



**Victorian Equal Opportunity
& Human Rights Commission**

Protest, the policing response

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



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 Police⁹³

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.⁹⁴ 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.⁹⁵

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.⁹⁶ Twenty-six protesters were fined \$1652 each for breaching the Stay at Home Directions.⁹⁷ Protest organiser Christopher Breen was arrested for 'incitement to riot' under the *Crimes Act 1958*.⁹⁸ The matter was later discharged in the Magistrates' Court due to insufficient evidence⁹⁹ and Mr Breen was issued with the same fine as the other protesters.¹⁰⁰

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.¹⁰¹

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)¹⁰² in relation to anti-lockdown protests during August and September.¹⁰³

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.¹⁰⁴

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 Project¹⁰⁵

→ Criminalising the organisation of protests

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

The Hon Daniel Andrews, Premier¹⁰⁶

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,¹⁰⁷ 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".¹⁰⁸ Police Accountability Project Principal Solicitor Gregor Husper said he believed the arrest was part of an "overzealous police response" to the pandemic.¹⁰⁹

The crime of incitement carries heavy penalties including, in this case, a fine of up to \$20,000.¹¹⁰ 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.¹¹¹

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.¹¹² Between 1 March and 30 December 2020, 38,390 COVID-19 fines were issued.¹¹³

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.¹¹⁴ This had been developed and rolled out from late 2019 in order to support police to understand their obligations under the Charter.¹¹⁵ 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.¹¹⁶

"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."¹¹⁷

- 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.¹¹⁸

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.¹¹⁹

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.¹²⁰

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found that a breach was not clear and unambiguous based on the criteria above, the public infringement notice was withdrawn.¹²¹ For example, all notices issued to children 14 years and under were withdrawn and, where possible, replaced with cautions or warnings.¹²²

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.¹²³

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.¹²⁴ 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.¹²⁵

In January 2021, it was reported that police were being instructed to hand out cautions for unpaid infringements, rather than proceed with charges.¹²⁶ 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.¹²⁷

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.¹²⁸ 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.¹²⁹ 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.¹³⁰

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.¹³¹ 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.¹³²

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)*,¹³³ 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 Peoples¹³⁴ and other multicultural and multifaith communities.¹³⁵

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.¹³⁶

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.¹³⁷

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.¹³⁸

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 Service¹³⁹

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]".¹⁴⁰

On 20 July 2020 the COVID Policing Australia Coalition, a collaboration of legal and human rights advocacy organisations and academics,¹⁴¹ 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.¹⁴² 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.¹⁴³

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-19.¹⁴⁴

"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.¹⁴⁵

Contact us

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