



**Victorian Equal Opportunity
& Human Rights Commission**

The Charter in operation, public policy decision- making and positive changes

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

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,⁸ 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.⁹ 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.¹⁰

- **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.¹¹ 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.¹²

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:¹³

- 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.¹⁴
- 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.

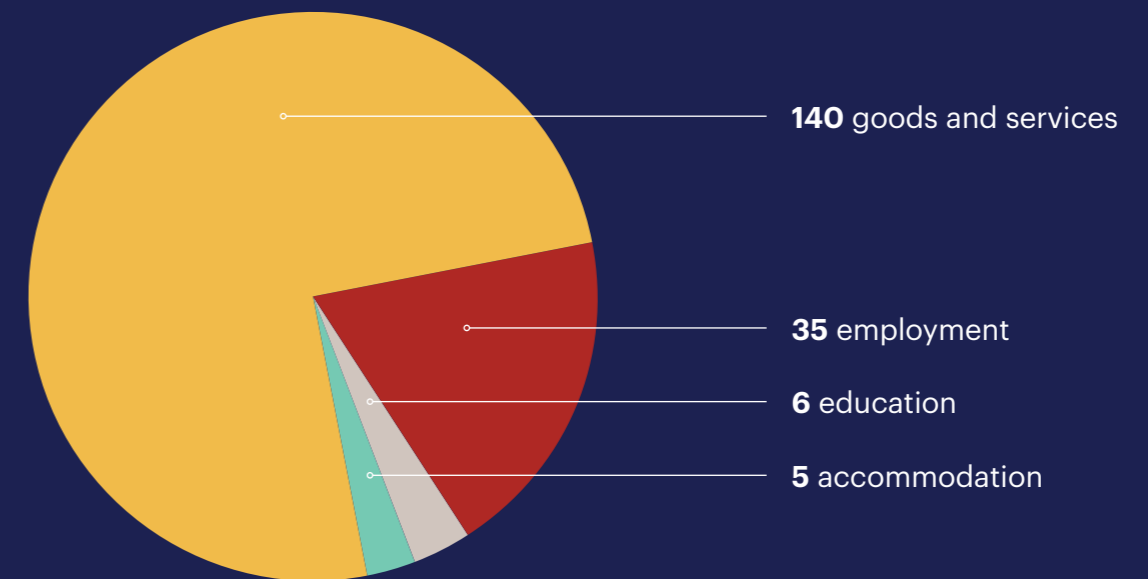
By far the largest number of COVID-related complaints were of disability discrimination, brought by people who were unable to wear a mask and who were denied entry to retail shops and health care settings, despite having a lawful exemption from wearing a mask under the Chief Health Officer's orders.

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:



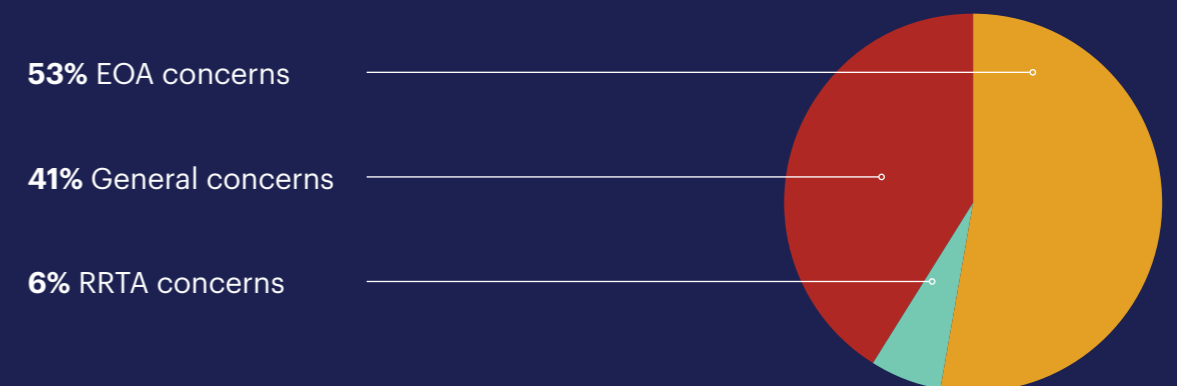
Note: People sometimes made complaints on the basis of more than one attribute, or in relation to more than one area of life.

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 2020.¹⁵ 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.¹⁶ 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).¹⁷

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.¹⁸ 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 provision¹⁹ 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.²⁰

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.²¹

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

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.²³ 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 directions²⁴ and the accountability of decision-making.²⁵

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.²⁶

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.²⁷

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.²⁸

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.²⁹ 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.³⁰

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.³¹

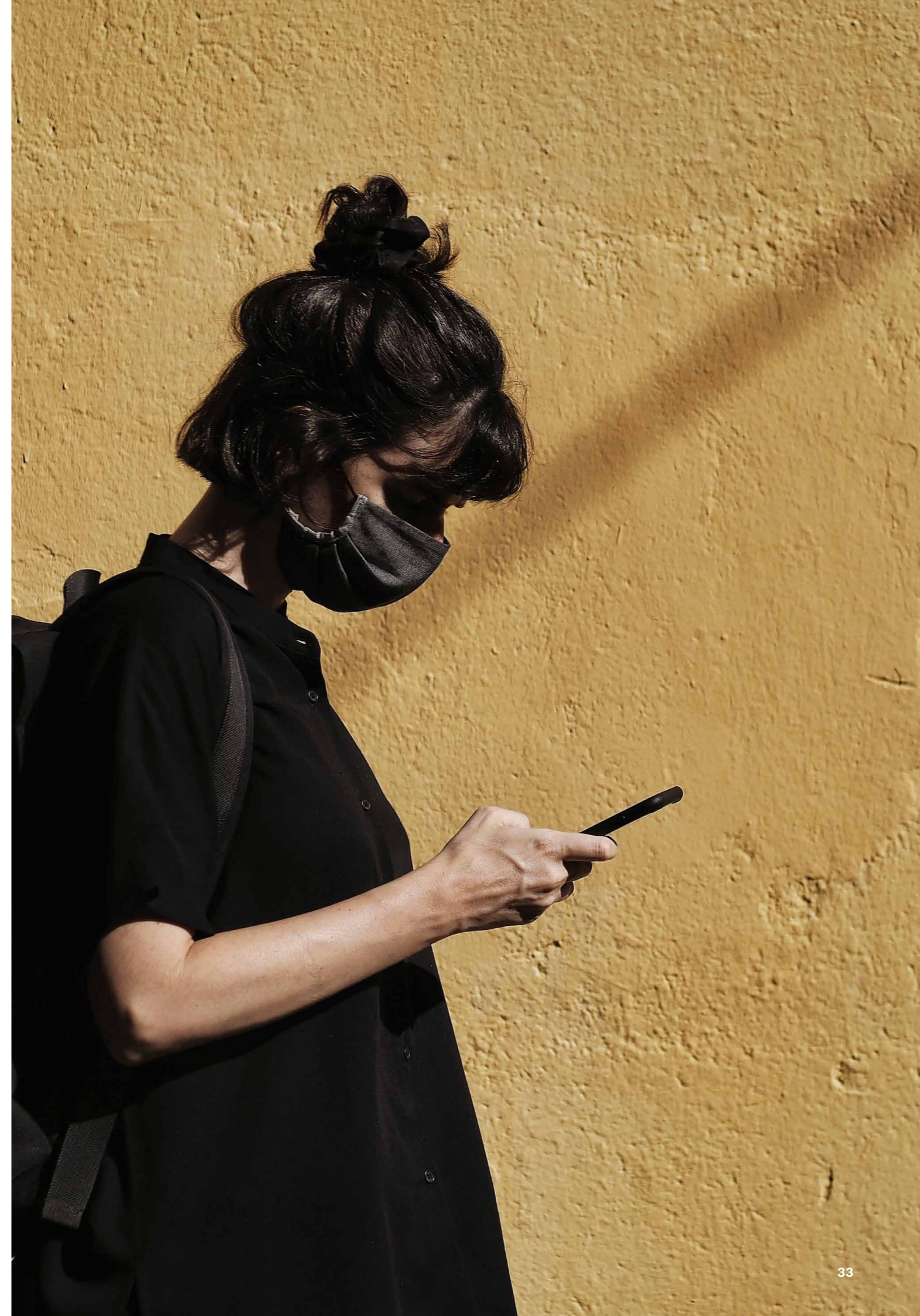
The interim and final reports did not provide any detailed analysis of what is required under the Charter, for example, necessary measures to uphold the right to humane treatment when deprived of liberty.

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.³² 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.³³
- 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.³⁴
- 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.



Endnotes

- 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.ap-southeast-2.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>.
- 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>>.

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