

Flattening the curve: Why the law should allow for compulsory testing in a pandemic

THE COVID-19 PANDEMIC HAS HIGHLIGHTED THE NEED TO AMEND THE PUBLIC HEALTH AND WELLBEING ACT 2008 TO PROTECT THE COMMUNITY.

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Does the PHW Act enable a person to be compulsorily tested for COVID-19?

According to the World Health Organisation, testing for COVID-19 is critical to tracking the virus, understanding epidemiology, informing case management and suppressing transmission.¹ The Victorian government has repeatedly urged people to get tested.²

The *Public Health and Wellbeing Act 2008* (PHW Act) empowers the Chief Health Officer (CHO) to make an examination and testing order (ETO) if the CHO believes that:

- a person has been exposed to an infectious disease
- the person is likely to transmit the disease if infected
- the disease presents a serious risk to public health.³

An ETO may require the person to be tested.⁴

One of the principles in the PHW Act is that a person who has, or suspects that they may have, an infectious disease should ascertain whether they have the disease.⁵ They should also take all reasonable steps to eliminate or reduce the risk of any other person contracting the disease.⁶

Despite these principles, and the CHO's power to make an ETO, testing cannot be carried out by the use of force.⁷

What are the consequences for refusing a test?

If a person refuses to be tested, the CHO's powers are limited to detaining the person (including in isolation) for a period not exceeding 72 hours.⁸ This gives the person an opportunity to consent to the test.

In addition to being detained, a person who fails to comply with an ETO is subject to a fine of 60 penalty units (approximately \$9900).⁹ However, if a person is infectious for 14 days, fining or detaining them for a short period does not help to address risks to public health. Without compulsory testing, the ETO provisions in the PHW Act are not sufficient to protect the public from exposure to those infected with COVID-19.

The PHW Act also empowers the CHO to make a public health order (PHO) to require a person with an infectious disease to undergo treatment or submit to being detained.¹⁰ However, as with an ETO, a person who breaches a PHO can be fined, but cannot be treated by the use of force.¹¹

In Victoria, there is no express criminal offence that deals with reckless or negligent transmission of an infectious disease to another person.¹² Nevertheless, a person who refuses a test could face criminal prosecution if they subsequently infect another person with the virus, having refused a test despite experiencing relevant symptoms or being a close contact of an infected person. A range of offences under the *Crimes Act 1958* (*Crimes Act*) could apply. These include causing serious injury recklessly or negligently and conduct endangering life or persons.¹³ The definition of injury includes "infection with a disease".¹⁴

SNAPSHOT

- In Victoria, the PHW Act is the key legislation that aims to protect the community from public health emergencies. It does not, however, adequately address the unprecedented challenges presented by the COVID-19 pandemic.
- Responding effectively to COVID-19 requires testing and detaining large numbers of people in a short time frame.
- The PHW Act should be amended to strengthen the requirement for testing and allow longer compulsory detention.

In 2008, a Victorian man with an infectious disease was sentenced to prison after being found guilty under the *Crimes Act* of offences relating to infecting others with a disease.¹⁵ The man had failed to comply with several orders issued under the *Health Act 1958*,¹⁶ which were not sufficient to deter him.

Prosecution under the *Crimes Act* is not well-suited to dealing with large numbers of people who refuse to be tested and subsequently infect others. The process would be time-consuming for Victoria Police and too slow to address the immediate public health risk. Prosecution is also unlikely to result in more people agreeing to be tested. When testing is time critical during a pandemic, there should be a well-understood and easy-to-use process to compel testing. The inability to legally compel testing undermines the purpose of the PHW Act to protect public health and wellbeing in the midst of a pandemic.

Are there legislative precedents to compel testing?

There are legislative precedents in Victoria for compelling a person to be examined or tested in circumstances where the person refuses or is unable to consent.

Under the *Mental Health Act 2014*, a person who appears to have a mental illness may be taken against their will to a designated mental health service to be compulsorily assessed.¹⁷ Reasonable force may be used.¹⁸ The legislative provisions are subject to various safeguards, including oversight by the Mental Health Tribunal and meeting relevant criteria.¹⁹ Any compulsory assessment must be the least restrictive intervention available.²⁰ The objective is to protect the person and also the public.²¹

Under the *Severe Substance Dependence Treatment Act 2010*, a person can be compulsorily examined, with reasonable force, to determine whether or not the person should be detained and treated for a severe substance dependence.²² There are various safeguards in the legislation, including oversight by the Magistrates' Court.²³

Another legislative precedent is in the PHW Act, which enables a person to be compulsorily tested, with reasonable force, following an incident involving a "caregiver or custodian".²⁴ An example is where a paramedic or a health practitioner suffers a needlestick injury while carrying out their duties.

These examples should be contrasted with the PHW Act's provisions for testing a person who is subject to an ETO, where reasonable force cannot be used to test the person against their will.²⁵ This is despite the significant risks to the public, given the highly infectious nature of COVID-19. The PHW Act should be amended, with appropriate safeguards, to allow forced testing in certain circumstances during a pandemic. For example, the legislation could compel testing of employees (by force, if necessary) where there is an outbreak of the virus in their workplace.

Does a State of Disaster declaration enable compulsory testing in a pandemic?

On 2 August 2020, the Premier declared a State of Disaster throughout Victoria under s23(1) of the *Emergency Management Act 1986* (EM Act) due to the COVID-19 pandemic (the Declaration).

The Declaration gives the Police Minister broad powers to direct and coordinate the government's response to the pandemic.²⁶ Any direction given by the Police Minister to a government agency is required to be followed.²⁷ That direction will prevail over any other legislation.²⁸ The powers provided under the EM Act otherwise operate separately from the emergency powers of the CHO under the PHW Act.

It appears that these powers allow the Police Minister to implement widespread, compulsory COVID-19 testing, including by force, for the period the Declaration is in effect. However, the EM Act does not contain any specific provisions on testing for an infectious disease or relevant safeguards.

The powers conferred on the Police Minister might also prejudice a person's rights and interests. If the powers are exercised to compel compulsory testing, the exercise of the powers may, at a minimum, be subject to judicial review by the Supreme Court of Victoria. The exercise of these powers may also be restricted by constitutional limitations vested in the state.

If extensive powers are required to address public health risks during a pandemic, the powers should be contained in the PHW Act.

Is compulsory testing and detention inconsistent with human rights?

The use of compulsory testing and detention may limit certain rights and freedoms afforded to individuals under the *Charter of Human Rights and Responsibilities Act 2006* (Charter). For example, under s10 of the Charter, a person must not be subjected to medical or scientific experimentation or treatment without their full, free and informed consent. A provision for compulsory testing, when conducted against the person's wishes, may be inconsistent with this right. Section 12 of the Charter also provides for the right to freedom of movement which may conflict with the CHO's power to detain a person who refuses to be tested.

In a pandemic, temporary curtailment of these rights may be justified.²⁹ This is because the Charter also provides for the right to life.³⁰ The right to life should not be limited or curtailed in any circumstances. This is because Australia has ratified the International Covenant on Civil and Political Rights³¹ which characterises the right to life as non-derogable.³² This treaty imposes on public authorities a positive duty to promote life (and, therefore, health) at an individual and community level.³³ Those authorities also have a negative duty, which prevents them from intentionally depriving someone of life.³⁴ In a pandemic, the right to life helps justify compulsory testing, even if it curtails other rights and freedoms. This is because one of the main purposes of compulsory testing is to reduce the loss of life. Any curtailments of human rights should be legitimate, proportionate and a last resort.³⁵ They should also be constantly monitored to avoid abuses and circumstances

where the curtailment of certain rights, in furtherance of protecting the right to life, has the opposite effect. For example, compulsory detention of an individual in a designated facility (such as a prison or a hotel) should not increase that person's risk of contracting COVID-19. If it did, this would be contrary to an individual's right to be treated humanely while their liberty is deprived.³⁶ If contracting the virus resulted in that individual's death, this would be contrary to their right to life.

The Charter, and the human rights it protects, are subservient to Parliament's overriding power. Parliament may expressly make legislation that is incompatible with the Charter or any provision of it, including any one or more of those rights.³⁷

Is the PHW Act sufficient to deal with future pandemics?

It is unlikely that the nature, scale and dynamic lethality of the COVID-19 pandemic was contemplated at the time the PHW Act was developed. Rather, its processes are suited to public health situations that are more manageable where there is less pressure to test thousands of people over a short period of time. Not every public health crisis will have the urgency or pressure of contagion that has been a feature of COVID-19.

While the PHW Act allows the CHO to make orders, its success has largely relied on the compliance of the Victorian community. Prior to COVID-19, the PHW Act had not been trialled on the community to determine what the key drivers were for compliance during a pandemic.

If Victoria is to adopt a long-term strategy for the management of future pandemics, it should include amendments to the PHW Act which reflect the lessons of managing COVID-19. The task for Parliament, therefore, will be balancing the need to "flatten the curve" with the preservation of human rights and freedoms. If rights and freedoms are to be curtailed, the amendments must justify the reasons for doing so.

Conclusion

During a pandemic, forced testing may be justified in certain circumstances, provided there are appropriate safeguards. In addition, there should be a longer period of compulsory detention for people who pose risks to public health. Amending the law would require consultation with key stakeholders and analysing the approaches of comparable jurisdictions within Australia and internationally. The Victorian Law Reform Commission is best suited for this task. ■

NB: At the date of printing, the Victorian government announced its intention to enact a new law for compulsory detention of people who refuse to self-isolate (see COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020).

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1. World Health Organisation, *Laboratory Testing Strategy Recommendations for COVID-19: Interim Guidance* (21 March 2020) 1 <<https://www.who.int/publications/i/item/laboratory-testing-strategy-recommendations-for-covid-19-interim-guidance>>.

2. ABC, "Victorian Premier Daniel Andrews urges everybody to do their bit to help lower case numbers in latest coronavirus update", (23 July 2020) <<https://www.abc.net.au/news/2020-07-23/daniel-andrews-press-conference-latest-coronavirus-update/12484334>>.
3. *Public Health and Wellbeing Act 2008* (Vic), s113.
4. Note 3 above, s113(3).
5. Note 3 above, s111(c)(i).
6. Note 3 above, s111(c)(ii).
7. Note 3 above, s123(2).
8. Note 3 above, s113(3)(c).
9. Note 3 above, s116.
10. Note 3 above, s117.
11. Note 3 above, ss117(3)(i) and 123(2).
12. The offence of intentionally infecting another person with a "very serious disease", defined to mean HIV, was repealed by the *Crimes Amendment (Repeal of Section 19A) Act 2015* (Vic).
13. *Crimes Act 1958* (Vic) ss17, 22, 23 and 24. See also: Raphael de Vietri and Felicity Gerry QC, "A Quick Reference Guide for Criminal Lawyers in Victoria: Emergency and Public Order Legislation in Victoria During the COVID-19 Pandemic", (22 March 2020) 12.
14. *Crimes Act*, s15.
15. *Neal v The Queen* [2011] VSCA 172, at [3]. The defendant was re-sentenced at [111].
16. Note 15 above, at [7].
17. *Mental Health Act 2014* (Vic) s353(2).
18. Note 17 above, s353(4).
19. Note 17 above, ss153 and 29.
20. Note 17 above, s29(d).
21. Note 17 above, s29(b)(ii).
22. *Severe Substance Dependence Treatment Act 2010* (Vic), s13(3).
23. Note 22 above, Part 2.
24. Note 3 above, s134.
25. Note 3 above, s123(2).
26. *Emergency Management Act 1986* (Vic) s24.
27. Note 26 above, s24(3)(a).
28. Note 26 above, s24(3)(b).
29. *Charter of Human Rights and Responsibilities Act 2006* (Vic), s7(2).
30. Note 29 above, s9.
31. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
32. Note 31 above, articles 4 and 6.
33. Human Rights Committee, General Committee No.36 on article 6 of the *International Covenant on Civil and Political Rights*, adopted at the 124th session (8 October to 2 November 2018).
34. Note 33 above.
35. Note 29 above, s7(2).
36. Note 29 above, s22.
37. Note 29 above, s31.



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