

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.

While government has the capacity to manage the sort of coordination required for an effective public health response, the extraordinary powers required call for greater safeguards, transparency and oversight, to ensure that unintended and harmful impacts can be identified, prevented and mitigated on an ongoing basis.

Aboriginal and/or Torres Strait Islander people bear the brunt of bad government. Forcing already marginalised groups to bear the greatest cost of a crisis response will ultimately drag out the negative impacts of a crisis, such as a pandemic, by increasing inequality and engraining it for generations to come.

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. You cannot police transmissions to zero. Indeed, when policing responses go beyond what is justified by the health risks, these measures

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can worsen a pandemic by undermining community confidence and compliance with public health measures.

A supportive, effective and inclusive public health response is the only way to manage a good government response to the pandemic. This requires government to base decisions on specific and robust health advice.

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 be 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 in advance 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

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by an independent body with both public health and human rights expertise. While 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 similar to that found in the *Commonwealth Biosecurity Act 2015* s477(3), relating to emergency requirements during human biosecurity emergency period (ie. 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 should ensure that it is not an offence to leave home (during periods other than when stay at home directions are in place, and only in compliance with the Charter) to take part in a pandemic-safe protest and 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 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

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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.

Recommendation 17. VALS continues to support 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;
- Release of people serving sentences of six months or less;
- Early release of people with less than six months remaining on their sentence;
- 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;

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- 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 on remand;
- 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
- 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 take into consideration the personal and public health impacts of detention, with the objective being police using their powers responsibly in order to curb further admissions to places of detention; relying instead on cautions, diversions, summons, as well as having a moratorium on pursuing prosecution for low-level offences and breaches of bail and conditional breaches of community correction orders.

Recommendation 21. Pandemic legislation should include in bail considerations:

- 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 22. 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 23. Legislation should be amended to require that incarcerated

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people in quarantine and isolation are regularly observed and verbally communicated with.

Recommendation 24. 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 25. 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.

Recommendation 26. 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 27. People in protective and transfer quarantine should be provided supports and services (including mental health services and cultural supports and services provided by Aboriginal Community Controlled Organisations), and means by which to contact family, lawyers, independent oversight bodies, and Aboriginal Community Controlled Organisations, including VALS.

Recommendation 28. Corrections Victoria should maintain a register of all people placed in protective and transfer quarantine 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.

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Recommendation 29. 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.

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

Recommendation 30. 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 31. 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 32. 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.

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Recommendation 33. 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 and vaccines.

Recommendation 34. 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.

Lockdowns and detention orders

Recommendation 35. 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 36. In line with Recommendation 35 above, any plans for responding to outbreaks in residential settings should be required to emphasise a cooperative public health approach, with policing and enforcement used to a minimum extent.

Recommendation 37.

- 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 38. With the public housing lockdown meeting the definition of deprivation of liberty under OPCAT, any future lockdowns should fall within the mandate

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of the NPM, once established. There should also be clear, accessible avenues for seeking review of detention orders.

Recommendation 39. Any deprivation of liberty, even during a public health emergency, must not be arbitrary. VALS is of the view that even with additional safeguards and protections, preventative detention is arbitrary, lacks justification and should be legislatively prohibited as a restrictive measure forming part of the Government's strategy to combat the pandemic.

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](#)