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A Quick Reference Guide for Criminal Lawyers in Victoria during the COVID-19 Pandemic

Introduction

This COVID-19 quick reference guide (QRG) for criminal lawyers in Victoria during the COVID-19 pandemic takes into account some of the fast-moving developments that have occurred in March and April 2020. It is designed as a starting point for criminal lawyers in Victoria seeking further information about the scope and nature of federal and state government powers during times of public emergency and potential disorder. This QRG does not contain all the criminal law on public health or public order but provides a survey of some of the primary legislative instruments relevant to the current circumstances.

The focus of this QRG is on Victorian state and federal public order and law enforcement powers that may be used (or have been used already) in response to the global viral pandemic of COVID-19 in the State of Victoria. Similar laws apply in other States and Territories but there are some differences that apply on the state level.

In this edition we have added some in-depth analysis of the applicable criminal law, as well as some guidance on relevant human rights principles to help lawyers consider the proportionality of government responses.

The rule of law is fundamental to a civilised society. It is even more important during times of widespread uncertainty or panic. By providing this resource, the authors hope to assist criminal lawyers in Victoria to keep check on the fair, reasoned, and just application of emergency powers.

These powers provide governmental agencies with the special authority they need to maintain public safety in extraordinary times. However, some of these legal powers — which are by their very definition "extraordinary" — have been introduced without publicly available prosecutorial or police guidance so it is not yet known how they will be used.

If these powers are disproportionate or misused they have the potential to erode public confidence, over-criminalise the public and diminish democratic freedoms which are otherwise taken for granted. It is especially important in times of emergency that government and law enforcement authorities remain conscious of their legal limits. This is so that persons in Australia are left to be as free as possible whilst still allowing the government to perform its important functions of maintenance of public health and public order.

Each legislative instrument which follows is hyperlinked and briefly summarised. Within each summary some (but not all) of the relevant coercive powers and criminal offences are identified.

Summary of Australia's Legal Structure for Public Health Emergencies

Traditionally, in Australia public health legislation has been the domain of the states and territories.[1] This is because the states enjoy plenary legislative power, while the federal legislature is constrained by the Australian constitution. There is no specific head of power in the Australian constitution dealing with public health, although the federal parliament does acquire some limited legislative power over public health emergencies through the quarantine power and incidentally through the trade and commerce power. In more recent years, the federal parliament has also invoked the foreign affairs power and the nationhood power to introduce special coercive powers that are highly relevant to the current COVID-19 pandemic.

In 2015 the federal government acquired certain special powers in relation to the control of human diseases under the Biosecurity Act 2015 (Cth) (which replaced the Quarantine Act 1908 (Cth)). In addition, all states and territories have signed the National Health Security Agreement (2008). The Agreement supports the National Health Security Act 2007 (Cth), which gives effect to the World Health Organization's International Health Regulations (2005). These Regulations require Australia to "develop multi-level capacities in the health sector to effectively manage public health threats". The objectives of the National Health Security Act include the provision of a national system of public health surveillance to enhance the response to public health events of national significance, such as, the occurrence of certain communicable diseases.

Despite the advent of the federal National Health Security Act in 2007 and the federal Biosecurity Act in 2015, the National Health Security Agreement still recognises that state and territory governments have "primary responsibility for the public health response" to public health events within their own jurisdictions, while the Commonwealth government has "primary responsibility for international border surveillance and public health events occurring at international borders."

The Australian Health Protection Principal Committee is the key decision-making committee in national

health emergencies. It is comprised of all state and territory Chief Health Officers and is chaired by the Australian Chief Medical Officer.

Through this system the states and territories, having residual legislative powers in relation to health, assume primary responsibility for the management of public health emergency control. This includes the penal enforcement mechanisms which give effect to legal requirements and prohibitions which can become enlivened during times of a public health emergency. The primary legislative instrument in Victoria relevant to public health emergencies is the Public Health and Wellbeing Act 2008 (Vic). There are equivalent Acts (albeit with differences) in each of the Australian states and territories.

Biosecurity Act 2015 (Cth)

Key Points

- The Biosecurity Act 2015 (Cth) (BSA) provides the federal legislative framework for the Australian government to manage biosecurity risks, including "the risk of contagion of … listed human diseases" (s 4).
- On **21 January 2020**, COVID-19 was designated as a "listed human disease": Biosecurity (List Human Diseases) Determination 2016.
- On **18 March 2020**, the Governor-General made a **declaration** under s 475 of the BSA that a "human biosecurity emergency" exists: see Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (The Declaration).
- The Declaration gives the Minister for Health expansive powers to issue any directions (s 478) and determine any requirements (s 479) the minister considers necessary to combat the spread of COVID-19. Subsection 475(4) requires that the human biosecurity emergency period last no longer than the minister considers necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia, or in any case, not longer than 3 months. The Governor-General may extend a declaration indefinitely (with each extension being for no longer than 3 months) if the minister remains satisfied that the conditions that required a declaration of a human biosecurity emergency continue (s 476).
- The declaration **is currently in force for 3 months from 18 March 2020.**
- The Minister for Health has, so far, made four determinations in relation to the COVID-19 crisis:
  - — Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 (18 March 2020).
  - — Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (25 March 2020).
  - — Biosecurity (Human Health Response Zone) (Swissotel Sydney) Determination 2020 (25 March 2020).
  - — Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020 (26 March 2020).

Criminal Offences (Biosecurity)

- The primary offence provision which gives the minister's emergency powers their force is s 479 of the Biosecurity Act. A person who fails to comply with a direction or requirement determined by the minister may commit a federal offence punishable by up to 5 years imprisonment or 300 penalty units (ie, $63,000). The offence is an "indictable offence triable summarily" (see **s 4G** and **s 4J** of the Crimes Act 1914 (Cth)).
- Section 636 of the Biosecurity Act contains another potentially relevant criminal offence provision; that of "hindering compliance with the Act". This provision contains two "sub-offences". First, it is an offence for a person to hinder another person who is performing functions or duties, or exercising powers, under the Act. Second, it is an offence for a person to hinder or prevent another person from complying with a requirement in the Act, or from complying with a direction given under the Act. The penalty for this offence (when charged as a criminal offence) is up to 2 years imprisonment or 120 penalty units (ie, $25,200), or both. The offence is an "indictable offence triable summarily" (see **s 4G** and **s 4J** of the Crimes Act 1914 (Cth)).
- The above are just two examples of many criminal offences found in the Biosecurity Act. Biosecurity officers are given extensive powers in a range of different scenarios related to biosecurity risks. Many of these powers are enforceable through criminal sanction.
- The sentencing options open to a sentencing judge or magistrate are those in the Crimes Act 1914 (Cth), and the sentencing considerations are those found at s 16A of that Act. A Commonwealth "penalty unit" is currently $210.

Infringements

- The Biosecurity Act includes an infringement notice scheme comprising of 52 infringement notices which can be issued across numerous environments such as airports and seaports. For example, in the airport context, a biosecurity officer is authorised to issue an infringement notice to a person for:
  - s 532(1): knowingly providing false or misleading information or omitting information when asked; or
  - s 533(1): knowingly producing a false or misleading document, including your Incoming Passenger Card;
- Infringement notices provide an administrative method for dealing with certain breaches of the law and are typically used for low-level offences. An infringement notice provides an alternative to prosecution for an offence and to proceedings for a civil penalty order. More information on the Infringement Notice Scheme.

Civil Penalties

- The Biosecurity Act includes a number of civil penalty provisions. Contravention of a civil penalty provision does not result in imprisonment or a criminal conviction. A civil penalty order can be obtained from a court and direct that a person pay a pecuniary penalty for the contravention of the civil penalty provision.
- Section 521 expressly provides for executive officers of companies to be personally liable for civil penalties in certain circumstances where the company contravenes a civil penalty provision.
- One example of a criminal offences which can alternatively be dealt with by way of civil penalty is the s 636 offence discussed above (hindering compliance with the Act). In that case, when dealt with in the civil jurisdiction, a penalty of up to 120 penalty units can be imposed (up to $25,200).

Analysis (General)

- The emergency powers that are given to the minister under the Biosecurity Act are incredibly broad.
- Concerns about lack of scrutiny of legislative and regulatory measures in the current climate have been raised at auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/. Even prior to the current circumstances, some legal scholarship on government interference with liberty during a pandemic had argued that while a few state jurisdictions (such as Victoria) have adopted provisions which protect civil liberties, the Commonwealth and remaining states lack crucial safeguards, and that government intrusion on individual liberty to achieve public health objectives could only be acceptable when these powers are balanced by accountability and procedural fairness.[2]
- One example of the significant derogation of fundamental rights that the Biosecurity Act brings is s 635, which overrides the privilege against self-incrimination (cf the Victorian PHWA s 212). This derogation applies in biosecurity emergencies, for example, through s 450 and s 451, which empower the federal minister or their delegate to require a person to provide information in relation to the biosecurity emergency. The person is compelled to provide the information, and risks a maximum penalty of 5 years imprisonment or 300 penalty units ($63,000). The person is compelled to comply with these provisions regardless of whether the information may incriminate the person. Such provisions represent a significant departure from the protections ordinarily afforded to citizens under the criminal law.
- By ss 477 and 478, the powers include *any* requirement that *the minister* is satisfied is necessary to prevent or control the emergence, establishment or spread of the declaration listed human disease in Australia where the requirement is likely to be effective, is appropriate and adapted to its purpose, and is no more restrictive or intrusive than is required in the circumstances.
- Determinations made under Biosecurity Act 2015 (Cth) are not disallowable by parliament (s 477(2)) and are stated to apply "despite any provision of any other Australian law" (s 477(5)).
- The only apparent check on the power that is relevant is that the determinations cease to apply at the end of the human biosecurity emergency period, which is three months from the date of the declaration under the Act (18 March 2020).
- The minister is empowered to impose general requirements on people entering or leaving specific places, to restrict or prevent the movement of people within places and to evacuate places.
- Under s 60 specific officers can make a human biosecurity control order to require individuals to do or not do certain things, such as providing information, restricting movement, isolation, decontamination and/or treatment.

- There is no requirement for a person to actually be infected or for the specified officer to reasonably believe or suspect that a person is or may be infected for a control order to be issued.
- If a person does not consent to a control order, s 72 provides a power for the Director of Human Biosecurity (the chief medical officer) to compel them to comply.

Analysis (Elements)

- The process of analysing and determining the elements of a given federal criminal offence is an exercise that many criminal lawyers find challenging. The provisions of the Biosecurity Act are no exception. What follows is an illustration of how such a process can be done. The suggested element breakdowns below should not be taken to be authoritative. In practice, if there is some uncertainty when dealing with a federal offence, criminal defence lawyers should not hesitate to contact the prosecutor at an early stage in order to enquire about how the prosecution intends to state the elements of the offence.
- The starting point for element analysis is to recall that Chapter 2 of the Commonwealth Criminal Code has "codified" the process of element analysis of all federal criminal offences. All federal offences are made up of "physical elements" and corresponding "fault elements".
- The Biosecurity Act has an added complication to element analysis; that is the concept of a "conduct rule provision". This concept effectively imports the physical elements from a "rule provision" into the offence provision itself, rather than having all the physical and fault elements together within the one offence provision (see s 534). The concept of the "conduct rule provision" applies, for example, to the offence of "hindering compliance with the Act" under s 636. It therefore appears that the offence under s 636 is made up of the following elements:

  (1) The person engages in conduct (**physical element** of *conduct* — see s 4.1 of the Criminal Code)
  (2) The person engages in the conduct intentionally (**fault element** of *intention* — see s 5.6(1) of the Criminal Code)
  (3) The conduct hinders or prevents another person in one of the ways mentioned in either s 636(1)(a) or s 636(1)(b) (**physical element** of *result* — see s 4.1 Criminal Code (Cth))
  (4) The person is reckless to the fact that the conduct is hindering in the manner described above (**fault element** of *recklessness* — see s 5.6(2) of the Criminal Code)

  Note: "recklessness" means that the person "was aware of a substantial risk that the result will occur … and it was unjustifiable to take the risk" (s 5.4 Criminal Code).

- The offence of "hindering compliance with the Act" was recently prosecuted in the County Court of Victoria in the case of *DPP (Cth) v EB Ocean* [2019] VCC 2072. In that case a body corporate was charged with serious and deliberate offending and was fined $80,000 on a plea of guilty. The facts of the case involved a small family business importing a consignment of frozen prawns from China that contained a virus. The offending behaviour involved hindering Biosecurity Officers on two occasions from making inspections of the prawn consignments.
- As discussed above, failing to comply with an emergency direction or requirement made by the minister is a criminal offence pursuant to s 479. That offence appears to be made up of the following physical and fault elements:

  (1) A requirement or determination under subs 477(1) or s 478(1) applies to the person (**physical element** of *circumstance* — see s 4.1 of the Criminal Code (Cth)).
  (2) The person is reckless to the fact that the conduct contravenes the requirement or determination (**fault element** of *recklessness* — see s 5.6(2) of the Criminal Code).

  Note: "recklessness" means that the person "was aware of a substantial risk that the circumstance existed" (s 5.4 of the Criminal Code).

  (3) The person engages in conduct (**physical element** of *conduct* — see s 4.1 of the Criminal Code (Cth))

  Note: "engages in conduct" means do an act or omit to perform an act which was required by law to be performed.

  (4) The person engaged in the conduct intentionally (**fault element** of *intention* — see s 5.6(1) of the Criminal Code).

  Note: "recklessness" means that the person "was aware of a substantial risk that the circumstance existed … and it was unjustifiable to take the risk" (s 5.4 of the Criminal Code).

  (5) The conduct contravenes a requirement or determination (**physical element** of *circumstance* — see s 4.1 of the Criminal Code (Cth)).
  (6) The person is reckless to the fact that the conduct contravenes the requirement or determination (**fault element** of recklessness — see s 5.6(2) of the Criminal Code).

Note: "recklessness" means that the person "was aware of a substantial risk that the circumstance existed" (s 5.4 of the Criminal Code).

- It is worth noting that the minister's determination / direction is not the offence-creating provision. The offence is in s 479, however, if a minister's determination / direction purports to impose a positive duty on a person to do something, if that requirement is not adhered to the determination / direction is likely to qualify as a "law of the Commonwealth" for the purposes of s 4.3 of the Criminal Code (Cth).[3] This means that a failure to perform the positive act could constitute conduct by "omission".
- Criminal prosecutions under the Biosecurity Act are dealt with by the Commonwealth DPP and are rare. The CDPP's annual reports indicates that in 2017–18 there were 16 charges under the Act dealt with in the summary jurisdiction and no indictable charges. In 2018–19 there were nine summary charges and one indictable charge dealt with. There are currently no reported cases on the legal databases of prosecution under s 479.

Summary Table — Biosecurity Act 2015 (Cth)

Section	Nature and Scope of Power	Criminal Offence
s 478 BSA	The Health Minister may give any direction (to any person) necessary to prevent the spread of COVID-19. "Directions" might include regulating movement of persons and closing premises.	A person who fails to comply with a direction given under this section may commit an offence under s 479 BSA. **The maximum penalty is 5 years imprisonment or 300 penalty units (ie, $63,000)**. The offence is an "indictable offence triable summarily" (see s 4G and s 4J of the Crimes Act 1914 (Cth)).
s 477 BSA	The Health Minister may determine any **requirement** necessary to prevent the spread of COVID-19. "Requirements" include requirements placed on people entering, leaving, and evacuating specified places.	A person who fails to comply with a direction given under this section may commit an offence under s 479 BSA. **The maximum penalty is 5 years imprisonment or 300 penalty units (ie, $63,000).** This offence is an "indictable offence triable summarily" (see s 4G and s 4J of the Crimes Act 1914 (Cth)).
s 60 BSA	A **human biosecurity control** order can be imposed on an individual if the individual may have a "listed human disease" (eg, COVID-19). Such an Order can result in measures such as vaccination and isolation being imposed on that individual.	A person who fails to comply with a biosecurity measure imposed under a control order may commit an offence under s 107 of the BSA. **The maximum penalty is 5 years imprisonment or 300 penalty units (ie, $63,000)**. This offence is an "indictable offence triable summarily" (see s 4G and s 4J of the Crimes Act 1914 (Cth)).
s 450 BSA	Failure to comply with request for **information** in biosecurity emergency.	**The maximum penalty is 5 years imprisonment or 300 penalty units (ie, $63,000)**. This offence is an "indictable offence triable summarily" (see s 4G and s 4J of the Crimes Act 1914 (Cth)).
s 636 BSA	**Hindering** compliance with the Act.	**The maximum penalty is 2 years imprisonment or 120 penalty units ($25,200)** This offence is an "indictable offence triable summarily" (see s 4G and s 4J of the Crimes Act 1914 (Cth)).

Public Health and Wellbeing Act 2008 (Vic)

Key Points

- The objective of the Public Health and Well Being Act 2008 (Vic) (PHWA) is to achieve the highest attainable standard of public health and wellbeing in Victoria and includes the prevention of disease (s 4 PHWA).
- The Act is underpinned by the "principle of proportionality" (s 9, PHWA), which provides that decisions and actions should be proportionate to the risk, and should not be arbitrary.
- Section 198 of the PHWA provides that the minister may declare a **"State of Emergency"**. On **16 March 2020**, the Victorian Government announced that it had declared a State of Emergency throughout the State of Victoria for a period of 4 weeks. On 12 April 2020 the State of Emergency was extended for a further 4 weeks, until 11 May 2020.
- In a State of Emergency, the Chief Health Officer of Victoria (CHOV) may (under s 199, PHWA) authorise the use of **"public health risk powers"** (listed in s 190 of the PHWA) and **"emergency powers"** (listed in s 200 of the PHWA). In this current State of Emergency, the Deputy Chief Health Officer of Victoria (D-CHOV) is authorised to by s 199(2)(a) to exercise the "public health risk powers" and "emergency powers".
- Under s 198(8), the Minister for Health is required to report to parliament on the declaration of a State of Emergency.
- Pursuant to s 200 the CHOV may issue enforceable "Directions". Several such Directions have been issued (see below for past and current Directions).
- On **28 March 2020** the Public Health and Wellbeing Amendment (Infringements) Regulations 2020 were gazetted. These Regulations were introduced in order to give Victoria Police the ability to issue on-the-spot infringements to persons who breached the Directions of the CHOV.
- VCAT has a limited power to review certain decisions made by the Chief Health Officer, the Secretary to the Department of Health and Human Services, and local councils under the Public Health and Wellbeing Act 2008.

Criminal Offences (Public Health and Well Being Act)

- Pursuant to s 203(1) of the PHWA it is an offence to fail to comply with a direction given by a person under s 199. The offence carries a pecuniary penalty only. These offences are summary (see Sentencing Act 1991 (Vic) s 112(b)). A natural person is liable to a maximum penalty of 120 penalty units (ie, $19,826.40). A body corporate is liable to a maximum penalty of 600 penalty units (ie, $99,132). A defense of "reasonable excuse" is available under s 203(2).
- Pursuant to s 193(1) of the PHWA it is an offence to fail to comply with a direction given by an authorised officer under the "public health risk powers" in s 189 of the PWHA. This offence attracts a maximum penalty of 120 penalty units for a natural person (ie, $19,826.40) and 600 penalty units for a body corporate ($99,132). A "reasonable excuse" defence applies (s 193(2) of the PWHA).
- Pursuant to s 188(2) of the PHWA it is an offence to fail to provide information when directed to do so by the CHOV, which the CHOV believes is necessary to investigate whether there is a risk to public health or to manage or control a risk to public health. The offence is punishable by a maximum of 60 penalty units (ie, $9913.20) for a natural person, and 300 penalty units (ie, $49,566) for a body corporate. There is a defence of "reasonable excuse" available (s 188(3)), and the offence does not affect the privilege against self-incrimination (s 212).
- Pursuant to s 183 of the PHWA it is an offence to hinder or obstruct an authorised officer. The offence is punishable by a maximum of 60 penalty units (ie, $9913.20).

Infringements

- Section 209 of the PHWA provides that certain prescribed offences may also be dealt with by way of an infringement notice.
- On **28 March 2020** the Public Health and Wellbeing Amendment (Infringements) Regulations 2020 amended the Public Health and Wellbeing Regulations 2019. The effect of the amendment was to provide for the following offences to be "prescribed offences" able to be dealt with by infringement:
  - Offence under s 183 (hinder authorised officer) = 5 penalty units (ie, $826.10).
  - Offence under s 188(2) (fail to provide information) = In the case of a body corporate, 30 penalty units (ie, $4956.60) & in the case of a natural person, 10 penalty units (ie, $1652.20).
  - Offence under s 193(1) (fail to comply with a direction) = In the case of a body corporate,

60 penalty units (ie, $9,913.20) & in the case of a natural person, 10 penalty units (ie, $1652.20).

— Offence under s 203(1) (fail to comply with a direction) = In the case of a body corporate, 60 penalty units (ie, $9,913.20) & in the case of a natural person, 10 penalty units (ie, $1652.20).

- The process of an infringement is governed by the Infringements Act 2006 (Vic). Once an infringement notice is served, a person may elect to have the matter heard in court (s 16). There are two risks associated with contesting the matter in court: firstly, if unsuccessful, the matter will be recorded as a criminal offence on the person's Victoria Police Record, and secondly, the range of available punishment in court is greater than the infringement amount.
- Noting that the offence provision includes a defence of "reasonable excuse", if a person who was being infringed claimed to have such a reasonable excuse, they would either need to put their case directly to the infringing police officer, or later exercise the election to have the matter heard in court.

Enforcement

- Under Pt 9 of the PWHA authorised officers have general powers such as powers of entry, search and seizure, and the authority to request information.
- The PHWA enables authorised officers to ask Victorian police for assistance when exercising their powers (ss 192 and 202).
- On 23 March 2020, the Premier of Victoria announced that Victoria Police had established a coronavirus enforcement squad with 500 police officers to assist with enforcing PHWA Directions.
- If an offence is charged, or an infringement is challenged in court, the most likely court to hear the matter is the Magistrates' Court of Victoria. The applicable sentencing principles and dispositions are found in the Sentencing Act 1991 (Vic).

Relevant Directions made by Chief Health Officer under PHWA

- On **16 March 2020** the CHOV made the Direction from Chief Health Officer in accordance with emergency powers arising from declared state of emergency. These Directions had two parts: Part 1 — Non-Essential Mass Gatherings, and Part 2 — Self-Quarantine Following Overseas Travel. Restrictions which were imposed by these Directions included banning "non-essential" mass gatherings of over 500 people such as cultural events, sporting events or conferences.
- On **18 March 2020** the DCHOV made the Mass Gatherings Directions (No 1). These Directions revoked the Directions of the CHOV made on 16 March 2020. These Directions prohibited gatherings of 500 people or more gathering in a single space.
- On **19 March 2020** the DCHOV made the Cruise Ship Docking Direction. These Directions required any passenger disembarking an international cruise ship to self-isolate for 14 days. The Directions were revoked on 28 March 2020 by the Revocation of Airport Arrivals Direction and Cruise Ship Docking Direction.
- On **18 March 2020** the DCHOV made the Airport Arrivals Direction which had the effect of requiring all persons arriving in Victoria at an airport from outside of Australia to self-quarantine for 14-days. The Directions were revoked on 28 March 2020 by the Revocation of Airport Arrivals Direction and Cruise Ship Docking Direction.
- On **21 March 2020** the DCHOV made the Mass Gathering Directions (No 2). These Directions revoked the Mass Gathering Directions (No. 1) and prohibited gatherings of 100 people or more in one space.
- On **21 March 2020** the DCHOV made the Aged Care Facilities Directions. These Directions had the effect of restricting access to aged care facilities. They were revoked by the Care Facilities Directions on 7 April 2020.
- On **23 March 2020** the DCHOV made the Non-Essential Business Closure Directions which had the effect of closing all "non-essential" businesses from noon on the 23 March 2020 until 13 April 2020. "Non-essential" business was a defined term and included licensed venues, cinemas, gyms, restaurants, cafes, and places of worship.
- On **25 March 2020** the DCHOV made the Prohibited Gatherings Directions which revoked the Mass gatherings Directions (No 2). These Directions include the following prohibitions:

  — A prohibition on 500 people or more gathering in an undivided outdoor space.

  — A prohibition of 100 people or more gathering in a single undivided indoor space.

  — A gathering of fewer than 100 people in a single undivided space, unless the gathering meets the particular floor space requirements, the gathering is in a private residence or in a vehicle.

  — A prohibition on social sport gatherings.

— A prohibition on weddings and funerals except in certain circumstances.

- On **25 March 2020** the DCHOV made the Non-essential Activity Directions. These Directions revoked the Non-Essential Business Closure Directions had the effect of prohibiting a wider range of business activities and imposing requirements such as cleaning and signage on businesses that remained open.
- On **26 March 2020** the DCHOV made the Non-Essential Activity Directions (No 2). These directions revoked the Non-Essential Activity Directions and replaced them with similar directions, however some changes were made to the types of business that could remain open and the conditions thereof. These directions were revoked by the Restricted Activity Directions (see below) at midnight on 30 March 2020.
- On **30 March 2019** the DCHOV made the Stay at Home Directions. These Directions revoked the Prohibited Gatherings Directions (which had been made on 25 March 2020). These Directions required everyone in Victoria to restrict the circumstances in which they leave the premises in which they ordinarily reside and placed restrictions on gatherings. As a result of these Directions, a person who is in Victoria must not leave the premises where the person ordinarily resides save for identified circumstances within the Directions.

Current Directions made by Chief Health Officer under the PHWA

- On **23 March 2020** the DCHOV made the Hospital Visitors Directions which had the effect of prohibiting persons from visiting hospitals except for certain classes of people.
- On **25 March 2020** the DCHOV made the Isolation (Diagnosis) Direction which required persons diagnosed with COVID-19 to self-isolate.
- On **7 April 2020** the DCHOV made the Care Facilities Directions. These Directions make restrictions on access to care facilities in order to limit the spread of COVID-19. Of interest to criminal lawyers, "care facility" includes an alcohol and drug residential service, a homelessness residential services, a disability residential services, a secure welfare services, and Thomas Embling Hospital.
- On **7 April 2020** the DCHOV made the Restricted Activity Directions (No 2). These Directions restrict the operation of certain businesses, community facilities and other social environments.
- On **7 April 2020** the DCHOV made the Stay At Home Directions (No 3). Like their predecessor Directions, these Directions require everyone in Victoria to limit their interactions with others by: (a) restricting the circumstances in which people may leave the premises where they ordinarily reside; and (b) placing restrictions on gatherings. Essentially, whilst the Directions remain current, a person is only allowed to leave their home to:
  — shop for food and other necessary goods and services
  — access medical services or provide caregiving
  — attend work or education where you can't do those things from home
  — exercise

  A person may leave home in an emergency or if required to by law.
- The latest Directions can be accessed at dhhs.vic.gov.au/state-emergency.

Analysis

- The PHWA contains important rights-protective principles that are relevant to the current activities that law enforcement agencies such as Victoria Police are undertaking in the context of policing the COVID-19 pandemic.
- Those provisions are: s 8 (the principle of accountability) and s 9 (the principle of proportionality). There principles apply to the whole Act, including the emergency powers and enforcement provisions which give rise to criminal offences. Therefore, in exercising law enforcement duties under the PHWA it is important to be aware that the actions of persons engaged in the administration of the PHWA (such as Victoria Police), are lawfully obliged to ensure that they exercise their powers in a *transparent*, *systematic*, and *appropriate* manner, so far as is practicable (s 8(1)).
- Section 111 of the PHWA establishes a set of principles which apply specifically to "the management and control of infectious diseases", including that "the spread of infectious disease should be prevented or minimised with the *minimum restriction on the rights of any person*" (emphasis added). Section 111 appears as the first section of Pt 8, rather than in the preambular provisions of Pt 2, and so it is arguable (although not absolute) that s 111 does apply to the emergency powers provisions, which are found in Pt 10.[4] In any case, the minimum interference principle expressed at s 111(1)(a) seems to broadly align with the intent of the proportionality principle in s 9 of the Act

(which certainly does apply to the emergency provisions), as well as the more global obligation placed on "public authorities" by s 8 of the Charter of Human Rights and Responsibilities Act 2006 (Vic), to act in a way that is compatible with human rights (discussed further below).

- Another rights-protective safeguard embedded into the Victorian PHWA is s 212, which protects the privilege against self-incrimination. This is important because in a non-emergency context authorised officers have a right to request information (s 167), and in an emergency context the Chief Health Officer may direct a person to provide information necessary to investigate, manage or control a risk to public health (s 188). The penalty for non-compliance with a direction to give such information in a state of emergency is 60 penalty units ($9,913.20) for natural person, or 300 penalty units ($49,566) for a body corporate. These provisions illustrate why the protection against self-incrimination is a significant safeguard on fundamental rights. This safeguard can be contrasted against the significant abrogation of that protection in the Federal Biosecurity Act (see above).
- Such rights-protective provisions are especially important during times of public emergency, because of the serious nature of the coercive powers that authorised officers and assisting police officers are able to exercise. The powers under s 200, for example, enable an officer to detain persons in the emergency area, restrict the movement of persons within the emergency area, prevent persons from entering the emergency area, and give any direction reasonably necessary to protect public health.
- Whilst the existence of these rights-protective provisions, along with the Charter, is somewhat reassuring from a civil liberties point of view, it may be that in the current context of a global pandemic the degree of rights encroachment that is considered by government to be "proportionate" and "appropriate" is of an order and magnitude that is unprecedented, and, for some, unpalatable. A recent empirical analysis of Australia's Public Health and Human Biosecurity Law found the following:[5]
  - That public health and human biosecurity practices are highly coercive. These practices rely upon powers created by public health and human biosecurity law found in a network of legislative and regulatory regimes across the nation. These laws authorise the executive to compel a person to undergo medical testing or treatment, to compel particular persons to engage in or refrain from particular behaviours or to limit their free movement, including through the power to involuntarily isolate or quarantine a person or group of persons including by the use of force. These coercive powers are applied by way of what are commonly referred to as "public health orders"; orders that are similar to the more familiar involuntary treatment orders in the mental health context. These are orders issued in almost all cases by the executive, following an administrative decision undertaken by decision-makers that are generally the Chief Health Officer or Chief Public Health Officer of a particular state or territory – who usually delegate this power to a range of other persons.
  - That the powers available to the state in the name of advancing or protecting the public's health are extensive and highly elastic.
  - The research reported some serious concerns about the use of these powers including evidence of the indefinite detention of multiple individuals by public health authorities, including those detained until their death, and public health orders made without time limits and never rescinded.
  - The overarching claim made was that the use of coercive public health and biosecurity legal powers in Australia is active but not currently accompanied by sufficient transparency and that this lack of publicly available information must be rebalanced in light of the strong public interest arguments for transparency and accountability.
- Prosecutions under the PHWA are relatively uncommon and there are almost no reported cases of prosecutions under any of the offence provisions (*Clubb v Edwards* [2020] VSC 49; BC202000894 being one exception). There are currently no reported cases of prosecutions under s 203 of the PHWA. There have, however, been multiple media reports of non-compliance during the current state of emergency.

Exceptions

The Stay at Home Directions (No 3) provide particular exceptions to the general requirement to stay at home. People may leave their home in the following circumstances:[6]

- to obtain food, drink or groceries,
- for health or medical purposes, including appointment and goods;

- to obtain goods or services from services or businesses that remain open, such as banks, post offices, pharmacies, hardware stores, vets and other retail;
- to care for children or visit children as part of parenting arrangements or where the child is in detention;
- to care for people with health issues;
- to visit someone they're in an intimate personal relationship with, such as a girlfriend, boyfriend or partner;
- to visit aged care facilities, hospitals, go to a wedding or funeral or donate blood;
- to attend paid or voluntary work or education that cannot be done at home;
- to exercise;
- as required by law, including to attend a police station or court;
- if they live in more than one place, to move between premises;
- move house, or leave Victoria or Australia, where the person lives in another state or country; or
- to escape harm including family violence, or in an emergency.

The above exceptions are not "defences" per se (although these types of facts may also be relevant to the statutory defence if a person is charged or infringed — see below). A question therefore arises as to which party bears the onus of proving an exception if a person is charged with an offence and claims to have be covered by one the above exceptions. This is a matter of construction and is therefore open for argument. Generally, in statutes, when an exception exists as a distinct provision or condition defeating the liability that otherwise exists, the onus of proof will be on the party seeking to prove the exception. However, it must be born in mind that in the present circumstances, the Directions are not offence-creating provision, and special rules of construction apply to interpreting subordinate instruments, especially those that give rise to criminal sanctions.

Defence of "Reasonable Excuse"

The PHWA makes it an offence to fail to comply with a direction or other requirement made under the State of Emergency provisions (eg, the Stay at Home Direction (No. 2)). However, under s 203(2) a person is not guilty of this offence is the person had a "reasonable excuse" for not complying.

This raises the question of what constitutes a "reasonable excuse". In *Taikato v R* (1996) 186 CLR 454; 139 ALR 386; BC9604824 the High Court said (at CLR 464):

> The term "reasonable excuse" has been used in many statutes and is the subject of many reported decisions. But decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excus" is an exception.

The take-away point from this case is that the meaning of the phrase "reasonable excuse" depends on the statute. Given the unprecedented nature of the current circumstances, the meaning of this defence will no doubt need to be the subject of litigation, and possibly an appeal to the Supreme Court on a question of law.

Criminal defence practitioners approached by persons charged with this offence should carefully consider the individual circumstances of the alleged breach, and if necessary, seek counsel's advice regarding the viability of testing the defence of "reasonable excuse" in the particular circumstances.

Criminal defence practitioners approached by persons given an infringement notice for this offence should also consider the viability of contesting the infringement in court on the grounds of "reasonable excuse".

In relation to a formal defence, unless the onus of proving a defence is placed on the accused by the statute (which is not the case with the PHWA), the prosecution will also bear the onus of disproving defences that arise on the evidence. Where the onus of proof is on the prosecution, the court is not to find the prosecution case proved unless it is satisfied that it has been proved beyond reasonable doubt (Evidence Act 2008, s 141(1)).

Summary Table — Public Health and Wellbeing Act 2008 (Vic)

Section	Nature and Scope of Power	Criminal Offence
s 199 PHWA	In a State of Emergency, the Chief Health Officer can authorise the use of "public health risk powers" (listed in s 190 of the PHWA) and "emergency powers" (listed in s 200 of the PHWA).	Pursuant to s 203 of the PHWA, it is an offence to fail to comply with a direction given by a person under s 199. The offence carries a pecuniary penalty only. These offences are summary (see Sentencing Act 1991 (Vic), s 112(b)). **A natural person is liable to a maximum penalty of 120 penalty units (ie, $19,826.40). A body corporate is liable to a maximum penalty of 600 penalty units (ie, $99,132)**. A defense of "reasonable excuse" is available under s 203(2).
s 183 PHWA	Obstructing an authorised officer who is exercising a power	**Summary offence — 60 penalty units ($9,913.2)**.

Emergency Management Acts (Vic)

Key Points

- The 1986 Emergency Management Act (EMA) has been substantially amended and is gradually being replaced by the 2013 Act. Currently, the two Acts are to be read and construed as one Act.
- The 1986 EMA contains the provisions related to the declaration of a **"State of Disaster"** (cf "State of Emergency" referred to in the PHWA). Section 23 of the EMA 1986 gives the state premier the power to declare a "State of Disaster", if the premier is satisfied the emergency "constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria".
- As of 5 April 2020, no State of Disaster has been declared in relation to COVID-19. The power was recently used during the bushfire crisis of 2019–2020. Under a State of Disaster, the minister is given powers which include taking control of property, controlling entry into or departure from a disaster area, and compelling the evacuation of an area (s 24 of the EMA 1986). The powers available seem more applicable to natural disasters rather than a health crisis.
- Separate from the declaration of a State of Disaster, s 36A of the EMA 1986 gives a power to the most senior police officer (above the rank of Senior Sergeant) in attendance at an emergency to declare an "emergency area". The police officer must consider the size, nature and location of the emergency. The consequence of declaring an "emergency area" is that police officers then gain powers under s 36B of the EMA 1986, such as the power to close or evacuate the area. Again, this power seems more applicable to natural disasters rather than a health crisis.

Summary Table — Emergency Management Acts (Vic)

Section	Nature and Scope of Power	Criminal Offences
s 36 EMA 1986	Offence of obstructing an emergency worker	**Summary offence — 60 penalty units (ie, $9,913.2).**
s 36A EMA 1986	Declaration by senior police officer of an "emergency area"	s 36C of the EMA 1986 creates the following summary offences in relation to "emergency areas": — Failure to obey prohibition or directions: maximum penalty **10 penalty units (ie, $1652.20)**. — Failure to comply with conditions in an emergency area: maximum penalty **10 penalty units (ie, $1652.20)**. — Failure to leave an emergency area when ordered to leave: maximum penalty **120 penalty units (ie, $19,826.40)**.

General Public Order Offences

Key Points

- There is currently no evidence of widespread public disorder so we have not dealt with relevant offending in that context.
- The policing of those who are found outside may particularly affect the homeless or young people who can find it more difficult to comply with isolation and social distancing measures. There is a useful summary of behaviour that (in addition to emergency powers) is unlawful in public, and associated police powers (including on-the-spot fines and orders to move on) from the VLA at legalaid.vic.gov.au/find-legal-answers/criminal-offences/behaviour-in-public-that-is-against-law. This can include behaving in a way that causes offence to other people, disorderly conduct in a public place, spitting and begging.
- It is also a criminal offence to resist a lawful arrest.
- In the context of PHWA directives that make gathering with more than one other person in a public place potentially unlawful, it is also worth considering the potential that unlawfully assembled crowds who intentionally disregard the Stay at Home Directions may be dealt with through criminal sanctions outside of the PHWA (eg, unlawful assembly or riot offences, depending on the nature of the gathering.)

Table of Select Public Order Offences

Section	Nature and Scope of Power	Criminal Offence
s 5 UAPC	Under the Unlawful Assemblies and Processions Act 1958 (UAPA), it is unlawful for persons to assemble together "riotously and tumultuously and to the disturbance of the public peace". This provision could, arguably, be used to disperse crowds that gather unlawfully. However, the provision implies that the gathering must also be unpeaceful.	This Act provides a statutory procedure for the dispersal of an unlawful or riotous assembly. It allows for an order to be read to the assembly directing them to disperse within a certain time, with criminal liability attaching to a failure to disperse. Under s 6 of the USPA, it is an indictable offence to obstruct, oppose or prevent a person from making or beginning to make such a proclamation or order. **Maximum penalty is 2 years imprisonment (s 113C of the Sentencing Act 1991 (Vic)) or 240 penalty units (ie, $39,652.8).**

Offences Against the Person

Key Points

- There are a range of criminal laws potentially applicable to disease transmission, some of which have been used in the context of alleged intentional or reckless HIV transmission (eg, *Kuoth v R* [2010] VSCA 103; BC201002693). The most recent High Court of Australia decision is *Zaburoni v R* (2016) 256 CLR 482; 330 ALR 49; [2016] HCA 12; BC201602217. It is not proposed to detail the criminal law on assaults further in this QRG but, the most recent supplement from the Global Commission on HIV and the law sets out some basic recommendations which are relevant to the proportionality of public health responses more broadly. These include the following:
  - — absence of discrimination in treatment;
  - — government responsibility for financing responses;
  - — government responsibility for facilitating use of internet with evidence-based information communications;
  - — protection of health confidentiality;
  - — ensuring that health status is not used to justify pre-trial detention, segregation in detention or prison, or harsher or more stringent sentences or conditions of parole or probation following release from custody;
  - — affordable access to the most effective diagnostics, medicines and vaccines.
- In May 2015 the Victorian Government repealed s 19A of the Crimes Act 1958 (Vic) which created a specific offence of intentionally infecting another person with a "very serious disease", defined exclusively to mean HIV. This reflects the general understanding that those living with HIV should not be the target of specific criminal legislation.
- Currently there is no criminal offence in Victoria which deals specifically with the intentional or reckless infection of a person with a disease or illness. This reflects the general understanding that usually these are matters for public health measures, not criminal law.
- "Physical injury" is defined in the Crimes Act 1958 (Vic) to include "**infection with a disease** and an impairment of bodily function".
- "Serious injury" is defined in the Crimes Act 1958 (Vic) to means an injury that "endangers life" or is "substantial and protracted" (see s 15 of the CA).
- Some of the existing offences which could potentially be invoked against a person who intentionally / recklessly / negligently causes another person to contract a disease include:
  - — s 16 (CA), Causing serious injury intentionally (20 year maximum)
  - — s 17 (CA), Causing serious injury recklessly (15 year maximum)
  - — s 18 (CA), Causing injury intentionally or recklessly (10 / 5 year maximum)
  - — s 21 (CA), Threat to inflict serious injury (5 year maximum)
  - — s 22 (CA), Conduct endangering life (in the context of HIV transmission, on the question of sufficiency risk to life, see: *R v Parenzee* (2008) 101 SASR 469; 257 LSJS 389; [2008] SASC 245; BC200808058. Likelihood of life being

endangered is a matter for the assessment of the fact finder) (10 year maximum)

— s 23 (CA), Conduct endangering persons (5 year maximum)

— s 24 CA, Negligently causing serious injury (5 year maximum)

— OHS Act — workplace manslaughter offence, In the case of an **employee** who breaches a **duty of care** in circumstances where there was a high risk or death, serious injury, or **serious illness** (available after 1 July 2020) (20 years maximum for individuals and $16.5 million for body corporates)

Airports and Sea Ports

Key Points

- There has been a total ban on international travel in force since 20 March 2020 for citizens and permanent residents seeking to leave Australia: Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (25 March 2020). Australian Border Force can grant exemptions, for example, in a situation of compelling need but there is apparently no merits review. This instrument does not appear to have an end date but it is issued pursuant to the Biosecurity Act declaration (see above) which runs for 3 months from 18 March 2020.
- The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020 forbids international cruise ships from entering Australian ports before 15 April 2020. Cruise ships function de facto free of national labour and environmental Regulations but, where there is a risk of loss of life on board there is a right to enter port under international law. This does not come with a right to disembark so long as elementary considerations of humanity can be observed. For an analysis of the legal minefield around cruise ships amid the COVID-19 pandemic listen to Don Rothwell, Professor of Law at the Australian National University at abc.net.au/radionational/programs/breakfast/the-legal-minefield-around-cruise-ships/12113278. The test for where a vessel can declare itself as "in distress" is laid out in *The New York* [1818] 3 Wheat 59: the necessity of entering a port must be "urgent and proceed from such a state of things as may be supposed to produce, on the mind of a skillful mariner, a well-grounded apprehension of the loss of the vessel and cargo or of the lives of the crew". Crew is defined as "those aboard". Obligations under international law have been the subject of requests for interpretation before the International Court of Justice. This might, for example, occur where there is a dispute between nations over the approach to obligations pursuant to the United Nations Convention on the Law of the Sea (1982) (UNCLOS), a multilateral treaty sometimes known as the "constitution of the oceans" which reflects much of customary international law of the sea. Rescue provisions are binding. There are no reports of cruise ships off the coast of Victoria but the NSW, WA and Qld issues are discussed at theguardian.com/australia-news/2020/apr/01/coronavirus-calls-to-repatriate-15000-crew-members-from-cruise-ships-off-australias-coast.
- The Australian Federal Police have a presence at all international airports in Australia. AFP officers have the power of arrest without warrant for any offence by virtue of s 3W of the Crimes Act 1914 (Cth).
- The Customs Act 1901 (Cth) gives the Australian Border Force very wide powers, including the power to question persons (s 195(1)) and search baggage (s 186) at international airports and seaports. There are also powers to detain and search persons (ss 219–219ZJ). However, these powers are all centered around the detection of "prohibited goods". Corresponding offence penal provisions apply (for example, giving false information is an offence). The power of arrest without warrant conferred on "customs officers" by s 210 is limited and does not extend to offences against the Biosecurity Act.
- The Migration Act 1958 (Cth) gives further powers to the Australia Border Force, including power to detain and search a person who is reasonably suspected of being an unlawful non-citizen (ss 188–189).
- Note the International Health Regulations (2005) (IHR), binding on all World Health Organization (WHO) member states, including Australia, state that health measures "shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives" (article 43). Total travel bans need to be weighed against less restrictive alternatives.

Powers of Arrest and Detention

Key Points

- Members of Victoria Police have the power to arrest a person for a summary or indictable offence

under s 459 of the Crimes Act (Vic). Therefore arrest is possible for the summary offences related to failing to comply with a Direction of the CHOV under the PHWA.

- Victoria Police members in Operation Sentinel have been tasked with policing of breaches of powers under the Public Health and Wellbeing Act 2008. This taskforce can detain or restrict the movement of a person or group in the emergency area in order to eliminate or reduce a serious risk to public health. Operation Sentinel is not currently (as of 5 April 2020) listed on the Victoria Police website but there are posts under the title Operation Sentinel on Facebook.
- On 30 March 2020, the Police Accountability Project (PAP) raised concerns about policing during the pandemic at policeaccountability.org.au/policing/policing-the-pandemic. The PAP is a specialist, innovative, public interest legal project located within the Flemington & Kensington Community Legal Centre in Victoria. It specialises in police accountability law and strategies. The PAP publication sets out two of the criteria from the Victoria Police policy rules in relation to interactions with the public as follows:
  - All police must act fairly, responsibly and impartially without discrimination, prejudice, stereotypes or bias (VPMP, *Interactions with the Public*)
  - Policing decisions must not be based on generalisations or stereotypes. Racial profiling is a form of discrimination and is against the law (VPMP, *Human rights equity and diversity standards*, Victoria Police Manual, Victoria Police, January 2020).
- Victoria Police Policy Rules are mandatory and provide the minimum standards that Victoria Police employees must apply. Non-compliance with or a departure from a policy rule may be subject to management or disciplinary action.

Chief Health Officer

- Aside from the general powers of arrest in the Crimes Act 1958 (Vic), the Public Health and Well Being Act 2008 (Vic) gives the Chief Health Officer powers to make an "examination and testing order" (s 113) and a "public health order" (s 117) in relation to an individual who the Chief Health Officer believes has been infected by or exposed to an infectious disease, and poses a serious risk to public health.
- A public health order can include a requirement for an individual to submit to being isolated or detained (s 117(5)(k)).
- It is an offence to fail to comply with an examination and testing order (s 116). The offence is punishable by a maximum of 60 penalty units ($9,913.20).
- It is an offence to fail to comply with a public health order (s 120). The offence is punishable by a maximum of 120 penalty units ($19,826.4).
- The power of the Chief Health Officer to make these orders is not unfettered. There are a number of safeguards to individual liberty built into the Act including:
  - The overarching principles of proportionality (s 9) and accountability (s 8).
  - The principles of least restriction (ss 111–112).
  - That the Chief Health Officer must have regard to listed factors before making an order (see ss 117 and s 113(2)).
  - The time limits placed on detention (ss 121–122 requires review within 7 days by the Chief Health Officer and provides for appeal to VCAT).
  - That the drafting of the provisions imply that the powers are intended to be applied to individuals rather than as a power of mass detention during a widespread emergency.

The Courts, Sentencing and Bail

Bail Applications and appeals

- Barrister Paul Kounnas has recently observed that "the courts at this stage don't want to give a broad statement of principle, but are assessing each case. It is clear that a take away from these cases is that whilst COVID-19 is a relevant consideration to many cases, at this stage the courts are hamstrung by a lack of evidence about its effects and the response by (for example) corrections. They are thus finding it difficult to assess the weight to be placed on this as a factor or as to whether or not they should consider the risks for a prisoner as being any greater than that of someone in the general community".
- In the absence of direct information from Victoria Police, Corrections Victoria or the OPP website as to the public health responses in prisons and youth detention centres, it is likely that the courts will continue on a case by case basis.
- Reported cases thus far are as follows:
  - *Broes, Re* [2020] VSC 128; BC202002055 (19 March 2020)

— *Re Lado* [2020] VSC 132; BC202002154 at [43] (20 March 2020)
— *R v Stott (No 2)* [2020] ACTSC 2020 (23 March 2020)
— *McCann, Re* [2020] VSC 138; BC202002218 (25 March 2020)
— *Tong, Re* [2020] VSC 141; BC202002259 (26 March 2020)
— *R v Madex* [2020] VSC 145; BC202002332 (26 March 2020)
— *Re Tiba* [2020] VSC (unreported, decision of Coghlan J, 31 March 2020)
— *Re JK* [2020] VSC 160; BC202002644 (1 April 2020)

Sentencing Law — COVID-19 as a mitigating factor and appeals

- There are now a few cases from which sentencing principles can be drawn as follows.
- A plea of guilty may have substantial utilitarian value at the present time, noting the current public health concerns regarding the COVID-19 virus, which have had an impact on the practical viability of jury trials for matters that do not resolve: *DPP v Bourke* [2020] VSC 130; BC202002153 (16 March) at [32].
- Additional stress and concern for prisoners as a Markovic type factor: *Brown (aka Davis) v R* [2020] VSCA 60; BC202002085 at [33], [42] and [48].
- The prospect of limited family visits and the effect of that on the offenders mind in isolation: *DPP v Morey* [2020] VCC 320 at [81]–[86].
- Generally, in the absence of specific information on public health risks and measures in prisons and YDC, the courts have proceeded on information from the defence but in *DPP v Harris (NT)* (unreported) the court heard evidence from the Alice Springs Correctional Centre.
- COVID-19 is not a new fact to support an argument for sentencing error on appeal: *Sazimanoska v R* [2020] VSCA 66; BC202002198 at [35], [43], [48] and [49].

Access to Justice

- Courts around Australia are putting into place new procedures given the current state of emergency. The Judicial College of Victoria has a helpful resource called *Coronavirus and the Courts* to stay up to date with the current practices and procedures, see judicialcollege.vic.edu.au/news/coronavirus-and-courts.
- Delay remains a relevant issue: *Mulquiney v Reynolds (Ruling No 1)* [2020] VSC 119; BC202001909 (16 March 2020).
- Trials by jury have been put on hold in Victoria, and there is not an option for a criminal trial to be heard by judge alone in Victoria.
- On 3 April 2020 the Law Council of Australia issued a statement expressing concern that one jurisdiction (the Australian Capital Territory) has passed legislation removing the right to a trial by jury. See lawcouncil.asn.au/tags/media-release.

Prisons

"Emergency Management Days" in Victorian Prisons

- Under s 58E(1) of the Corrections Act 1986 (Vic) the Secretary may reduce the length of a prisoner's sentence of imprisonment on account of the prisoner suffering disruption or deprivation which is not caused or contributed to by the prison.
- It is clear that COVID-19 will cause disruption and deprivation, however, it is unclear whether COVID-19 will be classified by Corrections Victoria as an "emergency existing within the prison" (s 58(1)(a)) or as "circumstances of an unforeseen and special nature" (s 58(1)(b)).
- The former classification (ie, s 58(1)(a) is potentially more advantageous to a prisoner, because of the wording of reg 100 of the Corrections Regulations 2019, which caps the number of days that can be reduced to 14 days if the later classification is applied (ie, s 58(1)(b)).
- According to several media reports[6] a spokesperson for the Corrections Minister has indicated that there will be not an automatic discount and that the usual procedure for applying for emergency management days will apply to each individual prisoner.
- Commissioner's Requirements 2.3.2 details the eligibility and procedural requirements for Emergency Management Day applications.

COVID-19 in Victorian Prisons

- United Nations Standard Minimum Rules for the Treatment of Prisoners which includes a prohibition on torture and any cruel, inhuman or degrading treatment or punishment, and obligations relating to restrictions on solitary confinement, and appropriate provision of healthcare.
- On **15 March 2020**, the World Health Organisation (WHO) published the Interim Guidance on Preparedness, Prevention and Control of COVID-19 in Prisons.

- On **25 March 2020**, the UN High Commissioner for Human Rights, Michelle Bachelet, called on governments to take urgent action to protect the health and safety of people in detention and other closed facilities, as part of overall efforts to contain the COVID-19 pandemic.
- On **31 March 2020** guidance was issued by the Australian government, developed by the Communicable Diseases Network Australia (CDNA) and endorsed by the Australian Health Protection Principal Committee (AHPPC) for the Prevention Control and Public Health Management of COVID-19 outbreaks in Correctional and Detention facilities in Australia.
- Some Australian lawyers have lobbied governments to take particular notice of the dangers from COVID-19 in prisons and YDC. For example: the National open Letter to Australian Governments on COVID-19 and the Criminal Justice System (20 March 2020) and the second national open letter focusing on information, monitoring and released on 6th April 2020. There is also a Victorian petition in relation to vulnerable prisoners and those serving short term sentences at change.org.

Human Rights Law

Key points:

- Australia is a party to the seven core international human rights treaties as follows:
  - International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965
  - International Covenant on Civil and Political Rights (ICCPR) 1966
  - International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966
  - Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979
  - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
  - Convention on the Rights of the Child (CRC) 1989
  - International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW) 1990
- Briefly, this means that Australia has accepted binding legal obligations under international law to protect the rights expressed therein. In the context of public health this includes:
  - an inherent right to life;
  - a right to the highest attainable standard of physical and mental health;
  - an obligation to ensure that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration; and
  - a right to liberty of movement, albeit subject to necessary and proportionate restrictions in relation to public health.
- Each of these treaties has established a committee of experts to monitor implementation of the treaty provisions by its state parties. Some of the treaties are supplemented by optional protocols dealing with specific concerns. Under five of these seven core United Nations human rights treaties to which Australia is a party, individuals may make complaints that their rights under the treaty have been violated by Australia. Complaints are made to the treaty body, or committee, established under the treaty. In the case of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the committee is not established under the treaty itself, but by a 1985 resolution of the UN Economic and Social Council.
- We have not sought to set out all international treaties and instruments here but, in the context of freedom of movement, we highlight Article 12 of the International Covenant on Civil and Political Rights (ICCPR) which provides as follows:

  Article 12

  1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

  2. Everyone shall be free to leave any country, including his own.

  3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

  4. No one shall be arbitrarily deprived of the right to enter his own country.
- On 19 March Human Rights Watch published an overview of human rights concerns posed by the COVID-19 outbreak, drawing on examples of government responses to date, and recommended

ways governments and other actors can respect human rights in their response.

- The Australian Human Rights Institute is publishing a weekly COVID-19 newsletter.

Principles on Derogation in Times of Public Emergency

- The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) were issued by the American Association for the International Commission of Jurists in 1985. The Siracusa Principles provide guidance for interpreting the "limitations clauses" such as those in the ICCPR which allow limitations to the freedom of movement only if they are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
- A common way of determining whether a law that limits rights is justified is by asking whether the law is **proportionate.** The Australian Law Reform Commission (ALRC) has explained that proportionality "as a concept is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of rights. However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important — even if not strictly constitutional — rights and principles … In short, a structured proportionality analysis involves considering whether a given law that limits important rights has a **legitimate objective** and is **suitable** and **necessary** to meet that objective, and whether — on **balance** — the public interest pursued by the law outweighs the harm done to the individual right."

The Victorian Charter of Human Rights

- The Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter) applies to all Victorian public authorities including Victoria Police and authorised officers under the PWHA. Section 8 requires all public authorities to give consideration to human rights.
- The Charter does not apply to the Commonwealth Government, and so would not apply, for example, to a biosecurity officer exercising powers under the federal Biosecurity Act.
- The Charter has not thus far been afforded the status of a free-standing human rights instrument, in the sense that it does not give rise a cause of action in and of itself. However, a breach of the Charter can be litigated alongside an existing cause of action.
- The main power of the Charter is that it has a normative influence on the behavior of public authorities by requiring them to give proper consideration to human rights. See *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129; 326 ALR 198; [2015] VSCA 197; BC201507004.
- The courts have some oversight of legislative measures through the interpretive rule in s 32(1) This rule provides that "so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". In *Momcilovic v R* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34; BC201106881 the majority held that s 32(1) operates as a valid rule of statutory interpretation, which is a function that may be conferred upon courts. It does not confer on courts a function of a law-making character repugnant to the exercise of judicial power. There is nothing in its text or context to suggest that the interpretation required by s 32(1) departs from the established understandings of the courts' role in construing legislation and that it must be understood as a process of construction understood and ordinarily applied by courts.

Military Assistance

Key Points

- Under the Defence Act 1903 (Cth) (DA), particularly Part IIIAAA, the Australian Defence Force can be called to assist in domestic situations, including in emergencies such as civil aid, humanitarian assistance, medical or civil emergency or disaster relief.
- The ADF Reserves can also be "called-out" pursuant to Part III of the DA. Recent Reserve Call Out Orders include Operation Civil Assist 2019–2020 and Operation Bushfire Assist 2019–2020.
- There are two principle circumstances in which the ADF may be deployed domestically: (i) where deployment is necessary to assist Commonwealth or state law enforcement where their law enforcement capabilities are insufficient (sometimes referred to as Defence Aid to the Civil Authority — DFACA), and (ii) where the civilian community does not have the necessary resources to undertake a specified task, including disaster relief (sometimes referred to as Defence Aid to the Civil

Community — DACC). In the first, it is expected that some ADF personnel involved may be required to use force, while in the second, no such expectation arises. It is the second circumstance that is most likely if there is a widespread medical emergency which becomes uncontrollable through the ordinary civilian channels.

- Should a Part IIIAAA call-out be made, it would specify whether Div 3, 4 or 5 applies. The application of any of those divisions serves to inform the content of and scope of the power of ADF personnel (see table below).
- On 27 March 2020 the Prime Minister announced that that at the request of states the Defence Force would be mobilised to assist states and territories with the COVID-19 pandemic. On 1 April the Minister for Defence announced an expansion of Operation COVID-19 Assist. From media reports, it appears that this ADF operation has not been initiated under the official Pt IIIAAA "Call Out" provisions but rather is under the Defence Assistance to the Civil Community Arrangements (DACC) (these are the same arrangements which were used for military assistance during the recent bushfire season). Therefore, at this stage, the Part IIIAAA powers do not apply.

Summary Table — Defence Act 1903 (Cth) Part IIIAAA

Section	Nature and Scope of Power	Criminal Offences
DA **Pt IIIAAA Div 3**	Special powers generally **authorised** by the Minister (s 46 DA) including protecting persons, evacuating places, and providing security. (Note: Div 6 allows ADF members exercising these powers to use reasonable and necessary force. It also confers powers to detained persons or things.)	s 51R of the DA provides that a person commits an offence if they fail to comply with a direction under this Division. **Summary — 60 penalty units (ie, $12,600)**
DA **Pt IIIAAA Div 4**	Powers exercised in a **specific area**: — the power to search premises in a **specified area** — powers relating to means of transport in the specified area — powers relating to persons in the specified area (Note: Div 6 allows ADF members exercising these powers to use reasonable and necessary force. It also confers powers to detained persons or things.)	s 51R of the DA provides that a person commits an offence if they fail to comply with a direction under this Division. **Summary — 60 penalty units (ie, $12,600)**
DA **Pt IIIAAA Div 5**	Powers to protect declared **infrastructure** (Note: Div 6 allows ADF members exercising these powers to use reasonable and necessary force. It also confers powers to detained persons or things.)	s 51R of the DA provides that a person commits an offence if they fail to comply with a direction under this Division. **Summary — 60 penalty units (ie, $12,600)**

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- Emergency Management Act 1986 (Vic)
- Emergency Management Act 2013 (Vic)
- Corrections Act 1986 (Vic)
- Charter of Human Rights and Responsibilities Act 2006 (Vic)
- Crimes Act 1958 (Vic)
- Defence Act 1903 (Cth)
- Migration Act 1958 (Cth)
- Infringements Act 2006 (Vic)

Subordinate Instruments

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- Public Health and Wellbeing Regulations 2019
- Corrections Regulations 2019
- Direction from Chief Health Officer in accordance with emergency powers arising from declared state of emergency
- Mass Gatherings Directions (No 1)
- Cruise Ship Docking Direction
- Revocation of Airport Arrivals Direction and Cruise Ship Docking Direction
- Airport Arrivals Direction
- Revocation of Airport Arrivals Direction and Cruise Ship Docking Direction
- Mass Gathering Directions (No 2)
- Non-Essential Business Closure Directions
- Prohibited Gatherings Directions
- Non-essential Activity Directions
- Non-Essential Activity Directions (No 2)
- Stay at Home Directions.
- Aged Care Facilities Directions
- Hospital Visitors Directions
- Isolation (Diagnosis) Direction
- Restricted Activity Directions
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- Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020
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Footnotes

1. See: D Carter "The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis" (2020) 43(1) *University of New South Wales Law Journal* 127; H Lee, M Adams, C Campbell and P Emerton, *Emergency Powers in Australia*, Cambridge University Press, 2018; K Buchanan "Australia: Legal Responses to Health Emergencies", Library of Congress (2015).
2. "State Interference with Liberty: The Scope and Accountability of Australian Powers to Detain during a Pandemic" (2010) 12(1) *Flinders Law Journal* 41.
3. An analogy can be draw with Defence Determinations, eg: *Betts v Chief of Army* [2018] ADFDAT 2; BC201805967 at [25] and [33]; *Herbert v Chief of Air Force* [2018] ADFDAT 1; BC201804994 at [53]–[55].
4. This view is supported by the Explanatory Memorandum of the PHWA which explains that s 111 requires that "in the administration of *this Part*, the interests of the public in being protected from infectious diseases must be balanced against the rights of an individual who may be infected." (emphasis added).
5. D Carter "The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis" (2020) 43(1) *University of New South Wales Law Journal*.
6. www.dhhs.vic.gov.au/sites/default/files/documents/202004/Stay%20At%20Home%20Directions%20%28No%202%29%20-%20signed.pdf.
7. Eg, ABCNews 26/3/2020 and Herald Sun 29/3/2020.

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