

How Victoria's COVID-19 Omnibus (Emergency Measures) Act 2020 engages with human rights

The COVID-19 pandemic has required the Victorian Government to make rapid and temporary changes to our laws and regulations. On 24 April, the Victorian Parliament passed the *COVID-19 Omnibus (Emergency Measures) Act 2020*, introducing a package of temporary reforms as part of the state's response to the pandemic.

These changes arising from the Act are wide-ranging and are likely to affect all Victorians, whether directly or indirectly. In these extraordinary times, it is important to make sure that any impact on human rights is closely monitored, but especially any impacts for those who are already at risk of having their human rights restricted or breached.

This register of rights will keep track of COVID-19 measures relevant to the criminal justice system and rights covered by Victoria's Charter of Human Rights and Responsibilities. It provides an overview of the key reforms that impact substantially on prisoners, children and young people who have been detained, and people interacting with the criminal justice system. The register sets out the new provision and its effect, the human rights that are relevant and the government's justification for any limitation of those rights.

Rights protected in Victoria's Charter of Human Rights and Responsibilities

 Equality before the law	 Life	 Protection from torture and inhuman treatment	 Freedom from forced work	 Freedom of movement	 Privacy and reputation	 Freedom of thought, religion and belief
 Freedom of expression	 Peaceful assembly, freedom of association	 Protection of families and children	 Taking part in public life	 Cultural rights	 Property rights	 Liberty and security
 Humane treatment when deprived of liberty	 Rights of children in the criminal process	 Fair hearing	 Rights in criminal proceedings	 Not to be tried or punished more than once	 Retrospective criminal laws	

Provisions	Rights engaged	Effect	Justification	Safeguards
Sunsetting				
Most of the new provisions are temporary and will no longer have effect in six months, including any regulations made pursuant to new powers in the Act.				
Oversight				
Oversight body	All rights protected by the Charter	The Act does not provide for independent scrutiny of the powers relied on under the Act and their impact.	<p>The Public Accounts and Estimates Committee is tasked with reviewing and reporting to the parliament on:</p> <ul style="list-style-type: none"> 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. <p>The committee is to report to parliament:</p> <ul style="list-style-type: none"> on or before 31 July 2020 and 31 October 2020; or such other date/s as the committee decides. 	N/A
Legislative override				
Legislative override	 <p>Fair hearing</p>  <p>Rights in criminal proceedings</p>	<p>Allows the Governor-in-Council, on the recommendation of the Attorney-General, to make emergency regulations to override justice-related laws and regulations, for example, to change:</p> <ul style="list-style-type: none"> arrangements relating to court and tribunal proceedings statutory time frames procedural matters concerning bail and sentencing. 	<p>These powers are intended to allow justice legislation to be amended quickly to respond to COVID-19, reduce unnecessary pressure on justice agencies and allow for the effective administration of justice during the pandemic.</p>	<p>The Attorney-General will only be able to recommend introduction of override regulations where they are consistent with the Chief Health Officer's advice. Any regulations must also be reasonable in responding to the COVID-19 pandemic, to protect the health, safety or welfare of persons in relation to the administration of justice or law, or to provide for the effective or efficient administration of justice, or conduct of integrity bodies.</p> <p>Regulations are limited to process or procedural matters and subject to disallowance by parliament.</p> <p>The regulations must cease operation within six months of the COVID-19 Omnibus Act commencing, if not revoked earlier.</p> <p>The regulations cannot override the Charter of Human Rights and Responsibilities.</p>

Provisions	Rights engaged	Effect	Justification	Safeguards
Criminal justice system				
Remand	 Liberty and security  Fair hearing  Rights in criminal proceedings	The Magistrates' Court can specify a remand period (the time before someone accused of a crime is brought back before the court) of greater than eight days without the consent of the parties.	This reform allows for greater flexibility in remanding an accused person and extends the period before which they are required to bring a person remanded before a court if it is not reasonably practicable to have the matter returned to court within eight days.	The provision does not apply to vulnerable people (children, Aboriginal and Torres Strait Islander peoples or a 'vulnerable adult' as defined in the Bail Act 1977). The extension of remand must be consistent with the interests of justice.
Use of audio link and audio-visual link technologies	 Equality before the law  Fair hearing  Rights in criminal proceedings	These provisions allow for adults, children and young people who are in custody to attend court events remotely by audio-visual link and audio link, rather than in person.	This will reduce the number of people required to attend court buildings and the number of accused people who are transported to court. This will assist courts to hear proceedings safely while practising social distancing and minimising face-to-face interactions.	The court can still order physical attendance if it considers it is in the interests of justice. The court must consider the accused's ability to comprehend proceedings, to communicate with their legal representative and give instructions. Children and young people will not be required as the default to attend by audio-visual link. The court must also consider the child's capacity to comprehend proceedings when assessing whether it should order a audio-visual link.
Electronic monitoring	 Privacy and reputation  Privacy and reputation	The Magistrates' Court can now impose electronic monitoring conditions on community corrections orders (CCOs) at sentencing.	These provisions allow people subject to CCOs in the community to be monitored. This is designed to ensure community safety and the safety of corrections officers and is a less restrictive option than imprisonment.	N/A
Judge-only trials	 Equality before the law  Fair hearing  Rights in criminal proceedings	<p>The Supreme and County Courts can make an order that a trial is to be heard by a judge alone (without a jury).</p> <p>Fitness to stand trial hearings and special hearings under the <i>Crimes (Mental Impairment and unfitness to be tried) Act 1997</i> may also be heard by a judge alone. There is also provision to extend the time frame in which special hearings must be heard.</p>	<p>These are temporary measures to enable appropriate criminal trials to be heard while jury trials are suspended as a response to COVID-19.</p> <p>This does not remove jury trials from the criminal justice system. Rather, it gives the courts another option to hear indictable matters.</p> <p>These changes will avoid delay for criminal mental impairment matters, which will often involve vulnerable accused persons.</p> <p>The time frame amendments will allow special hearings to be conducted as soon as reasonably practicable, but within 6 months of the court finding that the accused is not fit to stand trial, and not likely to become fit within the next 12 months.</p>	<p>The court must consider if it is in the interests of justice to do so, and the accused must provide their consent for the trial to be heard by a single judge.</p> <p>Special hearings under the <i>Crimes (Mental Impairment and unfitness to be tried) Act 1997</i> will only be conducted by a judge alone if the court is satisfied it is in the interests of justice.</p>

Provisions	Rights engaged	Effect	Justification	Safeguards
Prisons				
Mandatory quarantine for new prisoners	 Freedom of thought, religion and belief  Taking part in public life  Humane treatment when deprived of liberty  Rights in criminal proceedings  Not to be tried or punished more than once	The secretary or governor of a prison can lawfully isolate new prisoners for up to 14 days.	<p>The isolation is intended to be protective and is time-limited. It is considered by the government to be proportionate to the significant risk posed by COVID-19.</p> <p>The government considers the limitation on rights arising out of these powers mitigated by the supports provided to prisoners including in-cell phone calls, video-based visits, books and educational material, as well as prison and health staff, including Aboriginal liaison officers and specialist mental health services, regularly checking in and monitoring wellbeing.</p>	<p>Before doing so, prisons must consider the safety, protection and welfare of the prisoner including any vulnerability or health condition, as well as the safety and welfare of any person. They must also consider the safety, management, good order and security of prison.</p> <p>The Act also provides that, where necessary, a prisoner must be observed regularly by staff.</p>
Restrictions on movement and placement of prisoners	 Privacy and reputation  Protection of families and children  Humane treatment when deprived of liberty  Rights in criminal proceedings  Not to be tried or punished more than once	<p>The secretary or governor of a prison is given powers to separate, quarantine or isolate a prisoner from some or all other prisoners.</p> <p>Governors can establish separate cells, units or areas of the prison for occupancy by some prisoners. They may also lock down parts of the prison by restricting the movement and placement of prisoners in one or more prisons to secure a part of a prison from entry, exit or use.</p>	<p>The powers are provided for the purpose of preventing, detecting or mitigating the risk of COVID-19 or related health risks.</p>	<p>Before making an order, the governor must consider the safety, protection and welfare of the prisoner including any vulnerability or health condition, as well as the safety and welfare of any person. They must also consider the safety, management, good order and security of prison.</p> <p>Before making an order to separate, quarantine or isolate a prisoner, the governor must consider as far as reasonably practicable any medical or psychiatric condition of the prisoner; the vulnerability of the prisoner; any risk that the prisoner may pose to his or her own welfare or the welfare of other prisoners; or any physical limitations or disability, and the prisoner's cultural background.</p> <p>The period of any order must not exceed that necessary to prevent, detect or mitigate the risk of COVID-19 or related health risks.</p>

Provisions	Rights engaged	Effect	Justification	Safeguards
Prisons (continued)				
Restrictions on visitors	 Freedom of movement  Privacy and reputation  Freedom of thought, religion and belief  Freedom of expression  Protection of families and children  Liberty and security  Humane treatment when deprived of liberty  Fair hearing  Rights in criminal proceedings	<p>The secretary or governor of a prison is given powers to restrict a person (including an Ombudsman officer) from entering or the manner in which they enter or conduct a visit. These provisions also allow prisons to order a person to leave.</p> <p>A person who fails to comply will be guilty of an offence.</p>	<p>The government considers the limitation on rights caused by the exercise of these powers mitigated by the discretion to allow alternative means of communication for prisoners – for example, telephone, videoconference, etc.</p> <p>The government considers the limitation of rights proportionate to the risk posed by COVID-19 and states that no less restrictive measures are available.</p>	<p>The secretary or governor has discretion to permit communication between prisoners and visitors via alternative means including telephone, videoconference and written communication.</p>
Visits by lawyers	 Fair hearing  Rights in criminal proceedings	<p>A lawyer may only enter a prison and visit a prisoner if the governor has permitted the visit to be conducted using physical barriers or other modifications to create distancing.</p>	<p>The government considers that no less restrictive means are available to address the risk posed by COVID-19.</p>	<p>The secretary or governor also has discretion to permit communication between prisoners and lawyers (who are also considered ‘visitors’) via alternative means including telephone, videoconference and written communication.</p>
Medical assessments	 Fair hearing  Rights in criminal proceedings	<p>The secretary or governor of a prison may direct that a prisoner be medically examined, assessed, tested or treated in relation to preventing, detecting or mitigating the risk of COVID-19 or other related health risks.</p> <p>Staff will also be permitted to give orders or directions to facilitate such arrangements.</p>	<p>The purpose of the medical procedures is to protect the safety of the prisoner and other people inside the prison, in line with a prisoner’s existing statutory rights to access to reasonable medical care and treatment.</p>	<p>The voluntary and informed consent of a prisoner is required for these powers to be exercised.</p>

Provisions	Rights engaged	Effect	Justification	Safeguards
Youth justice facilities				
Isolation of children and young people	 Protection from torture and inhuman treatment  Freedom of movement  Freedom of thought, religion and belief  Peaceful assembly, freedom of association  Protection of families and children  Cultural rights  Liberty and security  Humane treatment when deprived of liberty	<p>Youth justice custodial staff are provided with specific power to isolate or quarantine a child or young person detained in the centre for the purpose of detecting COVID-19 or any other infectious disease or preventing or mitigating the transmission of COVID-19 or any other infectious disease within the centre.</p>	<p>Isolation under these powers is not deliberate mistreatment and is intended to be protective, not punitive.</p> <p>Influenza is another infectious disease which has similar symptoms to COVID-19. The health risks posed by COVID-19 are likely to be worsened if a person has simultaneous infection.</p> <p>The government considers these measures are necessary and proportionate to protect public health and to be treated humanely by preventing contraction of COVID-19 and other infectious diseases for children, young people and frontline staff.</p>	<p>The exercise of isolation powers will be based on medical evidence and for the minimum necessary period to detect, prevent or mitigate transmission, cannot exceed 14 days and must be to serve the purpose of protecting public health.</p> <p>There are a range of safeguards in place, including an entitlement to regular outdoor time and medical and mental health treatment for those who are isolated. Detainees will also be required to be supervised or observed at regular intervals (at least every 15 minutes) .</p> <p>Those isolated will maintain their existing entitlements under the Children, Youth and Families Act, unless it is deemed not safe.</p>