

# Victoria's new executive emergency powers must be accountable



Briefing paper June 2021

## Summary

The Victorian Government's response to the COVID-19 crisis has seen the concentration of executive power via declarations of states of emergency and disaster. Following news that the Government is negotiating with crossbenchers in order to secure the passage of new legislation replacing the current emergency powers, there is an important opportunity to ensure that the new legislation will contain appropriate parliamentary protections against executive excess.

Since the very beginning of the pandemic, decisions made under the powers enlivened by these declarations have faced minimal scrutiny: the declarations of a state of disaster and state of emergency are specifically exempt from the operation of the scrutiny provisions of the *Subordinate Legislation Act 1994* (Vic) (**SLA**), and the wide-ranging public health Directions – of which 11 are currently in force, and more than one hundred have been made since March 2020 – have not been scrutinised by the Parliament or its Scrutiny of Acts and Regulations Committee. Up until 22 December 2020, when the Government amended the *Subordinate Legislation (Legislative Instruments) Regulations 2011* in order to exclude the Directions from the operation of the SLA's scrutiny mechanisms,<sup>1</sup> this appears to have been a consequence of the Directions being treated as administrative in nature. This was in spite of the fact that there were very strong grounds for them being characterised as legislative instruments; such a characterisation would have attracted the Act's important scrutiny provisions and would also have had the effect of attracting the operation of the Human Rights Charter.

Though accountability mechanisms in the form of tabling, consideration by the Scrutiny of Acts and Regulations Committee and disallowance exist in relation to some of the ministerial decisions made via regulations, no provision is made under the *Public Health and Wellbeing Act 2008* (Vic) for disallowance of the COVID-related Public Health and Wellbeing Regulations. Furthermore, Victoria's experience throughout 2020 has thrown into sharp relief the fact that the effectiveness of parliamentary accountability measures is reduced – or even precluded – when Parliament is not sitting.

Scrutiny of the Government response to COVID-19 – and indeed, future emergency situations – should therefore be strengthened by limiting the use of regulations and legislative instruments, increasing the role of Parliament and primary legislation, and not exempting Directions from disallowance and Committee scrutiny.

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<sup>1</sup> By prescribing them not to be legislative instruments.

## State of emergency

On 16 March 2020 Victoria's Health Minister declared Victoria's first COVID-19-related state of emergency under the State's *Public Health and Wellbeing Act 2008* (Vic) (**PHWA**).

Upon this declaration the Chief Health Officer became empowered by s 199 of the PHWA to authorise the exercise of emergency powers contained at s 200 of the Act. These powers are substantial and wide-ranging, and they have to date been used to issue more than one hundred Directions regulating significant aspects of Victorians' lives: <sup>2</sup> mandatory quarantine for overseas arrivals; limitations on mass gatherings; access to and activities of aged care facilities, hospitals and businesses; self-isolation; a public housing 'hard lockdown'; mandatory masks, and the lockdown of both regional Victoria and metropolitan Melbourne.<sup>3</sup>

While s 198(7) of the PHWA previously limited the total period that a declaration can be in force to 6 months, on 1 September the government secured the extension of the state of emergency for another 6 months with the support of the crossbench.<sup>4</sup> Under the new provisions, the Health Minister is required to provide Parliament with the Chief Health Officer's advice each time the government renews its state of emergency.

## State of disaster

Under s 23(1) of the *Emergency Management Act 1986* (Vic) (**EMA**), the Premier has the power to declare a state of disaster if – after considering the advice of the Minister and Emergency Management Commissioner – s/he is satisfied that there is an emergency which "constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria".

On 2 August 2020 the Premier declared a state of disaster for the whole of Victoria. This declaration, which was made for the maximum one-month period permitted under the Act and was set on expire on 2 September 2020, was subsequently extended under s 23(6) of the Act.

The powers granted to the Minister for Police and Emergency Services under s 24 of the EMA are significant. Initially enacted in response to the Ash Wednesday bushfires, which had "*highlighted the need for quick decisions to be made; widespread knowledge of the chain of command and the need for an improved communication network between the various emergency services and agencies*",<sup>5</sup> they mean that the Minister is responsible for directing and co-ordinating the activities of all government agencies and allocating government resources as required. The EMA further provides that the Minister's directions prevail to the extent they are inconsistent with State laws and the Minister has power to suspend the operation of any State law (albeit in very limited circumstances).

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<sup>2</sup> Grata Fund, "Victoria: COVID law monitor" [https://www.gratafund.org.au/COVID\\_vic](https://www.gratafund.org.au/COVID_vic) accessed 24 August 2020.

<sup>3</sup> Parliament of Victoria, "Emergency powers, Public health and COVID-19" <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-COVID-19> accessed 24 August 2020.

<sup>4</sup> *Public Health and Wellbeing Amendment (State of Emergency Extension and Other Matters) Bill 2020* (Vic).

<sup>5</sup> The legislation preceding the *Emergency Management Act 1986* (Vic) was the *State Disasters Act 1983* (Vic). Victoria, Parliamentary Debates, 2 December 1983, Council, R.A. Mackenzie, 1556.

## **Concurrent emergency provisions**

It would appear that a state of emergency declaration and state of disaster declaration can coexist, given that s 198(9) of the PHWA states that a declaration of a state of emergency does not limit the declaration of an emergency under any other Act.

## **Accountability mechanisms**

Three key mechanisms exist to keep the executive accountable for how it exercises the significant powers it controls under such declarations: reporting to Parliament, the Scrutiny of Acts and Regulations Committee and disallowance. However, the application of these mechanisms is not universal and their effectiveness was hampered in 2020 by the fact that Parliament was not sitting as usual through the COVID-19 crisis.

### **Reporting to Parliament**

In respect of a declared state of disaster and the powers it enlivens, one accountability mechanism exists under s 23(7) of the EMA. This section requires that where a state of disaster has been declared, the Premier must report to Parliament on the state of disaster and the powers exercised under s 24 of the EMA *“as soon as practicable after the declaration if Parliament is then sitting and if Parliament is not then sitting as soon as practicable after the next meeting of Parliament”*.

The requirement for the Premier to report to Parliament on the state of disaster and exercise of s 24 powers was not an accountability mechanism included in the original Bill: it came about only as a result of an opposition-proposed amendment. Upon proposing the amendment (which the government accepted), Digby Crozier noted that:

*“The opposition believes the powers conferred under s 24 are of such open-ended dimensions and the events which would require the exercise of those powers would be of sufficient importance to suggest this reporting mechanism as a prudent qualification of the exercise of those powers”*.<sup>6</sup>

Tabling of documents in Parliament is an important accountability mechanism insofar as it ensures that information can be accessed by the Parliament and the people.

Presumably inspired by the earlier Act, the PHWA contains mirror reporting provisions at s 198(8).

### **Scrutiny of Acts and Regulations Committee**

The Scrutiny of Acts and Regulations Committee (**the Committee**) is an all-party Joint House Committee. Its functions are established by s 17 of the *Parliamentary Committees Act 2003* (Vic), and include considering Bills – and regulations and legislative instruments – and reporting to the Parliament in respect of whether the relevant legislation directly or indirectly trespasses unduly upon rights or freedoms, amongst other things.

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<sup>6</sup> Victoria, Parliamentary Debates, Assembly, Assembly, 8 May 1986, Digby Crozier, 1977.

In May 2020 the Committee scrutinised the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), and raised concerns with the Premier that the Act was incompatible with the human rights set out in the Charter of Human Rights and Responsibilities. After considering the Premier's responses the Committee concluded that the Act was not incompatible with the Charter,<sup>7</sup> noting that "*the COVID-19 pandemic is an unprecedented challenge for all Parliaments and that the regulation making provisions are repealed six months after commencement*".

The Regulations Review Subcommittee of the Committee has also considered a number of Regulations made in response to the COVID-19 crisis, but has so far not reported on them (with the exception of the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*).<sup>8</sup> These include the following:

- *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Integrity Entities) Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Criminal Proceedings and Other Matters) Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Integrity Entities) Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Integrity Entities) Amendment Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Criminal Proceedings and Other Matters) Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Criminal Proceedings and Other Matters) and (Integrity Entities) Amendment Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Amendment Regulations 2020*;
- *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020*;
- *Public Health and Wellbeing Amendment (Coronavirus) Regulations 2020*;
- *Public Health and Wellbeing Amendment Regulations 2020*;
- *Public Health and Wellbeing Amendment (Infringements) Regulations 2020*;
- *Public Health and Wellbeing Amendment (Further Infringement Offences) Regulations 2020*;
- *Public Health and Wellbeing Amendment (Further Infringements) Regulations 2020*;
- *Public Health and Wellbeing Further Amendment (Infringement Offences) Regulations 2020*;
- *Public Health and Wellbeing (Prescribed Accommodation) Regulations 2020*;
- *Public Health and Wellbeing (Quarantine Fees) Regulations 2020*;
- *Public Health and Wellbeing Further Amendment (Infringements) Regulations 2020*;
- *Public Health and Wellbeing Amendment (Compliance) Regulations 2020*;
- *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*;
- *Residential Tenancies (COVID-19 Emergency Measures) Amendment Regulations 2020*;
- *Education and Training Reform Amendment (COVID-19 Emergency Measures) Regulations 2020*;

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<sup>7</sup>Scrutiny of Acts and Regulations Committee, Alert Digest No 5, [https://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert\\_Digests/Alert\\_Digest\\_No\\_5\\_of\\_2020.pdf](https://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert_Digests/Alert_Digest_No_5_of_2020.pdf) accessed 31 August 2020.

<sup>8</sup> Ibid; Scrutiny of Acts and Regulations Committee, Alert Digest No 5, [https://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert\\_Digests/Alert\\_Digest\\_No\\_7\\_of\\_2020.pdf](https://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert_Digests/Alert_Digest_No_7_of_2020.pdf) accessed 31 August 2020; Parliament of Victoria, "Regulations considered", <<https://www.parliament.vic.gov.au/sarc/article/4062>> accessed 19 June 2021.

- *Education and Training Reform Amendment (COVID-19 Emergency Measures Extension) Regulations 2020; and*
- *Occupational Health and Safety (COVID-19 Incident Notification) Regulations 2020.*

It is yet to consider the relevant 2021 Regulations, which include the *Public Health and Wellbeing Amendment (Prescribed Accommodation) Regulations 2021*, the *Public Health and Wellbeing Amendment (Infringement Penalties) Regulations 2021*, and the *Public Health and Wellbeing Amendment (QR Reporting Infringement) Regulations 2021*.

### **Disallowance**

Disallowance by the Parliament (or either House of Parliament) of statutory rules and legislative instruments can be provided for in primary legislation; where it is not provided for it may still be possible under ss 21 or 25A of the *Subordinate Legislation Act 1994* (Vic) (**SLA**), but in this case the Committee would need to consider that the relevant provisions fell into one of the categories set out at s 21 before the power to disallow was enlivened.

As is evident from the above list of regulations, the vast majority of delegated legislation enacted by the executive in response to the COVID-19 crisis has been made under the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (**Omnibus Act**) and the *Public Health and Wellbeing Act 2008* (Vic) (**PHWA**).<sup>9</sup>

The accountability measure of disallowance is built into the Omnibus Act insofar as Regulations made under ss 4, 15, 62, 603(1) and 609(1) are disallowable by either House of Parliament.

Regulations made under the PHWA are authorised under ss 232 and 238 of that Act, which does not make them subject to disallowance. In contrast, other Orders in Council authorised to be made under s 126(5) of the same Act are explicitly stated to be subject to disallowance. While the SLA still operates and any of the Regulations could potentially be disallowed under s 21 of that Act, the Committee would need to consider that they fell into one of the categories set out at s 21 before the power to disallow was enlivened.

### **Exemption of state of emergency and disaster declarations from the SLA scrutiny provisions**

Both a state of emergency declaration under s 198(1) of the PHWA and a state of disaster declaration under s 23(1) of the EMA are specifically exempt from those Parts of the SLA which set out requirements for the preparation of legislative instruments, and which provide for their scrutiny and disallowance.<sup>10</sup>

The same exemption also applies to the very significant provisions of the EMA which empower the Minister to direct any government agency in respect of the exercise of its functions, powers, duties and responsibilities, and to suspend any Victorian law in certain

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<sup>9</sup> We note that not all of these Regulations are still in force. Regulations have also been made under the *Residential Tenancies Act 1997* (Vic) (*Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*) and the *Occupational Health and Safety Act 2004* (Vic) (*Occupational Health and Safety (COVID-19 Incident Notification) Regulations 2020*). Regulations can be made under the EMA, by virtue of s 39, but none have to date been enacted.

<sup>10</sup> Regulation 9 of the *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic).

circumstances.<sup>11</sup>

## **Public health Directions**

To date, the public health Directions made under ss 190(1) and 200(1) of the PHWA have not been scrutinised by the Parliament or its Scrutiny of Acts and Regulations Committee.

This is likely owing to the fact that the status of the Directions as legislative instruments or administrative directions was not entirely clear (though there was a very strong case for the former) until December 2020, when the Government amended the *Subordinate Legislation (Legislative Instruments) Regulations 2011* in order to prescribe the Directions not to be legislative instruments. This means that provisions of the SLA with respect to preparation, tabling in Parliament, review by the Scrutiny of Acts and Regulations Committee and the concomitant possibility of disallowance, do not apply to the Directions.

As noted above, there were strong grounds in favour of the Directions being characterised as legislative instruments: these are set out comprehensively in our briefing note titled 'Scrutiny of COVID Directions' and include the fact that they impose mandatory requirements, are of general application, and attract penalties for non-compliance.

In addition to attracting the operation of the SLA, characterisation of the Directions as legislative in nature would also have had the effect of requiring them to be interpreted in a way that is compatible with human rights, to the extent possible consistently with their purpose.<sup>12</sup>

## **Effectiveness of accountability mechanisms**

When Parliament is not sitting, the effectiveness of parliamentary accountability mechanisms is limited – if not entirely precluded. Concerted efforts must therefore be made to provide for Parliament to continue sitting notwithstanding crises like that presented by COVID-19.

Parliaments around the world have continued sitting throughout the COVID-19 crisis. The UK Parliament has developed a hybrid model of in person and virtual sitting, whereby those unable to attend in person can participate in debates, motions, deliberations and votes through a secure online member portal. This could be adapted to meet Victoria's needs.

## **Recommendations**

In circumstances where the resolution of the COVID-19 crisis in Victoria continues to be uncertain, it is imperative that the Parliament can properly participate in the process of responding to it.

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<sup>11</sup> Regulation 9 of the *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic).

<sup>12</sup> Section 32 (1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

To this end:

- Consideration should be given to whether it is appropriate to exclude the declarations of a state of emergency and state of disaster (and related powers) from the scrutiny provisions of the SLA; and
- Consideration should be given to making regulations authorised by ss 232 and 238 of the PHWA subject to disallowance.

In light of the strong case for characterising public health Directions as legislative instruments and treating them as such, transparency and accountability should be strengthened by:

- Amending the *Subordinate Legislation (Legislative Instruments) Regulations 2011* and PHWA to make the exercise of the powers at ss 199 and 200 of the Act subject to parliamentary scrutiny, by making the SLA's scrutiny mechanisms applicable to them (requiring the Directions to be tabled in Parliament and rendering them subject to disallowance); and
- Requiring the relevant Minister to provide a statement summarising Directions made to each sitting of the Parliament.

Regardless of accountability mechanisms that can be used or implemented in respect of the Directions, the use of Directions – and, equally, regulations – for major policy decisions should be limited: firstly, because accountability mechanisms like Committee scrutiny and disallowance are retrospective, and secondly, because such an approach would provide a strong incentive for governments to keep Parliament operating notwithstanding the existence of a crisis like COVID-19.

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