up to 30 visitors

MARCH

APRIL

MAY

JUNE

JULY

AUGUST

SEPTEMBER

OCTOBER

NOVEMBER

DECEMBER

# The Charter continued to operate

It is significant and commendable that throughout 2020 the Charter continued to operate, even in the State of Emergency and the State of Disaster. This has meant that the protections under the Charter have continued to apply and that the Charter has continued to provide a framework to ensure human rights are considered in government decision-making. This might well not have been the case. The Charter contains a provision allowing Parliament to override any or all of the protections set out in the Charter in exceptional circumstances,<sup>8</sup> meaning that the government had an opportunity to suspend the operation of the Charter given the exceptional circumstances Victoria faced, and it decided against it.

Instead, Victoria set an extremely important precedent for protecting human rights during an emergency. The continued operation of the Charter during the pandemic protected human rights in three key ways:

- Parliament continued to scrutinise Bills – including COVID-19 measures – for Charter compliance, which in turn promoted rights-consistent law-making.
- People retained their ability to challenge government decisions in the courts on Charter grounds.
- Public authorities remained bound to consider human rights, and to act in accordance with human rights, in their decision-making.

These areas are discussed briefly below and in detail throughout this report.

## Charter cases in the courts

The ongoing operation of the Charter meant that Victorians were able to challenge the decisions of public authorities if they felt that their rights had been breached.

In 2020, Charter rights were raised in two significant cases brought against the government:

- **Challenging the validity of the curfew (Loiello v Giles):** The Supreme Court considered the extent to which the curfew that was imposed during Stage 4 restrictions unreasonably limited Charter rights. The court found that the right to freedom of movement was limited by the curfew, but that the restrictions on human rights were proportionate to the purpose of protecting public health.<sup>9</sup> Evidence tendered during this case provides some insight into how the Department of Health and Human Services (DHHS) considered human rights when imposing the curfew, including the rights to freedom of movement, liberty, freedom of peaceful assembly and association, freedom of expression, equality, privacy and the protection of families and children.<sup>10</sup>

- **Seeking early release from prison (Rowson v DJCS):** Mark Rowson sought early release from Port Phillip Prison because of the risk that COVID-19 posed to his life and health, and the fact that he would be unable to adequately protect himself should the disease enter the prison. In an interlocutory hearing, the Supreme Court considered Mr Rowson's Charter rights to life, humane treatment when deprived of liberty, and recognition and equality before the law. It did not make any findings of fact but found that evidence, as well as the absence of any risk assessment carried out by the prison, supported a finding that there was a *prima facie* case that prison authorities had breached their duty of care.<sup>11</sup> The court ordered Corrections Victoria to conduct an assessment of the COVID-19-related risks to people within the prison and to implement the recommendations of that assessment.<sup>12</sup>

These cases are discussed in more detail in Chapters 2 and 7, respectively.

## Enquiries and complaints under the Charter

The Charter provides a range of options for people to receive information and to complain about breaches of their Charter rights. The following information and complaints functions exist in relation to Charter rights in Victoria:<sup>13</sup>

- The Commission provides information and advice about Charter rights and assists people to resolve complaints about discrimination, victimisation, sexual harassment and vilification under Victoria's discrimination and vilification laws.
- The Victorian Ombudsman may enquire into and investigate complaints about administrative action by authorities, including potential human rights breaches. Since 2019, it has had the power to conciliate or mediate such complaints in order to resolve them.<sup>14</sup>
- The Independent Broad-based Anti-corruption Commission (IBAC) also has a role in reviewing Victoria Police investigations into allegations of police misconduct.
- People can claim relief in Victorian courts for unlawfulness under the Charter where they could also do so on non-Charter grounds.

COVID-19-related complaints made to these bodies during 2020 are discussed below.



# COVID-19 complaints

## Complaints and enquiries to the Commission

**182** COVID-19 complaints

**602** COVID-19 enquiries

### Complaints

During 2020 the Commission received 182 complaints relating to the impact of COVID-19 on people's lives.

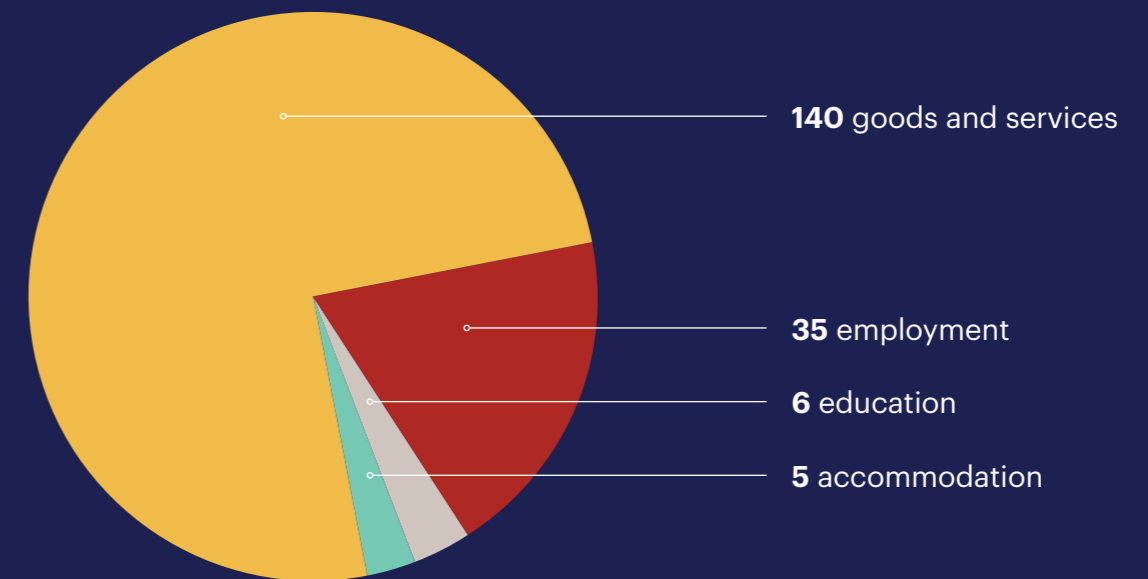
By far the largest number of COVID-related complaints were of disability discrimination, brought by people who were unable to wear a mask and who were denied entry to retail shops and health care settings, despite having a lawful exemption from wearing a mask under the Chief Health Officer's orders.

**117 people complained to the Commission about being discriminated against for not wearing a mask, despite having a lawful exemption not to.**

People alleged discrimination on the basis of the following attributes:

Disability	155
Race	8
Parental/carer status	7
Age	7
Pregnancy	4
Employment activity	2
Racial vilification	2
Sex	1
Marital status	1
Lawful sexual activity	1

People alleged discrimination in the following areas of public life:



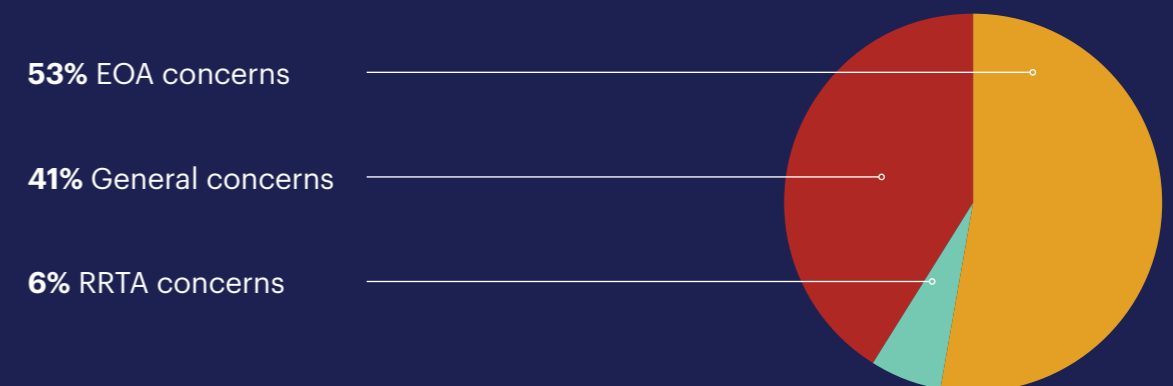
*Note: People sometimes made complaints on the basis of more than one attribute, or in relation to more than one area of life.*

Resolution of complaints

**80% of COVID-19 related complaints that attempted resolution in 2020 were successfully resolved.**

### Enquiries

During 2020 the Commission received 602 enquiries relating to COVID-19 and rights – more than three times the number of enquiries received in 2019. Enquiries made to the Commissions in 2020 raised concerns about discrimination under the EOA, racial vilification under the RRTA, and general concerns (including breach of rights protected by the Charter).



## Victorian Ombudsman

# 2000+

### COVID-related complaints in 2020

The Ombudsman received more than 2000 complaints relating to the COVID-19 pandemic and the government response since March 2020.<sup>15</sup> Of these, over 300 related to prison issues. Most commonly, these related to Emergency Management Days (EMDs), which people in custody may be eligible for after being placed in isolation for quarantine purposes. The EMD issue is discussed in detail on page 81.

#### 130 cases raised concerns about the conditions in quarantine.

During March and April 2020, 30 people also complained about prisons not adhering to social distancing guidelines, the cleanliness of common areas and access to cleaning products and hand sanitiser.

#### 240 complaints related to the Human Services portfolio.

Common complaints included: lack of access to fresh air and inadequate services provided to people in hotel quarantine; poor care and deficient hygiene services provided to residents during the public housing towers lockdown; poor maintenance of and access to public housing; and lack of facilitation of supervised visits with children in child protection throughout the pandemic.

#### 110 complaints to the Victorian Ombudsman during 2020 involved the Health portfolio.

These included complaints about: public authorities not recognising the exemptions to the requirement to wear masks; conditions of mandatory quarantine; restrictions on movement imposed by the Stay at Home Directions; health assistance for people caught up in the lockdown of the public housing towers; and restrictions on the movement of people who were single and not in intimate relationships.

## Independent Broad-based Anti-corruption Commission

# 200+

### COVID-19 related complaints in 2020

Between 1 March and 31 December 2020, IBAC received a total of 254 complaints and notifications about the COVID-19 pandemic response and policing of directions. It identified 32 matters as having a potential human rights violation or implication, with 23 of these involving Victoria Police.<sup>16</sup> Victoria Police may also receive notifications about alleged misconduct of a police officer or a protective services officer (PSO) (and may refer these to IBAC).<sup>17</sup>

Data provided by IBAC shows that during 2020, IBAC received 99 notifications from Victoria Police of misconduct of a police officer or a PSO. 25% of these alleged potential human rights violations and over half of these related to allegations of torture or cruel, inhumane or degrading treatment while in police custody.<sup>18</sup> These allegations were investigated by Victoria Police. A small percentage of the investigations were reviewed by IBAC.



# Improving public policy decision-making

"The Charter has been front and centre of the government's response to the COVID-19 pandemic. In developing and drafting directions under the public health emergency powers, the department's paramount consideration has been to protect the life and health of Victorians. Where rights have needed to be limited in order to achieve that purpose, we have closely examined whether that limitation is reasonable and proportionate. The need to protect and balance rights has played an integral role in decision-making throughout the pandemic. We have carefully considered detailed, evidence-based public health advice to ensure that any interference with rights is proportionate. In our experience, the Charter has influenced the development and execution of policy to an extent not seen before the pandemic."

Department of Health and Human Services

Perhaps the most significant impact of the Charter during the COVID-19 pandemic was the role it played in public policy decision-making. Public authorities remained bound by the Charter to consider human rights, and to act in accordance with human rights, in their decision-making.

Throughout 2020, the Commission heard from public servants that the Charter was 'part of the furniture' and that they had 'never considered the Charter more' in their work.

The need for the Charter to be applied by public authorities has additional significance during a State of Emergency, given that members of the executive are granted extraordinary powers to limit people's human rights. Unlike parliamentary and court processes, public authorities' work is not conducted openly and subject to less public scrutiny.

This report brings to light some of the positive ways in which public authorities took account of Charter rights in developing their responses to COVID-19 behind the scenes. It also considers the scrutiny measures that were imposed on executive action through Parliament, regulatory institutions and select inquiries.

## Scrutiny of Parliament and rights-compatible law reform

Under the Charter, every Bill introduced into Parliament must be accompanied by a statement outlining the Bill's compatibility with human rights. SARC is tasked with considering all Bills and reporting to Parliament on whether a Bill is compatible with human rights. SARC continued to operate during 2020 although, given the urgency of passing emergency legislation, it was not always able to scrutinise Bills before they were passed. To the extent possible in times of emergency, SARC's effectiveness would be improved if it had sufficient time and resources to review Bills before they were passed.

It is also notable that during the pandemic and State of Emergency, SARC has not had the opportunity to review the extraordinary powers given to ministers and government officials for compatibility with human rights, as it would if those powers were by statute.

Given that the Commonwealth and state parliaments were recessed for long periods during 2020, there was limited opportunity for parliamentary scrutiny of the legislation enacted in response to the pandemic. However, there were moments in 2020 in which public debate about the human rights implications of proposed new laws resulted in more proportionate and rights-respecting laws.

As a result of so many Victorians being affected by the COVID-19 public health restrictions, many people were engaged with and concerned about the government's exercise of power and the impact this was having on their human rights daily.

The most significant amendments to laws occurred when government sought to expand and extend the operation of emergency powers in August 2020. At first instance the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020* (COVID-19 Omnibus Act) sought a 12-month extension to the use of emergency powers, and to expand the pool of authorised officers, giving them new powers to pre-emptively detain people. The Charter provided a useful framework for debate on this issue, which ultimately resulted in amendments to the proposed provisions that reflect more proportionate limitations of Charter rights. This is discussed in more detail on page 37 below.

## Lack of transparent decision-making

During 2020 there was considerable dissemination of the overarching public health rationale for the Chief Health Officer's directions, including through daily press conferences and the availability of the Chief Health Officer and his team to answer questions. There was also public scrutiny of government action through parliament and regulators such as the Victorian Ombudsman report. However, the details of the public health justification for many of the extraordinary measures taken in 2020 were not made public at the time. This is significant given the broad human rights impacts of the Chief Health Officer's directions.

There was widespread acceptance of and compliance with many of the public health measures during 2020. However, the limited publicly available information about the public health justifications underpinning the Chief Health Officer directions made it difficult for people outside of government to understand the extent to which the restrictions imposed on human rights were necessary and proportionate. The Commission notes and welcomes the additional transparency arising from the provision<sup>19</sup> inserted into the PHWA in September 2020 which requires the Minister for Health to provide some transparency in relation to the public health justifications for the emergency measures.



## Scrutiny of government decision-making through inquiries

### Public Accounts and Estimates Committee scrutiny: Minority report raises concerns about human rights

In May 2020, the Victorian Government requested the parliamentary Public Accounts and Estimates Committee to inquire into the government's response to the COVID-19 pandemic.

PAEC was requested to review and report to the Victorian Parliament on:

- the responses taken by the Victorian Government, including as part of the National Cabinet, to manage the COVID-19 pandemic
- any other matter related to the COVID-19 pandemic.<sup>20</sup>

Within these terms of reference, the committee examined a broad spectrum of issues, including: the overall management of the pandemic by the government; the responses in the health system, aged care and mental health; the response to the social impacts of the pandemic and associated restrictions; the courts; corrections; and the Hotel Quarantine Program.<sup>21</sup>

PAEC received 228 submissions from a diverse mix of private, public and community organisations and individuals.<sup>22</sup>

PAEC tabled an interim report in Parliament on 4 August 2020 and a final report on 29 January 2021 (the latter comprised of a majority report and a dissenting minority report).

The inquiry provided important open oversight of the government's handling of the COVID-19 pandemic. The majority report noted that the government's decision not to suspend the Charter during the pandemic preserved Victorians' ability to challenge decisions made by the government under the Charter in the courts where they feel that their rights have been unduly impacted.<sup>23</sup> However, the majority report contained little detailed analysis of specific Charter impacts of the measures to address the pandemic, and no recommendations to embed human rights into future planning and decision-making.

The minority report raised concerns about Charter rights. It considered and made recommendations about the transparency of assessments underpinning public health directions<sup>24</sup> and the accountability of decision-making.<sup>25</sup>

The minority report found that there was insufficient publicly available information to independently determine whether Public Health Orders were proportionate and the least restrictive of human rights, as required by the PHWA.<sup>26</sup>

The minority report recommended that the government should provide clear guidance regarding how the right to protest may be lawfully exercised in Victoria and ensure that any future public health directions allow for protest as a legitimate reason for leaving home.<sup>27</sup>

### Hotel Quarantine Inquiry finds Charter rights were properly considered

In July 2020, the COVID-19 Hotel Quarantine Inquiry was established by the Governor in Council to examine matters related to Victoria's Hotel Quarantine Program. The Board of Inquiry published an interim report in November 2020 and a final report in December 2020. The board reviewed the role of the Charter in the making of the Mandatory Detention Orders and ultimately found that Charter rights were properly considered.<sup>28</sup>

However, the board found that expert advice should have been obtained by the decision-maker in order to fully understand the health and wellbeing risks of this type of quarantine arrangement and to provide guidance to the Hotel Quarantine Program on how to best manage these risks.<sup>29</sup> The board found that there were systemic gaps in meeting the health and human needs of those in quarantine, including not initially understanding or addressing the facts that:

- being in quarantine in a hotel room for 14 days is a very difficult and stressful experience for some people
- a percentage of the people held in quarantine will have significant health needs, physical or mental or both, and will need particular support
- having no access to fresh air or exercise is extremely difficult for some people.<sup>30</sup>

The board made recommendations to ensure the health and welfare of people subject to hotel quarantine. The board recommended improvements to facility-based quarantine models centred on infection prevention and control. The board further recommended considering a home-based quarantine or a hybrid model involving initial reception into a quarantine hotel as a form of 'triage' combined with a period of home-based quarantine, consistent with Charter requirements.<sup>31</sup>

The interim and final reports did not provide any detailed analysis of what is required under the Charter, for example, necessary measures to uphold the right to humane treatment when deprived of liberty.

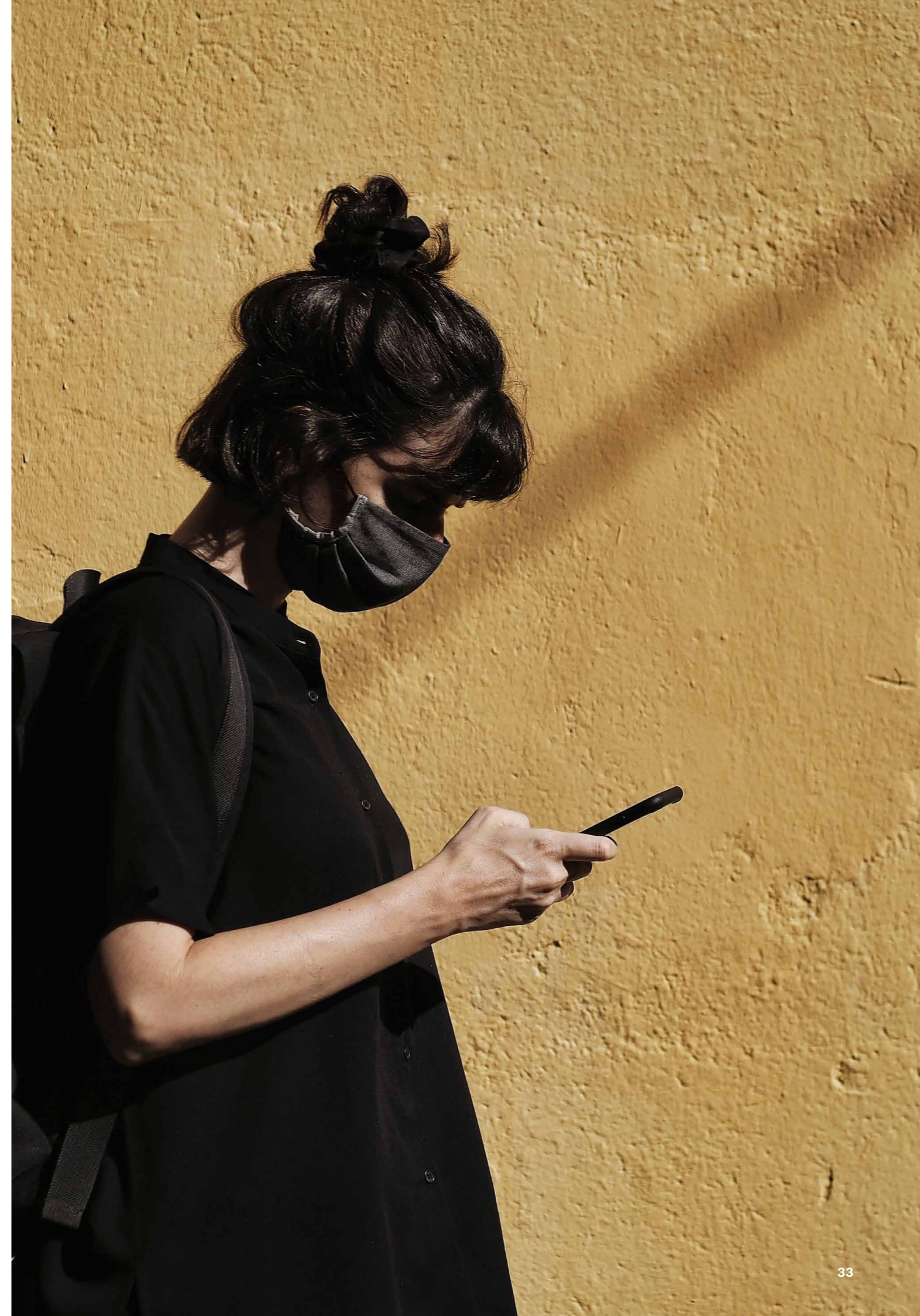
On 30 November 2020, the Victorian Government announced the implementation of a new quarantine program and the establishment of COVID-19 Quarantine Victoria to oversee all elements of the program.<sup>32</sup> The Government's response to the Inquiry can be found at [Victorian Government response to the Hotel Quarantine Inquiry | Victorian Government \(www.vic.gov.au\)](https://www.vic.gov.au/victorian-government-response-to-the-hotel-quarantine-inquiry).



# Positive changes worth keeping

Finally, the pandemic has created opportunity for some innovations that should be retained going forward:

- Remote access to many services increased, including increased online access to health and education services, and mental health and wellbeing checks for young people in isolation.
- The Department of Justice and Community Safety (DJCS) offered increased opportunities for people in prison and youth justice facilities to contact their family and community members through greater use of mobile phones or secure tablet devices and video calls. This is discussed in detail in Chapter 7. Although face-to-face visits are of primary importance, video visits can also be beneficial. DJCS advised the Commission it will continue to offer video visits to complement face-to-face visits beyond the pandemic.<sup>33</sup>
- DJCS extended safeguards and support for vulnerable people exiting custody, including mothers with children exiting prison and those exiting prison into emergency accommodation for those experiencing homelessness. These supports included providing transportation for prisoners exiting custody to their accommodation, establishing a community residential facility to accommodate exiting prisoners who would otherwise be homeless and funding the Victorian Association for the Care and Resettlement of Offenders to provide a day-of-release service.
- Prison numbers decreased, a fact which is partially understood by reference to judges and magistrates using their discretion to grant bail applications and which is strongly welcomed by the Commission.<sup>34</sup>
- There was an increased understanding of barriers to equity on the basis of race, resulting in COVID-19-related material eventually being provided in a range of accessible formats. This is discussed in Chapter 8.
- Many government, private and non-profit workplaces shifted to a remote working model, offering flexibility that could support people, more often women, with caring responsibilities and disabilities beyond the pandemic. The effect of the pandemic on workplace gender equality is discussed in Chapter 9.



# Part A: Lockdown measures

“Human rights are more important than ever in times of crisis. In 2020, Victorians faced profound challenges as a result of the COVID-19 pandemic and our leaders made difficult decisions with the urgent aim of protecting public health and the lives and livelihoods of our community. The Charter was designed to see us through times like this and it provided an effective framework to ensure human rights were considered by Parliament and the Government when designing and implementing the pandemic response.”

Ro Allen, Victorian Equal Opportunity  
and Human Rights Commissioner





# 1. Emergency and disaster measures to protect lives and health

## At a glance

- During 2020, Parliament and public authorities imposed emergency and disaster measures which played a vital role in safeguarding public health, but also limited human rights.
- The Commission worked closely with government and other stakeholders to monitor the impact of the emergency measures on the human rights of Victorians.

## Declaration of a State of Emergency

"During a State of Emergency, some limitations on human rights may be unavoidable – and these are not decisions we can take lightly. Any restriction on human rights must be necessary, justifiable, proportionate and timebound."

Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, 2020

On 16 March 2020, the Victorian Minister for Health declared a State of Emergency under the PHWA to combat COVID-19 and to allow measures to 'flatten the curve',<sup>35</sup> giving the health system the best chance of continuing to function effectively should cases rise exponentially during the pandemic.<sup>36</sup>

As noted above, in a State of Emergency the Chief Health Officer is given extraordinary powers to limit human rights for the purposes of eliminating or reducing serious risks to public health including:

- detaining a person or group for as long as reasonably necessary to eliminate or reduce a serious public health risk, restricting movement or preventing entry to Victoria<sup>37</sup>
- restricting people's movement within the emergency area<sup>38</sup>
- preventing entry into the emergency area<sup>39</sup>
- any direction reasonably necessary to protect public health.<sup>40</sup>

'Authorised officers'<sup>41</sup> under the PHWA are also given powers in a State of Emergency to investigate whether there is a risk to public health and to manage an identified risk, including powers to:

- enter into a public place or private premises with the consent of the occupier
- inspect premises and make enquiries
- seize things in certain circumstances



- direct people to produce documents, operate equipment or answer questions<sup>42</sup>
- detain people in an emergency area, or restrict movement or prevent entry into an area, for the period reasonably necessary to eliminate or reduce a serious risk to public health
- give any other direction that the authorised officer considers reasonably necessary to protect public health.<sup>43</sup>

These provisions of the PHWA formed the legal foundation for a large part of Victoria’s response to the pandemic. Passed two years after the enactment of the Charter, the PHWA in many ways incorporates and reflects a human rights-based approach. For example, it requires that all decisions made under the PHWA should be proportionate to the public health risk and should not be arbitrary.<sup>44</sup> Powers of detention under the PHWA contain safeguards including written notice to the Chief Health Officer and a review of detention every 24 hours.<sup>45</sup>

Throughout the pandemic, the Chief Health Officer has regularly issued directions to the Victorian public under the State of Emergency powers in the PHWA to address the “serious health risk posed to Victoria” by COVID-19.<sup>46</sup> Pursuant to the PHWA, these directions were only able to be in place for a period of up to four weeks, at which point they would expire.



## Safeguards for the State of Emergency extension

By August 2020, the Victorian Government was facing a limit on its ability to extend the State of Emergency beyond 16 September 2020. At that time, the PHWA only allowed a State of Emergency to be declared for four weeks at a time and those declarations could only be renewed for a maximum period of six months.<sup>47</sup>

However, in August 2020 Victoria was still at a critical stage in addressing the community transmission of COVID-19. The government considered that continued public health measures were necessary in order to manage the significant public health risks posed by COVID-19 and that many of those measures required the use of emergency powers, for example, to implement lockdowns and the returned traveller mandatory quarantine program.<sup>48</sup>

On 25 August 2020, Victoria recorded 148 new cases of COVID-19 and eight further deaths. The Minister for Health emphasised that if the State of Emergency expired, “every person who’s currently diagnosed with COVID-19 who’s legally required to stay home would be free to leave their home”.<sup>49</sup>

On 1 September 2020, the government introduced a Bill to extend the cap on the maximum period during which a State of Emergency declaration can operate by a further 12 months (to 18 months in total).<sup>50</sup> In response, oversight institutions and civil society organisations, including SARC, the Commission, the Law Institute Victoria, the Victorian Bar Association and the Institute of Public Affairs, raised concerns with the expansion, calling for it to be lawful, proportionate and justified.<sup>51</sup>

The Charter was a helpful framework for public debate on this issue and, ultimately, community and parliamentary engagement with Charter rights led to positive amendments to the aspects of the Bill that would otherwise have significantly limited human rights, including:

- a limited extension of the State of Emergency, with greater transparency of executive decision-making and added safeguards
- removal of the proposed new power to allow authorised officers to pre-emptively detain people who had been diagnosed with COVID-19 or were a close contact, where they were likely to refuse or fail to comply with a public health direction
- a reduction in the proposed the pool of people who could be appointed as authorised officers (and therefore exercise emergency powers) under the PHWA.

Although the swift passage of the Bill did not allow SARC to consider it in detail and report in a timely way,<sup>52</sup> these amendments reflect more rights-compatible outcomes while still achieving the primary purpose of the Bill. The Commission acknowledged the human rights implications of the emergency powers but supported this compromise. The outcome was timebound and proportionate, and there was a significant evidence base for the extension, given the high rate of community transmission.<sup>53</sup>

## Challenges to pre-emptive detention and expanded pool of authorised officers

On 17 September 2020, the government introduced the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020 into Parliament that included giving ‘authorised officers’ pre-emptive power to detain people for future conduct and expanding the categories of people who could be appointed as authorised officers under the PHWA.

As tabled, these provisions of the Bill would have permitted authorised officers to pre-emptively detain ‘high-risk’ people (those who were COVID-positive or close contacts) if they reasonably believed that those people were likely to refuse or fail to comply with a public health direction. This power would have allowed detention based on future non-compliance, rather than actual wrongdoing.

The Bill did not include clear review mechanisms for people detained under the power. Under the PHWA, an authorised officer is responsible for reviewing their own decision to detain a person. The proposed Bill also widened the scope of people who could be appointed as authorised officers with the power to detain. The Commission raised concern with SARC that some people appointed under the new criteria might not have the public health skills and experience necessary to carry out the functions prescribed to them under the PHWA, including to authorise detention on public health grounds.

The statement of compatibility accompanying the Bill noted that the limits imposed by the proposed emergency measures would be proportionate and justifiable in the circumstances. It outlined that there was a need to protect the life and health of Victorians and to ensure the ongoing safe and efficient delivery of public services during the COVID-19 pandemic, as well as quickly responding to emerging risks to public health, safety and welfare.

The proposed pre-emptive detention power sparked a significant public debate:

- SARC noted that the effect of the Bill could be to permit an authorised officer to detain a high-risk person for as long as the officer reasonably believed that person was likely to refuse or fail to comply, whether or not such detention was reasonably necessary.<sup>54</sup>
- SARC’s minority report challenged the Bill as a significant violation of human rights and highlighted the lack of judicial oversight or review mechanisms.<sup>55</sup>
- The Human Rights Law Centre called for the amendments to be scrapped, observing that any member of the community could be appointed as an authorised officer with the power to detain.<sup>56</sup>
- The Victorian Bar Association noted that unconstrained and undefined subjective powers naturally invite the tendency to exercise them to the fullest, in breach of human rights.<sup>57</sup>
- The Institute of Public Affairs particularly opposed the power given to authorised officers to detain without accountability or oversight, based on subjective criteria.<sup>58</sup>

Following this debate, House amendments removed the pre-emptive detention provisions, narrowed the range of people who could be appointed as authorised officers and limited their powers. Other provisions of the Bill were passed unamended.

## Declaration of a State of Disaster

On 2 August 2020, the same day that Stage 4 restrictions and the curfew were imposed, the Premier declared a State of Disaster<sup>59</sup> under the *Emergency Management Act 2013*. At that time:

- People in Greater Melbourne and Mitchell Shire had been in their second lockdown since 8 July 2020.<sup>60</sup>
- Victoria had experienced 11,557 confirmed positive cases of COVID-19 and 671 new cases were identified the previous day.<sup>61</sup>
- Morbidity and mortality projections forecasted an unprecedented burden on the Victorian health system and a sharp rise in the number of new daily cases despite restrictions being in place.<sup>62</sup>

The Premier emphasised that there was an unacceptably high number of community transmission cases and that Victoria had 760 active COVID-19 infections where the source of the transmission was not known.<sup>63</sup> He announced that a State of Disaster was necessary to restrict movement and limit human interaction in order to combat COVID-19 and ensure compliance with public health directions.<sup>64</sup>

The Minister for Police and Emergency Services and the Emergency Management Commissioner were satisfied that COVID-19 constituted or was likely to constitute a significant and widespread danger to life or property in Victoria.<sup>65</sup> The minister stated that the government “needed the legislation to ensure it had clear power to impose and enforce the curfew and new rules”.<sup>66</sup>

On 26 October 2020, almost three months later, the Premier reported that no cases had been found in the previous 24-hour period and the government was confident it was firmly on top of the virus. The Premier stated that, from 27 October, if the lockdown measures continued driving case numbers down, restrictions would be eased and Melbourne would move out of lockdown.<sup>67</sup> Case numbers continued to decline and, on 8 November 2020, the Premier decided not to renew the State of Disaster.<sup>68</sup>

## → Differences between a State of Emergency and a State of Disaster

A State of Emergency and a State of Disaster operate quite differently. A State of Emergency under the PHWA authorises the Chief Health Officer to issue directions and health officials to exercise powers when there is a serious risk to public health. A State of Disaster can be declared when there is an emergency that the Premier is satisfied constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria.<sup>69</sup> In determining whether to declare a State of Disaster, the Premier must consider the advice of the Minister for Police and Emergency Services and the Emergency Management Commissioner.<sup>70</sup> The declaration can apply to the whole or a part of Victoria.

State of Disaster powers, granted under the Emergency Management Act, are significantly more extraordinary and allow the Minister for Police and Emergency Services to direct the activities and allocate the resources of government agencies, and to significantly restrict the rights of individuals, including their movement.<sup>71</sup> For this reason, it is important that a State of Disaster is in place for only as long as is necessary to deal with the emergency.



## 2. Staying at home

### At a glance

- One of the most restrictive measures imposed by the Victorian Government during 2020 was the requirement for people to stay within their homes for extended periods of time unless for exercise, to provide care or to access necessary goods or services, alongside other limited circumstances.
- These directions particularly impacted on people who lived alone, were socially isolated, had a mental illness or required regular care including people with a disability and children who were unable to learn remotely.

The Chief Health Officer first directed Victorians to stay home in March 2020 (under Stage 3 restrictions) and only permitted people to leave home in certain circumstances, such as to access necessary goods or services, for care or other compassionate reasons, for work and for education, exercise and other specified reasons.<sup>72</sup> When leaving home, people were directed to maintain a physical distance of at least 1.5 metres from other people ('socially distance') and to ensure good hygiene practices.<sup>73</sup>

Stay at Home Directions were reissued regularly throughout the year to respond to the changing nature of the COVID-19 virus in Victoria and its spread in the community, from time to time requiring mask-wearing in certain settings.

Restrictions were eased briefly on 1 June 2020, with the reintroduction of gatherings of up to 20 people at home or in a public place. Restaurants, cafes and pubs reopened, as did businesses such as beauty therapists. However, with the second wave of COVID-19 in Victoria, on 8 July 2020 people living in Greater Melbourne and the Mitchell Shire were once again directed to stay at home.

At the peak of the second wave of COVID-19 in Victoria, on 2 August 2020 when there were high rates of transmission within the community, people living in Greater Melbourne and the Mitchell Shire were subject to Stage 4 restrictions. The Stage 4 restrictions in Greater Melbourne and the Mitchell Shire affected almost 5 million people and meant that:

- people were only permitted to leave the home for one of four reasons:
  - work or study
  - exercise (for up to one hour per day)
  - medical reasons
  - emergencies
- people were required to wear masks in all settings outside the home (unless an exception applied)
- a curfew operated between 8pm and 5am
- people were not able to travel outside a 5 km radius of their homes (with lawful exceptions)
- people were prohibited from having visitors to the home (unless exceptions applied, such as care and compassionate reasons).<sup>74</sup>

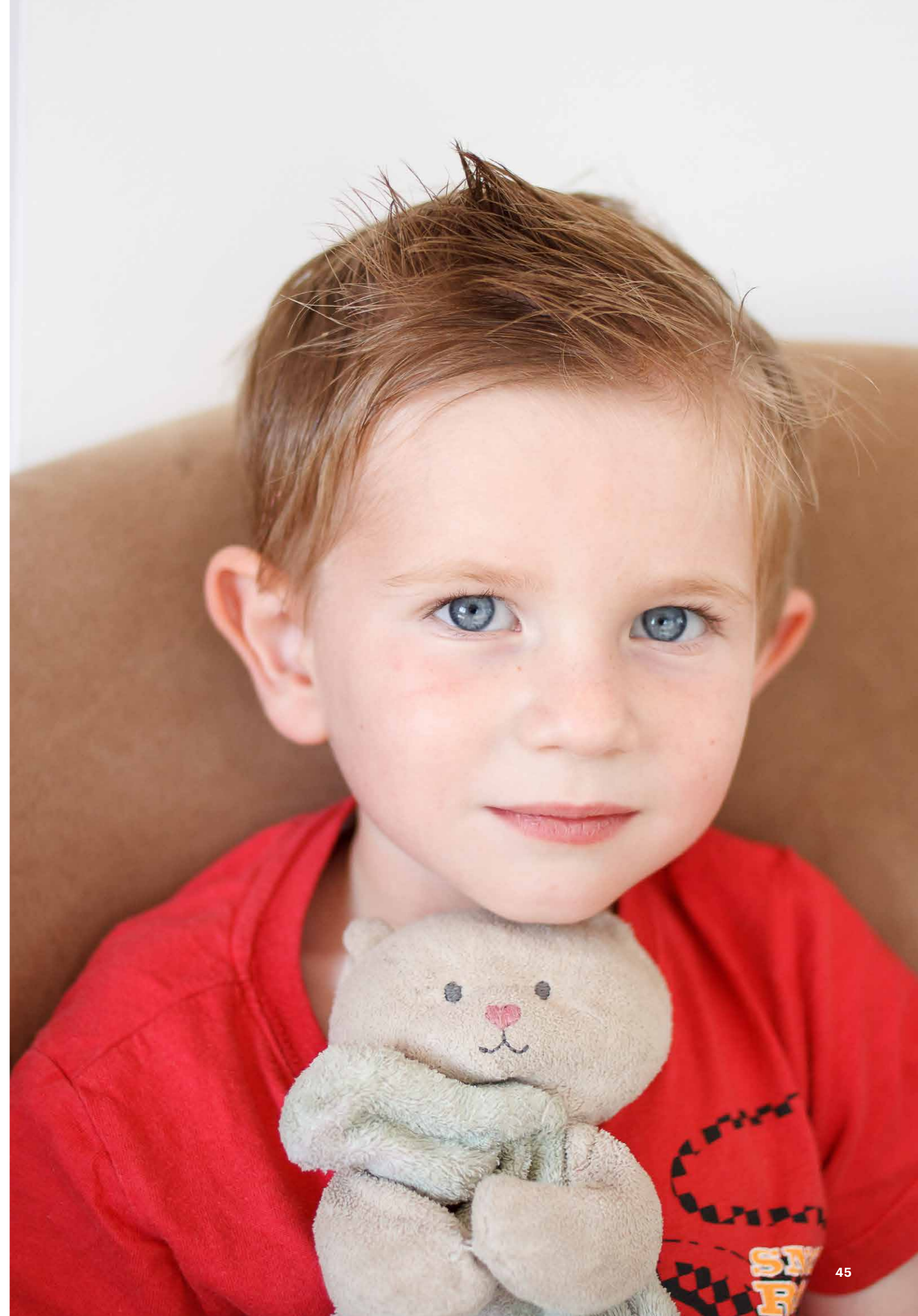


The directions limited people's freedom of movement (section 12 of the Charter). However, it is important to note that the directions (even at the peak of the second wave) did carve out important exceptions to the rules that accommodated people living with particular vulnerabilities or disadvantage. For example, people experiencing family violence were permitted to leave the home; people living with disability, and others who because of age or illness required it, could attend the supermarket with carers; and individuals who were not able to wear a face mask or covering because of their age, a medical condition or disability were exempted from doing so.<sup>75</sup>

The Commission learned through our Enquiry Line that the Stay at Home Directions particularly impacted on people who lived alone, people who were socially isolated and people with mental illness. For example, people living alone told us they felt their basic right to access friends and family was disproportionately hindered during the Stay at Home Directions. People also told us that, due to the isolation, they were experiencing mental health issues for the first time in their lives and that they were worried the effects and duration of the isolation might be more detrimental than COVID-19 itself. To minimise the impact of the Stay at Home Directions on people living alone, from 6 September 2020 the Victorian Government allowed people living alone and single parents to create 'single social bubbles' by nominating one other person living outside their household to form a bubble with, enabling them to visit each other's homes.<sup>76</sup>

**"Whether it's about quarantine, masks or curfews, human rights provide a compass to guide governments in making the right decisions to respond to this pandemic. They help all of us assess whether our governments are doing enough, getting it right or going too far. They ensure that even in dark times like these, we hold on to the values we all share, like fairness, compassion, dignity and respect."**

**Hugh de Kretser, Executive Director,  
Human Rights Law Centre**





## 3. Curfew

### At a glance

- From 2 August 2020 to 26 September 2020 a curfew between 8pm and 5am was imposed on all people in Greater Melbourne and Mitchell Shire.
- The curfew was the subject of considerable community concern and debate.
- The Supreme Court considered the legality of the curfew and its compatibility with Charter rights in the case of *Loiello v Giles*.<sup>77</sup> The court ultimately found the restrictions on rights imposed by the curfew were reasonable and proportionate.

On 2 August 2020, a nightly curfew was imposed on all people in Greater Melbourne and Mitchell Shire, preventing them from leaving their homes between the hours of 8pm and 5am.<sup>78</sup> The curfew operated alongside the Stay at Home Directions that already limited the reasons people could leave their home. The curfew was the subject of considerable community concern and debate. Between 26 August and 2 November 2020, the Commission received over 30 enquiries from community members about the curfew. Enquirers were concerned that the curfew had been imposed without apparent justification, that the directions had been issued by an authorised officer other than the Chief Health Officer (a delegate had signed the Order) and that the imposition of the curfew was an unreasonable limitation on human rights.

Then-Commissioner Kristen Hilton wrote to the Victorian Government conveying community concerns that the human rights enjoyed by Victorians should not be limited more than was necessary to protect people from the risks posed by the COVID-19 pandemic. She noted that as the rate of community transmission of COVID-19 declined, the argument that the curfew was reasonable, necessary and proportionate would become harder to make.<sup>79</sup>

In September, a Melbourne resident challenged the legality of the curfew in the Supreme Court in the case of *Loiello v Giles*<sup>80</sup> (discussed below), attracting widespread attention from the Victorian public. Although the curfew was lifted on 27 September 2020 prior to the case being heard, the case proceeded and the Supreme Court considered the restrictions on rights imposed by the curfew and ultimately found that they were reasonable and proportionate.

During that proceeding, legal advice provided to DHHS was put into evidence and cast some doubt on whether the curfew was compatible with the Charter rights. An extract of that advice said:

**"It is the department's view that these [Stay at Home] Directions are, on balance, likely to be compatible with human rights under the Charter, in light of the exceptional circumstances in which they are being issued and the public health advice they are based on. However, we note that this assessment is not without doubt; in particular, there is some risk of incompatibility with respect to the evening curfew."**

Legal advice provided to DHHS regarding the lawfulness of Stage 4 restrictions, including the curfew<sup>81</sup>



## CASE STUDY

# *Loielo v Giles*<sup>82</sup>

### Background

In September 2020, Victorian resident and restaurant owner Michelle Loielo filed an application in the Supreme Court challenging the curfew operating from 8pm to 5am.

Ms Loielo sought a declaration that the direction imposing the curfew under the PHWA was against the law and invalid. Ms Loielo sought judicial review on the grounds that the direction was made at the Premier's request, that it was unreasonable, illogical or irrational and that it unlawfully limited her human rights, including her right to freedom of movement and her right to liberty under the Charter.

The day before the case was heard, the Premier announced the curfew would be lifted. On the first day of the hearing, the curfew was no longer in place; however, Ms Loielo continued with the case as she remained concerned the curfew would be reintroduced by the Premier.<sup>83</sup>

### Facts

Ms Loielo operated a restaurant in Rosebud West on the Mornington Peninsula. She argued that her business income had been drastically reduced because of the curfew. She also argued that the early closure of surrounding businesses (such as supermarkets) meant that she was unable to buy the food required to operate her restaurant. In her application, Ms Loielo described the challenges she faced at home as a result of the curfew, such as being a single parent to three young children who required homeschooling, being isolated from friends and family, and being unable to go for walks after finishing work.



Ms Loielo argued that the curfew was 'a step too far' and unreasonably limited her rights under the Charter. She argued, in particular, that her rights to freedom of movement and to liberty were unreasonably limited between the hours of 8pm to 5am while the curfew was in place.

### Decision

Justice Tim Ginnane found that Ms Loielo's right to freedom of movement was engaged by the curfew because it limited or restricted the right of every person within Victoria to move freely.<sup>84</sup> However, he did not consider that Ms Loielo's right to liberty was directly engaged by the curfew. Justice Ginnane explained that "[although] in common usage, the right to liberty may include being able to come and go from your home as you choose, [in] human rights discourse, that right is more likely to be characterised as the right to freedom of movement – the section 12 right". He distinguished this case from other cases that have considered the rights to liberty and security in the context of curfews imposed on individuals suspected of criminal activity or entering the country without lawful authority, where the curfews were much longer and involved much stricter conditions.<sup>85</sup>

In considering whether any limitation of Ms Loielo's human right to freedom of movement was proportionate and justified, Justice Ginnane considered the purpose of the emergency powers (to eliminate or reduce a serious risk to public health) and the temporary duration of the curfew. He found that the restrictions on Ms Loielo's human rights caused by the curfew were proportionate to the purpose of protecting public health.<sup>86</sup> He also accepted the defendant's evidence that, in the circumstances, there were no other reasonably available and less restrictive means to achieve that purpose. The proceedings were dismissed.<sup>87</sup>



## 4. Mask wearing

### At a glance

- One of the measures adopted to reduce the spread of COVID-19 was the requirement for people to wear a face mask outside their homes unless an exception applied.
- While some Victorians raised concerns that being required to wear a mask was a violation of their human rights, it is clear that this requirement does not breach the Charter or international human rights instruments.
- However, many people with medical conditions and disabilities who had a lawful exemption from wearing a face mask were denied access to goods and services when they did not wear one.
- The Commission has received over 250 complaints about this issue (117 of which were received in 2020), all based on disability discrimination, which it has accepted for dispute resolution.

**"In certain circumstances, Victorians have been and may continue to be required to wear face coverings in specific settings. There is extensive evidence that face coverings are effective in reducing transmission of COVID-19. However, each time that face coverings have been mandated, there has also been a carefully designed set of exemptions to this requirement, informed by Charter rights and discrimination laws. At all times, we have sought to strike an optimal balance between the human rights and protected attributes of specific persons in our diverse Victorian community with the human right of right to life and protection of the health of all Victorians."**

**Prof. Brett Sutton, Chief Health Officer**

As COVID-19 spread, global experts including the World Health Organization recommended that people wear face masks to slow the spread of COVID-19.<sup>88</sup> On 22 July 2020 during Victoria's second wave, the Victorian Government introduced a requirement for people in Greater Melbourne and the Mitchell Shire to wear a face mask or covering in almost all settings when they were outside their home, unless an exception applied.<sup>89</sup> On that day, the State recorded 484 new cases of COVID-19 and two deaths. The direction for individuals to wear a face mask in certain settings was in place from 22 July 2020 and into 2021. The requirement to wear a face mask was reduced significantly from 6 December onward. The DHHS website listed current places where face masks were still required to be worn, including public transport, taxis, hospitals and indoors at aged care facilities.<sup>90</sup>

Some Victorians raised concerns that the requirement to wear a mask was a violation of their human rights. The Commission released a statement clearly stating that the requirement for residents to wear a face mask or covering when leaving the house does not violate any rights set out under Victoria's Charter or any international human rights instruments.



The Chief Health Officer directions provided exceptions to the requirement to wear a mask for people who had a 'relevant medical condition' (such as difficulty in breathing, a skin condition or a disability). People communicating with a person with a hearing impairment were also not required to wear a mask. Children under the age of 12 and people who had a professional reason or were undertaking strenuous exercise were also exempt.

Although people with a disability or medical condition requiring them to keep their face uncovered were legally exempted from the direction to wear a face mask, the Commission heard from people who were nonetheless discriminated against when receiving services or in employment for not wearing a mask, impacting on their right to equality.

In the interest of educating the community, the Commission published an explainer to assist people, shops, supermarkets, clinics and workplaces to navigate these issues. The explainer made it clear that:

- If you were refused goods and services for not wearing a mask in circumstances where you had a lawful excuse, the refusal could amount to discrimination.
- The provider of goods and services could rely on the health and safety exception if they thought a mask requirement was reasonably necessary to protect the health and safety of the person or the public generally.
- Whether that exception applied would depend on the risk of transmission in the particular situation, the vulnerability of people in the service and the consequences of refusal.
- People could come to the Commission if they were treated unfavourably or fined because they were not wearing a mask despite an exception applying to them.<sup>91</sup>

Nonetheless, the Chief Health Officer direction to wear masks led to a large number of complaints of disability discrimination under the *Equal Opportunity Act 2010*. The Commission successfully resolved many of these complaints through dispute resolution, with the outcomes including letters of apology, financial compensation and gift cards, changing an organisation's policy, providing training to staff and education of respondents of their obligations under the Equal Opportunity Act and DHHS guidelines.

The Commission's explainer on the requirement to wear face masks was one of our most-viewed pieces of content during 2020, with over 3000 views and with people spending an average of three minutes on the page. Likewise, our downloadable fact sheet on face masks and human rights was viewed over 160 times with an average read-time of six minutes.

Victoria Police also worked with DHHS to develop fact sheets to build awareness among frontline police of the experiences of priority communities that might mean they could not wear a mask. This included people with a disability, people experiencing mental health issues, the LGBTIQ community, the Aboriginal and Torres Strait Islander communities, people from multicultural backgrounds, seniors and young people. Victoria Police advised the Commission that the key message from this information was that "not everyone who fails to wear a mask when required is consciously non-compliant".<sup>92</sup>

## COMMISSION MASK COMPLAINT SNAPSHOT

The Commission received **182 complaints** relating to COVID-19 in 2020. **64% (117)** of these complaints, were related to the requirement to wear a mask.

### Complaints about mask-wearing



### Resolution of complaints about mask-wearing

**89% of complaints** about mask-wearing that were conciliated were successfully resolved by the Commission.





## CASE STUDY

### Denied bank service for not wearing a mask

In September 2020, bank staff refused to serve a woman for not wearing a mask or face covering. She suffered from bipolar disorder and depression, and had a medical exemption from wearing a face mask. She wore or carried a sticker that read, "I am exempt from wearing a face mask or covering" to prevent harassment and to inform staff when she entered a business. She also offered to provide her medical exemption certificate. Other customers at the bank took a step back during her exchange with the bank's representative and the whole incident left her feeling humiliated.

After her initial attempts to lodge a complaint with the bank were unsatisfactory, the woman made a complaint of disability discrimination to the Commission. The bank agreed to participate in the Commission's dispute resolution process.

During conciliation, the bank agreed that the complainant's exemption enabled her to attend her local branch without a mask. The bank also indicated that after considering DHHS guidance, it had sent updated communications to all branches regarding face-mask requirements and lawful exemptions. The bank had also updated in-branch posters to reflect this new position. This outcome recognised the discriminatory impact of the mandatory mask policy on this woman and achieved a systemic outcome promoting the right to equality for all customers of this bank who were medically exempt from wearing masks.



## CASE STUDY

### No mask, no work

A man obtained a medical certificate that exempted him from wearing a mask or a face shield at work due to the likelihood that wearing one might cause anxiety or panic attacks. The man provided an exemption certificate to his employer. His employer told him that he could not attend work unless he wore a mask and did not offer an alternate working arrangement. In the end the man was forced to take annual leave.

The man complained to the Commission, alleging disability discrimination against his employer. The Commission conciliated the complaint. The outcome was that the man was allowed to work remotely and had his annual leave recredited.



## CASE STUDY

### Denied hospitality for not wearing a mask

A man who was exempt from wearing a mask because of his disability was refused service when he entered a hotel. When the man told hotel staff that he could not wear a mask for medical reasons, he was asked to show a medical exemption certificate and then refused service. The complainant felt embarrassed and ostracised in front of his friends and other customers.

The man complained to the Commission that he had been discriminated against on the basis of his disability. The Commission conducted a negotiation between the parties. The matter was resolved with the hotel providing a letter of apology, a change in its policy in relation to mask-wearing on its premises and training for all staff regarding the new policy.





## 5. Protest

### At a glance

- People's ability to protest is a fundamental aspect of democracy. While the Charter protects protest rights, these rights may lawfully be limited, as occurred during 2020.
- Nonetheless, there was significant protest activity in 2020 on a range of issues. The measures taken to control gatherings changed as the risks of the pandemic changed.

**"Protesting is not unlawful, it's a human right ... Whether you're protesting down at your local park, whether you're protesting at the Shrine, you must comply with the [Chief Health Officer] directions about public gatherings."**

**Luke Cornelius, Assistant Commissioner, Victoria Police<sup>93</sup>**

People's ability to gather peacefully and speak out on matters that they care about is a fundamental aspect of democracy. There are a number of rights in the Charter that support the ability to march, rally or protest, including the rights to peaceful assembly, freedom of association and freedom of expression. While the Charter protects protest rights, these rights may lawfully be limited, including in a State of Emergency.

During the COVID-19 pandemic, public health directions issued by the Chief Health Officer promoted the right to life by stopping the spread of the virus, but restricted the reasons people in Greater Melbourne could leave their homes and the number of people who could gather in public. While Chief Health Officer directions did not explicitly ban protests, all protests were required to be conducted in accordance with them. As these directions changed in response to the level of public health risk posed by the pandemic, the ways that people could lawfully protest also changed.

During August 2020, the Commission published an explainer outlining the Charter rights that support the ability to protest and the circumstances under which those rights may be limited.<sup>94</sup> The Commission worked with Victoria Police to circulate the explainer to police to support them to positively engage with the public about why a lawful limitation had been placed on their right to protest during lockdown.<sup>95</sup>



## Stage 2 restrictions: Refugee action car convoy

In March 2020 during Stage 2 restrictions, activists took part in a car convoy protest in Melbourne to highlight the plight of refugees in detention who face a heightened risk of contracting COVID-19 due to overcrowded conditions. At that time, there were only four permitted reasons to leave home under the Chief Health Officer directions. Protesters stated that they were there for 'compassionate reasons', one of the permitted reasons to leave home.<sup>96</sup> Twenty-six protesters were fined \$1652 each for breaching the Stay at Home Directions.<sup>97</sup> Protest organiser Christopher Breen was arrested for 'incitement to riot' under the *Crimes Act 1958*.<sup>98</sup> The matter was later discharged in the Magistrates' Court due to insufficient evidence<sup>99</sup> and Mr Breen was issued with the same fine as the other protesters.<sup>100</sup>

## Stage 3 restrictions: Black Lives Matter protests

In June 2020, Black Lives Matter protests occurred globally in response to the deaths in custody of George Floyd and Breonna Taylor in the USA. At that time Victorians could leave home for any reason, but the Stay Safe Directions required them to take reasonable steps to socially distance from other people and restricted gatherings outside to a maximum of 20 people. Black Lives Matter organisers in Victoria encouraged protesters not to breach the restrictions and asked people to wear face masks, bring hand sanitiser and remain 1.5 metres apart, ensuring distance between each group of 20 people. Thousands of people gathered outside Parliament House as part of the Black Lives Matter movement. Victoria Police announced it would not fine people solely for attending the rally, but warned organisers they would be fined if Chief Health Officer Orders were breached. Victoria Police did not fine or arrest protesters on the day, but later fined the organisers of the protest.<sup>101</sup>

## Stage 4 restrictions: Lockdown protests

By August 2020, Stage 4 restrictions prohibited public gatherings. Under these conditions, it became effectively against the law to gather publicly in groups – a maximum of two people could meet for outdoor exercise. This raised an issue for a group of people who wished to protest the lockdown itself. So the policing response changed and several people were charged with breaching Stay at Home Directions and with the offence of 'incitement' (in this case, incitement to breach the Chief Health Officer's directions)<sup>102</sup> in relation to anti-lockdown protests during August and September.<sup>103</sup>

In March 2021, the media reported that one man accused of inciting others to attend anti-lockdown protests had had his criminal case adjourned while he challenged the constitutional validity of the charge against him in the High Court.<sup>104</sup>

The limitation on public gatherings during Stage 4 restrictions made lawful gathering for public protest almost impossible. While this did limit rights to free speech, assembly and association, there were other ways in which people could express their views that did not violate the Public Health Orders and respected the human rights of other Victorians. These included signing a petition, contacting their local Member of Parliament and gathering online to discuss concerns.

**"I think we need to recognise the need to limit certain individual rights in relation to the pandemic, but the State of Emergency doesn't mean individual rights disappear altogether."**

**Gregor Husper, Principal Solicitor, Police Accountability Project<sup>105</sup>**

## → Criminalising the organisation of protests

**"It's not the time to protest ... regardless of what you're protesting about."**

**The Hon Daniel Andrews, Premier<sup>106</sup>**

During 2020, several people were charged with the offence of 'incitement' to breach Chief Health Officer directions for their role in organising protests. The offence of incitement criminalises behaviour that encourages others to commit a crime.

In March 2020 Christopher Breen, a member of the Refugee Action Collective, was charged with the offence of 'incitement' to breach Chief Health Officer directions,<sup>107</sup> specifically for organising a car convoy calling for the release of 70 refugees detained in a hotel in Preston.

During September 2020, several people were also charged with 'incitement' to breach Chief Health Officer Orders in relation to anti-lockdown protests occurring around the state. In one high-profile arrest, police detectives used handcuffs to arrest a pregnant woman, Zoe Buhler, in her home.

Footage of Ms Buhler's arrest sparked a civil liberties debate. President of the Victorian Bar, Wendy Harris QC, said she was concerned that Ms Buhler's arrest "appeared disproportionate to the threat she presented".<sup>108</sup> Police Accountability Project Principal Solicitor Gregor Husper said he believed the arrest was part of an "overzealous police response" to the pandemic.<sup>109</sup>

The crime of incitement carries heavy penalties including, in this case, a fine of up to \$20,000.<sup>110</sup> Groups such as Melbourne Activist Legal Support have raised concerns about the use of the incitement offence against protesters and the negative effect this may have on people's willingness to speak out on matters they care about.<sup>111</sup>



## 6. Policing response

### At a glance

- In 2020, Victoria Police was responsible for enforcing emergency measures.
- While enforcement was necessary to ensure the public health directions were complied with, a number of issues emerged, including a disproportionate number of fines issued to Aboriginal and Torres Strait Islander and multicultural communities.
- Victoria Police implemented initiatives to support vulnerable populations including people experiencing homelessness or sleeping rough and people experiencing family violence.

### 38,390 COVID-19 fines were issued in Victoria between 1 March and 30 December 2020.

Victoria Police was responsible for supporting DHHS in enforcing the Chief Health Officer's public health directions during the State of Emergency and State of Disaster, using established systems and processes for rapid deployment of resources during an emergency to do so.

Fines for a breach of these directions ranged from \$200 for not wearing a face mask in public to \$1652 for most other breaches and \$4957 for breaching self-isolation requirements.<sup>112</sup> Between 1 March and 30 December 2020, 38,390 COVID-19 fines were issued.<sup>113</sup>

Victoria Police explained that it incorporated human rights into its approach to the enforcement of the public health directions through its PLAN (proportionate, lawful, accountable, necessary) decision-making framework.<sup>114</sup> This had been developed and rolled out from late 2019 in order to support police to understand their obligations under the Charter.<sup>115</sup> Victoria Police advised the Commission that it relied on the PLAN approach for enforcing public health directions and this was embedded into operational orders and briefings throughout the COVID-19 response.<sup>116</sup>

**"Whenever powers under the *Emergency Management Act 2013* and the *Public Health and Wellbeing Act 2008* were utilised by Victoria Police, our members were reminded that their actions must be fully compatible with the Charter, where compatibility involves:**

1. proportionality
2. necessity
3. minimal interference with an individual's rights in all circumstances."<sup>117</sup>

- Victoria Police



While enforcement was necessary to ensure the public health directions were complied with, the Commission heard concerns that, in practice, some communities were disproportionately impacted, including Aboriginal and Torres Strait Islander and multicultural communities and people with disabilities. For example, one enquirer caring for a person with disabilities reported that police had approached them while exercising outside during lockdown. The enquirer's companion needed to sit down and rest due to disabilities affecting mobility. The police had told them that they needed to be exercising and not "lounging around".

## Victoria Police assessment of fines

**"The Victorian Charter of Human Rights and Responsibilities was an important reference in framing the business rules for the assessment of COVID-19 penalty infringement notices."**

**Superintendent Derek Lamb, Operation Sentinel, Victoria Police**

Between March and June 2020, more than 6000 people were fined for breaching COVID-19 restrictions.<sup>118</sup>

Media reports detailed concerns about the large number of fines being issued and an alliance of community legal groups began publishing complaints from Victorians who felt that they were unfairly treated by police enforcing the restrictions.<sup>119</sup>

In April 2020, an internal assessment process was established to review fines issued by police for breaches of Chief Health Officer directions. Fines were assessed against a set of business rules based on the Charter. The criteria for assessment are:

- that there is a clear and unambiguous breach of a Chief Health Officer direction
- that there is demonstration of a reasonable degree of carelessness or reckless behaviour
- that there is risk to public health and safety
- the nature, severity and gravity of the offence
- any injury, loss or damage resulting directly from the offence
- appropriateness of the penalty considering community expectations and the effects of deterrence on the individual and the community in general
- that it is the least severe enforcement that can be undertaken to reduce the probability of the offender committing future offences and to achieve appropriate intervention or deterrence in the community.<sup>120</sup>

If assessers found that a breach was not clear and unambiguous based on the criteria above, the public infringement notice was withdrawn.<sup>121</sup> For example, all notices issued to children 14 years and under were withdrawn and, where possible, replaced with cautions or warnings.<sup>122</sup>

By 31 December 2020, of the 38,390 COVID-19 fines issued in 2020, 3294 had been assessed by Victoria Police at the request of the fine recipient. As a result of these reviews, 460 fines were withdrawn. A further 917 fines were withdrawn because of a discretionary decision by Victoria Police without a formal review being requested by the fine recipient.<sup>123</sup>

The Commission heard concerns about the adequacy and efficiency of the assessment process for people who wished to contest a fine they had received. Community legal centres reported that clients from vulnerable cohorts fined for breaching Stage 4 restrictions had not had fines waived on appeal despite having legitimate excuses and did not receive reasons.<sup>124</sup> The Federation of Community Legal Centres advised that, despite Victoria Police advice that each fine would be reviewed by the Chief Commissioner of Police, fines have tended to be confirmed even in instances of an unintentional breach or no breach at all.<sup>125</sup>

In January 2021, it was reported that police were being instructed to hand out cautions for unpaid infringements, rather than proceed with charges.<sup>126</sup> This means that fines could be converted to cautions and diversion, rather than leading to charges being heard in the Magistrates' Court. Victoria Police advised the Commission in May 2021 that this practice is ongoing.<sup>127</sup>

Victoria Police advised the Commission that while police may exercise discretion as to whether to issue an infringement to a person for breaching a Chief Health Officer direction, there is no discretion as to the penalty amount attaching to that infringement notice.<sup>128</sup> In deciding what action must be taken in relation to unpaid fines, police must have regard to the Victoria Police Manual, which states that the minimum (least severe) action must be chosen that achieves the purposes of taking that action against the offender.<sup>129</sup> In making this assessment, the following must be considered:

- the nature, severity and gravity of the offence
- the characteristics and circumstances of the offender and victim
- any injury, loss or damage resulting directly from the offence
- the appropriateness of the action in light of community expectations and the effects of deterrence on the individual and on the community in general
- any requirements that apply to the specific enforcement action.<sup>130</sup>

It was reported that charges would only proceed for people who demonstrated "repeated, deliberate or continuing breaches of the Chief Health Officer's directions" or those infected with COVID-19 who refused to isolate.<sup>131</sup> While this lenient approach is welcome, groups such as Liberty Victoria have expressed concern that it creates unfairness for those who have already paid their fines, and have called for a review of fines already paid.

Fines that remain unpaid within the set time period established by statute are remitted to Fines Victoria, DJCS for enforcement. Victoria Police plays no further part in enforcement of unpaid fines from this date.



## CASE STUDY

# Victoria Police assessment of fine issued to protester

During the Stage 4 restrictions, a fine was issued to a woman whom police saw in a park carrying a placard protesting against the Chief Health Officer directions. At that time, people were only permitted to leave home for four reasons and were not permitted to travel beyond 5 km. The woman was around 900 metres from her home. She was alone and not part of an organised protest. She was wearing a face covering and otherwise complying with social-distancing requirements.

When spoken to by police, the woman stated that she was exercising (a permitted reason to leave home) while simultaneously exercising her right to express her opposition to the restrictions. She was issued with a fine.

Victoria Police had concerns around the legality of the fine in the context of the Chief Health Officer directions and the woman's rights under the Charter including:

- freedom of movement (section 12)
- freedom of thought, conscience, religion and belief (section 14)
- freedom of expression (section 15)
- right to peaceful assembly (section 16).

Victoria Police sought legal advice, which ultimately found that simultaneously exercising and displaying a protest sign was consistent with Charter rights. Victoria Police withdrew the fine.<sup>132</sup>

Commission note: The facts underlying this case study were considered by the Supreme Court in the matter of *Kerry Cotterill v Finn Romanes (in his capacity as the Deputy Public Health Commander) and Brett Sutton (in his capacity as Chief Health Officer)*,<sup>133</sup> which challenged the relevant Chief Health Officer directions on the basis they infringed the implied freedom of political communication under the Australian Constitution. The Court found that the 'protection of health and life amply justifies the severity of the measures' and dismissed the proceeding. The Court also confirmed that it was not permissible to leave home for both a permitted purpose (such as exercising) and a not permitted reason (such as protesting against the lockdown).



## Fines for Aboriginal and Torres Strait Islander, and multicultural communities

From the outset, organisations including the Flemington Kensington Community Legal Centre expressed their concern that criminalising breaches of the Chief Health Officer Orders would disproportionately impact on communities who are already overpoliced, namely, Aboriginal and Torres Strait Islander Peoples<sup>134</sup> and other multicultural and multifaith communities.<sup>135</sup>

From the limited data available, it appears that fines were disproportionately issued to Aboriginal and Torres Strait Islander Peoples, people from Sudan and South Sudan, and young people. The September 2020 policing data from the Crime Statistics Agency showed that:

- People who were born in South Sudan and Sudan made up 5 per cent of the fines, but only make up around 0.14 per cent of the Victorian population.
- Aboriginal and Torres Strait Islander Peoples made up 4.7 per cent of the fines despite making up just 0.8 per cent of the Victorian population.
- 42 per cent of fines were to people aged under 24 and three out of four people fined were men.<sup>136</sup>

Through the Commission's online community reporting tool, we heard that Muslim and African communities were fearful of being targeted and fined by Victoria Police and PSOs for breaching Chief Health Officer directions when in public spaces.

Further, Victoria Police data showed that the most disadvantaged local government areas in Victoria received proportionately higher numbers of fines than local government areas with the highest levels of advantage, which were issued with only 10 per cent of fines. The areas that received the highest numbers of fines per capita were Yarriambiack, Northern Grampians and Greater Dandenong.<sup>137</sup>

These statistics accord with anecdotal evidence. The Commission received reports through its Enquiry Line and community reporting tool of over-policing and disproportionate issuing of fines to Aboriginal and Torres Strait Islander Peoples and people experiencing homelessness or sleeping rough. The media reported an incident in which an Aboriginal man was fined for sleeping on a park bench and then jailed for weeks due to a court error.<sup>138</sup>

In its submission to the PAEC inquiry, the Victorian Aboriginal Legal Service (VALS) highlighted the need for police to exercise their expansive powers responsibly:

**"Police must responsibly exercise their expansive powers, acknowledging that around the world, policing the pandemic through fines and arrests has disproportionately impacted on marginalised communities, including Aboriginal people ... Police should prioritise providing public health messaging and supporting people to comply with the current restrictions ... Arresting people will not achieve positive outcomes for the Victorian community, and such an approach would be at odds with expert advice that we need to curb admissions to detention to prevent further outbreaks of COVID-19 in detention and in the community."**

**Victorian Aboriginal Legal Service<sup>139</sup>**



Springvale Monash Legal Service spoke of the experiences of two Tamil asylum seekers being fined while sleeping rough: "The language barrier prevented them from being able to explain and also, they're terrified [of police]".<sup>140</sup>

On 20 July 2020 the COVID Policing Australia Coalition, a collaboration of legal and human rights advocacy organisations and academics,<sup>141</sup> published an open letter that noted the effect of the directions on people with disabilities. The letter cited an incident where a man with an acquired brain injury and mobility issues was told by Victoria Police that he "can't just lounge around" when he was taking a rest while exercising with his carer.<sup>142</sup> At this time, the Commission held regular forums with community legal centres and other advocates, met with the IBAC to better understand the demographic policing data and spoke directly to Victoria Police about the issues on the ground.<sup>143</sup>

## Protecting communities

Victoria Police advised the Commission that during the COVID-19 pandemic, it has implemented initiatives to support vulnerable populations including people experiencing homelessness or sleeping rough and people experiencing family violence.

### CASE STUDY

## Vulnerable Victorians provided with housing

People experiencing homelessness are much more likely to be out in the community and exposed to infection and, therefore, face significantly higher health risks than the wider community.

In 2020, Victoria Police worked with DJCS and DHHS to support temporarily housing 1000 rough sleepers in hotels across the Melbourne CBD. Victoria Police also helped by informing them about the risks of COVID-19 and relevant Chief Health Officer directions, and providing pathways to appropriate service providers. Having agencies work together ensured that people experiencing homelessness and people sleeping rough were not further disadvantaged by underlying and systemic inequalities compounded by COVID-19.<sup>144</sup>

**"The Charter assisted in framing police decision-making and responses in the COVID pandemic, both in a strategic sense in the way we worked with the homelessness sector and, most importantly, out on the streets where police and some of the community's most vulnerable people interact face-to-face."**

**Superintendent Craig Peel, Operation Sentinel, Victoria Police**



### CASE STUDY

## Police engage with 10,000 victim/survivors and perpetrators of family violence

Families and communities coped with the COVID-19 restrictions in significantly varied ways. Physical distancing and isolation, compounded by a multitude of pandemic-related stressors, placed some families at increased risk of family violence.

Victoria Police advised the Commission that it has responded to family violence during COVID-19 by addressing concerns raised by experts in relation to the increased pressure caused by the lockdown directions. These experts identified that lockdown may make it harder for victim survivors to reach out for help and it escalates the risk that victim/survivors will experience further family violence within their home.

Victoria Police sent a warning to perpetrators that "closed doors would not protect you from being held to account". This approach was complemented by targeted collection and recording of at-risk families by the specialist Family Violence Investigation Unit. This approach allowed Victoria Police to effectively connect and engage with at-risk families.

Unit police actively engaged with over 10,000 high-risk victim survivors and perpetrators, with partner agencies assisting in monitoring safety and compliance. Victoria Police diversified methods of contact including over the phone and via email, and contact in person was made, wherever safe and practical, for those identified to be most vulnerable to experiencing or committing further family violence.<sup>145</sup>



# Part B: Affected communities

"Although the pandemic continues to have an unprecedented impact on all Victorians, some groups have been disproportionately affected by the COVID-19 pandemic including: the homeless, people with a low socio-economic background, insecure workers, Aboriginal Victorians, multicultural Victorians, women and young people."

Inquiry into the Victorian Government's Response to the COVID-19 Pandemic: Final Report, PAEC<sup>146</sup>

## While the COVID-19 virus does not discriminate, its impacts have been felt more harshly by people and communities who already experience discrimination and disadvantage.

The pandemic has shone a light on systemic and structural disadvantages that serve to further entrench inequality:

- **Multicultural and multifaith communities:** Multicultural and multifaith communities experienced increased vilification and discrimination. The pandemic also highlighted the broader systemic failure to provide multicultural and multifaith communities with access to the resources and supports to understand and comply with public health directives and remain safe. See discussion in Chapter 8.<sup>147</sup>
- **People with disabilities:** People with disabilities and their carers were often more disadvantaged by service closures and lockdowns. People with disabilities also encountered discrimination in shops, clinics and at work from the inflexible application of the requirement to wear masks.<sup>148</sup> See case studies on pages 52-53.
- **People in closed environments:** People in prisons and mental health facilities had little or no face-to-face access to family as a result of measures necessary to protect health and safety. Changes in the management of custodial settings implemented to prevent the spread of the virus also meant that people had less access to fresh air, education and welfare programs. At times, people entering prison were subject to up to 14 days 'protective quarantine'.<sup>149</sup> See discussion in Chapter 7.
- **Young people:** Young people in youth justice facilities and out-of-home care had face-to-face access to family paused for significant periods during the pandemic; however, phone and online contact with family was possible. Educational and vocational activities in youth justice facilities were also disrupted or transferred online. More generally, across Victoria (and particularly in Greater Melbourne and Mitchell Shire) school learning was conducted online for most students for long periods of time during 2020, causing disruption to education. Young people have had their education significantly disrupted, experienced social isolation, experienced changes to their family lives and weekly schedules, and been placed at greater risk of mental ill-health.<sup>150</sup> On 23 July 2021, the Commission for Children and Young People released findings on the impact of COVID-19 following consultations with more than 600 children and young people and more than 170 workers supporting them.<sup>151</sup> The findings detail huge impacts on the lives of children and young people in Victoria across safety, mental health and education, revealing a picture of growing uncertainty and isolation, combined with diminished visibility. The findings can be accessed at <https://ccyp.vic.gov.au/upholding-childrens-rights/covid-engagement/>.

- **Older people:** Older Victorians were increasingly isolated, often cut off from family and supports, and at greater risk of hospitalisation and death, causing considerable distress. Between January and December 2020, 655 Victorians in residential aged care died from COVID-19.<sup>152</sup> This accounted for over 95 per cent of Australia's total aged care deaths in 2020.<sup>153</sup>
- **Women:** Women shouldered a disproportionate burden of increased unpaid caring responsibilities during the lockdown.<sup>154</sup> The pandemic, and measures taken in response, also exposed and exacerbated existing workplace gender inequalities, in particular in relation to employment entitlements, pay systems and the value the community places on feminised work and unpaid labour. These effects are discussed in Chapter 9.
- **People with insecure housing or work:** People with insecure housing or work suffered disproportionate economic impacts during 2020.

This is by no means a comprehensive list. Other groups that were disproportionately affected included: people living alone who were more isolated during lockdown; Aboriginal people; people experiencing homelessness or sleeping rough, who had more difficulty complying with Chief Health Officer Orders; small business owners who were forced to close their businesses and their casual employees who lost shifts as a result; people forced to defer surgery as hospitals pivoted to treating COVID-19 patients; pregnant women with limited supports when giving birth; healthcare and frontline workers who were exposed to infection at higher rates; and, of course, the people who contracted the virus and their loved ones.

It is not possible to cover all these issues in the scope of this report. Instead, we focus on three areas that are within the strategic priorities of the Commission and in which the Commission has been more deeply engaged. This section of the report:

- considers the human rights impacts on people in closed environments (Chapter 7)
- draws on research and community engagement by the Commission to understand the impact of COVID-19 on multicultural and multifaith communities (Chapter 8)
- provides the Commission's research findings on flexible work (Chapter 9).





## 7. Prisons and youth justice

### At a glance

- The Victorian Government implemented a suite of measures that successfully prevented COVID-19 outbreaks within Victorian prisons and youth justice facilities.
- While these measures successfully protected life and health, they impacted on the rights of adults and young people in these settings.
- At certain times, in line with health advice adults and young people were placed in protective quarantine for up to 14 days on entering prisons and youth justice facilities. This was challenging for people with existing vulnerabilities.
- For lengthy periods from March 2020 and into 2021, in-person personal visits to people in prisons and youth justice facilities were transitioned to online visits in response to community outbreaks. The Commission heard from community groups that the inability to have in-person visits with loved ones significantly impacted on those in closed environments.
- DJCS implemented safeguards to mitigate the impacts of these measures, including increased access to technology to facilitate contact with family and community, and proactive mental health and wellbeing checks.
- The Commission commends the decrease in the Victorian prison population that occurred in 2020. Community groups seek further decreases to prison populations including through early release of prisoners and changes to bail laws.

The COVID-19 pandemic has presented complex challenges for the Victorian Government in meeting its duty of care to people living and working in the prison and youth justice systems.

Correctional facilities are high-risk environments for COVID-19 transmission and many people in custody are particularly vulnerable to poor health outcomes if they contract COVID-19. These include Aboriginal and Torres Strait Islander Peoples, the elderly and those with underlying health conditions.<sup>155</sup>

The consequences of an outbreak of COVID-19 in prisons and youth justice facilities would be devastating. This was demonstrated internationally; for example, in the USA at the start of the pandemic, infection rates in closed environments were reported to be five times higher than the national average and death rates three times higher.<sup>156</sup> In countries where COVID-19 has entered the prison system or where COVID-19 has had a significant impact on staff, prisons have been placed into prolonged lockdown – prisoners locked in their cells for at least 23 hours a day, with limited access to education and employment.<sup>157</sup>



People in prison are at greater risk of death or serious harm if they contract COVID-19. In Australia, almost one-third of people entering prison live with a disability or have a chronic medical condition like asthma, cancer, cardiovascular disease or diabetes.<sup>158</sup> The risk and potential for serious harm are multiplied by the fact that access to the complex health care required to treat COVID-19 is limited in custodial settings.

In April 2020, the Premier announced measures designed to protect people's lives and health during the pandemic, while also maintaining flexible and effective administration of justice and assisting essential services to continue to operate.<sup>159</sup>

Emergency measures issued under the COVID-19 Omnibus Act included measures to be applied where appropriate, to prevent the virus from entering prison settings and from spreading inside, including:

- at certain times, requiring all adults entering prisons to undertake protective quarantine for up to 14 days<sup>160</sup>
- power to quarantine a young person in a youth justice facility for the minimum period of time that is required to detect, prevent or mitigate the transmission of COVID-19 or other infectious diseases, up to a maximum of 14 days<sup>161</sup>
- at certain times, suspending face-to-face personal visits for all people in prisons and youth justice facilities and replacing these with virtual visits and telephone calls<sup>162</sup>
- at certain times, replacing some face-to-face legal and health professional visits with virtual visits
- in some cases, halving the time people in custody are outside their cells
- reducing access to face-to-face training programs within prisons and youth justice facilities, and replacing these with online programs in some cases
- use of personal protective equipment and increased signage and instructions relating to the virus.<sup>163</sup>

Importantly, the COVID-19 Omnibus Act also included ways to mitigate some of the harm caused by isolating prisoners, including increased communication for people in prisons and youth justice facilities by telephone, video conference, letters and parcels.<sup>164</sup>

The COVID-19 Omnibus Act measures successfully contributed to Victoria avoiding a major outbreak in prisons and youth justice facilities. While there were reports of isolated cases of community-acquired COVID-19 within the prison<sup>165</sup> and youth justice populations,<sup>166</sup> these were limited. Within prisons, during 2020 only six staff tested positive to COVID-19, as well as one prisoner transport officer, one healthcare worker and one office-based Corrections Victoria staff member. All these cases were acquired in the community, not from within prisons or youth justice facilities.<sup>167</sup>

Nevertheless, the measures required people in custody to live without face-to-face visits from their families and loved ones for lengthy periods in 2020. They also reduced the opportunities for people in prisons to participate face to face in courses directed towards their rehabilitation or to engage in meaningful work.<sup>168</sup> In addition, many people were subjected to quarantine in prisons.<sup>169</sup>

While bodies such as VALS have documented some of the negative effects of these measures,<sup>170</sup> comprehensive research is needed to fully understand the effects of COVID-19 measures on the mental health and wellbeing of children and adults in closed environments.<sup>171</sup> The outcomes of this research will be

particularly relevant given the overlap of the prison population with cohorts who may be particularly vulnerable to isolation, including Aboriginal and Torres Strait Islander Peoples and people with disabilities and mental health issues.

The restrictions inside facilities took many forms. This report focuses on the use of protective quarantine and separation from families.

**"According to our clients, access to critical things like out-of-cell time, contact with family and legal representatives and complaints bodies, health and medical treatment and therapeutic programs during COVID was – and remains – very patchy and inconsistent from prison to prison. These rights were by no means consistently delivered during the pandemic."**

**Karen Fletcher, Senior Lawyer, Prison Advocacy, Fitzroy Legal Service**

## Protective quarantine

**"The introduction of Victoria's quarantine response was based on up-to-date health advice, and was in line with recommended approaches internationally, nationally and locally. The unprecedented pandemic conditions, particularly the speed of transmission and asymptomatic cases, required the Department of Justice and Community Safety to act quickly and decisively to protect the health and safety of people in custody and those working in prisons. These measures have been critical in preventing the catastrophic outcomes that were being reported within prisons in jurisdictions around the world."**

**Department of Justice and Community Safety<sup>172</sup>**

On 28 March 2020, Corrections Victoria established 'protective quarantine' across five prisons "as a preventative measure to reduce the risk of COVID-19 coming into the prison system".<sup>173</sup> From 28 March 2020, all adults entering custodial facilities were required to quarantine for up to 14 days in a protective quarantine unit.<sup>174</sup> People in protective quarantine are in cells by themselves and their access to other people is significantly reduced. On 20 August 2020, DJCS also introduced 'transfer quarantine' for prisoners transferring into prison custody from locations considered to be a transmission risk.

These measures affected many people – at any one time, about 400 adults in the corrections system were in protective quarantine.<sup>175</sup> From 1 April to 31 December 2020, over 8000 adults were subject to protective quarantine within the prison system.<sup>176</sup> In addition, people were subject to quarantine in police cells and young people were quarantined in the youth justice system. Many of these measures are still occurring in 2021.<sup>177</sup>

In relation to youth justice facilities, decisions on the minimum period of time required in order to detect, prevent or mitigate the spread of COVID-19 or other infectious diseases, up to a maximum of 14 days,<sup>178</sup> are made by the Secretary or other authorised person.<sup>179</sup> The length of COVID-19-related quarantine for young people varied based on health advice at the time. For example, DJCS advised the Commission that where a young person was admitted to custody during times of no reported community transmissions of COVID-19, they might be released from quarantine after providing one negative COVID-19 test result. Further, DJCS advised the Commission that between 2019–20 and 2020–21 there has been a significant decrease in the use of isolation in youth justice settings.<sup>180</sup>



## Concerns about the operation of protective quarantine

Without safeguards, quarantine can be akin to solitary confinement and particularly harmful for people in custody with known vulnerabilities to isolation including Aboriginal and Torres Strait Islander Peoples, young people, people with mental health issues, victim/survivors of family violence and other trauma, and people living with a disability.<sup>181</sup> The international standard – the Nelson Mandela Rules – defines solitary confinement as the “confinement of prisoners for 22 hours or more a day without meaningful human contact”.<sup>182</sup>

DJCS and health advice confirmed that quarantine arrangements were the most effective strategy implemented to prevent COVID-19 entering the prison system.<sup>183</sup> Despite the strong justification for protective quarantine, the practice impacts on rights to humane treatment when deprived of liberty, freedom of movement, protection of families and children, and cultural rights. The community raised concerns about these rights as a result of conditions in quarantine.

### Access to fresh air

The Deputy Commissioner of Corrections Victoria’s instructions note that prisons “will, unless it is not operationally possible, provide time out of cell for all prisoners”.<sup>184</sup> Similarly, a child or young person placed in quarantine in response to the COVID-19 pandemic is entitled to access outdoors and undertake outdoor recreation activities and that outdoor access is to occur at least once each day and for a reasonable period of time.<sup>185</sup>

The Commission heard some concerns about a lack of time out of cells and access to fresh air for some adults in protective quarantine. The Victorian Ombudsman received over 130 complaints relating to quarantine conditions including access to fresh air.<sup>186</sup> Fitzroy Legal Service reported that the amount of time their clients received out of their cells varied between custodial settings.<sup>187</sup> More research is required to understand the extent to which adults and young people in protective quarantine have had daily access to fresh air, which is a minimum requirement for the humane treatment of people in custody.

### Increased risks of quarantine for people with existing vulnerabilities

Protective quarantine raises increased risks for:

- people with mental and physical disabilities whose conditions could be exacerbated by quarantine conditions<sup>188</sup> – 40 per cent of people entering prison have been diagnosed with a mental health condition at some stage in their life and 30 per cent have been told they have a chronic physical health condition<sup>189</sup>
- pregnant and breastfeeding women, infants and children<sup>190</sup>
- Aboriginal and Torres Strait Islander Peoples, who continue to be overrepresented in the prison system.<sup>191</sup>

During 2020, VALS called for greater transparency about how the protective quarantine program was being operationalised and for additional safeguards that might minimise the impacts on incarcerated people’s rights and wellbeing.<sup>192</sup>

DJCS reported assisting VALS to facilitate welfare checks on behalf of people’s families and friends in the community.<sup>193</sup> DJCS also reported that throughout 2020, Aboriginal Wellbeing Officers continued to actively support Aboriginal

and Torres Strait Islander Peoples in quarantine. Youth Justice reported an increased emphasis on cultural support plans to strengthen young people’s connections to family, community and culture. This involved enhancing the cultural support planning process through the provision of cultural items, activities and virtual visits.<sup>194</sup>

## Human rights safeguards in closed environments and in protective quarantine

DJCS and Corrections Victoria reported that they used the Charter to consider the impacts of protective quarantine on human rights and to ensure those impacts were reasonable and demonstrably justified.<sup>195</sup> The DJCS policy approach to protective quarantine rested on three major pillars: public health, operational safety and human rights.<sup>196</sup> The length of time a prisoner spent in protective quarantine was limited to the amount of time deemed necessary, based on expert public health advice, to reduce the risk of transmission of COVID-19.<sup>197</sup>

The Charter also supported DJCS to develop and implement supports and safeguards to mitigate the impact of COVID measures – including protective quarantine – and to ensure that any limitations on human rights would be as minimal as possible while achieving the purposes of reducing the risk of transmission of COVID-19 within the prison system and maintaining operational safety.<sup>198</sup> Examples of these safeguards include supporting prisoners to maintain the following rights:

**Rights to family and social connections.** DJCS introduced tablets and mobile phones, and expanded wi-fi into prisons, allowing prisoners access to phone and video visits in cells (discussed further below). DJCS also funded the Victorian Association for the Care and Resettlement of Offenders to provide support to prisoners’ families to access video visits. Individual prisons also worked to support prisoners’ families during the pandemic. For example, prisoners in Barwon Prison had the opportunity to record Christmas storybooks to send to their children. DJCS also arranged televisions and activity packs translated into several languages.

**Rights to fair hearings and criminal proceedings.** Court appearances were facilitated through remote court facilities wherever possible. DJCS worked together with legal service providers, including Victoria Legal Aid, community legal centres and VALS, to ensure that they could continue to deliver services remotely to vulnerable people in custody.

**Rights to humane treatment when deprived of liberty.** DJCS advised the Commission that health and other support services continued to operate across all custodial settings, including through remote delivery. Specifically, DJCS provided proactive psychological wellbeing services to adults through the protective quarantine support service, including daily access to general and mental health nursing staff. DJCS reported that between 1 April 2020 and 31 May 2021, 40,705 sessions were provided to 8353 individual service users in public and private prisons.<sup>199</sup> Where possible and appropriate, DJCS facilitated access to remote education, offending behaviour programs, and drug and alcohol programs.

Youth Justice reported to the Commission that young people in youth justice centres received proactive professional welfare checks. Youth Justice also reported that legislation has safeguards in relation to the use of protective quarantine for young people, including that a young person must be closely supervised and observed at least every 15 minutes and that any isolation and reasonable use of force used to place a young person in isolation must be reported and recorded.<sup>200</sup>

## Connection with family and loved ones on the outside

**"In addition to restrictive regimes of lockdowns, quarantine and isolation, everyone in detention has been impacted by the suspension of programs and personal visits, the anxiety in relation to contracting COVID 19 in the high risk environment of prison, and the distress of not being able to support and be with their families during this difficult time."**

**Victorian Aboriginal Legal Service<sup>201</sup>**

From 28 March 2020, in-person personal visits within adult prisons were suspended and replaced with online video visits as a measure to reduce the risk of an outbreak of COVID-19. This meant that these prisoners were unable to be visited in person by family, friends or community members. Professional visits, including from lawyers, medical staff and psychiatrists, were also conducted remotely where possible.

Similarly, from 28 March to 11 December 2020 family visits for young people in youth justice facilities transitioned to virtual visits through secure tablet devices. DJCS advised the Commission that since that time, personal visits have transitioned between in-person and virtual as required, in line with health advice.<sup>202</sup> In March 2020, DJCS also introduced changed arrangements for professional visits, permitting only essential visits to occur in person, subject to rigorous screening procedures including temperature checks on arrival. All other professional visits were conducted virtually.<sup>203</sup>

The restriction of in-person visits appears to have been successful in helping to prevent a major outbreak within prisons. However, the policy has placed a huge burden on people who were detained who had been separated from family and loved ones. The Federation of Community Legal Centres highlights below how the suspension of in-person visits impacted on family relationships and, for some mothers – particularly Aboriginal and Torres Strait Islander mothers – affected contact with children, which could jeopardise future family reunification efforts:

**"Suspension of personal visits has made it almost impossible for people to communicate with young children and babies and those with complex communication needs. The suspension of personal visits is also impacting on the ability of women, particularly Aboriginal women, to maintain contact with children subject to Child Protection Orders. There is a risk that barriers to communicating with children during this time will weaken a woman's case for family reunification. In some cases, this is being viewed as the mother's lack of interest in maintaining contact, rather than as a result of the complex impacts of COVID-19 on women in prison. This is a real issue for parents facing a Permanent Care Order being made."**

**Federation of Community Legal Centres<sup>204</sup>**

The suspension engages a number of human rights protected by the Charter, including the protection of families and children, the right to humane treatment when deprived of liberty, the right to equality and, in the case of Aboriginal and Torres Strait Islander Peoples, cultural rights.

The Premier acknowledged that a suspension of in-person personal visits engaged the human right to the protection of families and children, but that limitations on these rights were "mitigated to some extent" by the provision of other non-physical forms of communication, and therefore justified and proportionate, because no less restrictive means were available.<sup>205</sup>

Despite the increased availability of secure tablets to connect with family, there were numerous reports that virtual visits with family could be infrequent.<sup>206</sup> Fitzroy Legal Service's clients reported that requests for out-of-cell time to contact family, legal representatives or bodies such as the Ombudsman, the Health Complaints Commissioner or the Commission were "commonly denied" for reasons including technical difficulties and lack of available devices.<sup>207</sup>

The Victorian Ombudsman received many complaints on this issue from people in prison – more than one-third referring to the cancellation of contact visits.<sup>208</sup>

The Commission welcomed the increased availability of technology to facilitate video calls with loved ones during the COVID-19 pandemic. This is an important innovation that should be retained in addition to in-person visits due to the benefits to mental health and social wellbeing. In some cases, the availability of video calls has increased contact between people in custody and their children, particularly for families who live interstate or overseas.<sup>209</sup> DJCS also advised the Commission that Youth Justice data shows some young people had more contact with family through virtual visits than they did previously with face-to-face visits.<sup>210</sup> However, remote visits are not a substitute for seeing loved ones face to face. Nor is it possible for some people to successfully reach their family and community remotely.<sup>211</sup>



## Decarceration

### Early release of people in custody

"Congregate settings like prisons provide an optimal setting for an outbreak and the prison population may be naive to the seriousness of COVID-19."

Prof. Richard Coker, Emeritus Professor of Public Health, London School of Hygiene and Tropical Medicine, in evidence before the Supreme Court<sup>212</sup>

As the COVID-19 pandemic began, concerns grew globally about the dire consequences for closed environments if COVID-19 were to enter. In response, in some parts of the world governments amended laws and policies to allow for the early release of some people in custody.<sup>213</sup> In New South Wales, for example, an early release program was established<sup>214</sup> which allowed for release where a person satisfied particular criteria and where the Commissioner was satisfied that release was reasonably necessary because of the risk to public health or to the good order and security of the facility.<sup>215</sup>

The DJCS Secretary has two existing powers to release people from custody. The first is early release on health grounds by issuing a corrections administration permit under section 57(A) of the *Corrections Act 1986*. The second is deducting EMDs from a person's sentence because they have suffered "disruption or deprivation" under section 58(E) of the *Corrections Act*. The Commissioner of Corrections Victoria determined that during the COVID-19 emergency, the number of EMDs granted would be close or equivalent to the number of days of deprivation or disruption experienced (including being placed in protective quarantine).<sup>216</sup> EMDs are discussed in detail on page 81.

Advocates called for powers to be introduced in Victoria to allow adults and young people in custody with particular vulnerabilities to be released and for fast-tracking of bail reform to make bail more accessible to those on remand yet to be found guilty of criminal offending and who pose a low risk to the community if released.<sup>217</sup> However, Victoria did not pass any such laws.

To date, the powers under section 57(A) have not been exercised although, in 2020, a case in the Supreme Court sought to require the Secretary to use her powers to release a person on health grounds.



### CASE STUDY

## *Rowson v Department of Justice and Community Safety*<sup>218</sup>

Mr Mark Rowson suffers from numerous respiratory and heart conditions. In 2020, he was serving a sentence of more than five years at Port Phillip Prison for fraud offences.

Mr Rowson sought Orders in the Supreme Court to release him from prison early under section 57(A) of the *Corrections Act* because of his specific health risks, including the risk that he would die if he became infected with COVID-19. Counsel for Mr Rowson submitted that, as a person unable to protect himself in prison, he was a "sitting duck" for the virus.<sup>219</sup> Mr Rowson argued that DJCS, the Commissioner of Corrections Victoria and the State of Victoria (the defendants) owed him a duty of care to take reasonable steps to ensure that he did not suffer serious injury or death from COVID-19. He also argued that the defendants had acted incompatibly with his human rights under the Charter, specifically his rights to:

- recognition and equality before the law (section 8)
- life (section 9)
- humane treatment when deprived of liberty (section 22).

Mr Rowson's evidence included examples of poor standards of hygiene, lack of risk assessment of the virus and limited enforcement of social-distancing measures. Mr Rowson also relied on expert evidence indicating he had an increased risk of developing COVID-19 and dying from it.

The defendants outlined various measures taken to prevent the virus from entering the prisons and controlling the spread if it did enter, including:

- the quarantining of people entering prisons and those returning from overseas
- halving of the time people in prison were outside their cells
- increased signage and instructions relating to the virus.

## Decision

The case only went to an interlocutory hearing. The judgment considered detailed expert evidence on the risk of COVID-19 entering Port Phillip Prison. Although no findings of fact were made, the evidence before the court suggested that, at that time, the risk of infection to a person in prison was lower than the risk of infection in the general community but, should an outbreak occur in prison, the risk to a person in prison would be higher than to the general population.<sup>220</sup> At the time (1 May 2020), community transmissions were low – only three new cases had been acquired within the past 24 hours.<sup>221</sup>

Without making a finding of fact, the court noted Mr Rowson’s concerns about the management of the risk, including that the prison had not conducted a risk assessment. It noted that “on Mr Rowson’s evidence, there appears to be a gap between what policy anticipates should occur and what is actually occurring”.<sup>222</sup> This included prisoners with symptoms being sent to the quarantine unit for testing and then being allowed to return to the unit despite having a high temperature, no advice being given to prisoners about existing prevention and management measures, and a lack of temperature testing.<sup>223</sup>

The court did not order Mr Rowson’s release in the interlocutory hearing. Factors weighing against release were that Mr Rowson had a significant proportion of his sentence left to serve, that it was unclear where he would live and still be under the Secretary’s care and control, and that there had been no positive cases of COVID-19 within the prison to date.

Instead, the court ordered Port Phillip Prison to carry out a risk assessment examining the COVID-19–related risks to people in prison and to ensure that any resulting recommendations were implemented.

## Outcome

The ensuing review by Infection Prevention Australia concluded that “overall, the findings of the inspection indicate that the facility has a robust system in place to minimise risk to any individual”.<sup>224</sup> Some room for improvement was found, including better use of personal protective equipment in the protective quarantine units.<sup>225</sup>

The court did not rule out that people in prison could be released by court order because of COVID-19 under different circumstances.<sup>226</sup>

## Emergency Management Days

As noted above, the DJCS Secretary holds a power to grant EMDs under section 58(E) of the Corrections Act. This discretionary power allows for people in prison to have days deducted from their sentence when they suffer disruption or deprivation during an emergency, industrial dispute or other special circumstance. Throughout the COVID-19 pandemic, people who were held in protective quarantine or other forms of isolation, and who had not demonstrated poor behaviour, were considered for EMDs.<sup>227</sup> The number of EMDs granted was to be close to equivalent to the number of days of disruption or deprivation.<sup>228</sup> This scheme acknowledges the impact of the pandemic on people who are serving sentences or on remand.

Corrections Victoria implemented an EMD coordinator at each prison, as well as a statewide EMD Coordinator, to support the EMD process through 2020.<sup>229</sup> However, feedback from those monitoring the EMD scheme and prisoner advocates showed that, in practice, the process has not been clear. Agencies have reported a number of issues arising in applying the policy:

- Of the 300 complaints from people in prison received by the Victorian Ombudsman, 250 related to EMDs. Common complaints included people experiencing delays in being awarded EMDs for time spent in isolation, having applications denied or receiving fewer days than they considered they should have.<sup>230</sup>
- VALS reported that Corrections Victoria did not provide adequate information for both detained people and their advocates regarding when and how EMDs would be applied or explanations for decisions refusing them.<sup>231</sup> VALS argued that information provided by DJCS (a fact sheet on EMDs) was confusing and would have been ambiguous for prisoners with low literacy.<sup>232</sup> Prisoner Legal Help reported to the Commission that the onus tended to be on prisoners to chase up EMDs where they thought these had been calculated incorrectly. Sometimes assistance from advocates led to EMDs being granted when a prisoner had previously been told they were not entitled to any or only to a few days.<sup>233</sup> DJCS does not support the view that EMDs have been calculated incorrectly, but noted that in many cases prisoners did not agree with the decision on the number of EMDs granted to them.<sup>234</sup>
- The Federation of Community Legal Centres raised concerns that some people did not receive EMDs in a timely way. The federation recommends that those on remand or with short sentences and subject to quarantine or otherwise in lockdown should have their EMDs applied immediately so that they do not lose the opportunity to have these credited against their sentence.<sup>235</sup> VALS also observed that, in practice, EMDs were assessed once every two weeks. This meant a prisoner serving a 28-day sentence who had spent 14 days in quarantine did not receive any reduction, even though they had submitted an EMD application on the first day of their sentence and followed up multiple times.<sup>236</sup> DJCS advised the Commission that consideration of EMDs occurred on a regular basis. Each matter was assessed on a case-by-case basis, including consideration of whether the prisoner was of good behaviour. Sufficient time was also required to administer this process.<sup>237</sup>
- PAEC recommended the implementation of a scheme like EMDs for children and young people, as a comparable process does not exist in the youth justice system.<sup>238</sup> PAEC stated that this is critical for young people, who are particularly



vulnerable to the mental health impacts of isolation and deprivation within custody.<sup>239</sup> In response, DJCS (Youth Justice) advised the Commission that the youth parole system is flexible, offering the opportunity for the parole of young people based on the decision-making of an Independent Youth Parole Board.<sup>240</sup>

## Reducing the prison population

Although there was no specific legislative reform to do so, in 2020 there was a decrease in the number of people held in prison in Victoria, which is strongly supported by the Commission. The adult prison population decreased from 8101 on 31 December 2019 to 7082 on 31 December 2020.<sup>241</sup>

Although the decrease in the prison population is welcome, the number of people on remand remains unacceptably high: as at 31 December 2020, over 38 per cent (2738) of people in custody were waiting for their case to be heard, a slight increase from 36 per cent at the start of the year.<sup>242</sup>

The decrease in prison numbers is partially understood by reference to judges and magistrates using their discretion to grant bail in response to COVID-19 measures. Recent Superior Court decisions have shown that decision-makers had regard for the impact of incarceration on an accused person applying for bail during the pandemic. For example, delay in trials due to COVID-19 established exceptional circumstances<sup>243</sup> or compelling reasons<sup>244</sup> to grant bail, particularly where delays would lead to an accused person spending more time on remand than the sentence.<sup>245</sup> Judges also had regard for cultural and community factors relevant to Aboriginal and Torres Strait Islander offenders,<sup>246</sup> the impact of COVID-19 spreading into the prison system<sup>247</sup> and health risks and restrictions on visitations.<sup>248</sup> There are not yet accurate figures on the number of bail applications that raised COVID-19.<sup>249</sup>

Victoria Legal Aid, Djirra, Australian Lawyers Alliance and the Law and Advocacy Centre for Women have been among those groups calling for systemic changes to Victoria's bail laws to reduce the number of people held on remand. These organisations have noted the particularly detrimental effect that current bail laws have on women.<sup>250</sup>

**"At the front end, it's still left to judges and magistrates to decide things like whether to grant bail on a case-by-case basis – there has been no systemic change to say, for example, let's rethink the provisions of the Bail Act that have caused an upsurge in the prison population recently, particularly for non-violent offenders."**

**Elena Papas, lawyer and co-founder of Law and Advocacy Centre for Women**

The reduction in prison numbers is welcome progress that should be sustained in the recovery phase of COVID-19. However, the high proportion of remanded people remains a concern:

**"It's incredible to see the number of Aboriginal people in prison going down during COVID, particularly Aboriginal women who had been the fastest-growing prison population. This is something we should hold on to, after the pandemic is over. If diversion can happen during COVID, why can't it happen as a matter of course?"**

**Antoinette Braybrook, Chief Executive Officer, Djirra**

**"There is a real opportunity to think about how reducing the flow of people into the corrections system that has been happening because of COVID can be sustained to make the criminal justice system work more effectively."**

**Dan Nicholson, Executive Director, Criminal Law, Victoria Legal Aid**

## Scrutiny of new measures in corrections

Measures in the COVID-19 Omnibus (Emergency Measures) Bill addressing the risk of transmission of COVID-19 in prisons included powers to:

- prohibit in-person prison visits, at certain times, where necessary<sup>251</sup>
- introduce protective quarantine of up to 14 days for adults entering custody, where necessary<sup>252</sup>
- at certain times, isolate people in prisons and youth justice facilities to prevent the spread of COVID-19, including new powers enabling the isolation of children and young people in youth justice detention.<sup>253</sup>

As required under the Charter, the Victorian Government provided a Statement of Compatibility with the Bill in which it outlined the rights impacted on by these measures – including the rights to liberty, humane treatment when deprived of liberty, freedom of movement, a fair trial, privacy and reputation, and the protection of families and children.<sup>254</sup>

The Statement of Compatibility justified the limitations on rights, stating that they were necessary to protect and promote the right to life of all Victorians. It noted that the Bill sought to reduce the risk of transmission of a potentially fatal virus and to ensure that health services were not overwhelmed.

The Charter requires the parliamentary SARC to consider every Bill introduced into Parliament and report to Parliament as to whether a Bill is compatible with human rights. However, the speed of the emergency response to COVID-19 meant that SARC was not able to scrutinise this Bill until after it had been passed.<sup>255</sup>

On 2 June 2020, SARC published its detailed consideration of the COVID-19 Omnibus Act. SARC noted that the Act authorises separation, quarantine or isolation of a prisoner from some or all adults and young people in custody to prevent, detect or mitigate the risk of COVID 19 and related health risks.<sup>256</sup> SARC noted the effect of the new provisions could be to isolate a young person for up to 14 days and requested further information from the Premier about this. SARC also noted that the Statement of Compatibility did not address the compatibility of these new sections with the Charter right of a child offender to be “treated in a way that is appropriate for his or her age” and wrote to the Premier seeking further information about this.<sup>257</sup> The Premier’s detailed response on 29 June 2020 included the following:

**"It is expected that most periods of isolation under these new sections will be substantially less than 14 days. For example, in practice, isolation for new admissions, without symptoms or other risk factors, is several hours at most (the time taken to undertake health checks)... The period of 14 days was chosen on the basis of expert advice as to the incubation period for COVID-19 (which is on average 5–6 days but can be up to 14 days) and is the maximum period at any one time that a person needs to be isolated if, for example, they have been diagnosed with the virus."<sup>258</sup>**

**The Hon. Daniel Andrews, Premier**

The Premier also provided a detailed response with respect to the new provisions that allow isolation of young people for the purpose of preventing or detecting COVID-19 and their compatibility with Charter rights. He concluded that the provisions are compatible with rights, including because appropriate safeguards are in place and because the provisions protect young people and others from the spread of COVID-19.<sup>259</sup>





## 8. Multicultural and multifaith communities

### At a glance

- Reports of racial discrimination and vilification increased during the pandemic, significantly impacting on multicultural communities.
- Multicultural communities experienced difficulty in accessing information during the pandemic and there were calls for the government to improve communication and engagement.
- The Commission consulted extensively with multicultural communities during 2020 to promote and protect human rights.
- Despite the challenges presented by COVID-19, Aboriginal and Torres Strait Islander, multicultural and multifaith communities showed significant strength and resilience.
- The Victorian Ombudsman found that DHHS acted wrongly by not providing residents of the public housing tower at 33 Alfred Street with timely and accessible notice of the reasons for the hard lockdown of their building. The government's response indicated it would consider many of the Ombudsman's findings and recommendations, but rejected the Ombudsman's finding regarding the lawfulness of the emergency response, stating that at all times it had acted lawfully and within the applicable legislative framework.<sup>260</sup>

### Rise in racism

The COVID-19 pandemic exposed the underlying inequalities that many multicultural and multifaith communities experience, including profound levels of racism and vilification. Reports of racism and xenophobia have increased throughout the COVID-19 pandemic.<sup>261</sup>

Early in the pandemic, there was an escalation in racially motivated abuse towards people from Asian backgrounds in Australia.<sup>262</sup> In April 2020, the Commission had a sharp spike in complaints about racial vilification, receiving almost eight times as many complaints as in the same period in 2019.<sup>263</sup> The ABC also reported that it had been contacted by hundreds of people who had shared experiences of discrimination during the pandemic.<sup>264</sup>

Multiple surveys conducted during 2020 showed that many people, including young people and international students, were the target of racially motivated discrimination and prejudice:

- A survey by the Centre for Multicultural Youth and Australian National University of more than 3000 people aged between 16 and 25 found that 84.5 per cent of Asian Australians reported at least one instance of discrimination between January and October 2020.<sup>265</sup>

- A survey conducted by the Migrant Worker Justice Initiative found that international students experienced verbal racist abuse during the COVID-19 crisis and were avoided based on their appearance.<sup>266</sup> Of the 6000 surveyed, 1500 reported that they had experienced xenophobic slurs or been treated as though they had COVID-19 due to their Asian appearance. Some also described physical attacks.<sup>267</sup>
- The Australian Race Discrimination Commissioner acknowledged a resurgence in racism being experienced in Australia during the pandemic.<sup>268</sup>
- Data from the Australian Human Rights Commission<sup>269</sup> and the Asian Australian Alliance<sup>270</sup> showed a consistent occurrence of race-related incidents during the pandemic.

### Rise in reports of racism and racial vilification to the Commission

The Commission plays a significant role in protecting and promoting the rights of multicultural and multifaith communities in Victoria. While racism and experiences of unfair treatment because of race have always been reported to us, in 2020 the Commission received an increase in enquiries and reports of race discrimination and vilification in the community.

In 2020, the Commission received more than double the number of reports of racial vilification than in 2019. It received a total of 406 enquiries specifically related to racism, of which 38 per cent concerned racial vilification. Members of the public also used the Commission's online community reporting tool to report racist incidents,<sup>271</sup> with 53 per cent of reports in 2020 related to racial discrimination and vilification.

In June 2020, the Commission received more enquiries about racism through all of our enquiry contact points, including the reporting tool, than at any time over the past 12 months. Around this time the Black Lives Matter movement raised community awareness of racism, which may have contributed to increased reporting of racist incidents to the Commission.

### Vilification online and in public places

In particular, people of Chinese or East Asian heritage reported being racially vilified during the early months of the pandemic. Reports included being abused online, in supermarkets, on public transport, in workplaces, at school, in shops and in their local neighbourhoods. The most common areas where race discrimination was experienced included employment, goods and services, and accommodation. Examples of discrimination and vilification experienced included racial profiling, stereotyping, racially targeted verbal abuse, racial insults, verbal and nonverbal microaggressions, and physical assaults causing injury.

We heard of patients declining treatment from doctors because of their racial background. We received many reports about abuse in public or at work. One woman was abused while shopping at her local supermarket. When she picked up some hand sanitiser, a staff member remarked: "All you Asians take everything".<sup>272</sup> We heard from a doctor working at one of Melbourne's busiest hospitals that he was abused so aggressively while taking the train to work that he no longer felt safe taking public transport.<sup>273</sup> Many of these racist incidents were directed towards women and most were verbal. Consultation with communities also highlighted the impact of COVID-19-related racism and discrimination on mental health and the need for targeted mental health responses to this.

Several enquiries and complaints related to the use of social media explicitly directed against people based on race. The inadequacies of our current anti-vilification laws were highlighted during this time, with two racial vilification complaints being refused because the respondent could not be identified. This included a matter regarding a social media group which was explicitly racist towards people of Chinese heritage.

The Commission engaged deeply with multicultural and multifaith communities across Victoria to better understand the impacts of COVID-19-related racism and to support individuals who had been treated unfairly based on their race.

## CASE STUDIES

### Racial vilification

A person rang the Commission and told us that they were out walking when a man shouted at them from his car about how he "can't fly anywhere anymore". The caller believed the man was referring to the travel ban with China due to COVID-19 and described his language as abusive and racially motivated.

Another person told the Commission that on public transport they witnessed another passenger making racist and discriminatory remarks towards two people of Asian appearance. The passenger approached the two people and became increasingly verbally aggressive. Another passenger stepped in to defend them.

A key concern raised by community members in our consultations was the significant barriers to reporting racism. These included:

- a lack of knowledge about where and how to make a report
- limited understanding of Victoria's anti-discrimination and anti-vilification laws
- reduced confidence in public authorities to provide an adequate response, including institutional race discrimination
- the mental health impacts of racism such as trauma and fear of victimisation
- the need for more in-language and culturally appropriate resources in order to understand people's rights.

### Better protections from racist abuse

Racial vilification undermines people's right to equality under the Charter. In Victoria, the *Racial and Religious Tolerance Act 2001* prohibits vilification. The instances of racism that have come to light during the pandemic reiterate the need for stronger anti-vilification laws in Victoria. Community leaders have told us that the current threshold for racial vilification is not meeting the needs of communities.<sup>274</sup>

The report of the parliamentary Inquiry into Anti-Vilification Protections, published in March 2021, recommended a raft of amendments to Victorian's anti-vilification laws and strengthening of Victoria's human rights culture. The Commission welcomes these recommendations and notes the government's response, including support and in-principle support for the majority of the inquiry's recommendations. The Commission encourages implementation of these important reforms in consultation with affected communities.



## Media using racist stereotypes

During 2020, the Commission also heard reports of stigmatising portrayals of multicultural communities by the media. Through consultation with the Victorian Multicultural Commission (VMC), we heard that many communities felt that the media's reporting of the second wave of the pandemic blamed multicultural communities for spreading the virus.<sup>275</sup>

Opinion pieces published throughout the year suggested Victoria's multiculturalism was responsible for weakening the state's response to the pandemic<sup>276</sup> and multicultural communities were responsible for outbreaks.<sup>277</sup> Racist headlines, phrases and hashtags attributing the outbreak and spread of COVID-19 to multicultural communities were also spread online and on social media platforms.<sup>278</sup> The Islamic Council of Victoria expressed concern over media scapegoating and stigmatising of the Muslim community.<sup>279</sup> In June 2020, Sky News<sup>280</sup> and *The Australian*<sup>281</sup> portrayed large multicultural families as fuelling the pandemic by breaking social-distancing rules, including to attend Eid celebrations. A number of articles were published on the issue of racist media and the marginalisation of multicultural communities during the pandemic.

**"The racist narratives promulgated during the pandemic about certain multicultural communities demonstrated a disgusting new low level of bigotry by media personalities. In particular, remarks made against the South Sudanese community only added salt to injury to a community that was significantly impacted by the pandemic. It felt like a blatant 'anti-immigrant' attack on our community with no facts to back up statements."**

Monica Deng, President, South Sudanese Youth United

## Disproportionate impacts of lockdown

Evidence provided to the PAEC Inquiry into the Victorian Government's Response to the COVID-19 Pandemic illustrated that while multicultural Victorians experienced many of the same social and financial issues as other Victorians during lockdown, these were compounded by the inequality experienced by these communities.<sup>282</sup> In the inquiry, PAEC found that Victoria's second wave of the COVID-19 pandemic disproportionately impacted on areas with high proportions of multicultural and migrant residents.<sup>283</sup>

One reason cited for this was employment, with many newly arrived migrants working in low-paying jobs in the service industry and as frontline workers.<sup>284</sup> The inquiry found that temporary migrants, refugees and asylum seekers in Victoria were severely impacted on by COVID-19 and at a high risk of financial stress due to a lack of eligibility for Australian Government support.<sup>285</sup> While this is undoubtedly a significant issue, we do not have the scope to consider it in this report.

The VMC has acknowledged the disproportionate and exceptional challenges faced by multicultural communities as a result of COVID-19 and that communities have shared with it concerns regarding accessing in-language information and resources, as well as issues in accessing employment, migration services and social security.<sup>286</sup>

Many community representatives also expressed to the Commission that the disadvantages stemmed in part from not having access to the tools, resources and supports to know about, understand, prepare for or comply with public health directions and remain safe.<sup>287</sup>

## Accessibility of information

Throughout the pandemic, it was reported by media and various multicultural and multifaith community leaders that efforts to communicate important public health messaging with migrant communities was ineffective or that more could have been done.<sup>288</sup>

Consultations with impacted communities, run jointly by the VMC and our Commission, revealed a lack of translated materials and resources for vulnerable multicultural communities<sup>289</sup> and a desire for better communication.

Multicultural communities expressed a desire for the government to co-develop creative and accessible materials together with community organisations to reach less accessible community members. Providing communities with accessible information is vital to ensure that public authorities comply with their obligation to uphold individuals' right to equality under the Charter.

During the second wave, local government areas in Victoria with high migrant populations were overrepresented in new infections, prompting the government to improve its messaging concerning COVID-19 in languages other than English.<sup>290</sup> The Chief Health Officer said it was essential for the government to properly engage with multicultural communities.<sup>291</sup> In August, the government announced the establishment of a multicultural Communities Taskforce to assist multicultural and multifaith communities through the pandemic.<sup>292</sup> The taskforce included representatives from VMC as well as representatives of various government departments.<sup>293</sup>

## Self-determined responses

Alongside much of the hardship of the pandemic, there has been great community organisation and resilience that has protected communities from disease and ameliorated some of the harsher effects of government measures. The following case studies illustrate this.



## CASE STUDY

# The Aboriginal community-led response to COVID-19

The Victorian Aboriginal Community Controlled Organisations (ACCOs) have had significant success in responding to the COVID-19 pandemic. COVID-19 transmissions within the Aboriginal and Torres Strait Islander community – one of the most at-risk communities in Victoria – were below transmission levels in the broader Victorian community throughout 2020.

A COVID-19 Aboriginal Community Taskforce (Taskforce) was established in March 2020, comprising of leaders from Aboriginal organisations and government departments. The Taskforce was instrumental in driving comprehensive, coordinated and culturally safe responses and recovery efforts.

ACCOs have led the development and dissemination of community-wide communications, outreach and rapid responses to Elders and vulnerable families. The Aboriginal Executive Council also facilitated fortnightly meetings throughout the pandemic to develop urgent responses and share resources. This regular forum has enabled ACCOs to identify emerging issues, respond to gaps, coordinate their efforts and bring systemic issues to the government's Taskforce.

Such a targeted response has protected and promoted the rights of Aboriginal and Torres Strait Islander Peoples under the Charter, including the rights to life and equality, and cultural rights.

These responses were supported by the Victorian Government's \$23 million Aboriginal-specific COVID-19 funding package through the *2020-21 State Budget*. The Package included a \$10 million COVID-19 Aboriginal Community Response and Recovery Fund, funding for ACCOs to support education outreach, homelessness support, IT capability uplift, clinical support and patient transport. Funding was also provided to Registered Aboriginal Parties to support them to undertake their cultural heritage work remotely.

Within 24 hours of the hard lockdown of the public housing estates, ACCOs provided an integrated response for Aboriginal and Torres Strait Islander families living there. This relieved some of the anxiety families were experiencing by providing a single access point for a range of services. As some restrictions eased to allow Aboriginal-led agencies access, ACCOs ensured families had access to the legal, medical, child and family, housing and community care supports that they needed, allowing families to respond to emerging challenges.

Across Melbourne, ACCOs established partnerships with foodbanks and cafes to ensure community members had access to healthy and nutritious meals. This supported people's cultural, social and emotional wellbeing. Connecting in this way enabled ACCOs to disseminate culturally safe COVID-19 updates, along with current government rules and mandates related to the pandemic.

The Victorian Aboriginal Community Controlled Health Organisation CEO, Jill Gallagher, said the low incidence of COVID-19 cases in Victorian Aboriginal communities is testament to Aboriginal communities' control and what can happen when they work meaningfully together.<sup>294</sup>

Members of the Aboriginal Executive Council advised the Commission that Aboriginal self-determination underpins the success of Victoria's ACCOs in protecting the Victorian Aboriginal community.<sup>295</sup>

**"At the heart of this success is Aboriginal self-determination. When ACCOs are free to use their resources and strengths to take the lead, the best outcomes will be achieved for Aboriginal people. These strengths include inter-generational family and community connections, localised knowledge, common purpose, cultural connections, and Aboriginal ways of caring for family and vulnerable community members.**

**Self-determination is at the heart of the ACCO sector and is a fundamental right of Aboriginal people. Self-determination needs to be at the heart of Victorian legislation and fundamental to the working relationship between governments and the Aboriginal community."**

**Esme Bamblett, Chairperson, Aboriginal Executive Council**



## Hard lockdown of public housing towers

In early July 2020 while Victoria was early in the second wave of COVID-19 infections, 23 residents of nine public housing towers in Flemington and North Melbourne tested positive for COVID-19. The high-density living conditions in the towers meant residents were deemed to be at additional risk of the virus.

In response, on 4 July following meetings of the Crisis Council of Cabinet, the Deputy Chief Health Officer issued a series of directions that effectively detained the 3000 residents of the public housing towers with immediate effect.

The Deputy Chief Health Officer directions ordered people not to leave their home unless: an exception applied; they had been granted permission to receive medical care; because it was necessary for their physical or mental health; on compassionate grounds; or in an emergency situation.<sup>296</sup> These exceptions were not immediately communicated to residents but, by contrast, the media reported the Premier advising residents, "There will be no one allowed in ... and no one allowed out".<sup>297</sup>

In response, Victoria Police immediately established a perimeter around the affected public housing towers, restricting access under the Emergency Management Act.

**"Whether that was in detention or jail in their country of origin, the presence of the police as either a trigger or because some residents of the towers [are aware of or] have had difficult experiences with Victoria Police, some felt stigmatised and distressed that for a few days at least, their basic needs were not being well met and there was inadequate communication, which heightened fear."**

**Dr Joanne Gardiner, Royal Melbourne Hospital<sup>298</sup>**

Testing conducted between 5 July and 8 July 2020 resulted in over 150 cases of COVID-19 within the towers. Of these, more than one-third were located in a single tower at 33 Alfred Street in North Melbourne.<sup>299</sup> After five days, eight of the nine towers returned to Stage 3 restrictions – the same level as the rest of Greater Melbourne and the Mitchell Shire. However, residents of 33 Alfred Street remained in hard lockdown for a total of two weeks.

During the lockdown, thousands of people lived in extremely challenging circumstances, many residents going without daily access to fresh air and, in the case of people living alone, without meaningful human contact. The fact that the lockdown was implemented without any official warning left residents with no time to prepare.

**"I found out [about the lockdown] when I came down and there were police and they said the building is locked."**

**Resident's oral submission to the Victorian Ombudsman<sup>300</sup>**

## Access to information

The towers are home to people from many cultures and nationalities – 73 per cent of residents spoke a language other than English at home and 21 per cent had self-reported poor or no English proficiency.<sup>301</sup> During the lockdown, the Commission heard that some people in the towers were struggling to access information about the lockdown in a language and a form that they understood.

In its inquiry, PAEC found that there was no prior communication of the lockdown and that delays in communicating with residents, particularly in languages other than English, led to confusion during the lockdown.<sup>302</sup>

**"The hard lockdown was disgusting. The government did not listen to our concerns, nor care about our human rights; rather, they treated us like second-class citizens. Just because we come from migrant and refugee backgrounds does not mean we should be treated differently. The whole situation made me feel like I was not Australian ... I felt like an outsider."<sup>303</sup>**

**Barry Berih, Founder, Young Australian People, and resident of public housing towers**

Unfortunately, the decision to impose the lockdown was not preceded or informed by consultation with multicultural community leaders.<sup>304</sup>

**"I think it would have been preferable. I think it would've been possible had we had another day to get things up and running."**

**Prof. Allen Cheng, Then Deputy Chief Health Officer<sup>305</sup>**

## Monitoring human rights

The Commission worked closely with community legal centres and other community groups to monitor the human rights situation during the lockdown. We heard that some people in the towers were struggling to get the medical and disability supports that they needed, and to leave their apartments for physical and mental health reasons.

One resident, a mother of seven, struggled to access essential items like nappies and milk.<sup>306</sup> Others reported that they received insufficient and culturally inappropriate food, such as a vegetarian family who received meat pies and other residents who received four sausage rolls to last them 48 hours.<sup>307</sup> Residents were concerned about the lack of consultation with them before and during the lockdown and an "overwhelming police presence outside their homes".<sup>308</sup>

Aboriginal support and legal service Djirra told us the effects of the lockdown were felt particularly hard by Aboriginal people:

**"When public housing towers in Melbourne were placed into lockdown, the heavy police presence there placed a particular burden on Aboriginal women, many of whom, because of our history, have a profound mistrust of police and authorities."<sup>309</sup>**

Although the residents' rights to liberty and movement were restricted to prevent the spread of the virus, they retained the right to be treated humanely while they were detained. This meant they retained the right to receive accessible information about the lockdown, as well as the rights to access disability and health services, and to receive necessary items and services such as food, legal assistance, electricity, water and heating.

The Commission produced a fact sheet, 'Your rights in full lockdown', which was translated into 11 community languages and distributed in both written form and audio files, providing information to assist residents, community leaders and public authorities to understand the rights of the people being detained.

## Community resilience and engagement

During the hard lockdown of the public housing towers, local multicultural and multifaith communities demonstrated incredible strength, resilience and resourcefulness, swiftly grappling with addressing community needs in a crisis:

- Residents within the towers translated information about the restrictions and public health measures into 10 written and five oral community languages within 24 hours and distributed this via text and social media.<sup>310</sup>
- The Asylum Seeker Resource Centre's catering enterprise cooked and delivered thousands of culturally appropriate meals to the towers, teaming up with community organisations including Sikh Volunteers Australia, Moving Feast and others.<sup>311</sup>
- The Australian Muslim Social Services Agency (AMSSA) collaborated with a range of organisations including Trades Hall, the Islamic Council of Victoria and others to deliver 5000 food and essential packages. Residents made orders via a 'special order hotline' to enable customised packages to comply with health and religious dietary requirements, enabling 3000 food packages to be delivered.
- AMSSA supported families experiencing extreme financial hardship.
- AMSSA connected with residents via social media, Zoom meetings, surveys and feedback forms to ensure community needs were being met.<sup>312</sup>

Community organisations can provide vital and timely supports via existing networks in culturally appropriate and respectful ways best fitting the needs of their own communities. Empowering community organisations to be part of decision-making, planning and response in an emergency management response ensures they can bring their networks and expertise.

Although community engagement did not happen prior to the lockdown, significant steps were taken to work with the community during the lockdown itself. Three days after the decision to lock down the towers, DHHS took a number of steps to engage with multicultural and multifaith communities impacted on by the decision. On 7 July 2020, with the assistance of the VMC a Community Working Group was established. Co-chaired by the VMC, it included representatives of DHHS and more than 20 multicultural community organisations.<sup>313</sup>

The Victorian Ombudsman reported that this was the first time that community representatives had been included in an emergency management structure in such a way in Victoria and that the group appeared to be effective in identifying and resolving issues raised by communities.<sup>314</sup>

**"The feedback received on the inclusion of community representatives was extremely positive from all the stakeholders and [showed] that this approach of having the community involved in the decision-making processes on the ground could be replicated in future emergency management responses."**

**Victorian Multicultural Commission<sup>315</sup>**

Following the lockdown, in weekly briefings to the Ombudsman and the Commission, DHHS detailed new measures to mitigate the risks of COVID-19 across Melbourne's high-density public housing estates by engaging more closely with residents and community groups through:

- training and employing residents to provide an ongoing 'health concierge' service at all high-rise public housing towers, including welfare checks and other supports
- continuing community working groups to provide advice on approaches to health promotion, messaging and engagement at each site, and to assist in the identification of local issues and risks
- hosting thematic resident-only forums relating to issues such as infection prevention and control, childcare, employment, education and mental health.<sup>316</sup>



## Victorian Ombudsman investigation into the hard lockdown of public housing towers and the Victorian Government response

The Victorian Ombudsman investigated the detention and treatment of the public housing tower residents. The Ombudsman tabled her report in Parliament in December 2020, making conclusions relating to 33 Alfred Street. She formed a clear view that the detention of these people on 4 July 2020, without notice and without sufficient preparation, was not compatible with the right to humane treatment when deprived of liberty protected under the Charter and that proper consideration was not given to human rights when deciding to impose the immediate lockdown.<sup>317</sup> She also concluded that DHHS had acted wrongly by failing to provide people, including those who did not speak English, with timely and accessible notice of the reasons for and terms of their detention.<sup>338</sup>

The Ombudsman further concluded that DHHS had acted wrongly regarding 33 Alfred Street by failing to:

- notify people of their ability to complain about aspects of their treatment under the PHWA
- implement appropriate measures to ensure people had access to fresh air and outdoor exercise
- implement appropriate measures to ensure people were provided with timely and reasonable access to required medication.<sup>318</sup>

### Government response to the Ombudsman's investigation

The Victorian Government accepted the Ombudsman's recommendations 3–9, committing to:

- identify and invest more in the COVID-19 response in high-risk accommodation settings
- evaluate the impact of COVID-19 response measures employed in high risk accommodation settings
- develop training and guidelines on issues including Charter obligations and legislative safeguards for those responsible for exercising emergency detention powers
- improve DHHS capability to perform health emergency management functions by appointing staff with emergency management experience, improving surge capacity arrangements for health emergencies and reinforcing partnerships with service providers
- publish information about how to make a complaint, including on the exercise of emergency powers during the COVID-19 pandemic, and
- work with community leaders and public housing residents to strengthen trust.<sup>319</sup>

The Government has also publicly reported on steps taken to implement these recommendations.<sup>320</sup> The Victorian Government rejected the Ombudsman's findings regarding the lawfulness or legitimacy of the emergency response, stating that it had at all times acted lawfully and within the applicable legislative framework.<sup>321</sup>

The Premier published a statement in response to the report, noting:

**"The immediate response was not perfect – particularly in the very beginning when processes were being established – but there were hundreds of people working day and night to ensure residents were safe and had access to food and medical care.**

**In the days following the lockdown, we implemented lessons we had learnt at Flemington and North Melbourne in other public housing estates and other high-risk accommodation settings including Supported Residential Services."<sup>322</sup>**

During the lockdown and in the weeks following, the Commission welcomed briefings from DHHS in relation to the community-based work it was engaged in to alleviate the pressure on residents and learn from the hard lockdown experience. We also welcomed its implementation of lessons learned.

On 30 June 2021, DHHS reported on the steps taken to implement the Ombudsman's recommendations:

**"An additional \$6.5 million on top of the \$7.5 million announced in last year's budget has been invested to continue to strengthen the Paving the Way Forward community capacity building program at North Melbourne and Flemington and improve social, economic, education and health outcomes for residents and their families."<sup>323</sup>**

**Prior to and since the tabling of the Victorian Ombudsman's investigation into 33 Alfred Street in December 2020, the Department of Families, Fairness and Housing (DFFH) and the Department of Health (DH) have made significant improvements to their COVID-19 readiness and response capabilities.**

**As of 30 June, both departments have either implemented or made strong progress against all of the accepted recommendations in the Ombudsman's report."<sup>324</sup>**

A detailed response to the recommendations may be found at <https://www.dhhs.vic.gov.au/publications/progress-report-33-alfred-street>.

## 9. Workplace gender equality

### At a glance

- Measures taken in response to the COVID-19 pandemic, while necessary to stop community transmission of the virus, had a disproportionate impact on women.
- Commission research found that:
  - The pandemic has exacerbated the already entrenched inequality experienced by women.
  - Women continue to shoulder a disproportionate burden of unpaid caring responsibilities.
  - Many employers continue to view family and caring responsibilities as belonging to women.
  - The gender imbalance in caring responsibilities contributes to increased stress and mental health issues for women.
  - Women and employees with family responsibilities generally report the highest rates of workplace discrimination.
- The COVID-19 crisis has provided an opportunity for positive change and to reset the way we work. As we recover, the Victorian community needs to continue to reflect on the different priorities and opportunities that the pandemic has revealed in relation to gender equality, including the importance of applying a gendered lens in government decision-making.

Gender equality is a fundamental human right. It is protected by the right to equality in the Charter, which provides that everyone is entitled to equal and effective protection against discrimination and to enjoy their human rights without discrimination.<sup>325</sup> Victorian Government public authorities are required to consider and act in accordance with Charter rights including gender equality in their decision-making and policy responses. As the Charter continued to operate during the pandemic in 2020, so did this requirement to consider gender equality issues.

Prior to the COVID-19 pandemic, the Victorian Government had undertaken initiatives to promote gender equality in the workplace and improve the status of women, with Parliament enacting the *Gender Equality Act 2020* and the subsequent appointment of the new Public Sector Gender Equality Commissioner.<sup>326</sup>

In 2020, the government took a range of measures in response to the COVID-19 pandemic that, although necessary to stop community transmission of the virus, had a disproportionate impact on women. In particular, closing schools, childcare

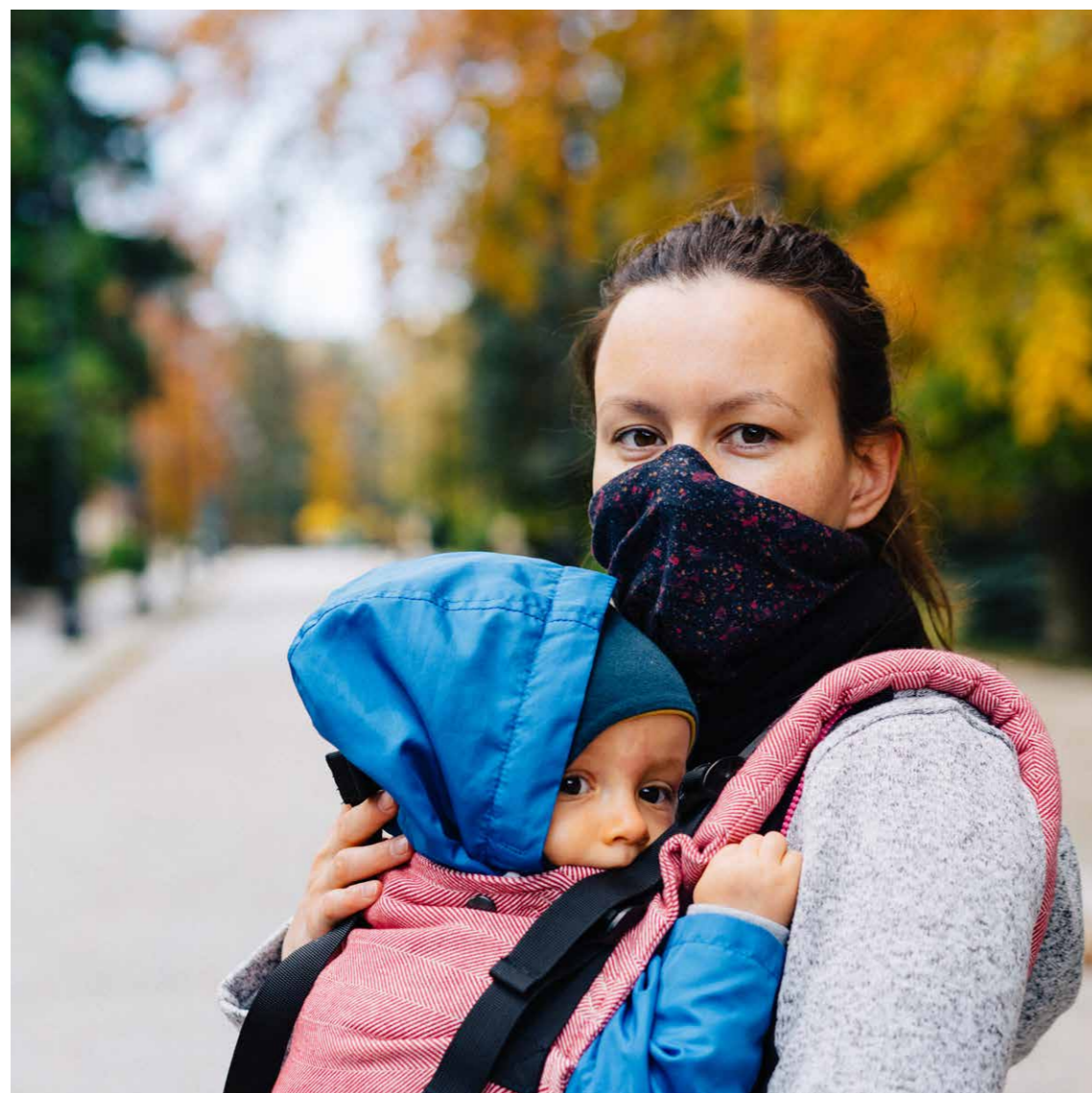


centres and many workplaces exposed and exacerbated existing workplace gender inequalities in relation to employment entitlements, pay systems and the value the community places on feminised work and unpaid labour.

The Commission monitored the gendered impact of many of the COVID-19 response measures in three ways. We:

- closely examined the enquiries and complaints we received during 2020
- conducted focused research into the barriers to gender pay equality in small-to-medium enterprises on how COVID-19 has drawn out and intensified structural inequalities that undermine equal pay, especially for women<sup>327</sup>
- conducted an online survey and in-depth interviews to understand the gendered and other impacts of the widescale and urgent transition to remote work and flexible working arrangements.

Some of the key findings from this work are highlighted in this chapter.<sup>328</sup>



## Commission research: Experiences of flexible work arrangements during COVID-19

The move to remote working and the unprecedented need for flexible work arrangements during COVID-19 have fundamentally changed the way Victorian workplaces operate. This presents both risks and opportunities for women.

In June 2020, the Commission surveyed 1500 people in order to better understand how COVID-19 transformed, and continues to transform, approaches to flexible work and the impacts of this transformation. We surveyed Victorian workers aged 18-plus years who are parents, carers and/or have a disability. We asked:

- How has COVID-19 transformed approaches to flexible work?
- What has worked well and should be continued?
- What have been the areas of concerns and what do we need to guard against in the future?
- What do best practice approaches to flexible work look like post-recovery?

## Key findings

### 1. The pandemic exacerbated the already entrenched inequality experienced by women

During 2020, more women than men lost their jobs or had their working hours drastically reduced, with significant consequences for their pay and economic security.<sup>329</sup> While more men than women reported a pay reduction during the pandemic (29 per cent of men compared with 22 per cent of women), the women who did lose pay lost much more, having their pay cut by 46 per cent on average compared to 30 per cent for men. The cuts rose to an average of 39 per cent among part-timers and 65 per cent for casual employees.

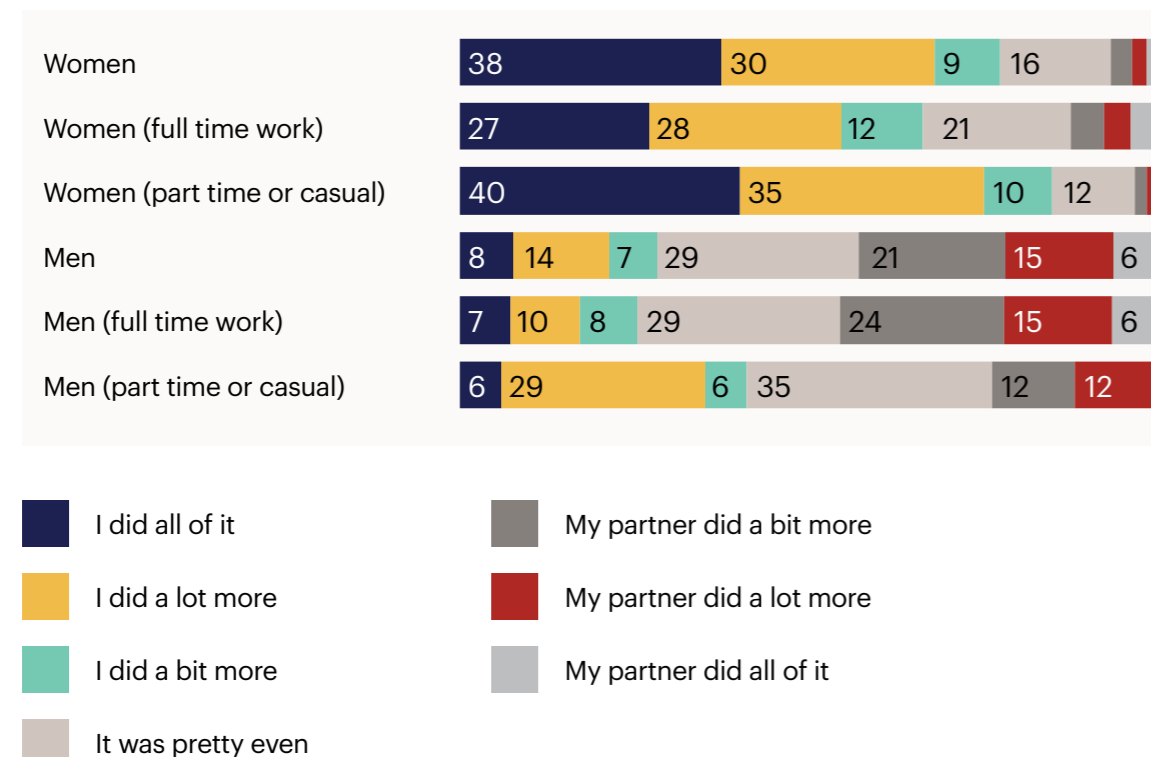
### 2. Women continue to shoulder a disproportionate burden of unpaid caring responsibilities

**78% of women reported they did more homeschooling than their partner. 28% of men reported they did more homeschooling than their partner.**

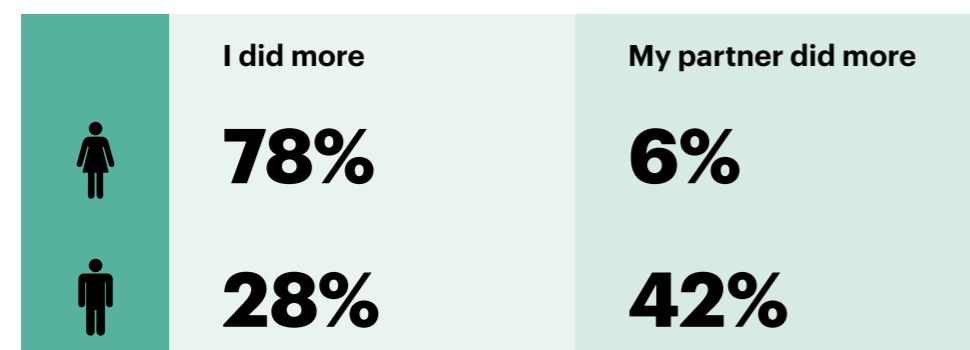
The Commission's survey showed that women in the workforce continued to take on more caring responsibilities, regardless of whether they were employed full time or part time, or had a partner who was working from home during the pandemic. For example, 78 per cent of women reported that they did more homeschooling than their partner, while 28 per cent of men reported that they did more homeschooling. Further, 72 per cent of men reported that their (usually female) partner spent more time with the children than before. Women were

also more likely than men to say that free childcare (introduced by the Australian Government for a limited period) had a “very positive” impact on their work performance during COVID-19 (58 per cent compared to 48 per cent of men). A majority of women (61 per cent) also said that free childcare would have a “very positive” impact on their career progression and ability to enter the workforce if it continued (compared to 48 per cent of men).

### Dividing responsibility for helping children with schoolwork – self vs. partner (%)



### Who helped with homeschooling?



"We had lots of tears in the first few days; there was lots of adjusting to do. I took the road that the kids are under enough pressure – I want to be easygoing in terms of pressure and schooling and parenting. I've been through pressure before, but they haven't. I'm quite a strict parent with certain expectations of schooling and what the kids present, but my expectation in this environment was too high. Right now, I need to focus on the things that make them feel good. Work went on the back burner; I did it after hours or in between and when they were having snacks or lunch ... Helping with schoolwork took four to five hours each day. I didn't do any of my work from 9 to 3; I'd cook dinner and work at night-time. I would answer a couple of calls during the day but maybe do three to four hours after dinner."

Single mother of two children, aged 10 and 13

### 3. Many employers continue to view family and caring responsibilities as women's responsibility

The Commission's survey also showed that, in terms of seeking flexible work arrangements to accommodate additional childcare responsibilities, men were slightly more likely to have a flexible work request refused (18 per cent compared to 14 per cent of women),<sup>330</sup> which reflects the dominant and detrimental view that family and caring responsibilities are for women to manage – and ultimately reinforces the gendered vision of labour and caring responsibilities in the community. Further, 37 per cent of women who did not ask for one or more flexible work options during COVID-19 did so because they thought it would have a negative impact on their job security (compared to 24 per cent of men).

Men	Women
<p>More likely than women to:</p> <ul style="list-style-type: none"> <li>have a request for time off in lieu refused (7% vs. 3%)</li> <li>have options to work from home or part time but not use them (13% vs. 6% and 34% vs. 23%)</li> <li>say that part time was not available for their role (29% vs. 18%)</li> </ul>	<p>More likely than men to say they did not know if it was possible for them to:</p> <ul style="list-style-type: none"> <li>attend personal appointments and make up the hours (10% vs. 5%)</li> <li>receive time off in lieu (16% vs. 9%)</li> <li>compress their working week (18% vs. 11%)</li> </ul>

### 4. The gender imbalance in caring responsibilities contributes to increased stress and mental health issues for women

The Commission survey found that the gender imbalance in caring responsibilities contributes to increased stress and mental health issues for women.



## CASE STUDY

# Working and parenting during the pandemic

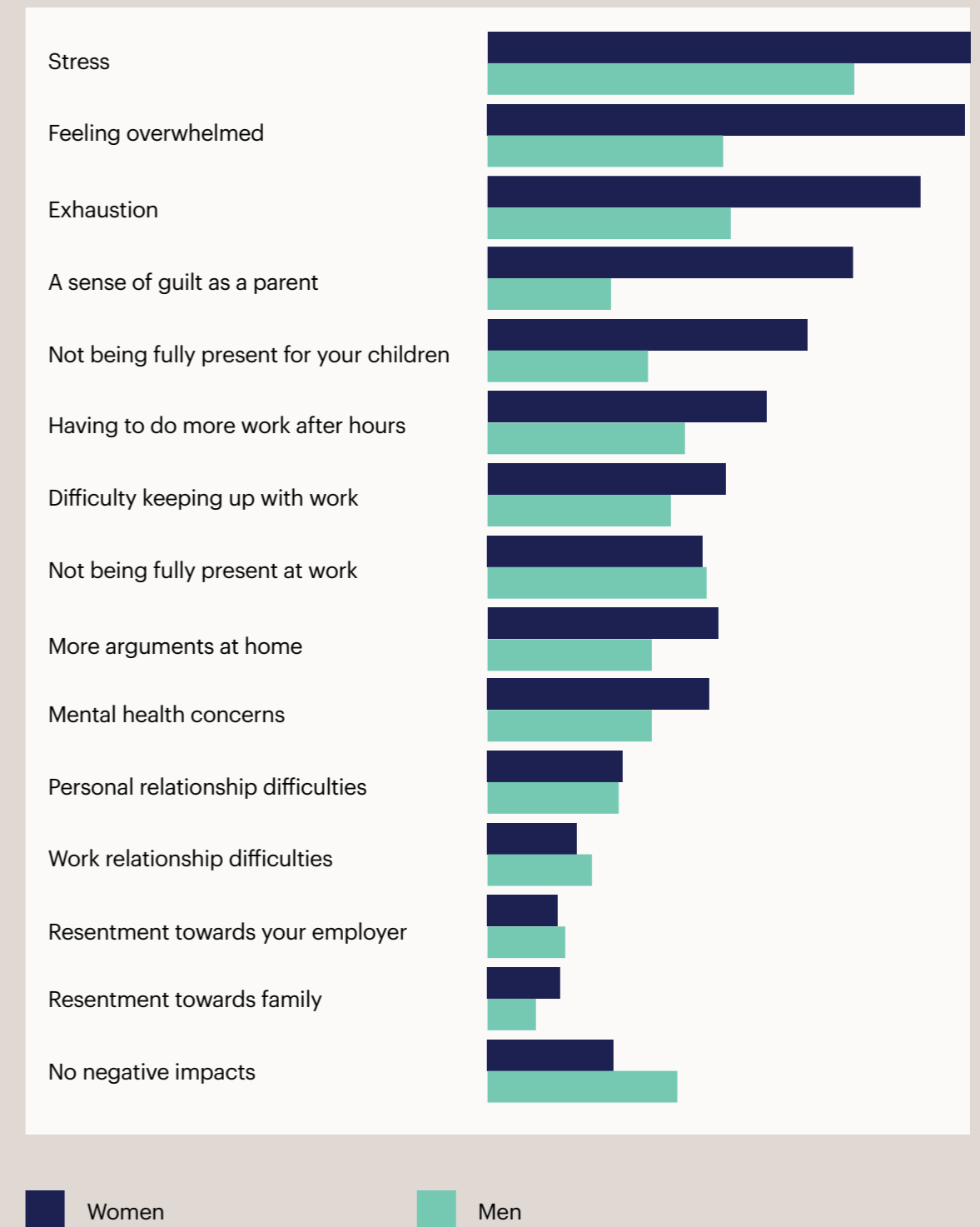
Marielle<sup>331</sup> moved to Australia from South America around 10 years ago and lives in regional Victoria with her husband and three young children. She works four days a week in healthcare administration and is also studying.

During the pandemic, she was able to work from home but her husband was not. She did all of the homeschooling work as well as all of the other domestic work around the home. Not having family here was especially hard:

**"I didn't know if I was getting depressed. The first few weeks I really struggled. We still had to do work from home, as well as look after the kids and keep them busy. Couldn't take the kids anywhere and even if I had to go to the supermarket, I had to wait for my husband to come home; it was very stressful. I ... so when the kids went back to school it felt like it went back to normal – that I could concentrate on one thing at a time. My kids are so little that they don't understand when I need to do work and they do need to be supervised. So I was doing the work late in the evening, sometimes at 10–11 at night."<sup>332</sup>**



## Negative impacts from trying to balance responsibilities (%)



## 5. Women and employees with family responsibilities generally report the highest rates of workplace discrimination

Commission research found that women and employees with family responsibilities continued to experience higher incidences of workplace discrimination during COVID-19.<sup>333</sup> Women are already overrepresented in insecure work and the need to balance work and unpaid carer responsibilities meant that women were having to negotiate greater flexibility from their employers. Stakeholders reported varying employer responses to these requests.<sup>334</sup> If requests were refused, women may have been forced to reduce hours or even resign.

For example, in a complaint to our service a woman told us she had been 15 weeks pregnant and the primary carer of her children when the COVID-19 restrictions came into force. She had asked her employer for flexible work arrangements. Her employer had said she could work three days a week or go on early maternity leave or unpaid leave. The complainant's employer had sent her an email stating she should consider taking a career break.

The precariousness of employment during COVID-19 has likely also limited women's willingness to report workplace discrimination and sexual harassment.

The pandemic has illustrated that flexible working helps reduce workplace inequalities, including the gender pay gap, because women continue to perform the bulk of unpaid work and care duties and so lose out on higher paying and secure roles that fail to offer flexibility:

**"They understand my role as a mum as best they can but unless you've walked in the shoes of a single parent it's hard to understand. But they are flexible. Two of the others have kids but those are quite traditional males where the wife stays home with the children."**<sup>335</sup>

The Commission encourages public authorities to consider these findings when implementing their obligations under section 8 of the Charter. It is also important for employers more broadly, who have a positive duty under the Equal Opportunity Act to eliminate discrimination, sexual harassment and victimisation.<sup>336</sup>

## Gender-equal recovery

In 2020, the pandemic provided an opportunity for positive change and to reset the way we work in order to progress gender equality during the pandemic recovery.<sup>337</sup>

Going forward, duty-holders under the Charter will need to be mindful of how the right to equality is engaged in the context of workplace gender equality, particularly in relation to accommodating requests for flexible work. Employees often seek small adjustments that can make a big difference to their ability to exercise and enjoy the right to equality.

The 2020–21 State Budget includes some important initiatives to counter some of the impact of COVID-19 on women, including gendered job creation, the Secure Work Pilot Scheme, the Women in Construction Program and the Women's Founders Angel Fund, as well as fully funding kindergarten and increasing the availability of before- and after-school care.<sup>338</sup>

The Commission is also pleased that the Victorian Public Sector Commission, as the body providing oversight of all public authorities, is prioritising and promoting the benefits of flexible work.<sup>339</sup> Combined with the Gender Equality Act measures and oversight by the Public Sector Gender Equality Commissioner, this work will help to uphold the right to equality in section 8 of the Charter.

It will also be necessary for the Victorian community to continue reflecting on the different priorities and opportunities that the pandemic has revealed in relation to gender equality, including the importance of applying a gendered lens in government decision-making on issues including cost of childcare:

**"I was lucky I didn't lose my job and had a chance to work from home. Having that extra income was good. We live in a small town, so many people lost their jobs and had to take their kids out of day care. So having the option for free childcare was really helpful. Going back to work, most of my income is going to childcare, so having that help from the government was great. Otherwise, I couldn't really afford to go back to work if the children were still homeschooling.**

**Free childcare would make a huge difference, even though I am happy to pay for childcare as they do an amazing job looking after the kids, and is the reason we can go to work. But it is very expensive. So, if we could have access to a bigger subsidy, it would put a lot more women into the workforce. I don't have other family members here in Australia, so I don't have anyone to look after kids. I have to send my other two now to vacation camp during the school holidays so I can work."**

*Responses to the Commission's Experiences of Flexible Work Arrangements During COVID-19 survey, June 2020*

While the benefits of free, accessible and properly funded childcare are clear, COVID-19 has also shown us that there is a need for greater investment in female-dominated sectors, to more proactively address the gender pay gap, and that employers can do more than previously imagined to support flexible working arrangements. Above all, women's voices – including women's networks and rights organisations – need to be better represented in COVID-19 policy spaces and decision-making.



# Appendices

## Appendix 1: How the Charter operates

### 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 2020.

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 2020.

Parliament	The Parliament of Victoria must assess any new laws to see whether they are consistent with human rights. Parliament must explain which human rights the 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 maintain 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 2: Cases raising or considering the Charter

*AFH v DJM (Residential Tenancies) [2020] VCAT 535*

*Application by Horner [2020] VSCA 85*

*Australian Broadcasting Corporation v Victoria Police & Kehoe [2020] VSC 410*

*Australian Cardiology Services Pty Ltd v Rudd (No 2) [2020] VSC 839*

*BJR v Secretary to the Department of Justice and Community Safety (Review and Regulation) [2020] VCAT 310*

*BLA v Mental Health Tribunal (Human Rights) [2020] VCAT 762*

*Carrafa & Anors v Saxton [2020] FCCA 218*

*Carson (a Pseudonym) v The Queen [2020] VSCA 202*

*Chopra v Department of Education and Training (Review and Regulation) [2020] VCAT 334*

*Clubb v Edwards [2020] VSC 49*

*Defteros v Google LLC [2020] VSC 219*

*Director of Housing v Chau (Residential Tenancies) [2020] VCAT 505*

*Director of Housing v Grigoriadis (Residential Tenancies) [2020] VCAT 1300*

*Director of Public Prosecutions v Dyke [2020] VSC 300*

*Director of Public Prosecutions v Truong & Bui [2020] VCC 806*

*Director of Public Prosecutions v Verduci (Application for trial by judge alone) [2020] VCC 1166*

*Dudley v a Judge of the County Court of Victoria [2020] VSCA 179*

*EHV (Guardianship) [2020] VCAT 501*

*Ellis v Medical Board of Australia (Review and Regulation) [2020] VCAT 862*

*Fiore v Magistrates' Court of Victoria [2020] VSCA 314*

*Freckleton v Victorian Building Authority (Review and Regulation) [2020] VCAT 69*

*Gardiner v Attorney-General [2020] VSC 224*

*Gardiner v Attorney-General (No 2) [2020] VSC 252*

*Gardiner v Attorney-General (No 3) [2020] VSC 516*

*Gebrehiwot v State of Victoria [2020]*

*Giurina v Director of Public Prosecutions & Anor [2020] VSC 1*

*Goode v Common Equity Housing Ltd [2020] VSCA 317*

*Grabski v Beier [2020] VSC 156*

*Haigh v Ryan (in his capacity as Governor of Barwon Prison) [2020] VSC 102*

*Happy Homes Building Group Pty Ltd v Registrar of Titles & Ors [2020] VCC 433*

*HCA v Mental Health Tribunal (Human Rights) [2020] VCAT 332*

*Helmer v The Secretary to the Department of Health and Human Services (Review and Regulation) [2020] VCAT 1309*

*INP v Secretary, Department of Health and Human Services (Review and Regulation) [2020] VCAT 1293*

*Izzo v State of Victoria (Department of Education and Training) [2020] FCA 770*

*Knight v Sellman & Ors [2020] VSC 320*

*Koh v Thomas (Residential Tenancies) [2020] VCAT 591*

*Laszczuk v Bendigo and Adelaide Bank Ltd [2020] VSCA 17*

*Lee v Fair Work Commission [2020] FCA 1204*

*LG v Melbourne Health [2020] VSCA 64*

*Loiello v Giles [2020] VSC 619*

*Loiello v Giles [2020] VSC 722*

*Loiello v Giles (Ruling No 2) [2020] VSC 723*

*LVA v Mental Health Tribunal (Human Rights) [2020] VCAT 364*

*Marijancevic v Page [2020] VSC 68*

*McLean v Racing Victoria Ltd [2020] VSCA 234*

*Minogue v Secretary, Department of Justice and Community Safety [2020] VSC 355*

*MJG (Guardianship) [2020] VCAT 250*

*MLP Developments Pty Ltd v Boroondara City Council [2020] VCAT 437*

*MLQ v Mental Health Tribunal (Human Rights) [2020] VCAT 587*

*Mulder v Victoria Police (Human Rights) [2020] VCAT 428*

*NCX (Guardianship) [2020] VCAT 919*

*North (a Pseudonym) v The Queen [2020] VSCA 1*

*OYN (Guardianship) [2020] VCAT 914*

*Pitman v Victorian Workcover Authority – WorkSafe Victoria (Review and Regulation) [2020] VCAT 487*

*Radman v Open Plan [2020] VSC 318*

*RDH v Mental Health Tribunal (Human Rights) [2020] VCAT 1267*

*Re IH [2020] VSC 325*

*Re James [2020] VSC 602*

*Re LB [2020] VSC 232*

*Roberts v The Queen [2020] VSCA 277*

*Rowson v Department of Justice and Community Safety [2020] VSC 236*

*Russell v Eaton [2020] VSCA 249*

*Russell v Murrindindi Shire Council (No 2) [2020]*

*Salvation Army Housing Victoria v LVM (Residential Tenancies) VCAT 1209*

*Smethurst v Commissioner of Police [2020] HCA 14*

*Taylor v Director of Public Prosecutions [2020] VSCA 142*

*TBV (Guardianship) [2020] VCAT 595*

*THD (Guardianship) [2020] VCAT 677*

*The Queen v The Herald & Weekly Times Pty Ltd & Ors (Ruling No 1) [2020] VSC 616*

*Thorpe v Head, Transport for Victoria & Ors [2020] VSC 804*

*TIR v Mental Health Tribunal (Human Rights) [2020] VCAT 624*

*Treloar v Richardson [2020] VSC 479*

*Truong v Prestige Strata & Property Solutions Pty Ltd (Owners Corporations) [2020] VCAT*

*Unison Housing Ltd v Perkich (Residential Tenancies) [2020] VCAT 1249*

*VBA v Mental Health Tribunal (Human Rights) [2020] VCAT 1085*

*Victorian Taxi Families Inc and Redfield Court Holdings Pty Ltd v Commercial Passenger Vehicle Commission [2020] VSC 762*

*VIJ (Guardianship) [2020] VCAT 760*

*Women's Housing Ltd v ELN (Residential Tenancies) [2020] VCAT 600*

*WQN (Guardianship) [2020] VCAT 814*

*WSX v Mental Health Tribunal (Human Rights) [2020] VCAT 530*

*WUT v Victoria Police [2020] VSC 586*

*XFL v Mental Health Tribunal (Human Rights) [2020] VCAT 377*

*XUV v Director of Housing (Residential Tenancies) [2020] VCAT 314*

*Zeqaj v Deputy Commissioner of Taxation [2020] FCA 1270*

*Zhong v Attorney-General [2020] VSC 302*



# Appendix 3: Key Charter Bills

Bill	Summary	Consideration of human rights by parliament and SARC
<b>Change or Suppression (Conversion) Practices Prohibition Bill 2020</b>	<p>The Bill upholds and protects the human rights of LGBTIQ Victorians.</p> <p>The Commission can receive and respond to reports about LGBTIQ change and suppression practices and conduct investigations of these practices where they may relate to a group and be serious or systemic. This can result in a notice directing a person or organisation to act, or refrain from certain actions. The Commission can accept a written undertaking. Undertakings and notices will be enforceable at the Victorian Civil and Administrative Tribunal.</p>	<p>The Scrutiny of Acts and Regulations Committee (Alert Digest No 13 of 2020) indicated that it would write to the Attorney General seeking further information about the application of the right to privacy and right to freedom of expression of measures implemented by the Bill.</p> <p>Response received (The Hon Jaclyn Symes MP, Attorney-General – Alert Digest No 2 of 2021)</p>
<b>COVID-19 Omnibus (Emergency Measures) Bill 2020</b>	<p>The Bill enables the temporary modification of the application of Victorian laws for the purpose of responding to COVID-19. The temporary measures aim to ensure that health services are not overwhelmed and to give key institutions and essential services greater flexibility to continue to operate or effectively respond to the threat of COVID-19.</p>	<p>The Bill was passed in a day, before SARC produced its Alert Digest.</p> <p>SARC (Alert Digest No 5 of 2020) provided detailed analysis and comments, and sought further information on a number of matters discussed in depth at page 83-84.</p> <p>Response received (The Hon Daniel Andrews MP, Premier – Alert Digest No 2 of 2021)</p>

<b>COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020</b>	<p>The Act allows modifications to the law to continue until 26 April 2021 in response to the COVID-19 pandemic. As tabled, it would have permitted a wide range of authorised officers to pre-emptively detain people based on future non-compliance.</p>	<p>SARC (Alert Digest No 9 of 2020) circulated its Alert Digest and posted submissions on its website. Submissions highlighted areas of the Bill that would potentially unreasonably limit a range of human rights.</p> <p>Members of parliament strongly criticised provisions.</p> <p>House Amendments removed these pre-emptive detention provisions after negotiations between the crossbench and the government.</p> <p>This Act is discussed at pages 38.</p>
<b>Crimes Amendment (Manslaughter and Related Offences) Bill 2020</b>	<p>The Bill introduces a new offence of ‘homicide by firearm’ for cases of manslaughter committed by discharging a firearm. It will also increase penalties for manslaughter and child homicide to 25 years imprisonment and introduce a 13 year ‘standard sentence’ for the homicide by firearm offence.</p>	<p>Derryn Hinch’s Justice Party circulated amendments that the offences be subject to life imprisonment. These were rejected.</p> <p>SARC (Alert Digest No 5 of 2020) stated that the Bill is compatible with Charter rights.</p>
<b>Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020</b>	<p>The Bill proposed to modernise the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> to improve the supervision and management of people found unfit to stand trial or not guilty because of mental impairment. It would implement recommendations of the Victorian Law Reform Commission.</p>	<p>This Bill was second read in the Legislative Assembly on 18 March 2020.</p> <p>SARC (Alert Digest No 5 of 2020) stated that the Bill is compatible with Charter rights.</p>
<b>Family Violence Reform Implementation Monitor Amendment Bill 2020</b>	<p>This is a private members Bill tabled in the Legislative Council by The Hon Edward O’Donohue. It seeks to ensure the genuine statutory independence of the family violence implementation monitor, to perform its work independent of government.</p>	<p>This Bill was second read in the Legislative Council on 16 September 2020.</p> <p>SARC (Alert Digest No 4 of 2020) stated that the Bill is compatible with Charter rights.</p>

<b>Justice Legislation Amendment (Supporting Victims and Other Matters) Bill 2020</b>	The Bill aims to fix changes to the law that were introduced by the government, to permit victim/survivors to self-publish their identity. However, the Bill states that the identities of deceased sexual assault victims should not be published on the grounds that they cannot consent. This would mean the relatives of deceased sexual assault victims would have to obtain a court Order.	<p>A media release of the Hon Jill Hennessy MP, Attorney-General, of 13 October 2020 states that a second tranche of reforms will consider issues, including examination of how the law should apply to the publication of details of deceased victims.</p> <p>The Second Reading Speech of 14 October 2020 indicated that there will be consultation with victim/survivors, family members of deceased victims, and other stakeholders to ensure the right balance is struck.</p> <p>SARC (Alert Digest No 10 of 2020) stated that the Bill is compatible with Charter rights.</p>
<b>Local Government (Casey City Council) Bill 2020</b>	These two Bills will dismiss Casey City and Whittlesea City councils, providing for appointment of administrators in response to recommendations of reports from municipal monitors appointed to the councils.	SARC (Alert Digest No 3 of 2020) referred to parliament the question of whether delaying elections for four years reasonably limited the right to vote and be elected at periodic municipal elections.
<b>Local Government (Whittlesea City Council) Bill 2020</b>	Each of the Bills provide for the next general election for each council to be held in October 2024.	<p>Members of parliament (Clifford Hayes, Catherine Cumming and Samantha Ratnam) sought for the elections to take place earlier.</p> <p>Regarding the Whittlesea City Council Bill, Dr Ratnam expressed concern that the Bill would dismiss a democratically elected local council. This type of proposal is being brought to the Legislative Council with increased frequency, with members given less than 48 hours' notice of significant Bills and little or no time to read the relevant reports. The Bills were not amended.</p> <p>SARC (Alert Digest No 5 of 2020) stated that the Statement of Compatibility and parliament have addressed the matters required to be considered by section 7(2) of the Charter.</p>

<b>Parliamentary Committees Amendment (SARC Protection Against Rights Curtailment by Urgent Bills) Bill 2020</b>	This is a private member's Bill tabled in the Legislative Council by the Hon David Davis MP. This Bill seeks to establish timely examination of Bills that may infringe the Charter. It would require SARC to examine and comment on a draft Bill if it receives a written request from a minister or a sponsor of the draft Bill. SARC could, on its own initiative, consider a draft Bill before it is introduced into parliament.	<p>This Bill was second read in the Legislative Council on 16 September 2020.</p> <p>SARC (Alert Digest No 9 of 2020) considers that the feasibility of processes for greater community consultation in the case of Bills with a significant human rights impact is a matter for the government of the day and should not be mandated by the Charter. SARC noted that the government supports publishing draft statements of compatibility when it releases exposure drafts of Bills for public comment.</p>
<b>Police and Emergency Legislation Amendment Bill 2020</b>	<p>The Bill expands the areas where Protective Services Officers can exercise their powers. This will occur by allowing the Chief Commissioner of Police to declare a range of places to be 'designated places', e.g. areas adjacent to other designated places, thoroughfares to access crowded places like a shopping centre, sporting venue or public transport.</p> <p>A declaration must be necessary for community safety, to provide a policing presence, deter crime and anti-social behavior, or provide reassurance. The Chief Commissioner must also be satisfied that PSOs will be supervised by police officers.</p> <p>The Bill adopts some recommendations of the Royal Commission into Family Violence.</p>	<p>A number of members of parliament (Tim Read, Clifford Hayes, Fiona Patten, Samantha Ratnam) expressed concern regarding having armed PSOs with police powers in more places. PSOs have 12 weeks of training compared to at least the 31 weeks provided to police members.</p> <p>Dr Ratnam stated that: "we have seen consistent mission creep from the original function of PSOs, turning them into the 'police lite' they are today. Today there is essentially no difference in the powers of PSOs and police to question people, to stop and search, and to detain and arrest – including children. But while PSO powers have grown and grown, the training they receive and the prerequisites for recruitment have remained the same."</p> <p>Members of parliament supported aspects of the Bill that adopted recommendations of the Royal Commission into Family Violence.</p> <p>SARC (Alert Digest No 6) of 2020 did not raise any human rights issues and noted that the Bill is compatible with the Charter.</p>



**Public Health and Wellbeing Amendment (State of Emergency Extension and Other Matters) Bill 2020**

The Bill amended the *Public Health and Wellbeing Act 2008* to extend the total timeframe during which a State of Emergency could operate, and State of Emergency declarations could be renewed regarding the COVID-19 pandemic – to 12 months. This was a compromise after critics of the original tabled Bill sought a maximum timeframe of 18 months.

The Legislative Council declared this an urgent Bill and passed it in a single day. The Legislative Assembly passed the legislation three days later.

Lucinda Gaye McLeish MP, Legislative Council, on 18 September 2020 noted: “the swift passage did not allow SARC to consider the Bill, which legislated for sweeping powers that clearly engaged Charter rights in detail, and report in a timely way”.

SARC (Alert Digest 8 of 2020) stated that it would write to the minister seeking information regarding the effect of clauses permitting the COVID 19 emergency declaration to be extended and authorised officers to exercise public health risk and emergency powers.

These issues were raised again by SARC in relation to another Bill (Alert Digest 2 of 2021) and were responded to in March 2021 (Alert Digest 4 of 2021).

This Bill is discussed on page 37.

**Sentencing Amendment (Emergency Worker Harm) Bill 2020**

The Bill:

imposes statutory minimum terms ranging between six months and five years to specific offences

places a reverse onus on people alleged to have been involved in a group attack against emergency workers to prove their involvement was minimal in order to avoid a statutory minimum sentence

prevents an alleged offender from relying on the exception of impaired mental functioning to statutory minimum sentencing where that impairment was substantially caused by self-induced intoxication.

SARC (Alert Digest 4 of 2020) noted that people who committed offences when mandatory or presumptive sentencing did not apply to them may have such sentencing imposed on them.

SARC indicated that it would write to the Attorney-General that this may be incompatible with the right against retrospective criminal penalties, querying whether the clause satisfies the test for reasonable limits in section 7(2) of the Charter.

SARC also observed that the Bill broadens the scope of minimum non-parole periods for adults who intentionally or recklessly injure emergency workers on duty unless a special reason exists not to impose such a minimum or they can prove that their involvement was minor.

The Ministerial Response in Alert Digest 6 noted that the Bill alters the way the sentencing scheme applies to offenders who have already been found guilty. The minimum sentences are within the normal range for such offences.

<b>Spent Convictions Bill 2020</b>	<p>The Bill:</p> <ul style="list-style-type: none"> <li>establishes a scheme for convictions to become spent automatically or on application</li> <li>regulates collection, use and disclosure of a spent conviction in limited circumstances.</li> <li>creates offences for unlawfully disclosing or obtaining spent conviction information, and</li> <li>amends the <i>Equal Opportunity Act 2010</i> to make a spent conviction an attribute upon which discrimination is prohibited.</li> </ul>	<p>SARC (Alert Digest 11 of 2020) noted that a clause may have the effect of barring disclosure of private, non-commercial records of convictions and may prevent disclosure of historical crimes, e.g. in research conducted by academics.</p> <p>SARC indicated that it would write to the Minister seeking further information regarding:</p> <ul style="list-style-type: none"> <li>whether this bar on disclosure is compatible with the right to freedom of expression.</li> <li>whether or not requests for, disclosure and consideration of a person's spent convictions is permitted where a statute permits or requires an entity to consider that person's character or fitness.</li> </ul> <p>The Attorney-General responded (in Alert Digest 3 of 2021), stating that: restriction on disclosure of private, non-commercial records is reasonably necessary to respect the rights and reputations of people whose criminal record information is protected under the Bill.</p> <p>exemptions apply in limited circumstances to agencies who can consider spent conviction information in performance of statutory functions, where legislation requires risk assessments.</p>
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<b>Summary Offences Amendment (Decriminalisation of Public Drunkenness) Bill 2020</b>	<p>The Bill decriminalises public drunkenness, repealing the offence and related powers of arrest.</p> <p>This will mean that no one can lawfully be locked in a police cell just for being drunk in public. It paves the way for public drunkenness to be treated as a health issue and people to be supported. The death of Yorta Yorta woman, Tanya Day had reignited calls for such reform.</p>	<p>Jill Hennessy MP noted in the Second Reading speech that the Bill promotes the right to equality before the law, the right to life and the right to liberty and security in reducing overrepresentation in custody. Aboriginal and Torres Strait Islander peoples, people experiencing homelessness or sleeping rough, and people from Sudan and South Sudan are disproportionately impacted by public drunkenness laws.</p> <p>In a media release, the Attorney-General, committed to continue to work closely with Aboriginal and Torres Strait Islander communities, health experts and other stakeholders, including police, to establish a health model that focuses on support and safety, not punishment.</p>
<b>Wage Theft Bill 2020</b>	<p>The Bill introduces a new criminal offence of wage theft for employers who withhold employee entitlements from their employees dishonestly.</p> <p>It will hold employers to account for deliberate underpayment or non-payment of wages and other employee entitlements.</p> <p>The Bill establishes a Wage Inspectorate to investigate and prosecute the offences.</p> <p>Victoria is the first Australian jurisdiction to introduce such a model.</p>	<p>Sam Hibbins MP observed that wage theft is most prevalent in hospitality and retail. Three out of four workers in hospitality have reported being underpaid at one time or another. In the food delivery industry, drivers and riders suffer about \$300 a week in wage theft. These industries employ many young people, migrant workers and temporary visa holders and are often female dominated and much lower paid, which reinforces inequality. Vulnerable worker groups may struggle to speak up for their entitlements in the face of a more powerful employer.</p>



# Endnotes

- 1 Senate Select Committee on COVID-19, Department of Prime Minister and Cabinet, Australian Government, *Inquiry into the Australian Government's Response to the COVID-19 Pandemic* (Whole of government submission, 12 May 2020) 3, 10 <<https://www.aph.gov.au/DocumentStore.ashx?id=34176972-783f-44d5-820d-087bb8051cda&subId=680501>>.
- 2 Prime Minister, Minister for Health and Chief Medical Officer, 'Advice on Coronavirus' (Media release, 13 March 2020) <[www.pm.gov.au/media/advice-coronavirus](http://www.pm.gov.au/media/advice-coronavirus)>.
- 3 Governor-General and Minister for Health 'Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Cth)', 18 March 2020 <[https://nswbar.asn.au/uploads/pdf-documents/biosecurity\\_emergency.pdf](https://nswbar.asn.au/uploads/pdf-documents/biosecurity_emergency.pdf)>.
- 4 Senate Select Committee on COVID-19, (n 1).
- 5 Premier of Victoria, 'State of Emergency Declared in Victoria over COVID-19' (Media release, 16 March 2020) <[www.Premier.vic.gov.au/state-emergency-declared-victoria-over-covid-19](http://www.Premier.vic.gov.au/state-emergency-declared-victoria-over-covid-19)>.
- 6 Department of Health, Australian Government, 'Coronavirus (COVID-19) at a Glance Infographic Collection' (Webpage, 31 December 2020) <[https://www.health.gov.au/sites/default/files/documents/2020/12/coronavirus-covid-19-at-a-glance-31-december-2020\\_0.pdf](https://www.health.gov.au/sites/default/files/documents/2020/12/coronavirus-covid-19-at-a-glance-31-december-2020_0.pdf)>.
- 7 Ibid.
- 8 *Charter of Human Rights and Responsibilities Act 2006*, s 31.
- 9 *Loiello v Giles* [2020] VSC 619 [252].
- 10 Ibid [232]–[235].
- 11 *Rowson v Department of Justice and Community Safety* [2020] VSC 236 (1 May 2020), [98].
- 12 Ibid [13].
- 13 Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities* (Report, September 2015) 225. <[https://s3.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7762/Full\\_Report\\_-\\_From\\_Commitment\\_to\\_Culture\\_-\\_The\\_2015\\_Review\\_of\\_the\\_Charter\\_of\\_Human\\_Rights\\_and\\_Responsibilities\\_Act\\_2006.pdf](https://s3.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7762/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf)>.
- 14 *Ombudsman Act 1973*, Part IIAC, s 13G.
- 15 Data provided to the Commission by the Victorian Ombudsman on 21 December 2020.
- 16 IBAC, 'Data Snapshot: COVID-19 Related Complaints and Notifications Provided by IBAC to the Commission' (6 January 2021) 1, 2.
- 17 *Victoria Police Act 2013*, s 169.
- 18 IBAC, 'Data Snapshot' (n 16) 3.
- 19 *Public Health and Wellbeing Act 2008*, s 8, 198(7), 198(8).
- 20 PAEC, Parliament of Victoria, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Majority report, 2 February 2021) xi.
- 21 Ibid v–x.
- 22 PAEC, Parliament of Victoria, *Inquiry into the Victorian Government's Response to the COVID-19 pandemic* (Webpage, 2 March 2021) <<https://www.parliament.vic.gov.au/paec/article/4499>>.
- 23 PAEC Majority report (n 20), 283–4.
- 24 AEC, Parliament of Victoria, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Minority report, 2 February 2021) 50.
- 25 Ibid 45–46.
- 26 Ibid 49, 50.
- 27 Ibid 51.
- 28 Board of Inquiry, Parliament of Victoria, *COVID-19 Hotel Quarantine Inquiry: Final Report and Recommendations*, Vol II (Report, December 2020) 76 <[https://www.parliament.vic.gov.au/file\\_uploads/0387\\_RC\\_Covid-19\\_Final\\_Report\\_Volume\\_2\\_v21\\_Digital\\_h1LPjbnZ.pdf](https://www.parliament.vic.gov.au/file_uploads/0387_RC_Covid-19_Final_Report_Volume_2_v21_Digital_h1LPjbnZ.pdf)>.
- 29 Ibid 34.
- 30 Ibid 100.
- 31 Ibid 76.
- 32 Premier of Victoria, 'A Stronger Quarantine Program To Protect What We've Built, (Media Release, 30 November 2020) <<https://www.premier.vic.gov.au/stronger-quarantine-program-protect-what-weve-built>>.
- 33 Advice provided to the Commission by DJCS, 17 August 2021.
- 34 Brendon Murphy and Tahlia Ferrari, 'Bail in the time of COVID-19' (2020) *Criminal Law Journal*, 247, 260, 263. <<https://www.holmeslist.com.au/content/upload/Bail%20in%20the%20Time%20of%20COVID-19%20Criminal%20Law%20Journal%202020.pdf>>.
- 35 Flatten the curve – reduce the rate of transmission of COVID-19. With a reduction in the incidence rate, the curve highlighted on graphs tracking the rate of transmission became flat, with a sharp reduction in cases. This 'curve' is based on modelling and shows the likely number of people contracting COVID-19 over a period of time.  
The University of Melbourne, 'Flattening the curve to help Australia's hospitals prepare' (Webpage) <<https://pursuit.unimelb.edu.au/articles/flattening-the-curve-to-help-australia-s-hospitals-prepare>>.
- 36 Premier of Victoria (n 5). The Minister for Health may declare a State of Emergency arising out of any circumstance causing a serious risk to public health: *Public Health and Wellbeing Act 2008* ss 3,198.
- 37 *Public Health and Wellbeing Act 2008*, s 200(1)(a).
- 38 Ibid, s 200(1)(b).
- 39 Ibid, s 200(1)(c).
- 40 Ibid, s 200(1)(d).
- 41 Authorised officers with suitable training and qualifications can be appointed by the Secretary to DJCS or by councils under ss 30 and 31 of the PHWA. These are not defined in detail in the PHWA. DHHS staff or council employees (e.g. health workers performing duties to support quarantine) may be authorised to exercise such powers under the PHWA.  
Legislative Council, Parliament of Victoria, Second Reading Debate, 13 October 2020 (the Hon Jaclyn Symes MP) 3044, 3053. Police officers, PSOs and WorkSafe inspectors are authorised to have public health risk powers.
- 42 *Public Health and Wellbeing Act 2008*, ss 168, 169, 175, 176.
- 43 Ibid, s 200(1)(d).
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