

COVID-19 – Failure to enforce law against protestors

Memorandum of Advice to Institute of Public Affairs

1. On 16 March 2020, a State of Emergency was declared in Victoria pursuant to s 198(1) of the *Public Health and Wellbeing Act* 2008 (**the PH Act**) in response to the worldwide Coronavirus pandemic. Under the Act, a State of Emergency may be declared by the Minister for Health on the advice of the Chief Health Officer in response to a “serious risk to public health”. The declaration gives the CH Officer broad powers to respond to the risk, including to make directions to close businesses and to limit the movement of people within Victoria. Such powers are extraordinary, designed to respond to only the most serious dangers to the public, and have never before been exercised in this State.
2. The CH Officer, and his delegate, have made a series of directions under the Act, requiring the closure of businesses and limiting public gatherings to very small numbers of people (**Directions**). Failure to comply with a direction can give rise to an offence, punishable by a large fine. The effect of the declarations has been significant, causing an economic recession, social isolation, business hardship and preventing citizens from gathering for church services, birthdays, weddings and funerals. These consequences have been justified by the serious risk to public health posed by the Coronavirus.
3. Under the Act, a request can be made for the assistance of Victoria Police in the exercise of certain powers conferred under the Act (see s 202). On 23 March 2020, such a request was announced by the Premier of Victoria. He said that “Victoria Police has established a coronavirus enforcement squad of five hundred officers to ensure that measures that have been put in place to combat coronavirus are followed”. He explained that the Police will be “enforcing the bans on indoor and outdoor gatherings”. He said that the Directions were “meaningless if Victorians don’t take them seriously or don’t think they will be caught if they flout the rules”. He said further that “Such thinking is wrong and the new coronavirus enforcement squad at Victoria Police will take action against anyone caught doing the wrong thing”. He warned that if Victorians did not abide by the rules, “more Victorians will die”.
4. Notwithstanding the ongoing State of Emergency and the continuing threat of injury or death, a large Black Lives Matter protest was planned to take place in the Melbourne Central Business District. The protest was planned for 6 June 2020. The planned protest was contrary to the Directions then in force under the Act, which, inter alia, prohibited public gatherings of more than 20 people.
5. Before the protest, Victoria Police made a decision not to enforce the Directions against any of the protestors by way of fine or by directing protestors to disperse (**Decision**). Only the organisers of the protests were to be fined for breach of the Directions. The Decision was made known to the public. The protest went ahead. An estimated ten thousand people attended. Consistent with the Decision, not one of the ten thousand was fined or asked to disperse by Victoria Police.

6. Throughout this period, Victoria Police continued to enforce the other Directions against other members of the community. For example, two days after the protest, Rye Pier was closed by Police over a concern that visitors were not observing social distancing requirements.
7. No formal reasons for the Decision have been made public. It has been reported that the Decision was made on the basis that it would have been impossible to enforce the Directions against everyone at the protests.
8. Immediately prior to the protests, the Coronavirus outbreak in Victoria appeared to be under control. In the next fortnight, the numbers of infected people significantly increased, as did community transmission. Victoria is now the national epicentre of the outbreak. The Premier has described this new state of affairs as a “public health bushfire”. A number of protestors in the crowd have subsequently tested positive to the virus. The extent of the link between the protests and the renewed outbreak is yet to be ascertained. It has been plausibly suggested that this vast public gathering contributed to public complacency about the virus, and that the flouting of the Directions at the protest destroyed the trust necessary for broad adherence to social distancing principles. It is likely that it would be established that permitting such a large public gathering undermined public perception of the seriousness of the virus and the need to adhere to rules attempting to mitigate it. It may well be established that this contributed to, for instance, the possible failure of any hotel security guards (working in the CBD, in the midst of the protests) to take seriously the rules that they were expected to follow in enforcing hotel quarantine (whether with respect to their own conduct, or that of quarantined persons).
9. In this context, I have been asked to advise as to the lawfulness of the Decision not to enforce the Directions against the protestors. Each of the facts referred to in this memorandum is based on public news reporting of the relevant events. The facts are therefore assumed only for the purposes of this advice (see further paragraph [22] below).
10. In answering this question, the starting point is the *Victoria Police Act* 2013 (Vic) (**VP Act**). This provides that the general functions of Victoria Police include protecting life and property and preventing the commission of offences (s 9). The Chief Commissioner of Police is responsible for the management and control of Victoria Police. His role includes “implementing the policing policy and priorities of the Government” (s 16). This is subject to the power of the Police Minister to give written directions as to the policy and priorities to be pursued, save that the Minister may not give directions about certain matters including “preservation of the peace and the protection of life and property in relation to any person or group of persons” or “enforcement of the law in relation to any person or group of persons” (s 10).

11. Ordinarily, this scheme confers a very broad discretion on the Commissioner to decide the circumstances and manner in which the police will discharge their functions, including when and how to enforce the law.¹ Such policy decisions will not lightly be second-guessed by the Court. Such discretion is not, however, unlimited. As Denning MR has observed:²

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. **I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.**

12. There are features of the present case that distinguish it from even the more general circumstances described by Denning MR. **First**, the essential context is that a State of Emergency has been declared on the basis of a serious risk to public health. **Second**, Directions have been made by the CH Officer, in the exercise of his statutory function and drawing on his expertise, to attempt to mitigate that risk. **Third**, a formal request has been made to Victoria Police to assist in the enforcement of those directions. In this context, enforcement may involve a fine, caution, detention of individuals or directions to disperse.
13. In this unusual circumstance of the present health crisis, in my opinion, there is a sound prima facie case that the Decision was unlawful. That is for two reasons:
14. **First**, in ordinary circumstances the Commissioner has the general statutory authority to interpret the policy and priorities of Victoria Police. That general authority is, however, in this case, qualified by the State of Emergency and Directions made under the PH Act. This confers powers on the CH Officer to decide what measures must be taken in response to a serious risk. It is the CH Officer who has the expertise and, for this reason, the statutory authority to decide on the appropriate public health response. In this context, the PH Act permits a request for assistance of Victoria Police in the enforcement of such measures. Importantly, Victoria Police have no expertise in responding to a public health crisis. They do not have any express decision-making function under the PH Act.

¹ See e.g. *Ritson v Commissioner of Police* [2013] NSWSC 1396, *Hinchcliffe v Commissioner of Police of the AFP* [2001] FCA 1747; *Desai v Keelty* [2009] FCA 1280. C.f. *R v Commissioner of Police for Tasmania* (1992) 1 Tas R 99; *R v Chief Constable of Devon and Cornwall* [1982] 1 QB 458.

² *R v Commissioner of Police of the Metropolis; Ex Parte Blackburn* [1968] 2 QB 118.

15. For Victoria Police to, by the Decision, make a general policy decision not to enforce the Directions against a certain group of people at a certain time, is to effectively refuse to give the assistance requested. As I have observed, under the VP Act, the Chief Commissioner “is responsible for implementing the policing policy and priorities of the Government”. A State of Emergency, and related Directions, could not be a clearer statement of the Government’s policy and priorities. A Decision should not, therefore, be made that is directly contrary to the responsibility to implement that policy.
16. Equally, if certain groups were to be excluded from the Directions, that decision was reserved for the CH Officer who could decide whether or not to revoke or qualify the Directions, not for the Victoria Police (who does not have any equivalent statutory function, or expertise).
17. The PH Act is silent as to what the Commissioner of Police must do in response to a request for assistance. It is likely that this was intended to reserve some measure of discretion to the Commissioner as to how to Police resources are used to provide the assistance requested. I doubt, however, that this extends to confer on the Commissioner a broad discretion to decide whether to enforce certain Directions against particular groups of people at all. This is particularly so, noting the general responsibility of the Commissioner to implement the policing policy and priorities of the Government.
18. I note that the apparent reason for the Decision is that it was said to be that it was impossible to enforce the Directions against all of the protestors, due to their large numbers. Such reasoning, erroneously conflates the impossibility of enforcing the Directions against *everyone*, with the impossibility of enforcing the Directions against *anyone*. To simply decide not to enforce the Directions against any protestor, had the practical consequence that (unlike every other Victorian everywhere else in the State), the Directions did not apply to those people. As I have said, under the statutory scheme, that was a decision for the PH Officer, not Victoria Police.
19. **Second**, I have described above the potentially decisive significance of the PH Act. However, even under the VP Act there is a limit on the general discretion of the Commissioner as to when and how to enforce the law. After all, in our system of law it is ultimately the Parliament that decides on the content of the law, not the police.
20. Nonetheless, there is ordinarily a broad discretion reserved to the Police as to when and how to uphold the law. That said, there is a difference between broad and limitless. The particular circumstances of the present case must also be borne in mind. There is, arguably, a profound disconnect between: (i) the seriousness of a declared public health emergency, on the one hand and; (ii) simply refusing to enforce Directions that seek to mitigate that emergency, on the other. There is, moreover, a tension between not enforcing the rules against the ten thousand people at the protests, but at the same-time strictly enforcing the rules against everybody else (from extra visitors in the home to fishermen on the

pier). In this context, to simply refuse to enforce the law against one particular group of protestors, is arguably – at a time of great peril to the community - to cross the line into a failure to enforce the law in the sense described by Denning MR.

21. So what is the consequence of the, prima facie, unlawful Decision? It remains to be seen whether, if the renewed outbreak escalates, Victoria Police may be exposed to civil claims. More fundamentally, if a similar Decision is made, while equivalent Directions remain in place, the possibility of seeking an urgent remedy from the Supreme Court may be considered.
22. I note, finally, that in giving this advice, I have been limited to information on the public record. I have assumed, for present purposes, that this information is correct. I have assumed the validity of the Directions and the unlawfulness of the gathering at the protests. I assume that there was no communication from the CH Officer (or a delegate) or the Government, that influenced the Decision (if so, that could raise some further but different legal concerns with the Decision). I have assumed the Decision was made by Victoria Police and for the reasons that have been reported. I do not have the benefit of considering any formal reasons for the Decision. All of these issues would need to be thoroughly considered before any concluded advice was given in response to the question I have asked, or any formal legal proceedings were to be commenced at some future time.

Conclusion

23. Thank you for your instructions. I would be happy to discuss further the contents of this memorandum if conference, should that be of assistance



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