



**Victorian Equal Opportunity
& Human Rights Commission**

Emergency and disaster measures to protect lives and health

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



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',³⁵ giving the health system the best chance of continuing to function effectively should cases rise exponentially during the pandemic.³⁶

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 Victoria³⁷
- restricting people's movement within the emergency area³⁸
- preventing entry into the emergency area³⁹
- any direction reasonably necessary to protect public health.⁴⁰

'Authorised officers'⁴¹ 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 questions⁴²
- 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.⁴³

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.⁴⁴ Powers of detention under the PHWA contain safeguards including written notice to the Chief Health Officer and a review of detention every 24 hours.⁴⁵

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-19.⁴⁶ 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.⁴⁷

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.⁴⁸

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”.⁴⁹

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).⁵⁰ 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.⁵¹

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,⁵² 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.⁵³

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.⁵⁴
- SARC’s minority report challenged the Bill as a significant violation of human rights and highlighted the lack of judicial oversight or review mechanisms.⁵⁵
- 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.⁵⁶
- 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.⁵⁷
- The Institute of Public Affairs particularly opposed the power given to authorised officers to detain without accountability or oversight, based on subjective criteria.⁵⁸

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 Disaster⁵⁹ 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 2020.⁶⁰
- Victoria had experienced 11,557 confirmed positive cases of COVID-19 and 671 new cases were identified the previous day.⁶¹
- 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.⁶²

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.⁶³ 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.⁶⁴

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.⁶⁵ The minister stated that the government “needed the legislation to ensure it had clear power to impose and enforce the curfew and new rules”.⁶⁶

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.⁶⁷ Case numbers continued to decline and, on 8 November 2020, the Premier decided not to renew the State of Disaster.⁶⁸

→ 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.

Endnotes

- 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).
- 44 Ibid s 9.
- 45 Ibid s 200(6). There are safeguards that mean that an authorised officer must explain why it is necessary to detain the person and that it is an offence to refuse; give written notice to the Chief Health Officer; and review, at least once every 24 hours, whether continuing to detain the person is reasonably necessary.
- 46 *Public Health and Wellbeing Act 2008*, s 200(1)(b) and (d).
- 47 *Public Health and Wellbeing Act 2008*, Extension of Declaration of a State of Emergency, s 198(7)(b)–(c) <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202012/Signed%20Extension%20of%20Declaration%20of%20State%20of%20Emergency%20-%206%20December%202020.pdf>>.
- Justice Connect, *How the Victorian Government’s Emergency Restrictions on COVID-19 (Coronavirus) Work* (Webpage, 6 December 2020) <https://justiceconnect.org.au/resources/how-the-victorian-governments-emergency-restrictions-on-coronavirus-covid-19-work/#_ftnref4>.
- 48 State Government of Victoria, Parliamentary Debates, Legislative Council, 1 September 2020, 2450, 2453 (Jenny Mikakos) <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2020/Legislative_Council_2020-09-01.pdf>.
- 49 ‘Victorian Coronavirus Cases Rise by 148 as State Records Eight Further COVID-19 deaths’, *ABC News* (online, 25 August 2020) <<https://www.abc.net.au/news/2020-08-25/victoria-coronavirus-cases-rise-by-148-as-state-records-8-deaths/12592086>>.
- 50 *Public Health and Wellbeing Amendment (State of Emergency Extension and Other Matters) Act 2020*, ss 1, 5.
- 51 Kristen Hilton, Commissioner, Victorian Equal Opportunity and Human Rights Commission, ‘Extending the State of Emergency is a Necessary Step in the COVID-19 Response’, (Web page, 1 Oct 2020) <<https://www.humanrights.vic.gov.au/news/extending-the-state-of-emergency-is-a-necessary-step-in-the-covid-19-response/>>.
- 52 Parliament of Victoria, Parliamentary Debates, Legislative Council, 18 September 2020, 2453 (Lucinda Gaye McLeish) <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2020/Legislative_Assembly_2020-09-18.pdf>.
- 53 Kristen Hilton (n 51).
- Victorian Equal Opportunity and Human Rights Commission, *6 Key Principles to Guide the Victorian Government’s Response to COVID-19* (Webpage, May 2020) <<https://www.humanrights.vic.gov.au/resources/6-key-principles-to-guide-the-victorian-governments-response-to-covid-19>>.
- 54 SARC, *Alert Digest* (Digest No 9 of 2020) 12.
- 55 SARC, *Alert Digest* (Digest No 9 of 2020) 47 (Minority report).
- 56 Hugh de Kretser, Human Rights Law Centre, ‘Controversial Proposed COVID Detention Powers Should be Scrapped’ (Media release, 28 September 2020) <<https://www.hrlc.org.au/news/2020/9/27/controversial-proposed-covid-detention-powers-should-be-scrapped>>.
- 57 Victorian Bar Association, ‘Submission to the Scrutiny of Acts and Regulation Committee on the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020’ (Submission, 6 October 2020) 5 <https://www.parliament.vic.gov.au/images/stories/committees/sarc/submissions/COVID19_Omnibus_emergency_measures/06-10-20_Victorian_Bar.pdf>.
- 58 SARC, *Alert Digest* (Digest No 9 of 2020) (n 55).
- 59 Premier of Victoria, ‘Statement on Changes to Melbourne’s Restrictions’ (Statement, 2 August 2020) <<https://www.Premier.vic.gov.au/statement-changes-melbournes-restrictions>>.
- 60 Kelsie Iorio, ‘Melbourne Enters New Coronavirus Lockdown. Here are the Key Points from Premier Daniel Andrews’, *ABC News* (online, 8 July 2020) <<https://www.abc.net.au/news/2020-07-07/melbourne-lockdown-daniel-andrews-key-points/12431708>>.
- 61 Anne Twomey, ‘Explainer: What is a “State of Disaster” and What Powers does it Confer?’ *The Conversation* (online, 2 August 2020) <<https://theconversation.com/explainer-what-is-a-state-of-disaster-and-what-powers-does-it-confer-143807>>.
- DHHS, ‘Coronavirus Update for Victoria’ (Webpage, 2 August 2020) <<https://www.dhhs.vic.gov.au/coronavirus-update-victoria-02-august-2020>>.
- 62 Parliament of Victoria, ‘Report to Parliament on Declaration of State of Disaster – Coronavirus (COVID-19) Pandemic’ (Report under s 23(7) of *Emergency Management Act 1986* (Vic)) (Report 1, September 2020) 4 <https://www.parliament.vic.gov.au/file_uploads/Finalised_-_Parliamentary_Report_on_State_of_Disaster_-_for_lodgement_t7NCOGDv.pdf>. *Emergency Management Act 1986*, s 23.>.
- 63 Yara Murray-Atfield and Joseph Dunstan, ‘Melbourne Placed under Stage 4 Coronavirus Lockdown, Stage 3 for Rest of Victoria as State of Disaster Declared’, *ABC News* (online, 2 August 2020) <<https://www.abc.net.au/news/2020-08-02/victoria-coronavirus-restrictions-imposed-death-toll-cases-rise/12515914>>.
- 64 Premier of Victoria (n 59).
- 65 Parliament of Victoria Report, (n 62) 2, 8.
- 66 Yara Murray-Atfield, ‘Victoria has Enacted a State of Disaster to Enforce Coronavirus Restrictions. Here’s What That Means’, *ABC News* (online, 2 August 2020) <<https://www.abc.net.au/news/2020-08-02/victoria-coronavirus-state-of-disaster-explained/12516570>>.
- 67 Premier of Victoria, ‘Statement from the Premier’ (Media release, 26 October 2020) <<https://www.Premier.vic.gov.au/statement-Premier-79>>.
- 68 Premier of Victoria, ‘Statement from the Premier’ (Media release, 8 November 2020) <<https://www.premier.vic.gov.au/sites/default/files/2020-11/201108%20-%20Statement%20From%20The%20Premier.pdf>>.
- 69 *Emergency Management Act 1986*, s 23(1).
- 70 Ibid s 23. Under section 23(6), State of Disaster powers can be in place for up to one month, but this period can be extended.
- 71 Ibid s 24(1).

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