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A NOTE TO READERS

The article 'A Tale of Two Forms of Protest: The Legality of Protest in Victoria in the Time of COVID-19' is to be read in conjunction with the author statement presented below.

AUTHOR STATEMENT

It should be noted that this article was written prior to the introduction of Part 8A of the *Public Health and Wellbeing Act 2008 (Vic)* in December 2021 by the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 (Vic)*, which now specifically applies to the management of pandemics.

A TALE OF TWO FORMS OF PROTEST: THE LEGALITY OF PROTEST IN VICTORIA IN THE TIME OF COVID-19

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The COVID-19 pandemic triggered extraordinary legislative and executive responses across the globe. In 2020, the Victorian Government used, for the first time, powers in the Public Health and Wellbeing Act 2008 (Vic) to impose significant restrictions on the freedoms of the public. This article considers the powers to make directions under the Victorian regime and the potential relevance of the implied freedom of political communication in the Australian Constitution and the human rights protected by the Charter of Human Rights and Responsibilities Act 2006 (Vic). We conclude that some forms of protest activity may have remained lawful during the Victorian lockdowns, although the purpose of the protest activity and the manner of protest may be relevant considerations when adopting a Charter-consistent interpretation of the statutory provisions.

I INTRODUCTION

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair ...¹

In late 2019, a new coronavirus SARS-CoV-2 began to spread in Hubei Province, China. On 30 January 2020, the World Health Organization declared a global Public Health Emergency of International Concern.² The disease came to be known as COVID-19. Nations around the world implemented extraordinary measures to prevent the arrival of the disease and limit the spread of infection.³

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1 Charles Dickens, *A Tale of Two Cities* (Chapman & Hall, 1859) 1.

2 World Health Organization, 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)' (Media Statement, 30 January 2020) <[https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))>.

3 The impact of the pandemic has been devastating. By mid-October 2021, the World Health Organization

On 16 March 2020, the Victorian Government declared a state of emergency.⁴ Despite initial success in containing spread, in June 2020 Victoria began to record increasing incidents of daily infection, culminating in a peak of 725 new cases on 5 August 2020.⁵ Over this period the Victorian Government introduced and then progressively strengthened directions made pursuant to the *Public Health and Wellbeing Act 2008* (Vic) ('PHW Act').⁶

These directions attracted varied criticisms,⁷ and the enforcement by Victoria Police was condemned on the basis that it was arbitrary and disproportionately impacted vulnerable members of the community.⁸ The now Chief Commissioner of Victoria Police recognised that an inconsistent approach to enforcement risked eroding public confidence in the police.⁹

Public protest activity has continued in Victoria throughout the pandemic in support of a wide range of causes. This has included protests directed towards the lockdown measures and perceived government overreach. In response, police have charged some of those accused of organising protests with the offence of incitement,¹⁰ and fined many of those who have attended protests for purportedly breaching directions made pursuant to the *PHW Act*.¹¹

estimated that, globally, there have been about 237 million COVID-19 infections and 4.85 million deaths: World Health Organization, 'Weekly Epidemiological Update On COVID-19' (Edition 61, 13 October 2021) <<https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19-14-september-2021>>.

In comparison Australia has had a very low level of infection, with about 131,380 total cases and 1,461 deaths: 'Coronavirus (COVID-19) Case Numbers and Statistics', *Department of Health* (Web Page, 14 October 2021) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-case-numbers-and-statistics>>.

4 *Public Health and Wellbeing Act 2008* (Vic) s 198(1) ('PHW Act').

5 Ian Marschner, 'Yes, It Looks Like Victoria Has Passed the Peak of Its Second Wave. It Probably Did Earlier Than We Think', *The Conversation* (Web Page, 13 August 2020) <<https://theconversation.com/yes-it-looks-like-victoria-has-passed-the-peak-of-its-second-wave-it-probably-did-earlier-than-we-think-144200>>.

6 The directions have been described at various stages as 'Stay at Home Directions', 'Detention Directions', 'Restricted Activity Directions' and 'Stay Safe Directions'.

7 See for example, Liberty Victoria, Submission No 1 to Public Accounts and Estimates Committee, Parliament of Victoria, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (31 July 2020); Noel Towell and Michael Fowler, 'Curfew, Stage Four COVID Lockdown under Fire from All Sides', *The Age* (online, 11 September 2020) <<https://www.theage.com.au/national/victoria/curfew-stage-four-covid-lockdown-under-fire-from-all-sides-20200911-p55uuvr.html>>; Melissa Davey, 'Victoria's Roadmap out of Covid Lockdown is "A Sledgehammer Approach" Expert Says', *The Guardian* (online, 9 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/09/victorias-roadmap-out-of-covid-lockdown-is-a-sledgehammer-approach-expert-says>>.

8 COVID Policing Australia Coalition, *COVID Policing* (Web Page, 2020) <covidpolicing.org.au>.

9 Tammy Mills, 'COVID-19 Lockdown Fines "Eroding Public Confidence" Top Cop Warns', *The Age* (online, 13 April 2020) <<https://www.theage.com.au/national/victoria/covid-19-lockdown-fines-eroding-public-confidence-top-cop-warns-20200413-p54jfk.html>>. The comment was made by then Deputy Commissioner Shane Patton.

10 Contrary to *Crimes Act 1958* (Vic) s 321G.

11 For refusing or failing to comply with a direction contrary to of the *PHW Act* (n 4) s 203.

In early 2021, as community transmission fell back to zero, the Victorian Government introduced a permit system for organised public events (including protests) through the ‘Public Events Framework’, which requires advance notice and, for larger events, a COVIDSafe Event Plan.¹² Over this period the directions progressively permitted more persons to gather in public.¹³ However, with the spread of the highly infectious Delta variant of COVID-19 in mid-2021, a new wave of infections spread in New South Wales and Victoria, with New South Wales recording over 1,000 new daily infections by 28 August 2021.¹⁴ New South Wales and Victoria ramped up restrictions. This again resulted in significant protest activity, with thousands of protesters marching in Sydney and Melbourne.¹⁵

This article focuses on the Victorian experience of protest activity during the pandemic.¹⁶ It considers:

- different examples of protest activity in Victoria;
- the power to make directions under the *PHW Act*;
- the offence of incitement;
- recent case law relevant to the *PHW Act* and directions;
- the implied freedom of political communication in the *Australian Constitution*; and
- the operation and effect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*‘Charter’*).

We conclude, despite the bringing of charges of incitement and the issuing of thousands of fines, that some protest activity during the pandemic may well have remained lawful, particularly in circumstances where the protest activity had a basis in care and compassion for others and where protesters were acting responsibly, including by engaging in social distancing.

12 Melbourne Activist Legal Network, ‘The Victorian Government Has an Application Process for Holding Large Protest Events under COVID: Here’s What You Need to Know’ (Web Page, 16 March 2021) <<https://melbactivistlegal.org.au/2021/03/16/new-pathway-for-organising-protests-under-covid-a-mals-review/>>.

13 From 10 to 20 to 100 and then to 200 persons.

14 ‘NSW Cases: Daily Confirmed Cases’, *Covid Live* (Web Page, 30 August 2021) <<https://covidlive.com.au/report/daily-cases/nsw>>. It should be noted that this article was written before the spread of the Omicron variant of COVID-19.

15 Bella Fowler and Sarah Sharples, ‘Anti-Lockdown Protests: Violent Scuffles in Victoria, Arrests in NSW’, *News.com.au* (Web Page, 21 August 2021) <<https://www.news.com.au/lifestyle/health/health-problems/thousands-of-police-deployed-in-sydney-to-block-antilockdown-protests/news-story/cbd04030f3abddb9cb042c2673ae23a8>>.

16 This approach is in contrast to New South Wales, where orders have been sought to prohibit public assembly pursuant to the *Summary Offences Act 1988* (NSW) s 25(1); *Commissioner of Police (NSW) v Gibson* [2020] NSWSC 953 (Ierace J); *Commissioner of Police (NSW) v Gray* [2020] NSWSC 867 (Adamson J); *Commissioner of Police (NSW) v Kumar* [2020] NSWSC 804 (Loneragan J); *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727 (Walton J); *Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109 (Bathurst CJ, Bell P, Leeming JA).

II DIFFERENT EXAMPLES OF PROTEST ACTIVITY

A *The Good Friday Protest*

After receiving medical treatment in Australia, 40 persons seeking asylum were detained by the Australian Government at the Mantra Hotel in Melbourne's north.¹⁷ In March 2020, over 1,000 doctors and health professionals signed an open letter calling for persons seeking asylum and refugees to be released from detention during the pandemic, including those in hotel detention. The letter, authored by Sydney paediatrician and refugee advocate David Isaacs, said that hotel detention sites were 'a very high-risk environment for detainees' mental and physical health'.¹⁸

On 10 April 2020 (Good Friday), a protest occurred at the Mantra Hotel calling for those seeking asylum to be released.¹⁹ In attempting to comply with social-distancing rules the protesters formed a car and bicycle cavalcade. Victoria Police arrested and charged one person for incitement and issued fines totalling AUD 43,000 to participants in the convoy.²⁰ Victoria Police stated '[w]hile Victoria Police respects the public's right to protest, these are extraordinary times and the health and safety of every Victorian needs to be our number one priority at this time'.²¹

During the Good Friday protest, the first *Stay at Home Directions* were in place. The directions contained four permitted reasons for leaving a person's place of residence: (a) obtaining necessary goods and services; (b) care and compassionate reasons; (c) work or education; and (d) exercise. Outdoor gatherings with more than one other person were prohibited, subject to the care and compassion and work and education exceptions.²²

Ultimately the charges against the alleged organiser of the Good Friday protest were discharged due to insufficient evidence so the issue of the legality of the protest activity under the directions was not determined.²³

17 Elise Kinsella, 'Melbourne Council Offers Refugees and Asylum Seekers Detained in Hotel Free Access to Services', *ABC News* (online, 24 December 2019) <<https://www.abc.net.au/news/2019-12-24/melbourne-council-offers-asylum-seekers-in-hotel-free-services/11825732>>.

18 'Coronavirus Deaths Rise to 13 in Victoria, Melbourne Refugee Protesters Fined by Police', *ABC News* (online, 10 April 2020) <<https://www.abc.net.au/news/2020-04-10/coronavirus-easter-victorians-told-to-stay-home-this-weekend/12140378>> ('Coronavirus Deaths Rise').

19 Refugee Action Collective (Victoria), 'Car Cavalcade: Detention Is a Covid-19 Risk, Free the Refugees!' (Facebook, 10 April 2020) <<https://www.facebook.com/events/831414197337542/>>.

20 Coronavirus Deaths Rise (n 18).

21 Ibid. See also 'Media Release: Refugee Protest and Fines', *Liberty Victoria* (Web Page, 14 April 2020) <<https://libertyvictoria.org.au/content/media-release-%E2%80%93-refugee-protest-arrest-and-fines>> ('Refugee Protest and Fines').

22 Deputy Chief Health Officer (Communicable Disease) (Vic), *Stay at Home Directions* (30 March 2020), cl 11(4) <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202003/Stay%20at%20Home%20Directions%20.pdf>> ('*Stay at Home Directions*').

23 Gus McCubbing, 'Refugee Activist's Protest Charge Dropped', *7 News* (online, 29 March 2021)

Other protests in support of what could be broadly described as ‘progressive’ causes have continued throughout the pandemic. For example, on 26 October 2020, the day after the Premier of Victoria, Hon Daniel Andrews MP, announced the lifting of some restrictions, 50 persons protesting the destruction of culturally significant trees to the Djab Wurrung people near Buangor, west of Melbourne were arrested and issued with AUD 4,957 fines.²⁴ There are other examples of protest activity where, in contrast to the above, there appears to have been limited enforcement through the issuing of fines, such as the Black Lives Matter protests on 6 June 2020,²⁵ and the Australia Day/Invasion Day protests on 26 January 2021. Organisers of such protests have encouraged participants to wear masks and engage in social distancing.²⁶

B *The Anti-Lockdown Rallies*

On 26 August 2020, an ‘anti-lockdown’ protest took place in Dandenong involving hundreds of protesters on foot.²⁷ Some protesters were reported as saying they were exercising their ‘right to freedom’.²⁸ The alleged organiser of the protest was charged with incitement, and 11 protesters each received a AUD 1,652 fine. At the time of this protest, the *Stay at Home Directions (No 13)* were in place. The directions contained additional restrictions to the first *Stay at Home Directions*, including mandating face coverings, work permits, a five-kilometre boundary from a person’s place of residence, and a curfew. Nevertheless, the directions still provided the four permitted reasons for leaving home outlined above. Again, the directions prohibited outdoor gatherings with more than one other person, subject to the care and compassion and work and education exceptions.²⁹ On 5 September 2020, there was another ‘anti-lockdown’ protest where protesters marched from Melbourne’s Shrine of Remembrance to

- <<https://7news.com.au/news/crime/refugee-activists-protest-charge-dropped-c-2465754>>.
- 24 Calla Wahlquist, ‘Djab Wurrung Trees: Destruction on Hold as Victorian Supreme Court Agrees to Hear Case’, *The Guardian* (online, 28 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/28/djab-wurrung-trees-destruction-on-hold-as-victorian-supreme-court-agrees-to-hear-case>>.
- 25 With only three alleged organisers fined; ‘Melbourne Black Lives Matter Protest Organisers to be Fined for Breaching Coronavirus Restrictions’, *ABC News* (online, 6 June 2020) <<https://www.abc.net.au/news/2020-06-06/melbourne-black-lives-matter-protest-organisers-fined-by-police/12329514>>.
- 26 Melissa Cunningham, ‘Crowd Marshals, Masks for All: Invasion Day Rally Organisers Unveil COVID-Safe Plan’, *The Age* (online, 22 January 2021) <<https://www.theage.com.au/national/victoria/crowd-marshals-masks-for-all-invasion-day-rally-organisers-unveil-covid-safe-plan-20210122-p56w5k.html>>.
- 27 Emily Ollie, ‘Lockdown Protesters Face Off with Police in Dandenong over Stage 4 COVID Restrictions’, *7 News* (online, 26 August 2020) <<https://7news.com.au/lifestyle/health-wellbeing/lockdown-protesters-face-off-with-police-in-dandenong-over-stage-4-covid-restrictions-c-1268077>>.
- 28 Ibid.
- 29 Deputy Public Health Commander (Vic), *Stay at Home Directions (Restricted Areas) (No 13)* (20 August 2020) cl 11(3)(a), (e) <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202008/Stay%20at%20Home%20Directions%20%28Restricted%20Area%29%20%28No%2013%29.pdf>>.

Albert Park Lake, resulting in 17 arrests and more than 160 fines.³⁰ On 23 October 2020, there were further protests at the Shrine of Remembrance, resulting in 16 arrests and 96 fines.³¹ On 3 November 2020, Victoria Police arrested 404 persons protesting outside Parliament House in Melbourne's CBD and issued 395 fines.³²

After the Delta variant spread in New South Wales and Victoria in July and August 2021, and restrictions were hardened, there was significant protest activity in Sydney and Melbourne. On 21 August 2021, an estimated 4,000 anti-lockdown protesters marched through Melbourne's CBD, with 218 arrests and the issuing of an estimated AUD 1.2 million in fines. Many of the protesters refused to wear masks or engage in social distancing. There were alleged assaults on police, with six officers hospitalised.³³ Police utilised pepper ball rounds and oleoresin capsicum foam canisters on some protesters.³⁴ These protests have been reported as enabling far-right political mobilisation and presenting an opportunity for activists to spread conspiracy theories and other misinformation regarding the pandemic.³⁵

As the numbers of daily new COVID-19 infections in Victoria increased beyond those from the first wave,³⁶ there was further rolling protest activity in mid-late September 2021. This included, on 18 September 2021, confronting scenes of protesters breaking police lines and police utilising pepper ball rounds, stinger grenades and capsicum spray, with 235 arrests and 10 police injured.³⁷

After the Victorian Government announced mandatory vaccination requirements for workers in the construction industry³⁸ there were heated protests at the

30 Elias Clure and Margaret Paul, 'Anti-Lockdown Coronavirus Protesters Arrested in Melbourne, 'Solidarity' Rallies Held Across Australia', *ABC News* (online, 5 September 2020) <<https://www.abc.net.au/news/2020-09-05/melbourne-coronavirus-restrictions-lockdown-protests-police/12633164>>.

31 'Police Arrest Demonstrators at Melbourne Protest against Victoria's Coronavirus Lockdown Restrictions', *ABC News* (online, 24 October 2020) <<https://www.abc.net.au/news/2020-10-23/anti-lockdown-protesters-converge-on-melbourne-shrine/12706900>>.

32 'Melbourne Anti-Lockdown Protest Sees Around 400 Demonstrators Arrested and Fined', *ABC News* (online, 3 November 2020) <<https://www.abc.net.au/news/2020-11-03/melbourne-anti-lockdown-protest-sees-over-400-protesters-arrest/12845120>>.

33 Fowler and Sharples (n 15).

34 Ibid.

35 Frank Bongiorno, 'Right Out There: How the Pandemic Has Given Rise to Extreme Views and Fractured Conservative Politics', *The Conversation* (Web Page, 16 August 2021) <<https://theconversation.com/right-out-there-how-the-pandemic-has-given-rise-to-extreme-views-and-fractured-conservative-politics-165448>>.

36 With Victoria reporting a national daily record of 2,297 new cases on 14 October 2021: Cassandra Morgan, 'National record as Victoria reports 2297 new COVID-19 cases, 11 deaths', *The Age* (online, 14 October 2021) <<https://www.theage.com.au/national/victoria/national-record-as-victoria-reports-2297-new-covid-19-cases-11-deaths-20211014-p58zvtv.html>>.

37 Tom Cowie, David Estcourt and Ashleigh McMillan, 'Ten Police Injured, More than 200 Arrested in Anti-Lockdown Protest', *The Age* (online, 18 September 2021), <<https://www.theage.com.au/national/victoria/travel-into-melbourne-blocked-as-police-prepare-for-anti-lockdown-protesters-20210918-p58srx.html>>.

38 Giuseppe Carabetta, 'What Are the Protests against Victoria's Construction Union All About?', *The Conversation* (Web Page, 22 September 2021) <<https://theconversation.com/what-are-the-protests-against-victorias-construction-union-all-about-168367>>.

Construction, Forestry, Maritime, Mining and Energy Union’s headquarters in Melbourne’s CBD,³⁹ and further marches by protesters to the Shrine of Remembrance.⁴⁰

Further protest activity in Victoria during the pandemic, from across the political spectrum, appears inevitable.

III THE PUBLIC HEALTH AND WELLBEING ACT 2008 (VIC)

Where there is a serious risk to public health,⁴¹ the *PHW Act* permits the Minister for Health to declare a state of emergency.⁴² At the time of the first protests considered above, the state of emergency could be repeatedly extended by a period not exceeding four weeks, but the declaration could not continue in force beyond six months.⁴³ During the course of the pandemic that outer limit was increased by Parliament to 12 months and later to 21 months.⁴⁴

39 ‘Victorian Government Shuts Down Construction Industry after Clashes at CFMEU Office’, *ABC News* (online, 20 September 2021) <<https://www.abc.net.au/news/2021-09-20/victorian-construction-industry-shutdown/100477912>>.

40 Serena Seyfort, ‘Chaotic scenes at Melbourne war memorial as police take action against protesters’, *9 News* (online, 22 September 2021) <<https://www.9news.com.au/national/coronavirus-victoria-melbourne-protesters-converge-on-war-memorial-shrine-of-remembrance/b7351c38-5f48-47e6-81b4-cd377ff1df38>>.

41 Section 3 of the *PHW Act* defines a ‘serious risk to public health’ as ‘a material risk that substantial injury or prejudice to the health of human beings has or may occur’ having regard to:

- the number of persons likely to be affected;
- the location, immediacy and seriousness of the threat to the health of persons;
- the nature, scale and effects of the harm, illness or injury that may develop; and
- the availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce the risk to the health of human beings.

The *Public Health and Wellbeing Amendment (State of Emergency Extension and Other Matters) Act 2020* (Vic) inserted s 3(4) into the Act which now provides:

Without limiting the definition of serious risk to public health in subsection (1), for the purposes of Division 3 of Part 10 COVID-19 may pose a material risk of substantial injury or prejudice to the health of human beings even when the rate of community transmission of COVID-19 in Victoria is low or there have been no cases of COVID-19 in Victoria for a period of time.

42 *PHW Act* (n 4) s 198(1). This occurred on 16 March 2020, see *Loiello v Giles* (2020) 63 VR 1, 15 [31] (Ginnane J) (*‘Loiello’*); Victoria, *Victoria Government Gazette: Special*, No s 129, 16 March 2020.

43 *PHW Act* (n 4) s 200(7).

44 The outer limit was increased to 12 months by *Public Health and Wellbeing Amendment (State of Emergency Extension and Other Matters) Act 2020* (Vic) s 5(1), which was subsequently extended to 21 months by *Public Health and Wellbeing Amendment (State of Emergency Extension) Act 2021* (Vic) s 3. It should be noted that in Victoria a ‘state of disaster’ was also declared by the Premier on 2 August 2020 pursuant to the *Emergency Management Act 1986* (Vic), which empowers a Minister to, amongst other things, suspend legislative provisions. As noted in *Loiello* (n 42) 16 [37] (Ginnane J):

After I had reserved judgment, the parties informed me by email that on 2 August, 2 September and 13 September 2020, the Minister for Police and Emergency Services made orders under s 24 of the *Emergency Management Act 1986* suspending the operation of s 200(2)–(9) of the *PHW Act* and that that Ministerial direction was in force from the time the *Stay at Home Directions* were made until the time they were revoked. On 13 August, 2 September and 13 September 2020, the Minister for Police and Emergency Services pursuant to powers under s 24(2)(a) of the *Emergency Management Act*, directed authorised officers exercising powers under s 200(1)(a)–(d) of the *PHW Act* to warn persons before exercising powers that a refusal or failure to comply with a direction without reasonable excuse is an offence. These matters were identified in reports tabled in Parliament. These three reports were Report to Parliament on declaration of State of Disaster–Coronavirus (COVID-19) pandemic under s 23(7) of the *Emergency Management Act 1986* on 3 September, 17 September and 15 October.

Emergency powers, as defined by s 200(1) of the *PHW Act*, include the power to detain, to restrict movement of persons within the ‘emergency area’, and to give directions that are deemed reasonably necessary to protect public health. The directions, including the *Stay at Home Directions* and the *Detention Directions* imposed with regard to the ‘hard lockdown’ of the housing towers in North Melbourne and Flemington in July 2020, were made by officers authorised by the Chief Health Officer pursuant to s 199 of *PHW Act*.⁴⁵

Section 203(1) of the *PHW Act* is titled ‘Compliance with direction or other requirement’, and provides that ‘a person must not refuse or fail to comply with a direction given to the person, or a requirement made of the person, in the exercise of a power under an authorisation given under section 199’.

Section 203(2) provides a defence of reasonable excuse. As noted above, the *Stay at Home Directions* have had exceptions.⁴⁶

The *PHW Act* has express regard to principles of proportionality. Section 9 provides that the decisions made and actions taken in the administration of the *Act*:

- should be proportionate to the public health risk sought to be prevented, minimised or controlled; and
- should not be made or taken in an arbitrary manner.

Section 111(a) of the *PHW Act* states that, with regard to the principles applying to the management and control of infectious diseases, ‘the spread of an infectious disease should be prevented or minimised with the minimum restriction on the rights of any person’.

The state of disaster ended on 8 November 2020.

45 See for example, Liberty Victoria, Submission No 1 to Public Accounts and Estimates Committee, Parliament of Victoria, *Inquiry into the Victorian Government’s Response to the COVID-19 Pandemic* (31 July 2020), [14], [25]–[26]. Notably, the Victorian Ombudsman found the hard lockdown appeared to have resulted in breaches of the human rights of residents as protected by the *Charter: Victorian Ombudsman, ‘Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 ‘Hard Lockdown’ in July 2020’ 179* (Report, 17 December 2020) <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-detention-and-treatment-of-public-housing-residents-arising-from-a-covid-19-hard-lockdown-in-july-2020/>>.

46 At the time of the Good Friday protest, for example, the *Stay at Home Directions* (n 22) provided:

7. Leaving premises for care and other compassionate reasons
 - (1) A person may leave the premises:
 - (d) to provide care and support to a relative or other person who has particular needs because of age, infirmity, disability, illness, a chronic health condition, or because of matters relating to the other person’s health (including matters relating to mental health or pregnancy).
8. Leaving premises to attend work or education
 - (1) Subject to subclause (2), a person may leave the premises to:
 - (a) attend work (whether paid or voluntary, including for charitable purposes).
 - (2) A person may leave the premises under subclause (1) only if it is not reasonably practicable for the person:
 - (a) to work from the premises.

A Prosecuting the Offence of Refusing or Failing to Comply with a Direction

With regard to potential prosecutions of protesters, when considering the effect of s 203 of the *PHW Act* together with the *Stay at Home Directions*, it could be argued that it is for the prosecution to establish beyond reasonable doubt that each of the exceptions do not apply in a given case, in order to establish that an accused person refused or failed to comply with the given direction. However, that would be unwieldy and onerous. Pursuant to s 72 of the *Criminal Procedure Act 2009* (Vic), when interpreting the directions (as a subordinate instrument⁴⁷ that arguably creates an offence and provides an exception) it is likely that the correct interpretation is one that places an evidentiary onus on an accused person to raise an exception contained in a direction as a ‘reasonable possibility’. Once raised on the evidence, it would then be for the prosecution to disprove that exception beyond reasonable doubt.

Section 203(2) of the *PHW Act* provides that a person is not guilty of the offence if they have a ‘reasonable excuse’ for their failure or refusal. What amounts to a ‘reasonable excuse’ is determined having regard to the purpose of the provision to which the ‘reasonable excuse’ applies.⁴⁸ Under the *PHW Act*, the reasonable excuse must refer to something other than the ‘exceptions’ outlined above, because a person who satisfies an exception has not failed or refused to comply with the direction. It is most likely that the accused will bear the onus to establish a reasonable excuse on the balance of probabilities.⁴⁹

Section 212 of the *PHW Act* maintains the privilege against self-incrimination.⁵⁰ However, in order to establish an evidentiary foundation for an exception or a reasonable excuse to apply it is likely that in some contested cases an accused person will need to give evidence.

With regard to penalties, the infringement penalty for refusing or failing to comply with a direction was initially set at AUD 1,652 for individuals.⁵¹ The regulations were updated on 28 September 2020 and the penalty was increased to AUD 4,957 for unlawful gatherings.⁵² However, persons who have been summoned on a charge of breaching a direction, or who elect to contest the infringement at court, are exposed to the greater maximum penalty of about AUD 20,000 for individuals and AUD 100,000

47 As an instrument made under an Act which is of a ‘legislative character’ pursuant to the definition of ‘subordinate instrument’ under *Interpretation of Legislation Act 1984* (Vic) s 38.

48 *Taikato v The Queen* (1996) 186 CLR 454, 464 (Brennan CJ, Toohey, McHugh and Gummow JJ) (*‘Taikato’*).

49 *Evidence Act 2008* (Vic) s 141(2).

50 There is an exception for some categories of documents and the person’s name and address.

51 *Public Health and Wellbeing Amendment (Infringements) Regulations 2020* (Vic).

52 *Public Health and Wellbeing Further Amendment (Infringement Offences) Regulations 2020* (Vic). With the increase in the value of a penalty unit from 1 July 2021, the fines have been increased to AUD 1,817 and AUD 5,452 respectively.

for businesses. Those persons are also exposed to the risk of receiving a criminal record if they unsuccessfully challenge the fine. In August 2021, it was estimated that AUD 54.8 million in *PHW Act* fines remained unpaid.⁵³ Unpaid fines may result in the commencement of enforcement proceedings, the issuing of infringement warrants and potential imprisonment.⁵⁴

We now consider the offence of incitement, which may also result in the imposition of significant penalties.⁵⁵

IV THE OFFENCE OF INCITEMENT

Justice Michael Croucher has observed that ‘incitement is, arguably, the least culpable of the inchoate offences, and the furthest-removed from any substantive offending’.⁵⁶ Before the executive response to protest activity during the pandemic, it was rarely charged in Victoria. Section 321G of the *Crimes Act 1958* (Vic) sets out the offence of incitement.⁵⁷ ‘Incite’ is defined by s 2A(1) of the *Crimes Act 1958* (Vic) as including ‘command, request, propose, advise, encourage or authorize’.⁵⁸

53 Aneeka Simonis and Kieran Rooney, ‘New Crackdown for Victorians Evading Covid Fines’, *Herald Sun* (online, 11 August 2021) <<https://www.heraldsun.com.au/coronavirus/new-crackdown-for-victorians-evading-covid-fines/news-story/4f9af5438959a9943ae45ef178b3db20>>.

54 *Infringements Act 2006* (Vic) pts 4–6.

55 The penalty for the offence of incitement is set out in s 321I of the *Crimes Act 1958* (Vic):

- (1) Where a person is convicted under section 321G of incitement to commit an offence or offences against a law or laws in force in Victoria—
 - (a) if the penalty for the relevant offence is fixed by law, the person shall be liable to a penalty not exceeding the penalty for the relevant offence; ...
 - (d) if the relevant offence, or each of the relevant offences, may be heard and determined only in the Magistrates’ Court, the person shall be liable to—
 - (i) level 6 imprisonment (5 years maximum) ...

56 *Zhong v Attorney-General* [2020] VSC 302, [337] (Croucher J) (‘*Zhong*’).

57 It provides:

- (1) Subject to this Act, where a person in Victoria or elsewhere incites any other person to pursue a course of conduct which will involve the commission of an offence by—
 - (a) the person incited;
 - (b) the inciter; or
 - (c) both the inciter and the person incited—
 if the inciting is acted on in accordance with the inciter’s intention, the inciter is guilty of the indictable offence of incitement.
- (2) For a person to be guilty under subsection (1) of incitement the person—
 - (a) must intend that the offence the subject of the incitement be committed; and
 - (b) must intend or believe that any fact or circumstance the existence of which is an element of the offence in question will exist at the time when the conduct constituting the offence is to take place.
- (3) A person may be guilty under subsection (1) of incitement notwithstanding the existence of facts of which the person is unaware which make commission of the offence in question by the course of conduct incited impossible.

58 With regard to the elements of the offence, Dr Ian Freckelton QC and Kerryn Cockroft have written in *Indictable Offences in Victoria* (Thomson Reuters, 6th ed, 2015) at [11.20] that the matters to be proved to establish incitement are:

- 1 That the offence occurred at the place and time alleged;
- 2 That the offender was the accused (or that he or she was an accomplice);
- 3 That the accused incited another person to pursue a course of conduct involving the

At its heart, the offence of incitement involves the intentional encouragement of another person to engage in a criminal act. There is a specific element that a person guilty of incitement must have ‘intended or believed that any fact or circumstance the existence of which is an element of the offence in question will exist at the time when the conduct constituting the offence is to take place’.⁵⁹ Accordingly, if an accused person believed that a valid exception to the relevant directions applied with regard to protest activity (and therefore that an element of the offence of breaching a direction would not exist because there was a valid reason for leaving the home), then arguably this element would not be made out.⁶⁰

There is a question as to whether a person can be found guilty of incitement in circumstances where the person allegedly incited was already ‘ready, willing and able’ to engage in the conduct.⁶¹ This could be relevant with regard to protest activity where the alleged inciter only encouraged a group of persons who were already ‘ready, willing and able’ to engage in protest. On the other hand, it could be argued that most protests, by their nature, require some degree of organisation.

- commission of an offence by him or her, the person incited, or both of them;
- 4 That the accused intended that the offence the subject of the incitement be committed;
- 5 That the accused intended or believed that any fact or circumstance the existence of which is an element of the offence in question would exist at the time when the conduct constituting the offence was to take place;
- 6 The conduct the subject of the incitement was committed; and
- 7 That the conduct engaged in by the inciter or the person incited, or both of them, was in accordance with the intention of the accused ...

With respect it is strongly arguable that Freckelton and Cockroft’s 6th and 7th elements are not required. As Freckelton and Cockroft separately observe at [11.20], the offence can be proven even if the offence incited is not actually committed, and even if it was impossible to be committed. For example, in *Zhong* (n 56) the appellant procured a purported hitman to murder his partner. The hitman was in fact an undercover police officer and the incitement was never acted upon. The appellant was convicted of incitement to murder. Accordingly, it appears that incitement can encompass the encouragement of prospective criminal conduct, even when not acted upon.

59 *Crimes Act 1958* (Vic) s 321G(2)(b).

60 See *Zhong* (n 56) [279]–[342] (Croucher J), where his Honour questioned the correctness of *R v Massie* [1999] 1 VR 542.

61 In the New South Wales Court of Criminal Appeal judgment of *R v Eade* (2002) 131 A Crim R 390 Hodgson JA (with whom Hidden J and Smart AJ agreed) held 401 [51]–[52]:

[A] mere request by an addict to the addict’s supplier for drugs would not normally amount to the offence of inciting; but in my opinion that is not because the requested supply is to the person asking, but rather because in the normal case the element of incitement is absent. The element of incitement is generally absent in such cases because the drugs are being acquired from a person understood by the acquirer to be ready, willing and able to supply drugs forthwith to the acquirer; and incitement does not occur because it is not required ... One would expect incitement to occur only in those cases when a person is seeking a supply of drugs from another person not understood by the former to be ready, willing and able forthwith to supply the drugs as sought. It is in those cases that the extra element of incitement might occur, so as to bring it about that the other person is induced to become ready, willing and able to make the supply.

There is also a threshold issue. Incitement must involve the pursuit of conduct that involves the commission of an *offence*. If those who were allegedly incited to commit protest activity were not committing an offence by protesting then there could be no unlawful incitement. Accordingly, this article now turns to judicial consideration of the legality of the *PHW Act* and the directions.

V CONSIDERATION BY THE COURTS

Over the first two years of the pandemic, the legislative and executive response to COVID-19 has been considered in several cases.

In *Gerner v Victoria* (*'Gerner'*),⁶² the High Court considered the Victorian regime and held that there was no freestanding implied freedom of movement in the *Australian Constitution* (*'Constitution'*). However, it was observed that a statute that limited freedom of movement so as to burden political communication may be invalid.⁶³ Notably, the plaintiffs in *Gerner* did not plead that the *PHW Act* and the relevant directions burdened the implied freedom of political communication.⁶⁴ Accordingly, the question of the constitutionality of the legislative regime and directions as they may impact upon the implied freedom of political communication was not considered.

In *Palmer v Western Australia* (*'Palmer'*),⁶⁵ the High Court considered the state of emergency declared in Western Australia and directions made pursuant to the *Emergency Management Act 2005* (WA). The Court held that the restrictions to interstate trade, commerce and intercourse had a non-discriminatory purpose and were proportionate⁶⁶ (or on the minority approach, reasonably necessary)⁶⁷ and accordingly not incompatible with s 92 of the *Constitution*. Kiefel CJ and Keane JJ observed that

[t]here can be no doubt that a law restricting the movement of persons into a State is suitable for the purpose of preventing persons infected with COVID-19 from bringing the disease into the community. Further, the matters necessary to be considered before such restrictions can be put in place, including with respect to an emergency declaration and the shortness of the period of an emergency declaration, suggest that these measures are a considered, proportionate response to an emergency such as an epidemic.⁶⁸

62 *Gerner v Victoria* (2020) 385 ALJR 394.

63 *Ibid* 401 [24] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

64 *Ibid* 401 [24]–[25] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

65 (2021) 388 ALR 180 (*'Palmer'*).

66 *Ibid* 196 [62] (Kiefel CJ and Keane J), 247 [262] (Edelman J).

67 *Ibid*. Gageler J at 202 [94] and Gordon J at 227–8 [197]–[198] preferred this approach to a structured proportionality analysis.

68 *Ibid* 199 [77] (Kiefel CJ and Keane J).

Importantly, the Court agreed with the Victorian Attorney-General, as intervenor, that the primacy focus of a question of compliance with a constitutional limitation is answered by the construction of the statute rather than the exercise of power by the executive under that statute.⁶⁹ Again, the implied freedom of political communication was not directly considered.

In *Loiello v Giles* ('*Loiello*'),⁷⁰ Ginnane J held that an aspect of the latter Victorian directions, the curfew, was lawful and a proportionate limitation to the human right of freedom of movement for the purpose of protecting public health.⁷¹ Ginnane J observed:

I consider that Parliament's intention in choosing the words 'person or group of persons within the emergency area' in s 200 of the *PHW Act* was to permit the implementation of emergency powers over a large group of people, including a group as large as the population of greater Melbourne. It included the power to impose a curfew if the authorised officer considered it reasonably necessary for the protection of public health. The ordering of a curfew could only occur while the state of emergency existed.⁷²

Loiello did not consider the legality of the other limitations imposed by the directions, nor the human rights to freedom of expression and peaceful assembly as protected by the *Charter*.

In July and August 2021, another case came before the Supreme Court of Victoria, *Cotterill v Romanes and Sutton* ('*Cotterill*'),⁷³ which did squarely raise the implied freedom of political communication in the context of protest activity. *Cotterill* concerned a person who, on 13 September 2020, was exercising within 5 kilometres of her home (as permitted at the time) and simultaneously demonstrating against the lockdown by holding a sign with a hand-drawn image of Mr Andrews that stated 'toot to boot', and whilst wearing a facemask emblazoned with 'Ban Dan'.⁷⁴ Ms Cotterill received an infringement notice from police,⁷⁵ although that was later withdrawn.⁷⁶

69 Ibid 196 [65] (Kiefel CJ and Keane J) 208–10 [118]–[127] (Gageler J), 270–1 [201] (Gordon J), 235 [226] (Edelman J) applying *Wotton v Queensland* (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

70 *Loiello* (n 42). This concerned the curfew between 9:00pm and 5:00am contained in the Chief Health Officer (Vic), *Stay at Home Directions (Restricted Areas) (No 15)* (13 September 2020) <<https://www.dhhs.vic.gov.au/sites/default/files/documents/202009/Stay%20at%20Home%20Directions%20%28Restricted%20Areas%29%20%28No%2015%29%20signed%2013%20Sept.pdf>>.

71 *Loiello* (n 42) 10 [21]. Notably, the Government had internal legal advice that 'there is some risk of incompatibility with respect to the evening curfew'; see 32 [95] (Ginnane J)

72 Ibid [126] (Ginnane J) (citation omitted).

73 [2021] VSC 498 ('*Cotterill*').

74 Ibid [124] (Niall JA).

75 Ibid [125] (Niall JA).

76 Ibid [128] (Niall JA). The Court found that, notwithstanding the fine was withdrawn, the plaintiff did have

The relevant directions at the time were the *Stay at Home Directions (Restricted Areas) (No 14)* and the *Stay Safe Directions (Melbourne) (No 2)*. On judicial review, the plaintiff submitted that the directions were invalid because they impermissibly burdened the implied freedom of political communication. Niall JA, sitting alone in the Trial Division, applied *Palmer* and held that the structured proportionality test regarding the implied freedom of political communication applied to the relevant legislative provisions of the *PHW Act*, and not to the directions themselves as an exercise of executive power. Accordingly, his Honour found that the plaintiff's discrete challenge to the directions had to fail.⁷⁷ Niall JA observed 'generally speaking, the question is to be asked at the level of the legislation and directed to the particular provisions in issue, and not in respect of the exercise of power purportedly authorised by the legislation'.⁷⁸

In the alternative, Niall JA held that, even if the proportionality test did apply to the directions, they were not invalid.⁷⁹ His Honour observed, in relation to the question of suitability:

The Directions bear a rational connection to the achievement of their purpose. First, they restrict the reasons for leaving home and therefore the occasions on which people might leave their home and interact with other persons. In the context of a very infectious disease, airborne and aerosol transmission, and pre-symptomatic and asymptomatic transmission, it is rational to require everyone to stay at home so as to minimise interactions. The existence of some exceptions to the general requirement to stay home does not render the failure to include one touching on political communication irrational, or sever the connection that the ban has to the attainment of the purpose.⁸⁰

Niall JA considered that a precautionary approach regarding the risk of transmission was to consider the full range of potential conduct, and observed that political debate is often raucous, divisive and lacking in civility.⁸¹ His Honour observed that allowing some exceptions for individuals to leave their home for exercise, essential work and other certain activities could make the requirement to stay at home more tolerable and could aid compliance.⁸² In short, his Honour held that the crafting of the directions involved matters of judgment and degree which are properly reposed in the executive.⁸³

standing to commence judicial review proceedings: at [132] (Niall JA).

77 Ibid [10], [197] (Niall JA).

78 Ibid [197] (Niall JA).

79 Ibid [11] (Niall JA).

80 Ibid [274] (Niall JA).

81 Ibid [287] (Niall JA).

82 Ibid [290] (Niall JA).

83 Ibid [293] (Niall JA).

Importantly, in *Cotterill* the plaintiff did not rely on the *Charter*. The plaintiff also submitted that the relevant directions did not permit a person to both leave their premise for a legitimate reason (such as to exercise within five kilometres of home) and to simultaneously engage in political communication (such as wearing a political t-shirt or carrying a placard).⁸⁴ In contrast, the defendant submitted the directions did not prohibit someone from having a dual purpose.⁸⁵ In *obiter*, Niall JA concluded that there was no room for a dual purpose that included a non-permitted reason⁸⁶ and that such a measure could dilute the force of the directions and complicate enforcement.⁸⁷ His Honour concluded with the observations of Kiefel CJ and Keane J in *Palmer* that ‘it cannot be denied that the importance of the protection of health and life amply justifies the severity of the measures’,⁸⁸ whether applied at the level of the statute or the directions.⁸⁹

VI THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

As stated by Niall JA in *Cotterill*,⁹⁰ the High Court has emphasised that the implied freedom of political communication in the *Constitution* is not a personal right of free speech.⁹¹ It is a restriction on legislative power arising as a necessary implication from the *Constitution*, and as such extends only so far as is necessary to preserve and protect the constitutionally-mandated system of representative and responsible government.⁹² This requires an analysis of: (a) whether the law in question burdens

84 Ibid [75] (Niall JA). This appears to have been in order for the plaintiff to submit the directions should be held to be invalid, rather than read down. However, with regard to this kind of approach see the unanimous warnings of the High Court in *Zhang v Commissioner of Police* (2021) 389 ALR 363, 369–70 [26]–[28] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

85 *Cotterill* (n 73) [74] (Niall JA).

86 Ibid [81] (Niall JA). However, his Honour questioned whether wearing an item of clothing emblazoned with a political message would demonstrate the *purpose* of why a person left their home.

87 Ibid [80] (Niall JA).

88 *Palmer* (n 65) 199 [81] (Kiefel CJ and Keane J).

89 *Cotterill* (n 73) [302] (Niall JA).

90 Ibid [157].

91 *Comcare v Banerji* (2019) 267 CLR 373, 395–6 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) (*‘Comcare’*). See also: *LibertyWorks Inc v Commonwealth* (2020) 391 ALR 188, 199–200 [44]–[46] (Kiefel CJ, Keane and Gleeson JJ). Notably, in *LibertyWorks* Steward J opined in *obiter* that it was arguable that the implied freedom does not exist: at 267 [298]–[299].

92 There is a live question about the circumstances in which the implied freedom of political communication impacts upon executive power purportedly authorised by a governing statute; see *Comcare* (n 91) 408 [51] (Gageler J), 434 [135] (Gordon J), 458–9 [208]–[209] (Edelman J); *Palmer* (n 65) 196 [65] (Kiefel CJ and Keane J) 208–10 [118]–[127] (Gageler J), 229 [201] (Gordon J), 235 [226] (Edelman J) applying *Wotton v Queensland* (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ). Cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 where the High Court (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) held that the implied freedom of political communication precludes curtailment of the protected freedom by the exercise of legislative or executive power.

the implied freedom of political communication; (b) whether the law's purposes and the means of achieving those purposes are legitimate; and (c) whether the law is reasonably appropriate and adapted to its legitimate object.

Since *McCloy v New South Wales*⁹³ a majority of the High Court has applied a 'structured proportionality' analysis to the third question, which considers the questions of suitability, necessity and adequacy.

Applying such an approach, it has been held that legislation that restricts protest activity may serve a legitimate purpose and be proportionate and not infringe the implied freedom (for example safe access zones around abortion clinics).⁹⁴ However, the High Court has found that, in some circumstances, anti-protest legislation can impermissibly burden the implied freedom.⁹⁵

The implied freedom of political communication may result in statutory offences being 'read down'.⁹⁶ To read down the offences under the *PHW Act* so as not to offend the implied freedom would involve considering whether the relevant provisions serve a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*, and if so whether they are appropriate and adapted to serve the achievement of that objective in the context of a global pandemic.⁹⁷

The High Court in *Palmer* and the Supreme Court of Victoria in *Cotterill* have demonstrated a degree of deference to the executive when adopting a proportionality analysis in the context of emergency legislation and the COVID-19 pandemic. Further, it is clear from *Palmer* and *Cotterill* that the implied freedom primarily involves an analysis of the governing statute, and not the directions made by the executive purportedly pursuant to the statute.⁹⁸

Given the relatively narrow field of operation of the implied freedom of political communication, and the limitations to its application to executive power, it may well be that the *Charter* will have more impact when considering the legality of protest activity in purported breach of the directions.

93 (2015) 257 CLR 178.

94 *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171.

95 *Brown v Tasmania* (2017) 261 CLR 328. See Ingmar Duldig and Jasmyn Tran, 'Proportionality and Protest: *Brown v Tasmania* (2017) 261 CLR 328' (2018) 39(2) *Adelaide Law Review* 493.

96 *Coleman v Power* (2004) 220 CLR 1. See Daniel McGlone, 'The Right to Protest' (2005) 30(6) *Alternative Law Journal* 274.

97 *Comcare* (n 91) 398–9 [29] (Kiefel CJ, Bell, Keane and Nettle JJ).

98 The actions of the executive may still of course be *ultra vires* under orthodox principles of judicial review.

VII THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (VIC)

In Victoria, human rights are expressly protected by the *Charter*. These include the rights to life, liberty, freedom of movement, freedom of expression, peaceful assembly, taking part in public life, and privacy.⁹⁹ These rights can be limited, but in general only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.¹⁰⁰ In the context of the pandemic, it has been observed that the advantage of human rights legislation is that it facilitates and supports policy decisions that balance individual rights and community protection.¹⁰¹

Section 32(1) of the *Charter* provides that statutory provisions must, so far as is possible to do so consistently with their purpose, be interpreted in a way that is compatible with human rights. When a legislative provision engages a human right referred to in the *Charter*, s 32(1) must be considered in conjunction with other ordinary principles of statutory interpretation.¹⁰² If a statutory provision cannot be interpreted consistently with the *Charter*, then the Supreme Court may make a declaration of inconsistent interpretation.¹⁰³ While such a declaration does not invalidate the particular provision,¹⁰⁴ it requires a legislative response.¹⁰⁵

It is strongly arguable that the directions made under the *PHW Act* are subordinate instruments,¹⁰⁶ and that s 32(1) of the *Charter* applies so that the directions should be

99 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 9, 21, 12, 15, 16, 18, 13 ('*Charter*').

100 *Ibid* s 7(2).

101 See George Williams and Sophie Rigney, 'Human Rights in a Pandemic' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (The Federation Press, 2021) 134–149, 146.

102 *R v Momcilovic* (2010) 25 VR 436. In *Momcilovic v The Queen* (2011) 245 CLR 1, the High Court of Australia was divided about the correct methodological approach to ss 32(1) and 7(2) of the *Charter*, and the Court of Appeal has continued to apply *R v Momcilovic* [2010] VSCA 50; (2010) 25 VR 436; Noone, *Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91; (2012) 38 VR 569, 576–7 [28]–[31] (Warren CJ and Cavanough AJA), 609 [142] (Nettle JA). Cf Tate JA in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 62 [189].

103 *Charter* (n 99) s 36(2).

104 *Ibid* s 36(5)(a). This reflects the 'dialogue model' of statutory human rights instruments which preserves parliamentary sovereignty. It should be noted that in *Momcilovic v The Queen* (2011) 245 CLR 1, Crennan and Kiefel JJ observed '[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate': at 229 [605].

105 *Ibid* s 37.

106 See the definition of 'statutory provision' pursuant to the *Charter* s 3(1). Arguably the Stay at Home Directions are instruments made under an Act and have a 'legislative character' pursuant to the definition of 'subordinate instrument' under the *Interpretation of Legislation Act 1984* (Vic) s 38. That is notwithstanding that such directions have been prescribed by item 87.4 of Schedule 1 to the *Subordinate Legislation (Legislative Instruments) Regulations 2021* (Vic) as not being 'legislative instruments' for the purposes of the *Subordinate Legislation Act 1994* (Vic). The exempting of legislative instruments from the requirements of the *Subordinate Legislation Act 1994* (Vic) (such as the preparation of human

interpreted in a manner that is compatible with those rights, so far as is possible to do so consistently with their purpose. This is in stark contrast to the operation of the implied freedom of political communication on the directions considered in *Cotterill*.

Section 38(1) of the *Charter* makes it unlawful for a public authority (which includes Victoria Police¹⁰⁷ and authorised officers under the *PHW Act*¹⁰⁸) to act in a way that is incompatible with a human right or fail to give proper consideration to a relevant human right, unless the exception in s 38(2) applies, in that the public authority could not have acted differently or made a different decision as a result of a statutory provision.¹⁰⁹

Once a human right is identified as limited by the action of a public authority, the onus of ‘demonstrably justifying’ the limitation in accordance with s 7(2) of the *Charter* resides with the party seeking to uphold the limitation.¹¹⁰ In light of what must be justified, the standard of proof is high.¹¹¹

rights certificates under s 12D of that Act) should not result in the exclusion of the operation of s 32(1) of the *Charter* on ‘subordinate instruments’ in the absence of clear statutory language. In *Visa International Service Association and Another v Reserve Bank of Australia* (2003) 131 FCR 300, Tamberlin J observed at 424 [592]:

In *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185, the Full Court [Wilcox, Branson, Lindgren JJ] pointed out that there is no simple rule for determining whether a decision is of an administrative or legislative character. The court proceeded to consider some of the matters discussed in the authorities and had regard to those considerations. The court considered the characterisation question taking a cumulative approach to various considerations. The particular matters which the court took into account included the following:

- Whether the decisions determined rules of general application or whether there was an application of rules to particular cases.
- Whether there was Parliamentary control of the decision.
- Whether there was public notification of the making of the regulation.
- Whether there has been public consultation and the extent of any such consultation.
- Whether there were broad policy considerations imposed.
- Whether the regulations could be varied.
- Whether there was power of executive variation or control.
- Whether provision exists for merits review.
- Binding effect.

107 *Charter* (n 99) s 4(1)(d).

108 *Loiello* (n 42) 56 [207] (Ginnane J).

109 *Kerrison v Melbourne City Council* (2014) 228 FCR 87, 131–3 [189]–[200].

110 *Re an application under the Major Crime (Investigative Powers) Act 2004* (Vic); *DAS v Victorian Human Rights & Equal Opportunity Commission* (2009) 24 VR 415, 448 [147] (Warren CJ) (*‘DAS’*). Approved by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 475 [144]; *Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 498 [175] (John Dixon J).

111 In *DAS* (n 110) 449 [148], Warren CJ cited with approval the observations of Dickson CJ in the celebrated judgment of *R v Oakes* [1986] 1 SCR 10, 43 [70]:

There are ... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance” (citations omitted).

See also *R v Momcilovic* (2010) 25 VR 436, 475 [144]; *Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 498 [175] (John Dixon J).

The human right to freedom of expression is protected by s 15(2) of the *Charter*. In addition to the operation of s 7(2) of the *Charter*, the right is subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons and for the protection of national security, public order, *public health* or public morality (an express internal limitation).¹¹² The right is also protected under international law by Article 19(2) of the *International Covenant on Civil and Political Rights* ('*ICCPR*').¹¹³ In General Comment No 34, the United Nations Human Rights Committee ('*UNHRC*') stated that '[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.¹¹⁴

The human right to peaceful assembly and freedom of association is protected by s 16 of the *Charter*. It is also protected by Article 21 of the *ICCPR*. Interestingly, in the *ICCPR* this right also has an express internal limitation including for protecting public health, but not in the *Charter*. In General Comment No 37, the *UNHRC* stated:

Together with other related rights ... [the right to peaceful assembly] constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism. Peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain and to establish the extent of support for or opposition to those ideas and goals.¹¹⁵

It appears clear that, in seeking to prohibit public gatherings and accordingly public protest activity, the human rights of freedom of expression and peaceful assembly are engaged and limited by the *PHW Act* and the directions. The real question is one of proportionality.

112 *Charter* (n 99) s 15(3).

113 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Ratified by Australia 13 August 1980.

114 Human Rights Committee, *General Comment No 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (29 July 2011) [1].

115 Human Rights Committee, *General Comment No 37: On the Right to Peaceful Assembly*, 129th sess, UN Doc CCPR/C/GC/37 (23 July 2021) [1]. It should be noted that the HRC also cited the judgment of the European Court of Human Rights in *Cissé v France* [2002] III Eur Court HR 1 and remarked at [45]:
The protection of 'public health' may exceptionally permit restrictions to be imposed, for example where there is an outbreak of an infectious disease and gatherings are dangerous. This may in extreme cases also be applicable where the sanitary situation during an assembly presents a substantial health risk to the general public or to the participants themselves.

A *How Might the Charter Affect the Prosecution of the Protesters?*

The *Charter* could be relied upon by protesters charged with offences of incitement and/or breaching the directions in three principal ways. It could be submitted that:

- The *PHW Act* and directions should be interpreted in a manner consistent with human rights pursuant to s 32(1) of the *Charter*, and that under a human rights compatible interpretation some protest activity remained lawful;
- The directions made under the *PHW Act* were unlawful pursuant to s 38 of the *Charter*; and/or
- The enforcement of the directions by Victoria Police when charging protesters with incitement and/or issuing fines was unlawful under s 38 of the *Charter*.

These three avenues will be considered in turn.

1 *The Interpretation of the PHW Act and the Directions Pursuant to s 32(1) of the Charter*

As noted above, it is strongly arguable that the *Stay at Home Directions* must, so far as it is possible consistently with their purpose, be interpreted in a manner compatible with human rights as protected by the *Charter*.

In *Loiello*, Ginnane J was not required to consider the operation and effect of s 32(1) of the *Charter* on the *Stay at Home Directions*, most likely because the terms of the curfew were plain and did not allow for competing interpretations. As noted above, the *Charter* was not relied upon in *Cotterill*.

It is arguable that the *Charter*, and in particular the human rights to freedom of expression and peaceful assembly as protected by ss 15–16, should affect the interpretation of what amounts to ‘care and support’, and what constitutes ‘work’ for the purposes of the exceptions under the relevant directions. As Liberty Victoria has contended:

Given the perilous conditions faced by refugees and people seeking asylum at the Mantra Hotel in Preston, Liberty Victoria notes that it is at least arguable that such protests (which appear to have been engaged in a manner that complies with ‘social distancing’), were conducted on compassionate grounds – and that those engaged in the protests sought to provide care and support to vulnerable people with particular needs. Alternatively, those engaged in the protests could be considered as engaging in voluntary work for a charitable purpose.¹¹⁶

116 Refugee Protest and Fines (n 21).

It may be that the *purpose* of a given protest is relevant when considering issues of legality. Arguably, under a human rights compatible interpretation of the *Stay at Home Directions*, a protest to raise attention to the plight of refugees and persons seeking asylum (as a vulnerable cohort with significant health issues), could fall within the care and compassion and/or work exceptions. In contrast to some of the conduct by protesters at the anti-lockdown rallies, the fact that the protest was conducted in a socially distanced manner may also be relevant when considering whether a *Charter*-compatible interpretation of the *Stay at Home Directions* protects some forms of protest activity and represents the least restrictive interpretation of those directions consistent with human rights.

The *Charter* has previously affected the interpretation of statutory provisions relevant to protest activity. In *Victoria Police v Anderson*,¹¹⁷ which concerned Boycott, Divestment and Sanctions protests outside the Max Brenner store in Melbourne's CBD on 1 July 2011, his Honour Magistrate Garnett took the *Charter* (and the human rights to freedom of expression and peaceful assembly) into account in favour of a submission on behalf of the accused about the proper construction of s 9(1)(d) of the *Summary Offences Act 1966* (Vic).¹¹⁸ In the context of the particular facts of that case, his Honour held that the offence of 'wilful trespass' in a public place should be interpreted to apply to a person entering or being in a public place *with the intention to commit a criminal offence*, and his Honour rejected the prosecution argument that wilful trespass could be committed once a demand had been made for the protesters (who were engaged in lawful protest) to leave the public space.¹¹⁹

The *Charter* may also inform what is meant by a 'reasonable excuse' pursuant to s 203(2) of the *PHW Act*. That expression should itself be interpreted, so far as it is possible to do so consistently with its purpose, in a manner that is compatible with human rights. However, as outlined above, what amounts to a 'reasonable excuse' depends in part on the purpose of the provision to which 'reasonable excuse' applies.¹²⁰ It would no doubt be contended by those seeking to enforce the *Stay at Home Directions* that a 'reasonable excuse' cannot be interpreted so broadly that it would frustrate the purpose of the directions. Accordingly, while this avenue might be of some assistance, it is likely that the *Charter*-compatible construction of the directions themselves (including the exceptions) would be of the most practical utility for some of the protesters.

117 [2012] VMC 22.

118 Ibid [64].

119 Ibid [70].

120 *Taikato* (n 48) 464.

2 *The Lawfulness of Making the Directions Pursuant to s 38 of the Charter*

It could be contended that, in arguably prohibiting public protest activity, the *Stay at Home Directions* are themselves incompatible with the *Charter*, and the Chief Health Officer and/or his or her delegates acted incompatibly with their obligations pursuant to s 38(1) of the *Charter* in making them.¹²¹

In *Kerrison v Melbourne City Council* ('*Kerrison*'),¹²² concerning the Occupy Melbourne protests, the Full Court of the Federal Court held:

[T]he making of the Local Law cannot be challenged under s 38(1) of the *Charter*. On the proper construction of the scheme of the *Charter* as a whole, the making of a subordinate instrument by a public authority is not comprehended by the phrase 'to act in a way' in s 38(1) of the *Charter*.¹²³

Applying *Kerrison* it is unlikely that it could be successfully argued the making of the directions was unlawful pursuant to s 38(1) of the *Charter*.¹²⁴ However, it should be noted that in *Loiolo*, while Ginnane J brought *Kerrison* to the attention of the parties, it was accepted by the former Solicitor-General (Vic) on behalf of the defendant that s 38(1) of the *Charter* applied to a decision to make directions under the *PHW Act*.¹²⁵

121 In *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 497 [174] John Dixon J identified a useful road map prepared by the Victorian Equal Opportunity and Human Rights Commission for assessing incompatibility under s 38 of the *Charter*. Under that roadmap, the Court is to consider a number of questions:

- (a) Is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take? (the relevance or engagement question);
- (b) If so, has the public authority done or failed to do anything that limits that right? (the limitation question);
- (c) If so, is that limit under law reasonable and is it demonstrably justified having regard to the matters set out in s 7(2) of the *Charter*? (the proportionality or justification question);
- (d) Even if the limit is proportionate, if the public authority has made a decision, did it give proper consideration to the right? (the proper consideration question); and
- (e) Was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 32 of the *Charter* in a way that is consistent with the protected right (the inevitable infringement question).

122 (2014) 228 FCR 87.

123 *Ibid* 129–35 [182]–[208] (Flick, Jagot and Mortimer JJ).

124 For completeness, it should be noted, that in *Kerrison* it was held that by 'wearing' a tent the appellant was using it as a form of protest and thereby exercising her human right to freedom of expression under s15(2) of the *Charter* to impart information and ideas about how the Occupy Melbourne protests were being constrained. However, it was found that the Council officers did not act incompatibly with that right by removing the tent after several warnings. Further, the appellant did not discharge her burden of persuading the Court as to how or why the actions of the Council in removing an Occupy Melbourne banner limited her human rights. This is consistent with Victorian jurisprudence that has emphasised that the right to free expression can be subject to reasonable limitations, such as with regard to anti-graffiti laws (see *Magee v Delaney* (2012) 39 VR 50).

125 *Loiolo* (n 42) 56 [207], fn 195 (Ginnane J). However, it should be noted that in *Harding v Sutton* [2021] VSC 741, an ongoing case involving mandatory vaccine directions, the current Solicitor-General appears to have taken a different position: see [158] (Richards J). Justice Richards also observed at [210](d) that the plaintiffs and/or the VEOHRC may wish to contend that the relevant holding in *Kerrison* was plainly wrong.

It could be argued that the directions themselves constitute disproportionate limitations to *Charter* rights in some respects. In *Loiello* it was held that the right to liberty, as protected by s 21 of the *Charter*, was not directly engaged by the imposition of the curfew.¹²⁶ However, the right to freedom of movement, as protected by s 12 of the *Charter*, was engaged by the imposition of the curfew.¹²⁷ Ginnane J held that the evidence of Associate Professor Giles established that:

- she gave proper consideration to human rights as required by the second limb of s 38(1) of the *Charter*;¹²⁸
- the curfew was reasonably necessary to protect public health; and
- there were no other reasonably available means to achieve the purpose of reducing infections.

Accordingly, the imposition of the curfew was held to be proportionate pursuant to s 7(2) of the *Charter*.¹²⁹

The judgments of the Supreme Court of Victoria in *Loiello* and *Cotterill* demonstrate that, when applying a proportionality analysis, judicial decision-makers are likely to have a significant degree of deference to those public health experts tasked with balancing competing human rights considerations when making the directions. In *Loiello*, Ginnane J observed:¹³⁰

The statement of compatibility of the *PHW Act* was tabled in Parliament which described the right to health as being ultimately concerned with the right to life which was the supreme right. Mr Andrews, as Health Minister, stated that the right to health was essential for the enjoyment of many other rights protected by the *Charter*, particularly the right to life. The defendant contended that this was consistent with the UNHRC's most recent General Comment which described the right to life as a pre-requisite for the enjoyment of all other human rights. In a similar vein, Blackstone listed the right to life as the primary natural right, followed by the right to liberty.

In the circumstances of a global pandemic, which requires the balancing of competing rights, it is clear that the foundational importance of the right to life will be given significant weight in the proportionality analysis required by s 7(2) of the *Charter*. Further, while breach of the *Charter* may result in declaratory relief,¹³¹ it

126 Ibid 58 [217] (Ginnane J).

127 Ibid 59 [221] (Ginnane J).

128 Ibid 69 [260] (Ginnane J).

129 Ibid 68 [253] (Ginnane J).

130 Ibid 64 [239] (Ginnane J) (citations omitted).

131 Although regard would have to be had to s 39 of the *Charter*. See further Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33(1) *Melbourne University Law Review* 105; *Director of Housing v Sudi* (2011) 33 VR 559, 604–5 [267]–[269] (Weinberg JA).

does not provide a defence at law and so would be of little practical assistance to the protesters who have been charged and/or fined unless they were withdrawn by the executive because of the finding of unlawfulness. However, the executive would not be obliged to make any such withdrawal.

3 *The Lawfulness of the Enforcement of the Directions Pursuant to s 38 of the Charter*

In charging persons with incitement and issuing infringement notices, it may be arguable that some members of Victoria Police acted incompatibly with the *Charter* and failed to give proper consideration to *Charter* rights.

Evidence may be excluded in a criminal proceeding if there has been a failure by members of Victoria Police, or other public authorities, to act compatibly with the *Charter*, pursuant to s 138(1) of the *Evidence Act 2008* (Vic). In *DPP v Kaba*,¹³² Bell J held:

Under s 38(1) of the *Charter*, it is ‘unlawful’ for a public authority to act in a way that is incompatible with human rights or to fail to give proper consideration to human rights in making a decision. Section 39(1) contemplates relief or remedy being given in respect of such unlawfulness in the specified circumstances. As police are public authorities under the *Charter*, it is a source of the standards expected of law enforcement officers in Victorian society. This is relevant to determining whether police actions are improper under s 138(1) of the *Evidence Act*.¹³³

The potential exclusion of evidence would turn on it being found that the actions or decisions of police and/or other public authorities limited a *Charter* right and were disproportionate under s 7(2) of the *Charter* (and therefore improper or unlawful), and then on discretionary considerations.¹³⁴ Achieving the discretionary exclusion of evidence can be difficult, especially in circumstances where there are factors that favour the admissibility of such evidence.¹³⁵

In light of the above, it appears likely that the interpretative provision of the *Charter* will have the most utility to some protesters seeking to challenge charges of incitement and/or infringement offences, because it would directly test the purported unlawfulness of the relevant conduct through its impact on the interpretation of the *PHW Act* and the directions.

132 (2014) 44 VR 526.

133 Ibid 617 [334] (Bell J).

134 See further *Kadir v The Queen*; *Grech v The Queen* (2020) 267 CLR 109, 109 [12]–[13], 134 [40] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

135 Having regard to the non-exhaustive factors in s 138(3) of the *Evidence Act 2008* (Vic).

VIII CONCLUSION

These have been challenging times for legislators, the executive and the community. However, history demonstrates that claims to the greatest good for the greatest number can lead to oppressive and unnecessary laws and unfair prosecutions. It is in times of emergency that human rights have the most work to do. As observed by Ginnane J in *Loielo*:

[e]ven in an emergency, Victoria is a society of laws and any executive decrees must be made according to law ... Human rights are of importance even in urgent or emergency situations, if governments and executives can disregard them, they are not rights of any real value.¹³⁶

Through a tale of two different forms of protest, we have sought to demonstrate that the *Charter* may protect some forms of protest activity. This is more likely to be in circumstances in where the human rights of freedom of expression and peaceful assembly are exercised on compassionate grounds on behalf of those who themselves are particularly vulnerable to the COVID-19 pandemic, and where protesters have acted responsibly. The *Charter* has a wider field of operation than the implied freedom of political communication, and should inform the interpretation of the *PHW Act*, the directions and their exceptions, with the consequence that the test for lawful protest during the pandemic is one of both purpose and proportionality.

136 *Loielo* (n 42) 9 [15], [17] (Ginnane J). See further *Certain Children (by their Litigation Guardian, Sister Marie Brigid Arthur) v Minister for Families and Children* (2016) 51 VR 473, 508 [188] (Garde J): '[t]he existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights'.

