

SUBMISSION TO THE INQUIRY INTO THE  
VICTORIAN GOVERNMENT'S RESPONSE TO  
THE COVID-19 PANDEMIC

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The Victorian Government has not responded appropriately to the issues arising from regulating the rights of movement and assembly during the COVID-19 pandemic. This will be discussed through analysing the actions taken by the government in light of the concept executive accountability. This essay will firstly discuss the issue of rights of freedom and movement in relation to the COVID-19 pandemic, and then will outline the theoretical framework surrounding executive accountability. The government's response to the pandemic will then be examined in relation to its effect on the freedom of movement and the practical implications of these responses to executive accountability.

## I A BRIEF OVERVIEW OF THE COVID-19 RESPONSE ISSUES

On the 16<sup>th</sup> of March 2020, the Victorian Premier Daniel Andrews announced a state of emergency in the wake of the COVID-19 pandemic.<sup>1</sup> The executive needed to have emergency powers to be conferred upon them in order to create regulations for the COVID-19 pandemic. This was done via part 10 of the *Public Health and Wellbeing Act 2008*, which conferred emergency powers to protect public health onto the executive.<sup>2</sup> This allowed Chief Health Officer, exercising executive power, to create directives which became law in Victoria. Victoria has plenary power over all areas “in and for Victoria in all cases whatsoever”.<sup>3</sup> Other than ensuring that the law is consistent with the law of the Commonwealth, and the few exceptions of exclusive power granted explicitly granted to the federal government, there are no restrictions on Victoria's law making powers.<sup>4</sup> Therefore, the directions given were within power. The first direction, given on the 19<sup>th</sup> of March, was the first of many directions given

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<sup>1</sup> Daniel Andrews, ‘State of Emergency Declared in Victoria Over COVID-19’, *Premier of Victoria* (Media Release 16 March 2020) <<https://www.premier.vic.gov.au/state-of-emergency-declared-in-victoria-over-covid-19/>>.

<sup>2</sup> *Public Health and Wellbeing Act 2008* (Vic) pt 10 (‘*Public Health Act*’).

<sup>3</sup> *Constitution Act 1975* (Vic) s 16.

<sup>4</sup> *Australian Constitution* s 109.

that restricted movement and assembly.<sup>5</sup> As the COVID-19 pandemic worsened, more directives came into force and movements were restricted further. From requiring physical distancing of 4sqm per person and banning mass gatherings, to strict regulations prohibiting travel (except for a handful of reasons), the directions significantly limited the freedom of movement and assembly within Victoria.<sup>6</sup>

Without a doubt these restrictions played a role in reducing the number of COVID-19 cases. However the restrictions also had several negative consequences that must be analysed from a public law perspective. The restrictions were unclear, and their operation hinged almost entirely on the discretion and interpretation of the police who were enforcing them. They were applied inconsistently, which coupled with the intense media scrutiny the enforcement received, meant that the practical applications of the restrictions were unclear. Citizens were unsure of what was a prohibited activity and what was considered ‘necessary’ for the purposes of the directions, and often the enforcement of restrictions were portrayed as an arbitrary exercise. Not only did this undermine the public’s trust in the enforcement agencies, but it also meant that the function of executive accountability was compromised. With no clear benchmark to regulate by, ensuring just and equal regulation is almost impossible.

## II WHAT IS EXECUTIVE ACCOUNTABILITY?

The separation of powers is a cornerstone of the Australian parliamentary system. At the federal level, law making authority is divided between the legislature, the judiciary, and the executive.<sup>7</sup> It follows that since each branch is granted with power to govern, each should be

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<sup>5</sup> Annaliese van Diemen, ‘Directions from Deputy Chief Health Officer (Communicable Disease) in Accordance with Emergency Powers Arising from Declared State of Emergency: Mass Gatherings’ in Victoria, *Victoria Government Gazette*, No S 135, 19 March 2020, 3 (‘Mass Gathering Directions’).

<sup>6</sup> Annaliese van Diemen, ‘Directions from Deputy Chief Health Officer (Communicable Disease) in Accordance with Emergency Powers Arising from Declared State of Emergency: Stay at Home Directions’ in Victoria, *Victoria Government Gazette*, No S 169, 31 March 2020, 8, 5 (‘Stay at Home Directions’).

<sup>7</sup> Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (The Federation Press, 2017) 31-32.

checked and balanced to ensure accountability.<sup>8</sup> Although Victoria does not technically have a separation of powers in its constitution, the practical distinction between the arms of government can still be a useful tool to analyse the implications of government decisions. Traditionally, the legislative branch deals with the development of the law and the executive branch administers it.<sup>9</sup> It is a well-known fact that in practice, these branches are not exactly separate and instead they coexist and harmonise with one another. Although the legislature ultimately makes the law, the executive has a considerable degree of authority to direct the legislature as to what the law should be via the implementation of policy.<sup>10</sup> However, over time this distinction has been watered down and the executive has been afforded more law making authority via empowering legislative instruments.

Responsible government is the pinnacle of executive accountability. With its traditional interpretation, it means that the executive government is accountable to parliament, therefore it must act responsibly.<sup>11</sup> However a divergent meaning has come to bear, which transposes a “*duty to govern*” with the traditional interpretation.<sup>12</sup> This creates a concept where the executive is no longer only responsible to parliament for its actions, but it has an inherent responsibility to govern the population.<sup>13</sup> This conceptual change has seen sweeping reformative law which establishes and grants new law making authority within the executive branch through delegated legislation, government departments, and agencies.<sup>14</sup> Although there are positive changes that have been brought about by this development, it also means that the

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid 33.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 35.

<sup>12</sup> David Kinley, ‘Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices’ (1995) 18(2) *UNSW Law Journal* 409, 411.

<sup>13</sup> Ibid.

<sup>14</sup> John Halligan and John Power, *Political Management in the 1990s* (Oxford University Press, 2<sup>nd</sup> ed, 1992) 2.

accountability of the executive has been undermined because it can essentially bypass parliament when creating law.<sup>15</sup>

This change is clearly demonstrated through the Victorian Government's response to the COVID-19 pandemic. The chief health officer was empowered to make the directives via the *Public Health Act*, which meant the directives became the law of Victoria and they were therefore able to be enforced through fines and other punitive methods.<sup>16</sup> This is a prime example of the executive being granted law making power through which the demarcation between the legislature and the executive have been further watered down. The Chief Health Officer, exercising executive power, was essentially able to bypass parliament when making these laws which had a very direct, and very invasive effect on the citizens in Victoria. This meant that the person creating the laws had expertise in what was clearly a specialised area. It also meant that changes to the regulations could be made efficiently to reflect the rapidly developing situation.

However there were very real implications for the accountability of the executive that were perhaps overlooked during the government's response to the pandemic. By allowing the executive to have sole authority in the regulations, the parliamentary scrutiny element was excluded from the development process.<sup>17</sup> This meant that the proposed regulations were not given careful consideration by the elected representatives of the citizens who were affected by it. Clearly, this has ethical implications about the democratic effectiveness of delegated legislation, and the fact that the executive was not checked by parliament. An important facet of the checks and balances system in Victoria is the compatibility statement with the Victorian *Charter of Human Rights and Responsibilities* ('Victorian Charter').<sup>18</sup> Although the charter is

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<sup>15</sup> Martin Loughlin, *Public Law and Political Theory* (Clarendon Press 1992) 260-261.

<sup>16</sup> *Public Health Act* (n 2) s 199-200.

<sup>17</sup> Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (The Federation Press, 2008) 423.

<sup>18</sup> *Charter of Human Rights and Responsibilities 2006* (Vic) s 28 ('Victorian Charter').



the new restrictions, and there were serious concerns about the capacity of the hospitals to deal with the outbreak. However, as is evident from the graphs, the curve dramatically flattened once the restrictions came into force.<sup>24</sup> There is very little doubt that the restrictions reduced community transmissions of the virus, and the benefits of this have been felt throughout sectors of the Victorian economy and the health system alike. In that respect, the response by the Government was appropriate because it undoubtedly prevented countless deaths from the virus.

#### IV THE DETRIMENTS OF THE COVID-19 RESPONSE

However, these restrictions do pose significant questions regarding the applicability of executive accountability. As mentioned earlier, the executive agencies have had heightened authority in the development and application of the law regulating the Government's response to the pandemic. This has been at the almost entire exclusion of the other two arms of government, which in essence enabled the executive to have complete control on the issue. The executive government in Victoria, vested in the Chief Health Officer acting on delegated legislation, was able to develop and implement law that had a direct impact on the citizens of Victoria.<sup>25</sup> The Victorian police, as authorised officers under the *Public Health Act* and indisputably as agents of the executive, were tasked with carrying out the enforcement of these restriction by way of fines and arrests in a number of situations.<sup>26</sup> This approach is not without its merits, but it does have very direct consequences to the issue of executive accountability that must be discussed in detail below.

##### *A The Unclear Directions*

On a macro scale, the differences in directions given between states contributed to the lack of clarity. This disco-ordination between state governments is perfectly illuminated by the

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<sup>24</sup> Ibid.

<sup>25</sup> *Public Health Act* (n 2) s 199-200.

<sup>26</sup> *Public Health Act* (n 2) s 30.

advice given for travelling to holiday houses over the Easter weekend. In New South Wales, this was strictly prohibited by the Police Commissioner who warned about the potential for fines, as it was deemed unnecessary travel.<sup>27</sup> However, the advice given in Victoria was that it was okay to travel to a secondary residence as long as you travelled directly there and made no stops on the way.<sup>28</sup> Of course, a discussion of the differences in approaches taken on a nationwide scale would have limited applicability for the purposes of the terms of reference, but it is still important to note that this is where some of the confusion stemmed from.

Nonetheless, this particular action taken by the Victorian Government allowing holidaymakers to travel in the midst of stage three lockdowns also created confusion on a micro scale within Victoria. At the time the announcement was made that people could travel to their holiday homes over Easter, the lockdown regulations were still strictly regulating the movement of people via the explicitly valid reasons that people could leave their house.<sup>29</sup> Other than for shopping, care, work, education, exercise, and medical reasons, people were effectively prohibited from leaving their houses, thus limiting their freedom of movement.<sup>30</sup> The decision to allow people to travel to their holiday homes therefore stands directly at odds with the restrictions that were current at the time.

Moreover, the Chief Health Officer Professor Brett Sutton also urged the public to stay home unless absolutely necessary in the same media address within which he okayed people travelling to their holiday houses<sup>31</sup>. When actions such as this are combined with news reports

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<sup>27</sup> Interview with Mick Fuller (Fran Kelly, RN Breakfast, 7 April 2020) <<https://www.abc.net.au/radionational/programs/breakfast/it-was-my-idea-nsw-police-commissioner-mick-fuller/12127848>>.

<sup>28</sup> Noel Towell, 'No Fines for Easter Holiday House Trips, but Please Stay Home', *The Age* (online, 6 April 2020) <<https://www.theage.com.au/national/victoria/no-fines-for-easter-holiday-house-trips-but-please-stay-home-20200406-p54hmy.html>>.

<sup>29</sup> Victoria, *Victoria Government Gazette*, No S 177, 3 April 2020.

<sup>30</sup> *Ibid* r 5.

<sup>31</sup> Towell (n 26).

of people being stopped by police and questioned as to their reasons for travelling, potentially receiving fines, further served to confuse the already unclear restrictions surrounding this issue.

In the United States an unclear law would be voided for vagueness.<sup>32</sup> If an average person could not clearly determine the elements of a crime, then that statute is unconstitutional on the basis that the defendant could not clearly defend themselves, thus denying them due process.<sup>33</sup> However in Victoria there is no such rule protecting the citizens from persecution via an unclear law. People were issued infringement notices for breaching the restrictions on their freedom of movement, even if those breaches resulted from a genuine misunderstanding of the regulations.

It is possible that the reason why there was such a high degree of uncertainty regarding the meaning and application of the regulations is because they were not given the requisite scrutiny that such a pervasive legislative instrument would receive. Any restrictions on the freedom of movement as per section 12 of the *Victorian Charter* would usually require a statement of compatibility justifying why the restrictions were necessary, and it would be examined by the Scrutiny of Acts and Regulations Committee.<sup>34</sup> Because the directions had an Executive mode of delivery, they were not afforded the usual checks by examining their effects on human rights. This means there was also no acknowledgement of the effect on the right to assembly as per section 16 of the *Victorian Charter*, which is another human right clearly affected by the restrictions on movement.<sup>35</sup> The Scrutiny of Acts and Regulations Committee is still able to review the regulations in relation to their effect on the rights in the *Victorian Charter*, but this is not a necessary measure, nor is their report binding on Parliament.<sup>36</sup> This means that the executive's power went largely unchecked. Had there been a higher degree of

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<sup>32</sup> Black's Law Dictionary (online at 28 June 2020) 'Void' (def 'Void for Vagueness' 2).

<sup>33</sup> Ibid.

<sup>34</sup> *Victorian Charter* (n 16) ss 12, 28.

<sup>35</sup> Ibid s 16.

<sup>36</sup> *Subordinate Legislation Act 1994* (Vic) ss 21-22.

parliamentary scrutiny here, it would be likely that the application and implications of the restrictions would have been more carefully analysed and even more clearly drafted to ensure the effect on freedom of movement and assembly was minimal. Thus, the Victorian Government's response to the COVID-19 situation overlooked these implications of executive accountability because it allowed the executive to have almost entirely unchecked power restricting freedom of movement.

### *B Police Discretion in the Application of the Directions*

Perhaps one of the biggest issues in the application of the directions given by the Chief Health Officer was the considerable degree of discretion afforded to the police. As established earlier, the police are a vehicle of executive power as they are often charged with administering and enforcing the law, and the enforcement of the directions given by the Chief Health Officer are no different. However, the uncertainty of the meaning of these restrictions as discussed above means that the police will need to both interpret and apply the law, as well as enforce it through the use of on-the-spot infringement notices.<sup>37</sup> This could even be analysed as a potential encroachment on the judiciary's authority, even though contesting fines in court is still valid.<sup>38</sup> In practice, consequences of non-contest mean that in some circumstances the police's interpretation and application of the restrictions is the final say, thus limiting the opportunity of the judiciary to review executive discretion.<sup>39</sup> Thus, the degree of police discretion required to enforce the restrictions can mean that the accountability of the executive is diminished further.

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<sup>37</sup> Palmer (n 19).

<sup>38</sup> Michael Eburn, 'On the Spot Fines v Court Penalties', *Australian Emergency Law* (Blog Post, 26 August 2020) < <https://emergencylaw.wordpress.com/2019/08/26/on-the-spot-fines-v-court-penalties/>>.

<sup>39</sup> Saunders et al (n 18)

The degree of discretion is perfectly illuminated by the case of the 17 year old learner driver who was fined \$1652 for taking a driving lesson with her mother.<sup>40</sup> Although they made it clear at the time that they were not stopping anywhere, nor were they going to see anyone, the police still issued them an infringement notice for breaching the stage three restrictions on unnecessary travel.<sup>41</sup> As argued by the supervising driver, they had interpreted the restrictions in a way that meant they were able to travel for the purposes of learning to drive, because it fell under the education exception. However the police officer who gave the on-the-spot penalty interpreted the actions as unnecessary travel. Not only did this result in a further curtailment of the freedom of movement in an arbitrary situation, it also meant that the police officer was able to determine the interpretation and application of the law without any real check on their power. Although the fine was later withdrawn following extensive media coverage, it still illuminated the arbitrariness of the police discretion which was necessary to apply the pandemic restrictions. Thus, this degree of discretion afforded to the executive, as vested in the Victorian Police, has the effect of allowing the executive to interpret and apply the law arbitrarily.

Any degree of arbitrariness in the application of law is likely to create a situation where the law is applied unfairly. As highlighted by the Fitzgerald Inquiry into policing in the 1990s, there is a need for the police to enforce the law with the consent and trust of the people if they are to be effective.<sup>42</sup> And in order for the police to have the consent of the people, the law needs to be applied fairly and consistently.<sup>43</sup> This has not been the case with pandemic policing. The use of discretion has not been monitored at all, which makes it incredibly difficult to detect trends in the restrictions' application and to ensure they are being applied fairly.<sup>44</sup> In some

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<sup>40</sup> Christine McGinn, 'Victorian Learner Driver Hunter Reynolds Fined Over Coronavirus Rules', *7 News* (online 6 April 2020) <<https://7news.com.au/lifestyle/health-wellbeing/vic-driver-fined-over-covid-19-rules-c-958222>>.

<sup>41</sup> *Ibid.*

<sup>42</sup> GE Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council* (Report, 3 July 1989) 219, 321 ('*Fitzgerald Report*').

<sup>43</sup> *Ibid*; Palmer (n 19).

<sup>44</sup> Palmer (n 19).

cases, people were receiving fines or even being arrested for breaching the directions, whereas other people were simply given a warning. Without proper monitoring of these applications, it is impossible to hold police to account where the restrictions were applied too harshly or too leniently without going through the court system. Thus, the executive power was not appropriately checked and when enforcing the COVID-19 restrictions

#### CONCLUSION

As evidenced through the discussion above, the Victorian Government has overlooked executive accountability in their restrictions on freedom of movement and assembly at almost every stage of the law enforcement process. The restrictions that were put in place created significant curtailments of the freedom of movement and assembly, and this was not given proper consideration or scrutiny as they were developed. Not only was there a lack of scrutiny surrounding the degradation of human rights but the unclear laws restricting the freedom of movement also required a large degree of discretion to operate. Had there been adequate data collection on the use of police discretion, it would have been possible to ensure the fair application of the laws. However, this was not the case. Therefore it is only possible to conclude that while the restrictions undoubtedly saved lives, the Victorian Government's actions undermined executive accountability.

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