

# Managing a pandemic in Victoria: Support, proper process and transparency as the foundations of a good government response to the COVID-19 pandemic

## The importance of good government during the COVID-19 pandemic

The COVID-19 pandemic has highlighted the important role that government plays in our lives. A pandemic is a crisis that cannot be navigated by any individual or corporation. A pandemic requires large scale coordination of people and resources to ensure an effective public health response that can prevent the worst-case scenarios that have wreaked havoc on societies that have faced similar crises throughout human history.

Government has the tools to manage the necessary coordination of an effective public health response. The extraordinary powers that Government has in a pandemic require strong safeguards, transparency and oversight. This helps to identify, prevent and mitigate any unintended and harmful impacts. These harmful impacts fall hardest on already marginalised groups like Aboriginal and Torres Strait Islander people. It is crucial that Government does all it can to ensure that these harmful impacts do not deepen and further entrench disadvantage.

## The basis of a good government response to a pandemic

A pandemic is a public health crisis. Everyone is vulnerable during a pandemic and large-scale outbreaks can lead to huge death tolls and massive economic loss if people do not have confidence that the pandemic is being properly managed.

### **A public health issue must be managed with a public health response.**

Around the world, and particularly in Victoria, there has been a heavy reliance on policing responses to the pandemic. Indeed, when policing responses go beyond what is justified by the health risks, these measures can worsen a pandemic by undermining community confidence and compliance with public health measures.

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A police-led response also undermines public health education which needs a single, clear set of messages about what we can do to keep ourselves and our families and communities safe.

A supportive, effective and inclusive public health response is the only way to manage a good government response to the pandemic.

Increased powers must be accompanied by increased transparency and accountability. The advice, analysis and reasoning of government decision-making must be made publicly available.

### Oversight and governance

**Recommendation 1.** Restrictions in response to the pandemic must

- be based on specific health advice - there must a clear nexus between the medical/ health advice and the restrictive measures to be imposed;
- must be assessed for compliance with the *Charter*, with the Government to produce a document similar to a Statement of Compatibility.

Pandemic legislation should require the Government to publish the specific health advice and human rights compatibility assessments on which public health orders are based. The advice, analysis and reasoning must be made publicly available. Curfews should not form part of the Government's response unless the above stipulations are met.

**Recommendation 2.** The Victorian Parliament should sit throughout any pandemic. Procedures to facilitate remote work should be put in place to facilitate this.

**Recommendation 3.** Pandemic legislation should provide for the establishment of a special Parliamentary Committee whenever a pandemic is declared, to conduct ongoing investigations and monitoring of the pandemic response. Legislation should create opportunities for the review of public health orders and health advice, potentially by an independent body with both public health and human rights expertise. While

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the expectation is not that such a review be immediate, it should be done in a timely fashion.

**Recommendation 4.** To strengthen human rights protections, there should be a provision in legislation like that found in the *Commonwealth Biosecurity Act 2015* s477(3) which relates to emergency requirements during a human biosecurity emergency period.

For example, that ‘the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined; that the requirement is appropriate and adapted to achieve the purpose for which it is to be determined; that the requirement is no more restrictive or intrusive than is required in the circumstances; that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances; that the period during which the requirement is to apply is only as long as is necessary.’

**Recommendation 5.** Pandemic legislation must ensure that it is not an offence to leave home to take part in a pandemic-safe protest. This applies to periods other than when stay at home directions are in place, and only in compliance with the *Charter*. Victoria Police should be required to plan for and facilitate *pandemic-safe* protest actions.

**Recommendation 6.** There should be genuine, independent merits review before VCAT available. Judicial review should be timely and not cost-prohibitive.

### Policing and enforcement response

**Recommendation 7.** Legislation should require that, in a pandemic, achieving compliance with public health regulations is focused on:

- Explaining rules and their justification;
- Encouraging compliance and providing support to enable community members to comply; and
- Issuing fines only as a last resort, where the above steps can be demonstrated.

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**Recommendation 8.** Legislation should bar police from issuing public health fines to children.

**Recommendation 9.** Legislation should reduce the size of financial penalties for public health offences, recognising the substantial hardship caused by large fines and the low likelihood of full amounts being recovered.

**Recommendation 10.** When police have stopped someone in relation to public health rules, they should not be permitted to:

- Execute outstanding warrants;
- Question them about unrelated matters; or
- Search them, except for serious crimes specified by legislation.

**Recommendation 11.** Police should be required to record the Indigenous status for all people they record public health-related offences against.

**Recommendation 12.** The Crime Statistics Agency should be required to publish regular and timely data on public health offences, with breakdowns by Indigenous status; Local Government Authority; and age.

**Recommendation 13:** In conducting internal review of COVID-19 fines, police should be required to provide reasons for their decisions.

**Recommendation 14.** Fines Victoria should utilise non-statutory arrangements in accordance with s.20 of the *Fines Reform Act 2014* to enhance review options so that COVID-19 fines are not enforced against Aboriginal people, young people, financially disadvantaged people, and other vulnerable groups.

**Recommendation 15.** Amendments introduced by the *Police and Emergency Legislation Amendment Act 2020*, expanding and permitting the expansion of designated areas in which Protective Services Officers (**PSOs**) operate, should be repealed.

**Recommendation 16.** Pandemic legislation should not include any provisions to expand the role or powers of PSOs.

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**Recommendation 17.** VALS supports Liberty Victoria’s recommendation that ‘[i]f PSOs are used as de facto police, they should receive the same level of training. Further, the expansion of the definition of “designated place” under the *Victoria Police Regulations 2014* should be rolled back.’

**Recommendation 18.** Legislation should require that, where health regulations make check-in or registration compulsory in any setting, this check-in data cannot be accessed by anyone except health authorities, and can only be accessed and used for the purposes of contact tracing. Similarly, protections in relation to contact tracing data and information must be legislated for.

### Prison management

**Recommendation 19.** Decreasing the number of people in places of detention is part of a responsible and comprehensive public health strategy. Pandemic legislation should include an automatic trigger requiring authorities to consider ways of reducing the incarcerated population, including through:

- Release of people held on remand;
- Use of administrative leave and Emergency Management Days;
- Use of permits, particularly for people with chronic health conditions, disabilities and mental health conditions, elderly people and Aboriginal people;
- Increased use of temporary leave for children and young people;
- Increased frequency of Parole Board hearings to allow for the processing of more parole applications;
- Increased grants of parole.

**Recommendation 20:** Pandemic legislation should include specific provisions concerning bail, including:

- Making bail should be made easier and more accessible for children, young people and adults;
- A presumption in favour of bail for all offences, with the onus on prosecution to prove there is a specific and immediate risk to the physical safety of another person; and

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- Increased and mandated guidance and oversight for police officers to ensure they are capable of appropriately determining when bail should be granted by a police decision maker and when a person should be taken before a court.

**Recommendation 21.** Pandemic legislation should direct police to consider the personal and public health impacts of detention, with the aim being police using powers to curb further admissions to places of detention. For example, making significant use of cautions, diversions and summons. There should also be a moratorium on pursuing prosecution for low-level offences and breaches of bail and conditional breaches of community correction orders where there is a low risk to community safety.

**Recommendation 22.** Pandemic legislation should include in bail considerations for Victoria Police, bail justices and the Courts:

- the personal and public health impacts of detaining people during a pandemic;
- the negative impact of restrictive measures enacted by detaining authorities in an effort to exclude and contain the spread of the infectious disease, COVID-19, in detention (such as the use of protective and transfer quarantine, suspension of personal visits and suspension or reduction of programs and services).

**Recommendation 23.** Pandemic legislation should automatically direct resources to improve accommodation options for people facing homelessness, recognising the connection between homelessness and the denial of bail and parole, and offending.

**Recommendation 24.** Legislation should be amended to require that incarcerated people in quarantine and isolation are regularly observed and verbally communicated with.

**Recommendation 25.** Legislation should be amended to ensure that no person is placed in solitary confinement as part of a pandemic response, particularly people with mental or physical disabilities.

**Recommendation 26.** Legislation should explicitly provide for the rights of people in protective and transfer quarantine, including guaranteeing meaningful contact with other people and time out of cell.

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**Recommendation 27.** Pandemic preparedness plans should include adequate planning to address staffing and other operational issues, to ensure no one is subjected to solitary confinement and lockdowns of prisons are avoided.

**Recommendation 28.** People in protective quarantine, transfer quarantine and isolation must be provided supports and services. This includes mental health services and cultural supports and services provided by Aboriginal Community Controlled Organisations (**ACCOs**). They must also be provided the means to contact family, lawyers, independent oversight bodies, and ACCOs, including VALS.

**Recommendation 29.** Corrections Victoria should maintain a register of all people placed in protective quarantine, transfer quarantine and isolation that includes:

- Information such as age, gender, disabilities, medical conditions, mental health conditions and Aboriginality;
- Information concerning the length and the nature of meaningful contact provided on a daily basis, how much time people spend out of cell, and the services made available to them and used by them; and
- Any incidents, such as attempted self-harm.

**Recommendation 30.** Legislation should provide that the use of protective and transfer quarantine in prisons, and the conditions associated with quarantine, are regularly reviewed and modified where necessary. Reviews should:

- Be guided by up-to-date medical advice which establishes a clear nexus between the quarantine requirements for prisons and the public health situation in the Victorian community;
- Include consultation with civil society stakeholders;
- Ensure that the least restrictive possible measure is adopted, in accordance with the *Victorian Charter of Human Rights and Responsibilities*;
- Make publicly available the evidence, expert advice and analysis in relation to *Charter* compliance and health advice relied upon.

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Reviews should not include revisiting protections such as the proposed absolute prohibition on the use of solitary confinement. Certain protections should be absolute.

**Recommendation 31.** All approved vaccines must be made available, as a matter of urgency, to all people in prison and youth detention centres, and all staff and contractors working in these facilities. Pandemic legislation should require the Victorian Government to develop a vaccination rollout plan which makes vaccinations of people in prison and prison staff a high priority, and includes targets for vaccinations of people in prison and prison staff.

**Recommendation 32.** In line with the principle of equivalence, legislation should ensure that no person in prison is offered a vaccine later than they would if living freely in the community. This includes providing early and appropriate access for those people in prison eligible due to their Aboriginality, age, health status or other factors.

**Recommendation 33.** Legislation should mandate that the progress of the vaccination rollout is considered when reviewing of quarantine and isolation arrangements in prisons. Meeting vaccination rollout targets should trigger an automatic review and relaxation of restrictions.

**Recommendation 34.** Legislation should mandate that the Victorian Government's vaccine rollout plan for prisons provides for Aboriginal Community Controlled Organisations, which have the necessary trust with detained Aboriginal people and capacity to deliver culturally safe services, to be involved in delivering health information.

**Recommendation 35.** The Government should be required to make publicly available the vaccination rollout plan, including how this will impact restrictions in prisons, and provide regular updates on the status of the vaccination rollout, including demographic information such as Aboriginality. The number of people, and the number of Aboriginal people, who have tested COVID-19 positive in prison and youth detention facilities should be made publicly, regularly, available.

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## Lockdowns and detention orders

**Recommendation 36.** Pandemic legislation should require the Victorian Government to develop, in advance, specific plans for preventing, managing and responding to outbreaks in high-density residential settings, particularly public and social housing.

**Recommendation 37.** In line with Recommendation 36 above, any plans for responding to outbreaks in residential settings must emphasise a cooperative public health approach, with policing and enforcement used to a minimum extent.

### **Recommendation 38.**

- Legislation should require that when detention directions are published, the specific health advice they are based on is published simultaneously, and that there is a clear nexus between the advice and the restrictive measures to be imposed.
- Information in relation to detention directions, and any other restrictions or directions, should be provided in an understandable and accessible way to the public.
- Sufficient notice of any lockdowns must be provided, to enable people to make the necessary arrangements and preparations (such as buying medication).

**Recommendation 39.** With the public housing lockdown meeting the definition of deprivation of liberty under OPCAT, any future lockdowns should fall within the mandate of the NPM, once established. There should also be clear, accessible avenues for seeking review of detention orders.

**Recommendation 40.** Any deprivation of liberty, even during a public health emergency, must not be arbitrary. Preventative detention should be legislatively prohibited as a restrictive measure in the Government's strategy to combat pandemics.

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### Also see:

- [Building Back Better: Victorian Aboriginal Legal Service COVID-19 Recovery Plan](#)
- [VALS submission to the Public Accounts and Estimate Committee COVID-19 Inquiry](#)