



**Victorian Equal Opportunity
& Human Rights Commission**

Staying at home, curfew

**SELECTIONS FROM THE 2020 REPORT ON
THE OPERATION OF THE CHARTER OF
HUMAN RIGHTS AND RESPONSIBILITIES**

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.⁷² 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.⁷³

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:

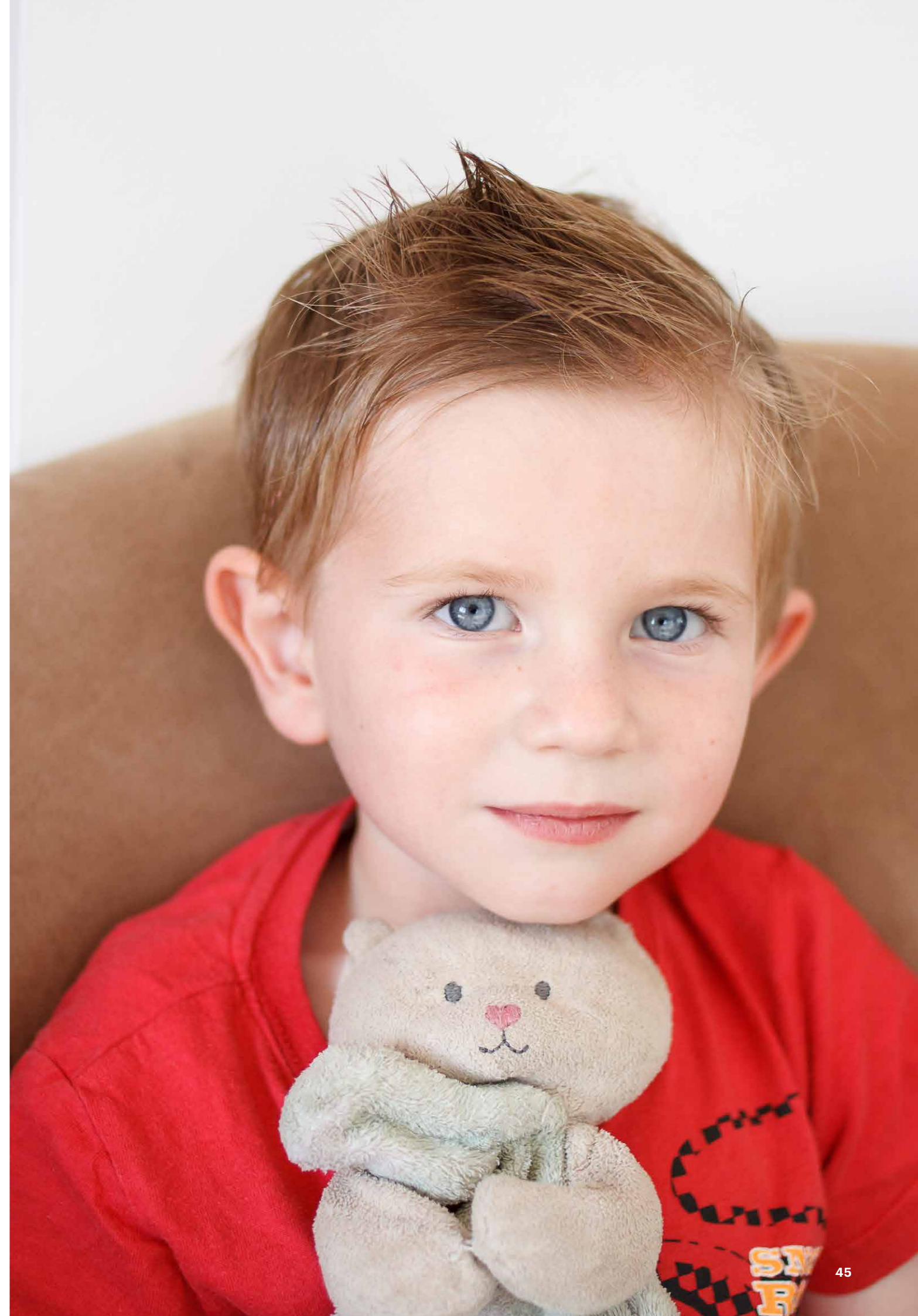
- people were only permitted to leave the home for one of four reasons:
 - work or study
 - exercise (for up to one hour per day)
 - medical reasons
 - emergencies
- people were required to wear masks in all settings outside the home (unless an exception applied)
- a curfew operated between 8pm and 5am
- 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).⁷⁴

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.⁷⁵

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.⁷⁶

"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*.⁷⁷ 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.⁷⁸ 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.⁷⁹

In September, a Melbourne resident challenged the legality of the curfew in the Supreme Court in the case of *Loiello v Giles*⁸⁰ (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 curfew⁸¹

CASE STUDY

*Loiello v Giles*⁸²

Background

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

Ms Loiello sought a declaration that the direction imposing the curfew under the PHWA was against the law and invalid. Ms Loiello 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 Loiello continued with the case as she remained concerned the curfew would be reintroduced by the Premier.⁸³

Facts

Ms Loiello 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 Loiello 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 Loiello 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 Loiello'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.⁸⁴ However, he did not consider that Ms Loiello'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.⁸⁵

In considering whether any limitation of Ms Loiello'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 Loiello's human rights caused by the curfew were proportionate to the purpose of protecting public health.⁸⁶ 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.⁸⁷

Endnotes

- 72 Deputy Chief Health Officer, 'Directions from Deputy Chief Health Officer (Communicable Disease) in Accordance with Emergency Powers Arising from Declared State of Emergency' (Stay at Home Directions, 30 March 2020) 2 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202003/Stay%20at%20Home%20Directions%20.pdf>>.
- 73 Ibid 4.
- 74 Ibid 2.
- 75 Public Health Commander, 'Directions from Public Health Commander in Accordance with Emergency Powers Arising from Declared State of Emergency' (Stay at Home Directions, Restricted areas, No 12, 16 August 2020) 3, 6–7 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202008/Stay%20at%20Home%20Directions%20%28Restricted%20Areas%29%20%28No%2012%29%20-%2016%20August%202020.pdf>>.
- 76 Premier of Victoria, 'Statement from the Premier' (Statement, 6 September 2020) <<https://www.dhhs.vic.gov.au/updates/coronavirus-covid-19/statement-Premier-0>>.
- 77 Loielo v Giles (n 9).
- 78 Premier of Victoria, (n 59, n 76) On 9 September 2020, the time was amended to 9pm.
- 79 Victorian Equal Opportunity and Human Rights Commission, Statement on the metropolitan Melbourne curfew – balancing rights and restrictions, (Web page, 17 September 2020) <<https://www.humanrights.vic.gov.au/news/statement-on-the-metropolitan-melbourne-curfew-balancing-rights-and-restrictions/>>.
- 80 Loielo v Giles (n 9).
- 81 Ibid [95].
- 82 Loielo v Giles (n 9).
- 83 Ibid, [29].
- 84 Ibid, [216].
- 85 Ibid [217].
- 86 Ibid, [21].
- 87 Ibid.

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