

A Quick Reference Guide for Criminal Lawyers in Victoria:

# Emergency and Public Order Legislation in Victoria during the COVID-19 Pandemic

Raphael de Vietri and Felicity Gerry Q.C.<sup>1</sup>

First Edition - 22 March 2020

---

## INTRODUCTION

This quick reference guide (QRG) is designed as a starting point for criminal lawyers in Victoria seeking further information about the scope and nature of federal and state government powers during times of public emergency and potential disorder. This QRG does not contain all the criminal law on public health or public order but provides a list of some of the primary legislative instruments relevant to the current circumstances. The focus of this QRG is on Victorian state and federal *public order* and *law enforcement* powers that may be used (or have been used already) in response to the global viral pandemic of COVID-19 in the State of Victoria.

The rule of law is fundamental to a civilized society. It is even more important during times of widespread uncertainty or panic. By providing this resource, the authors hope to assist legal practitioners in Victoria to keep check on the fair, reasoned, and just application of emergency powers.

Some of these legal powers – which are by their very definition ‘extraordinary’ – have been introduced without prosecutorial guidance so it is not yet known how they will be used. They provide governmental agencies with the special authority they need to maintain public safety in extraordinary times. On the other hand, if they are misused, these powers also have the potential to erode public confidence, over- criminalise the public and diminish democratic freedoms which are otherwise taken for granted. It is especially important in times of emergency that government and law enforcement authorities remain conscious of their legal limits. This is so that persons in Australia are left to be as free as possible whilst still allowing the government to perform its important functions of maintenance of public health and public order.

Each legislative instrument which follows is hyper-linked and briefly summarised. Within each summary some (but not all) of the relevant coercive powers and criminal offences are identified.

## Biosecurity Act 2015 (Cth)

### Key Points:

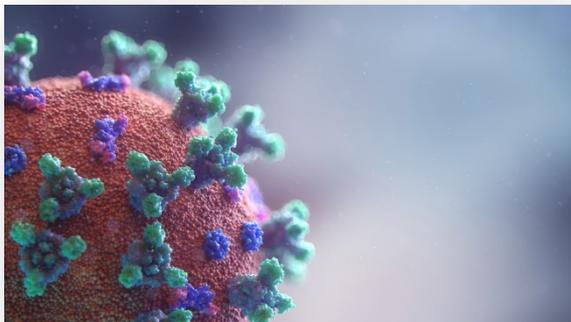
✚ The *Biosecurity Act 2015 (Cth)* ('BSA') provides the federal legislative framework for the Australian Government to manage biosecurity risks, including 'the risk of contagion of ... listed human diseases' (s4 BSA). It already contains a range of quarantine and infestation measures which are not dealt with here.

✚ On 21 January 2020, COVID-19 was designated as a 'listed human disease': *Biosecurity (List Human Diseases) Determination 2016*

✚ On 18 March 2020, the Governor-General made a declaration under s475 BSA that a 'human biosecurity emergency' exists: see *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*.



✚ The Declaration gives the Minister for Health expansive powers to issue directions and set requirements to combat the spread of COVID-19. The declaration **is currently in force for 3 months**.



Section	Nature and Scope of Power	Criminal Offence
<p><b>s478 BSA</b></p>	<p>The Health Minister may give any <b>direction</b> (to any person) necessary to prevent the spread of COVID-19.</p> <p>“Directions” might include regulating movement of persons and closing premises.</p>	<p>A person who fails to comply with a direction given under this section may commit an offence under <a href="#">s479 BSA</a>.</p> <p><b>The maximum penalty is 5 years imprisonment or 300 penalty units (i.e. \$63,000).</b></p> <p>The offence is an ‘indictable offence triable summarily’ (see <a href="#">s4G</a>, <a href="#">s4J Crimes Act 1914 (Cth)</a>)</p>
<p><b>s477 BSA</b></p>	<p>The Health Minister may determine any <b>requirement</b> necessary to prevent the spread of COVID-19.</p> <p>“Requirements” include requirements placed on people entering, leaving, and evacuating specified places.</p>	<p>A person who fails to comply with a direction given under this section may commit an offence under <a href="#">s479 BSA</a>.</p> <p><b>The maximum penalty is 5 years imprisonment or 300 penalty units (i.e. \$63,000).</b></p> <p>This offence is an ‘indictable offence triable summarily’ (see <a href="#">s4G</a>, <a href="#">s4J Crimes Act 1914 (Cth)</a>)</p>
<p><b>s60 BSA</b></p>	<p>A <b>human biosecurity control order</b> can be imposed on an individual if the individual may have a ‘listed human disease’ (e.g. COVID-19).</p> <p>Such an Order can result in measures such as vaccination and isolation being imposed on that individual.</p>	<p>A person who fails to comply with a biosecurity measure imposed under control order may commit an offence under <a href="#">s107 BSA</a>.</p> <p><b>The maximum penalty is 5 years imprisonment or 300 penalty units (i.e. \$63,000).</b></p> <p>This offence is an ‘indictable offence triable summarily’ (see <a href="#">s4G</a>, <a href="#">s4J Crimes Act 1914 (Cth)</a>)</p>

# Public Health and Wellbeing Act 2008 (Vic)

## Key Points:

✚ The objective of the *Public Health and Well Being Act 2008 (Vic)* ('PHWA') is to achieve the highest attainable standard of public health and wellbeing in Victoria and includes the prevention of disease (s4 PHWA).

✚ In a State of Emergency, the Chief Health Officer may (under s199 PHWA) authorise the use of 'public health risk powers' (listed in s190 PHWA) and 'emergency powers' (listed in s200 PHWA). On 16 March, the Chief Health Officer issued a **direction** pursuant to s200 PHWA prohibiting mass gatherings of 500 persons in an undivided space, and requiring persons returning from overseas to self-isolate for a period of 14 days. On **18 March 2020**, a further **direction** was made that reduced the mass gathering prohibition down to 100 people.

✚ The act is underpinned by the 'principle of proportionality' (s9 PHWA), which provides that decisions and actions should be proportionate to the risk, and should not be arbitrary.



✚ s198 PHWA provides that the Minister may declare a 'State of Emergency'. On **16 March 2020**, the Victorian Government **announced** that it had **declared** a State of Emergency throughout the State of Victoria **for a period of 4 weeks**.

✚ Under s198(8), the Minister for Health is required to **report** to Parliament on the Declaration of a State of Emergency.



Special powers and corresponding offence provisions include:

Section	Nature and Scope of Power	Criminal Offence
<b>s199 PHWA</b>	<p>In a State of Emergency, the Chief Health Officer can authorize the use of 'public health risk powers' (listed in <a href="#">s190 PHWA</a>) and 'emergency powers' (listed in <a href="#">s200 PHWA</a>).</p>	<p>Pursuant to <a href="#">s203 PHWA</a>, it is an offence to fail to comply with a direction given by a person under s199.</p> <p>The offence carries a pecuniary penalty only. These offences are summary (see <a href="#">Sentencing Act 1991 (Vic) s112(b)</a>).</p> <p><b>A natural person is liable to a maximum penalty of 120 penalty units (i.e. \$19,826.40). A body corporate is liable to a maximum penalty of 600 penalty units (i.e. \$99,132).</b></p> <p>A defense of 'reasonable excuse' is available under s203(2).</p>
<b>s183 PHWA</b>	<p>Obstructing an authorised officer who is exercising a power</p>	<p><b>Summary offence - 60 penalty units (\$9,913.2).</b></p>
<b>s5 UAPC</b>	<p>Under the <i>Unlawful Assemblies and Processions Act 1958</i> ('UAPA'), it is unlawful for persons to assemble together "riotously and tumultuously and to the disturbance of the public peace".</p> <p>This provision could, arguably, be used to disperse crowds that gather unlawfully. However, the provision implies that the gathering must also be unpeaceful.</p>	<p>This Act provides a statutory procedure for the dispersal of an unlawful or riotous assembly. It allows for an order to be read to the assembly directing them to disperse within a certain time, with criminal liability attaching to a failure to disperse.</p> <p>Under <a href="#">s6 USPA</a>, it is an indictable offence to obstruct, oppose or prevent a person from making or beginning to make such a proclamation or order.</p> <p><b>Maximum penalty is 2 years imprisonment (s113C <a href="#">Sentencing Act 1991 (Vic)</a>) or 240 penalty units (i.e. \$39,652.8).</b></p>

# Emergency Management Act 1986 (Vic) and Emergency Management Act 2013 (Vic)

## Key Points:

✚ The 1986 *Emergency Management Act* ('EMA') has been substantially amended and is gradually being replaced by the 2013 Act. Currently, the two acts are to be read and construed as one Act.

✚ The 1986 EMA contains the provisions related to the declaration of a 'State of Disaster' (cf. 'State of Emergency' referred to in the PHWA). [Section 23 EMA 1986](#) gives the State Premier the power to declare a 'State of Disaster', if he is satisfied the emergency "constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria".



✚ As of the date of publication of this QRG, no State of Disaster has been declared in relation to COVID-19. The power was recently used using the [bushfire crisis](#) of 2019-2020. Under a State of Disaster, the Minister is given powers which include taking control of property, controlling entry into or departure from a disaster area, and compelling the evacuation of an area ([s24 EMA 1986](#)). The powers available seem more applicable to natural disasters rather than a health crisis.

✚ Separate from the declaration of a State of Disaster, [s36A EMA 1986](#) gives a power to the most senior police officer (above the rank of Senior Sergeant) in attendance at an emergency to declare an 'emergency area'. The police officer must consider the size, nature and location of the emergency. The consequence of declaring an 'emergency area' is that police officers then gain powers under [s36B EMA 1986](#), such as the power to close or evacuate the area. Again, this power seems more applicable to natural disasters rather than a health crisis.

Special powers and corresponding offence provisions include:

Section	Nature and Scope of Power	Criminal Offence
<b>s36 EMA 1986</b>	Offence of obstructing an emergency worker	Summary offence – 60 penalty units (i.e. \$9,913.2).
<b>s36A EMA 1986</b>	Declaration by senior police officer of an 'emergency area'	<p>s36C EMA 1986 creates the following summary offences in relation to 'emergency areas':</p> <ul style="list-style-type: none"><li>- Failure to obey prohibition or directions: 10 penalty units (i.e. \$1652.20).</li><li>- Failure to comply with conditions in an emergency area: 10 penalty units (i.e. \$1652.20).</li><li>- Failure to leave an emergency area when ordered to leave: 120 penalty units (i.e. \$19,826.40).</li></ul>



# Military Assistance

## Key Points:

Under the *Defence Act 1903 (Cth)* ('DA'), particularly Part IIIAAA, the Australian Defence Force can be called to assist in domestic situations, including in emergencies such as civil aid, humanitarian assistance, medical or civil emergency or disaster relief.

The ADF Reserves can also be 'called-out' pursuant to Part III DA. Recent Reserve Call Out Orders include Operation Civil Assist 2019-2020 and Operation Bushfire Assist 2019-2020.



Should a Part IIIA call-out be made, it would specify whether Division 3, 4, or 5 applies. The application of any of those divisions serves to inform the content of and scope of the power of ADF personnel (see table below).

There are two principle circumstances in which the ADF may be deployed domestically: (i) where deployment is necessary to assist Commonwealth or State law enforcement where their law enforcement capabilities are insufficient (sometimes referred to as Defence Aid to the Civil Authority – DFACA), and (ii) where the civilian community does not have the necessary resources to undertake a specified task, including disaster relief (sometimes referred to as Defence Aid to the Civil Community – DACC). In the first, it is expected that some ADF personnel involved may be required to use force, while in the second, no such expectation arises. It is the second circumstance that is most likely if there is a widespread medical emergency which becomes uncontrollable through the ordinary civilian channels.

Special powers and corresponding offence provisions include:

Section	Nature and Scope of Power	Criminal Offences
<b>DA Part IIIAAA Division 3</b>	<p>Special powers generally <b>authorised</b> by the Minister (<i>s46 DA</i>) including protecting persons, evacuating places, and providing security.</p> <p>(Note: Division 6 allows ADF members exercising these powers to use reasonable and necessary force. It also confers powers to detained persons or things.)</p>	<p><i>s51R DA</i> provides that a person commits an offence if they fail to comply with a direction under this Division.</p> <p><b>Summary - 60 penalty units (i.e. \$12,600)</b></p>
<b>DA Part IIIAAA Division 4</b>	<p>Powers exercised in a <b>specific area</b>:</p> <ul style="list-style-type: none"><li>- the power to search premises specified area</li><li>- powers relating to means of transport in the specified area</li><li>- powers relating to persons in the specified area</li></ul> <p>(Note: Division 6 allows ADF members exercising these powers to use reasonable and necessary force. It also confers powers to detained persons or things.)</p>	<p><i>s51R DA</i> provides that a person commits an offence if they fail to comply with a direction under this Division.</p> <p><b>Summary - 60 penalty units (i.e. \$12,600)</b></p>
<b>DA Part IIIAAA Division 5</b>	<p>Powers to protect declared <b>infrastructure</b></p> <p>(Note: Division 6 allows ADF members exercising these powers to use reasonable and necessary force. It also confers powers to detained persons or things.)</p>	<p><i>s51R DA</i> provides that a person commits an offence if they fail to comply with a direction under this Division.</p> <p><b>Summary - 60 penalty units (i.e. \$12,600)</b></p>

# Airports and Immigration

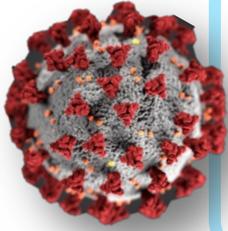
## Key Points:

- ✚ The Australian Federal Police have a presence at all international airports in Australia. APF Officers have the power of arrest without warrant in certain circumstances by virtue of s3W *Crimes Act 1914 (Cth)*.



- ✚ The *Customs Act 1901 (Cth)* gives the Australian Border Force very wide powers, including the power to question persons (s195(1)) and search baggage (s186) at international airports. There are also powers to detain and search persons (ss219-219ZJ). These powers are all centered around the detection of 'prohibited goods'. Corresponding offence penal provisions apply.

- ✚ The *Migration Act 1958 (Cth)* gives further powers to the Australia Border Force, including power to detain and search a person who is reasonably suspected of being an unlawful non-citizen (ss188-189).



# Criminal Charges

## Key Points:

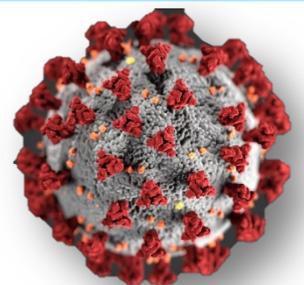
✚ There are a range of criminal laws potentially applicable to disease transmission, some of which have been used in the context of alleged intentional or reckless HIV transmission. The most recent High Court of Australia decision is *Zaburoni v The Queen* [2016] HCA 12. It is not proposed to detail the law further in this QRG but, the most recent [supplement from the Global Commission on HIV](#) and the law sets out some basic recommendations which are relevant to the proportionality of public health responses more broadly. These include absence of discrimination in treatment, government responsibility for financing responses and facilitating use of internet with evidence based information communications, protection of health confidentiality, ensuring that health status is not used to justify pre-trial detention, segregation in detention or prison, or harsher or more stringent sentences or conditions of parole or probation following release from custody and affordable access to the most effective diagnostics, medicines and vaccines.

✚ Currently, there is no criminal offence in Victoria which deals specifically with the intentional or reckless infection of a person with a disease or illness.

✚ In May 2015 the Victorian Government [repealed](#) s19A of the *Crimes Act 1958* (Vic) which created a specific offence of intentionally infecting another person with a “very serious disease”, defined exclusively to mean HIV.

✚ “Physical injury” is defined in the *Crimes Act 1958* (Vic) to include “**infection with a disease** and an impairment of bodily function”.

✚ “Serious injury” is defined in the *Crimes Act 1958* (Vic) to mean an injury that “endangers life” or is “substantial and protracted” (see s15 CA);



Some of the existing offences which could potentially be invoked against a person who intentionally/recklessly infects another person with an illness or disease include:

Section	Offence	Note
<b>s16 CA</b>	Causing serious injury intentionally	20 year maximum
<b>s17 CA</b>	Causing serious injury recklessly	15 year maximum
<b>s18 CA</b>	Causing injury intentionally or recklessly	10 / 5 year maximum
<b>s21 CA</b>	Threat to inflict serious injury	5 year maximum
<b>s22 CA</b>	Conduct endangering life	10 year maximum
<b>s23 CA</b>	Conduct endangering persons	5 year maximum
<b>s24 CA</b>	Negligently causing serious injury	5 year maximum

## ***Bail Applications***

### **Key Points:**

On the 19 March 2020, His Honour Lasry J of the Victorian Supreme Court granted an accused bail, in case where it was necessary for the applicant to prove “exceptional circumstances”. Reliance had been placed upon a combination of factors which include the risk of contracting COVID-19 in the prison setting and delay to trial. At the time of writing this QRG, the decision had not been published.

## ***Further Information:***

- 📌 Australian Federal Government information and advice:  
<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert-current-status>
- 📌 Victorian State Government information:  
<https://www.dhhs.vic.gov.au/coronavirus>
- 📌 Victorian Emergency information and advice: [www.emergency.vic.gov.au](http://www.emergency.vic.gov.au)

**The content of this QRG will be developed and refined in future editions. Feel free to contact the authors with any feedback or suggestions.**

### ***Raphael de Vietri***

Reader, Victorian Bar (Foley's List)  
Lecturer in Law, La Trobe University  
Email: [rdev@vicbar.com.au](mailto:rdev@vicbar.com.au)

### ***Prof. Felicity Gerry Q.C.***

Barrister, Victorian Bar (Greens List)  
Professor of Legal Practice, Deakin University  
Email: [fgerryqc@vicbar.com.au](mailto:fgerryqc@vicbar.com.au)



The authors would like to thank Mavin RK (BSc. candidate, University of Melbourne) for proofreading this article and Florence Harrison for design.