

Investigation into the detention and treatment of public housing residents arising from a COVID-19 'hard lockdown' in July 2020

December 2020

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**The Victorian Ombudsman pays respect to First Nations custodians of Country throughout Victoria. This respect is extended to their Elders past, present and emerging. We acknowledge their sovereignty was never ceded.**

# Letter to the Legislative Council and the Legislative Assembly

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To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament my *Investigation into the detention and treatment of public housing residents arising from a COVID-19 'hard lockdown' in July 2020*.



Deborah Glass OBE

**Ombudsman**

17 December 2020

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# Foreword

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*'We grew up here, we were born here, we know the system. We have doctors among us, psychologists ... It felt like, "are we in a safe place anymore, or not?" ... We felt unworthy, just people who live in public housing.'*

- 'Aaron', a resident of 33 Alfred Street, in evidence to the investigation

On 4 July 2020 about 3,000 residents of nine inner-Melbourne public housing towers were detained by the State. They received no advance notice or explanation of a direction to stay in their often-crowded high-rise homes without outside space. Images of their distress flashed on television screens around the world.

Australia's second largest city of over 5 million people was teetering on the edge of the COVID-19 second wave. 'Stay at home' orders had been reimposed three days earlier on ten Melbourne postcodes. But health officials were seriously concerned about an outbreak linked to the network of public housing towers - there was a 'risk of exponential spread'.

At around 11am on 4 July senior officials dealing with the public health emergency agreed an intervention was needed for the towers. They discussed a structure, including the need for community engagement, security, and provision of support to residents. Several officials told us they expected the intervention would not begin until midnight the following day, some 36 hours away.

Yet at 4.08pm the Premier of Victoria announced the lockdown, effective immediately.

Most of the residents found out about it when they saw uniformed police officers surrounding their homes. The Deputy Chief Health Officer - the expert on infectious diseases acting as Victoria's Chief Health Officer on the day - told us that although she signed the directions, the timing was not on her advice. She was given less than 15 minutes to consider the terms of several lengthy documents and their human rights implications.

On the evidence available to me, which does not include Cabinet documents, this decision appears traceable to a Cabinet meeting earlier that afternoon.

Despite the best efforts of those on the ground, the early days of the lockdown were chaotic: people found themselves without food, medication and other essential supports. Information was confused, incomprehensible, or simply lacking. On the ground few seemed to know who was in charge. No access to fresh air and outdoor exercise was provided for over a week. In a particularly unfortunate act, temporary fencing for an exercise area was erected one night, surrounded by police, and although quickly taken down, reinforced the residents' sense of being imprisoned.

After five days the lockdown was lifted at eight of the nine towers. Residents of 33 Alfred Street, some 11 per cent of whom by now had tested positive, were required to remain in their homes for a further nine days.

The lockdown worked - halting the rapid growth of COVID-19 cases within the building. But in my opinion the detention of residents on 4 July 2020 appears to have been contrary to law. Although she acknowledged the seriousness of the situation, the Deputy Chief Health Officer did not recommend a lockdown had to take place immediately, without more time to plan for the inevitable consequences. Owing to the foreseeability of those consequences, I was not persuaded the lockdown was compatible with residents' human rights, including their right to humane treatment when deprived of liberty.

The Government does not agree that the detention of people at Alfred Street was contrary to law or that any human rights were breached. The Ombudsman is not a court, and only a court can determine questions of lawfulness. But I can express an opinion based on the evidence gathered by the investigation, and I do so.

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Documents relating to the lockdown asserted there were security concerns, suggesting the towers were a hotbed of criminality and non-compliance. But the evidence was the vast majority were law-abiding people, just like other Australians. It is unimaginable that such stereotypical assumptions, leading to the ‘theatre of policing’ that followed, would have accompanied the response to an outbreak of COVID-19 in a luxury apartment block.

A significant proportion of tower residents came from non-European backgrounds. Some had endured civil wars and dictatorships before settling in Australia, some even surviving torture at the hands of their former State. For them the overwhelming police presence was particularly traumatic. Their distress, when they spoke to us, was palpable; their voices are in this report.

Since a state of emergency was first declared on 16 March 2020, restrictions on movement, both broad and specific, had been issued in Victoria many times, always with advance notice. In fact, when the immediate lockdown of 33 Alfred Street was announced, neighbours living across the road were given nearly eight hours to prepare for their own ‘stay at home’ orders. Only with regard to the public housing towers was it considered necessary to detain people on public health grounds with no warning whatsoever.

The opinions in this report are not a criticism of the Deputy Chief Health Officer or the many hundreds of public officials dealing with the crisis, with its huge logistical challenges. People laboured heroically into the winter nights, above and beyond their official duties, to support the residents and respond to the public health emergency. Many lessons were also learned about the need to connect with residents and community leaders during the crisis, and encouragingly, the Government continues to invest in these and other positive initiatives.

But neglecting human rights comes at a deep human cost. Proper consideration of human rights would have allowed for time to communicate and at least to some degree, better plan the public health response. It would have put health, not security, front and centre. It could have reduced or eliminated much of the distress that followed.

We may be tempted, during a crisis, to view human rights as expendable in the pursuit of saving human lives. This thinking can lead to dangerous territory. It is not unlawful to curtail fundamental rights and freedoms when there are compelling reasons for doing so; human rights are inherently and inseparably a consideration of human lives.

The Government need not apologise for taking necessary and difficult action to keep us all safe – in the face of this pandemic, there is no alternative but to accept the advice of our State’s leading infectious disease experts. But the decision to bring forward the operation to detain 3,000 people immediately did not appear to have been based on such advice, and like the virus it sought to contain, risked the health and wellbeing of many people. In a just society, human rights are not a convention to be ignored during a crisis, but a framework for how we will treat and be treated as the crisis unfolds.

I have recommended the Government apologise publicly to those detained at the Flemington and North Melbourne public housing estates for harm and distress caused by the immediacy of their lockdown. This would mark an important step in restoring community trust and affirm our collective commitment to protecting human rights.

This report refocuses our thinking on the truth that human rights are for all of us – whatever our state of health or wealth, background or behaviour. Wherever we live.

Deborah Glass

**Ombudsman**

# Glossary

<b>33 Alfred Street</b>	High-density public housing tower located in North Melbourne comprising 152 residential apartments
<b>Association for the Prevention of Torture</b>	International non-government organisation based in Geneva focusing on the prevention of torture and other acts of cruel, inhuman or degrading treatment and providing advice on OPCAT
<b>Australian COVID-19 Health Response Plan</b>	Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19) – plan to guide the Australian health sector response to COVID-19 prepared by the Commonwealth Department of Health in March 2020
<b>Authorised Officer</b>	Person appointed by the Secretary to DHHS to discharge functions, duties or powers under the Public Health and Wellbeing Act; may be authorised by the CHO to exercise emergency powers during a state of emergency
<b>Charter of Rights Act</b>	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) – legislation providing for the protection of fundamental human rights in Victoria; commonly referred to as ‘the Charter’
<b>CHO</b>	Chief Health Officer appointed under the Public Health and Wellbeing Act
<b>Close Contacts Directions</b>	Diagnosed Persons and Close Contacts Directions – directions made by the Deputy CHO under the Public Health and Wellbeing Act restricting the movement and activities of persons diagnosed with COVID-19 and their close contacts
<b>Cohealth</b>	Not-for-profit community health organisation in Victoria engaged by DHHS to provide health and wellbeing services to residents at 33 Alfred Street during the lockdown
<b>COVID-19</b>	Infectious disease caused by a new strain of coronavirus first identified in December 2019
<b>Deputy CHO</b>	Deputy CHO (Communicable Disease) – the public health expert ordinarily responsible for leading Victoria’s response to outbreaks of infectious diseases
<b>Detention Directions</b>	Detention Directions (33 Alfred Street, North Melbourne) – directions made by the Deputy CHO under the Public Health and Wellbeing Act on 4 July 2020 detaining people residing at 33 Alfred Street
<b>Detention Principles</b>	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted in 1988 by the United Nations General Assembly
<b>DHHS</b>	Department of Health and Human Services – Victorian Government department responsible for administering the Public Health and Wellbeing Act and Victoria’s public housing system
<b>Emergency Management Act</b>	<i>Emergency Management Act 2013</i> (Vic) – legislation establishing governance arrangements for emergency management in Victoria. This legislation operates concurrently with the <i>Emergency Management Act 1986</i> (Vic), which is identified in this report by its year.

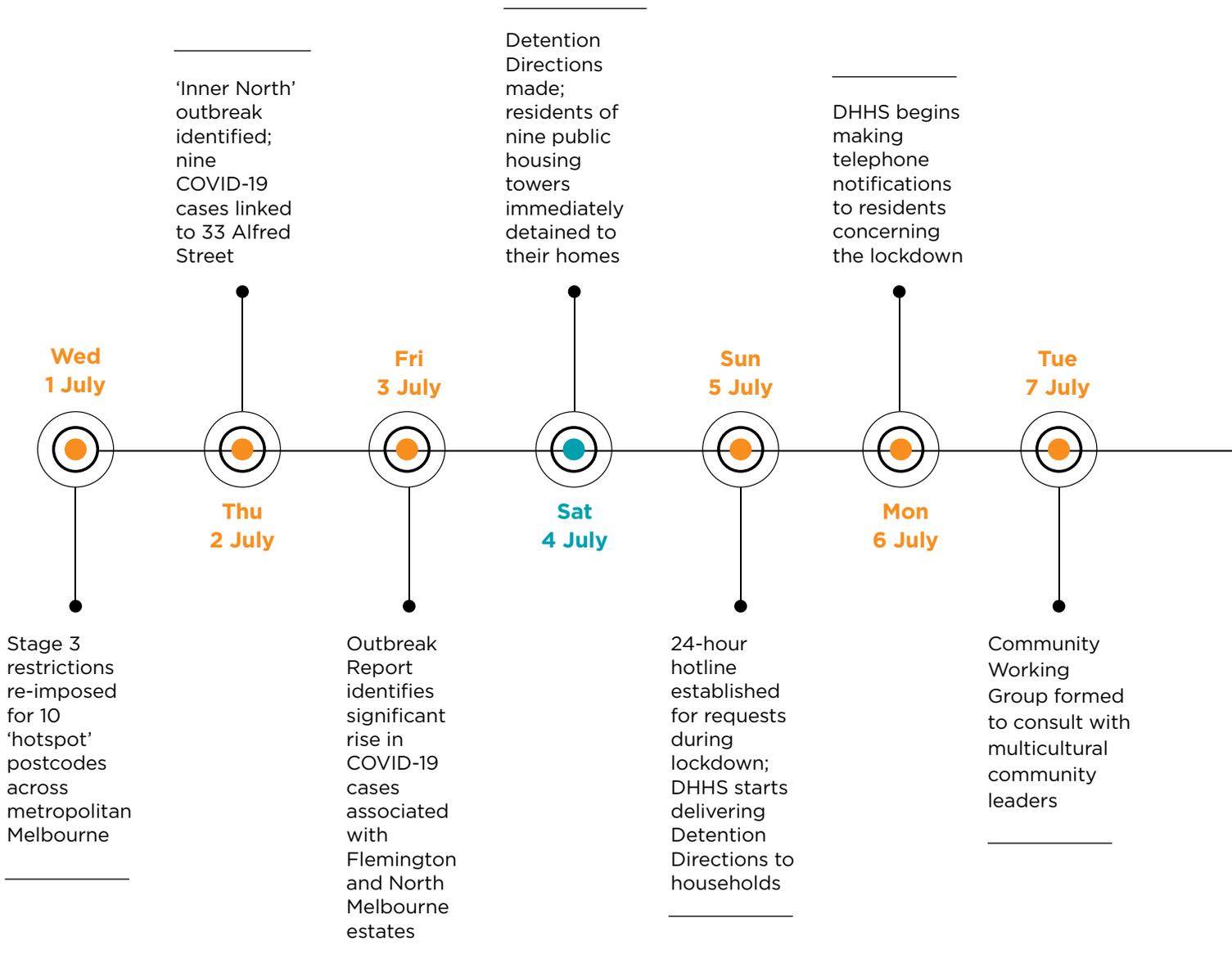
<b>Havana Rules</b>	Rules for the Protection of Juveniles Deprived of their Liberty, adopted in 1990 by the United Nations General Assembly
<b>Health Emergency Response Plan</b>	State Health Emergency Response Plan – document prepared prior to the COVID-19 pandemic, providing arrangements for the management of health emergencies in Victoria; sub-plan of the State Emergency Management Plan
<b>ICCPR</b>	United Nations International Covenant on Civil and Political Rights ratified by Australia in 1980
<b>Ill-treatment</b>	A collective term in this report for cruel, inhuman or degrading treatment or punishment, as prohibited by the ICCPR, the United Nations Convention Against Torture and the Charter of Rights Act
<b>Intervention</b>	Term used in this report to refer to the public health measures first implemented by DHHS on 4 July 2020 in response to the outbreak of COVID-19 at the Flemington and North Melbourne public housing estates
<b>Mandela Rules</b>	Standard Minimum Rules for the Treatment of Prisoners, adopted in 2015 by the United Nations General Assembly
<b>OPCAT</b>	Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 2002 by the United Nations General Assembly and ratified by Australia in 2017
<b>Operation Benessere</b>	Operation established to coordinate the lockdowns at the Flemington and North Melbourne public housing estates on 4 July 2020
<b>Victorian COVID-19 Outbreak Management Plan</b>	COVID-19 Outbreak Management Plan – document setting out key aspects of DHHS’s expected response to outbreaks of COVID-19 in Victoria approved by the CHO in June 2020
<b>Victorian COVID-19 Pandemic Plan</b>	COVID-19 Pandemic Plan for the Victorian Health Sector – plan to guide the Victorian health sector response to COVID-19 prepared by the Minister for Health in March 2020
<b>Victorian Pandemic Management Plan</b>	Victorian Health Management Plan for Pandemic Influenza – plan addressing Victoria’s preparedness and emergency response to an influenza pandemic prepared by the CHO in October 2014
<b>Public Health and Wellbeing Act</b>	<i>Public Health and Wellbeing Act 2008</i> (Vic) – legislation providing for the protection of public health and management of public health emergencies in Victoria
<b>Siracusa Principles</b>	Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR – non-binding principles clarifying when rights under the ICCPR may be reasonably limited
<b>Social landlord</b>	Landlord with social responsibilities – principle under which DHHS is expected to set public housing rents at affordable levels and promote tenant wellbeing and participation, neighbourhood upkeep and community vitality

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<b>State Control Centre</b>	Primary control centre for the management of emergencies in Victoria, administered by the Emergency Management Commissioner with and on behalf of agencies performing functions under the Emergency Management Act
<b>State Controller (Health)</b>	Person appointed by the Secretary to DHHS under the Emergency Management Act and Health Emergency Response Plan to lead and manage the response to a public health emergency
<b>State Emergency Management Plan</b>	Plan for the management of emergencies in Victoria prepared by the Emergency Management Commissioner under the Emergency Management Act
<b>State of emergency</b>	Declaration made by the Victorian Minister for Health under section 198 of the Public Health and Wellbeing Act under which the CHO may authorise the use of public health emergency powers, including the power of detention
<b>VEOHRC</b>	Victorian Equal Opportunity and Human Rights Commission
<b>WHO</b>	World Health Organisation - United Nations agency based in Geneva responsible for international public health



# Timeline of key events – 1 to 18 July 2020



Over 2,500 COVID-19 tests have been administered; DHHS begins delivering translated materials explaining the lockdown

DHHS begins developing fresh air and exercise program; dedicated health hotline established

COVID-19 growth rate within the public housing towers falls to one quarter the Victorian average

Close Contacts Directions amended to clarify entitlements to outdoor exercise

Wed  
8 July

Thu  
9 July

Fri  
10 July

Sat  
11 July

Sun  
12 July

Wed  
15 July

Thu  
16 July

Sat  
18 July

Detention Directions are revoked; 33 Alfred Street remains in lockdown under Close Contacts Directions

Fresh air and exercise program begins; fences are erected and later dismantled

Second COVID-19 testing blitz commences at 33 Alfred Street; additional 30 cases identified

Substantive lockdown at 33 Alfred Street ends at 11:59pm

For a timeline that focuses on the events of 4 July 2020, please see pages 46-47.

# Executive summary

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## Why we investigated

1. At approximately 4pm on 4 July 2020, Victoria's Deputy Chief Health Officer (Communicable Disease) ('Deputy CHO') issued a series of directions under the *Public Health and Wellbeing Act 2008* (Vic) to residents and other people living at nine public housing towers located in the inner-Melbourne suburbs of Flemington and North Melbourne.
2. These directions – at the time, the most restrictive imposed in Australia in response to an outbreak of COVID-19 – detained approximately 3,000 Victorians to their homes with immediate effect.
3. Following a concerted COVID-19 testing blitz, restrictions were relaxed in relation to eight of the nine public housing towers on 9 July 2020, some five days later.
4. At the same time, authorities announced the decision to maintain a 'hard lockdown' of one public housing tower located at 33 Alfred Street, North Melbourne ('33 Alfred Street'), where more than 10 per cent of residents had tested positive for the virus.
5. As a consequence of this decision, more than 400 people at 33 Alfred Street were confined to their homes for a period of two weeks – unable to attend work, visit the supermarket or, for the most part, access fresh air and outdoor exercise.
6. During this period, the Ombudsman received more than 85 complaints from residents, community advocates and concerned Victorians relating to the treatment of people at 33 Alfred Street and the other public housing towers subject to the initial lockdown, highlighting concerns about how the public health intervention was announced and implemented at the overwhelmingly multicultural Flemington and North Melbourne public housing estates.
7. During the lockdown, Ombudsman investigators also attended the 33 Alfred Street site and spoke with community advocates, emergency services staff and representatives of the Department of Health and Human Services ('DHHS') – the social landlord for the public housing towers and authority with overarching responsibility for the operation.
8. On 16 July 2020, the Ombudsman decided to conduct an 'own motion' investigation into the treatment of people at 33 Alfred Street, looking at whether imposition of the lockdown complied with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
9. The investigation also looked at:
  - the conditions under which people were, and continued to be, detained at 33 Alfred Street
  - the nature and accessibility of official communications with residents and advocates
  - the nature and appropriateness of restrictions upon people's access to fresh air, exercise, medical care and medical supplies while detained.

## Public housing lockdowns

### Public housing outbreak

10. The outbreak of COVID-19 associated with 33 Alfred Street was first identified on 2 July 2020, in the early stages of Victoria's 'second wave' of COVID-19 infections.
11. At the time, Victoria's COVID-19 Outbreak Management Plan emphasised the need for early detection and rapid management of COVID-19 outbreaks occurring in 'sensitive' settings. Although not specifically identified in the document, Melbourne's high-density public housing estates were clearly such environments.

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12. Prior to the July outbreak, DHHS as the landlord had not prepared a specific Outbreak Management Plan for the Flemington and North Melbourne public housing estates or Melbourne's high-density public housing settings more generally. Both Victorian and Commonwealth guidelines relating to other 'sensitive' and 'high risk' settings recommended the preparation of such a document.
  13. An Outbreak Management Team was nevertheless promptly formed to respond to the situation. Meanwhile, understanding of the outbreak continued to evolve. By late in the evening of 3 July 2020, almost two dozen recently confirmed cases of COVID-19 had been connected to three public housing towers located at the Flemington and North Melbourne public housing estates. The Deputy CHO – the public health expert ordinarily responsible for leading Victoria's response to outbreaks of infectious diseases – was 'terrified' by the potential for rapid spread of COVID-19 within these settings and the health consequences for residents that would likely follow.
  14. For the first time, senior DHHS officials began to discuss the possibility of imposing a 'temporary quarantine order' over those living at the outbreak sites.
  15. Discussions continued throughout the evening and into the morning of 4 July 2020. An inter-agency meeting was convened at 11am to discuss the contemplated public health intervention. Residents of the affected public housing towers would be required to quarantine at home for an initial period of five days. Results of a COVID-19 testing blitz would inform a subsequent decision to relax or extend restrictions associated with the intervention.
  16. Senior DHHS officers leaving the meeting, including the Deputy CHO, expected these arrangements would not commence for approximately 36 hours.
  17. A meeting of the Crisis Council of Cabinet was later convened at 1:45pm.
  18. It is a matter of public record that a recommendation was put to this body and a decision made in relation to management of the Flemington and North Melbourne outbreak.
  19. The Victorian Government declined to provide the Ombudsman with documents relating to the deliberations of the Crisis Council of Cabinet, and the investigation was therefore unable to conclusively determine what decision was made at the 4 July 2020 meeting.
- ### Lockdown
20. During the early afternoon of 4 July 2020, the Deputy CHO was informed that a decision had been made to bring forward the quarantine and testing operation. Directions were to be made under the Public Health and Wellbeing Act and announced at a Victorian Government press conference that afternoon.
  21. An inter-agency Emergency Management Team meeting was convened at approximately 2:30pm to plan for the imminent intervention.
  22. The Deputy CHO was later emailed proposed public health directions relating to the operation, while travelling by car to the location of the press conference.
  23. Under the proposed directions prepared by DHHS's Legal Services team, nearly 3,000 public housing residents were to be immediately detained to their premises for an 'initial detention period' of 14 days.

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24. This was to be the first use of emergency detention powers to manage an outbreak of COVID-19 within the Victorian community, and the first 'hard lockdown' of a high-density residential building anywhere in Australia in response to the global pandemic. There were no Victorian or Commonwealth guidelines relating to such an intervention. The human rights implications of the decision were extraordinary and required careful consideration.
  25. The press conference announcing the operation was scheduled to begin in less than 15 minutes.
  26. The proposed directions were accompanied by a brief relating to the COVID-19 pandemic and a 15-page human rights assessment. The latter did not meaningfully address whether any less restrictive alternatives were available in the circumstances, nor did it explain why DHHS considered it necessary to detain residents immediately and without warning.
  27. The Deputy CHO reviewed the human rights assessment and signed the proposed directions before immediately joining the press conference. She was 'not entirely' comfortable with the process observed on the occasion. This was the shortest period she had ever been provided to consider the human rights impacts of proposed directions relating to the COVID-19 pandemic. While convinced of the need to impose additional public health restrictions at the outbreak sites, she would have preferred an opportunity to consult with multicultural community leaders and further time to discuss the available options.

28. Later, given the opportunity to reflect on the severity of the intervention, the Deputy CHO told the investigation she was not convinced delaying the lockdown by a day would have made a 'hugely significant' difference to containing the outbreak.

### **Implementation**

29. No contingency plans existed for imposition of a building-wide 'hard lockdown' to manage an outbreak of COVID-19 within the Victorian community.
30. There was urgent need to devise and implement arrangements to provide food relief, as well as health and social supports for the thousands of people likely to be affected by the intervention.
31. Public servants and qualified interpreters needed to be sourced on short notice. Those operating on the ground required advice on appropriate infection prevention and control protocols. Meanwhile, there was need to develop a community engagement strategy and brief multicultural community leaders about the intervention.
32. Despite the dedicated efforts of those coordinating the operation, many of these matters remained outstanding or only just under development when the lockdown commenced.

### **Treatment of people at 33 Alfred Street**

33. The Premier of Victoria publicly announced the public health directions made by the Deputy CHO during a televised press conference at approximately 4:08pm on 4 July 2020.

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34. Hundreds of uniformed Victoria Police officers were immediately deployed to the North Melbourne and Flemington estates. Police perimeters were formed around the affected public housing towers. Residents were directed to remain inside their homes.
  35. Copies of the Detention Directions – the English-language instrument setting out the purpose and terms under which people were being detained – were not distributed when the lockdown commenced. DHHS did not provide some households with a copy of this document until the third day of the intervention
  36. Other attempts to notify residents of the purpose and terms of the lockdown were not without their own problems. Telephone notifications did not commence until the third day of the intervention, and almost half of all households at 33 Alfred Street were yet to be contacted when notification activities ceased on 10 July 2020. Owing to translation and distribution delays, written materials explaining the Detention Directions in community languages were not distributed to households until the fifth and sixth days of the intervention – in the latter case, the same day the directions were revoked.
  37. Factors causing these shortcomings could have been contemplated and better addressed had more time been allocated towards preparation for the operation.
  39. Despite this, DHHS was unable to produce any records demonstrating the detention of residents at 33 Alfred Street was formally reviewed each day – or, for that matter, at all.
  40. Section 185(1) of the Public Health and Wellbeing Act also provided a mechanism under which residents at 33 Alfred Street could complain directly to the Secretary to DHHS about many of the conditions of the lockdown.
  41. Yet information distributed to residents did not refer to this provision, and no complaints relating to the lockdown at 33 Alfred Street were received or investigated by the Secretary.
  42. While arrangements for compassionate circumstances existed, residents at 33 Alfred Street were also not formally notified of the process for submitting requests to leave the building during the lockdown.

### **Fresh air and outdoor exercise**

#### **Relevant safeguards**

38. While falling short of international human rights standards, section 200(6) of the Public Health and Wellbeing Act required the detention of people subject to the lockdown be reviewed by a representative of DHHS at least once every 24 hours.
43. Residents at 33 Alfred Street were not provided access to outdoor exercise during the first week of the lockdown, increasing risks to health and wellbeing during this period.
44. Arrangements for residents to access fresh air and outdoor exercise could have been developed and put in place when the lockdown began, had more time been allocated towards preparation for the intervention.
45. Such arrangements were first trialled on the evening of 11 July 2020. Those participating in the fresh air and exercise program were escorted by Victoria Police officers to an outdoor area enclosed by temporary fencing. These residents likened the area to a cage or prison exercise space and said they felt ‘surrounded’ by Victoria Police personnel.

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46. DHHS attributed this to a misunderstanding and quickly rectified the issue, but the use of temporary fencing in this manner was clearly degrading and inhumane.
  47. Other restrictions associated with the program, including requirements that residents be escorted through the building and supervised by health staff, were imposed in accordance with public health advice and were not unreasonable in the circumstances.
  48. Imposition of the program was nevertheless initially inconsistent with the public health directions governing the second phase of the lockdown, under which people at 33 Alfred Street should generally have been at liberty to leave their homes and the surrounding area for the purposes of exercise.
  49. These and other restrictions imposed on residents during this period resulted in the de facto detention of residents at 33 Alfred Street. Yet DHHS did not appear to have consciously exercised the power of detention under the Public Health and Wellbeing Act to maintain the lockdown after 9 July 2020, nor complied with the legislative safeguards applying to its use.

### **Enforcement model**

50. The involvement of large numbers of uniformed Victoria Police officers in implementing the lockdown was described by residents, advocates and some health workers as both unnecessary and insensitive to the experiences of many of those living at 33 Alfred Street.
51. The decision to foreground Victoria Police personnel in the operation instead of public health officials also appeared to result in significant confusion about the nature and terms of the intervention.
52. While not responsible for developing the enforcement model used by the lockdown, DHHS clearly anticipated Victoria Police personnel would be deployed to the public housing towers as part of the intervention. This enforcement model did not appear to have been the subject of noteworthy inter-agency discussion or debate prior to its implementation, nor based on direct advice from the Deputy CHO.
53. DHHS as the authority responsible for the operation and the social landlord appeared to have given insufficient consideration to how the significant police deployment was likely to be perceived and experienced by residents.

### **Health and wellbeing**

54. The investigation was generally satisfied appropriate arrangements were put in place for residents at 33 Alfred Street to access medical care during the lockdown, including emergency treatment where necessary.
55. Although in some cases significantly delayed, materials distributed to residents also tended to provide clear and accessible information about the processes for seeking most forms of medical attention.
56. On the other hand, the delivery of care was undermined by confusion about lines of authority and issues of coordination between DHHS and Victoria Police personnel controlling access to the building.
57. There were also significant problems with the provision of medication and other medical supplies to residents at 33 Alfred Street during the lockdown.

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58. The investigation identified several cases where fulfilment of seemingly urgent requests for medication was delayed or neglected by authorities administering the lockdown. Residents were in some cases forced to rely upon family or community volunteers to collect and deliver essential supplies.
59. Inefficiencies in the process appeared attributable to a 'referral chain' between DHHS and relevant support agencies, leading to the delayed escalation of requests to pharmacy providers.
60. Resolving requests for medical supplies would have benefited from a centralised case management system and greater coordination and oversight from DHHS.
61. While most households at 33 Alfred Street appeared to have received at least one telephone welfare check during the initial phase of the lockdown, implementation of a more structured, comprehensive approach to monitoring resident welfare would also have decreased risks to health and wellbeing associated with the intervention.
64. The investigation nevertheless received largely positive feedback about the decisions to form a Community Working Group to inform the operation and to invite community representatives to participate in meetings of the site level Incident Management Team – the latter being an apparent first for emergency management operations within Victoria.
65. While DHHS made efforts to ensure written materials concerning the intervention were translated into languages commonly spoken within the Flemington and North Melbourne public housing estates, there were nevertheless significant delays in preparing and distributing these materials to residents.
66. Of most concern, written materials explaining the purpose and terms of the lockdown in community languages were not distributed until the fifth and sixth days of the intervention. In other cases, it appeared that time constraints resulted in some factsheets being produced in only a few languages.
67. While some delay in the production of translated materials may have been unavoidable, information concerning the lockdown could have been made more readily accessible to culturally and linguistically diverse residents had further time been allocated towards preparing for the intervention.

### **Cultural and linguistic diversity**

62. The decision to impose the lockdown was not preceded or informed by consultation with multicultural community leaders. Earlier community consultation would have been preferred by the Deputy CHO, who indicated the immediacy of the intervention largely prevented such activities.
63. Consultation by DHHS with multicultural communities following imposition of the lockdown was initially reactive and non-collaborative in nature, driven in part by community concern about the immediacy and implementation of the intervention.
68. There was also an unacceptable absence of qualified interpreters at the Flemington and North Melbourne public housing estates during the critical first evening of the lockdown, leaving residents from non-English speaking backgrounds to rely upon the assistance of neighbours, family members and community advocates to understand the circumstances under which they were being detained.

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## Compatibility with human rights

69. There was a clear and understandable sense of urgency surrounding efforts to contain the outbreak of COVID-19 associated with the Flemington and North Melbourne public housing estates.
70. Yet the reasons for imposing a lockdown on 4 July 2020 – with just a few hours' planning – remained unclear to the investigation. Such an immediate response was not specifically recommended by the Deputy CHO, who, like other senior DHHS officers, originally anticipated the public health intervention commencing after at least 24 hours' further preparation.
71. While the temporary detention of residents at 33 Alfred Street may have been an appropriate measure to contain the outbreak of COVID-19 sweeping the building, the imposition of such restrictions with more or less immediate effect – absent further preparation, and without specific health advice recommending such an approach – did not appear justified and reasonable in the circumstances, nor compatible with the right to humane treatment when deprived of liberty.
72. Indeed, many of the problems associated with implementation of the lockdown appeared attributable to this feature of the intervention.
73. The investigation was also not satisfied proper consideration was given to the human rights of those affected by the lockdown at 33 Alfred Street when restrictions were introduced.
74. This conclusion was unavoidable, having regard to the limited time – less than 15 minutes in all – afforded to the Deputy CHO to consider the human rights implications of the intervention before its scheduled announcement.
75. In fact, the circumstances surrounding the making of the decision gave rise to lingering concerns about the extent to which the Deputy CHO was permitted to bring an independent mind to the issue.
76. While public health directions relating to the intervention were signed by the Deputy CHO moments before the Victorian Government press conference announcing the operation, the evidence strongly suggested the decision to impose an immediate lockdown was taken by the Crisis Council of Cabinet some two hours earlier, and was not based on direct advice from this public health expert.
77. It was also clear that greater effort could have been taken to reconcile aspects of how the intervention was implemented and perceived with its overall public health objectives. In many cases, grievances about implementation of the lockdown were wholly understandable, having regard to the experiences shared by residents, volunteers and advocates.
78. The investigation welcomed the many additional measures being implemented by DHHS to mitigate the risks of COVID-19 within Melbourne's high-density public housing estates and other sensitive residential settings – some of which no doubt should have preceded identification of the outbreak in July.
79. Ultimately, there was a common view, voiced by many of the residents, advocates and senior DHHS officers who shared their experiences with the investigation, of the need to restore trust following the intervention.

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## Recommendations

80. As a result of the investigation, the Ombudsman made the following recommendations to the Victorian Government:

- (1) Apologise publicly to residents of the Flemington and North Melbourne public housing estates for harm or distress caused by imposition of the immediate lockdown on 4 July 2020.
- (2) Amend the *Public Health and Wellbeing Act 2008* (Vic) to:
  - (a) allow a person subject to detention under section 200(1)(a) to apply to both the Chief Health Officer and VCAT for review of the decision
  - (b) require that a person subject to detention under section 200(1)(a) be promptly provided with information concerning the following in a manner and form they are capable of understanding:
    - (i) the purpose and terms of their detention
    - (ii) availability of, and processes for seeking, relevant exemptions
    - (iii) any right(s) of complaint or review
  - (c) require that a person subject to detention under section 200(1)(a) be provided with regular and meaningful access to fresh air and outdoor exercise, wherever practicable.

81. The Ombudsman also made the following recommendations to DHHS:

- (3) Identify all sensitive and high-risk accommodation settings administered by the Victorian Government and invest in them to ensure appropriate COVID-19 outbreak prevention, preparation and response measures are in place.
- (4) Establish processes to regularly evaluate implementation and impact of these measures for the duration of the COVID-19 pandemic.
- (5) Develop and implement local guidelines, procedures and training relating to exercise of the emergency detention power identified in section 200(1)(a) of the *Public Health and Wellbeing Act 2008* (Vic) in response to an outbreak of an infectious disease, addressing, at a minimum:
  - (a) the circumstances in which it may be appropriate to detain a person during a public health emergency
  - (b) considerations informing use of the power, including the need to respect and protect the health and wellbeing of those being detained
  - (c) legislative safeguards relating to use of the power, specifying, wherever possible, measures to be adopted to ensure compliance with these safeguards
  - (d) obligations arising under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

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- (6) Consider measures to improve DHHS's capability to perform health emergency management functions, including by:
    - (a) appointing or investing in staff with relevant emergency management expertise
    - (b) clarifying and enhancing surge capacity arrangements for health emergencies
    - (c) reinforcing partnerships with relevant service providers in support of emergency preparedness, response and recovery activities.
  - (7) Develop and publish information clarifying the process for making complaints under section 185(1) of the *Public Health and Wellbeing Act 2008* (Vic), including specific information for people seeking to complain about the exercise of emergency powers during the COVID-19 pandemic.
  - (8) In consultation with the Victorian Multicultural Commission, work with community leaders and public housing residents to strengthen trust and engagement, and develop and implement measures to:
    - (a) establish avenues for improving the accuracy of public housing records maintained by the Housing Division, including primary/ preferred language and country of-origin data
    - (b) improve understanding of the needs and preferences of culturally and linguistically diverse people living in public housing
    - (c) establish and maintain partnerships with community leaders and residents to support timely communication with people living in public housing
    - (d) increase participation of multicultural communities in policy, planning and project activities relating to public housing.
  - (9) Consider other measures to improve relationships between DHHS and residents of the Flemington and North Melbourne public housing estates, including:
    - (a) forming one or more tenant representative bodies
    - (b) further opportunities for remunerated employment or workplace learning within the Victorian Government that could be made available to residents during and beyond the COVID-19 pandemic
    - (c) identifying opportunities to expand the community engagement model adopted during the lockdown to broader departmental activities.
  - (10) Report publicly on steps taken to implement recommendations 3-9 above, on or before 30 June 2021.

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## Responses to the Ombudsman's draft report

82. DHHS provided a lengthy legal analysis in response to the Ombudsman's draft report, indicating it did not agree with the provisional conclusions of the investigation.
83. The Ombudsman carefully considered DHHS's response but, having regard to the weight of the evidence, was not persuaded to a substantially different view.
84. DHHS's response to the Ombudsman's draft report is included as Appendix A of this report.
85. Victoria Police provided a response to the Ombudsman's draft report in which it declined to comment on the investigation's provisional conclusions.
86. Victoria Police observed:

Victoria Police takes seriously its legal responsibilities under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to protect human rights ... and our role in Operation Benessere reflected this.
87. Individual witnesses interviewed by the investigation did not elect to comment on the provisional conclusions of the draft report.

# Introduction

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## Why we investigated

88. At about 4pm on 4 July 2020, Victoria's Deputy Chief Health Officer (Communicable Disease) ('Deputy CHO') issued a series of directions under the *Public Health and Wellbeing Act 2008* (Vic) to residents and other people located at nine inner-Melbourne public housing towers.
89. These directions – at the time, the most restrictive imposed in Australia in response to an outbreak of COVID-19 – detained around 3,000 Victorians to their homes with immediate effect.
90. Following a concerted COVID-19 testing blitz, restrictions were relaxed in relation to eight of the nine public housing towers on 9 July 2020, some five days later.
91. At the same time, authorities announced the decision to maintain a 'hard lockdown' of one public housing tower located at 33 Alfred Street, North Melbourne ('33 Alfred Street'), where more than 10 per cent of residents had tested positive for the virus.
92. As a consequence of this decision, more than 400 people at 33 Alfred Street were confined to their homes for a period of two weeks – unable to attend work, visit the supermarket or, for the most part, access fresh air and outdoor exercise.
93. During this period, the Ombudsman received more than 85 complaints from residents, community advocates and concerned Victorians relating to the treatment of people at 33 Alfred Street and the other public housing towers subject to initial lockdown.
94. These complaints highlighted concerns about:
- whether the lockdown of public housing residents was discriminatory
  - an 'overwhelming' police presence at the public housing towers
  - lack of effective communication with residents, noting the cultural and linguistic diversity of people living at the Flemington and North Melbourne public housing estates
  - lack of consultation with multicultural community leaders
  - access to culturally appropriate food, medical supplies, fresh air and exercise.
95. During the lockdown, Ombudsman investigators attended the 33 Alfred Street site and spoke with community advocates, emergency services staff and representatives of the Department of Health and Human Services ('DHHS') – the authority with overarching responsibility for the operation.
96. These parties spoke openly with investigators about the significant administrative and logistical challenges associated with maintaining the lockdown and pointed to measures that had already been implemented to address concerns from residents.
97. At the same time, investigators were concerned that as at the evening of 11 July 2020 – approximately one week into the lockdown – residents at 33 Alfred Street were still yet to be granted access to fresh air and outdoor exercise in accordance with the allowances then afforded to other people diagnosed with COVID-19 and their close contacts in Victoria.

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98. While arrangements for residents to access fresh air and exercise were implemented later that evening, the Ombudsman continued to receive complaints about this issue, and what was viewed as an overly restrictive and paternalistic approach by authorities to people seeking access to basic necessities.

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***‘Why can’t we be treated like other people?’***

- Oral submission from resident.

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99. At the same time, Ombudsman investigators were concerned restrictions imposed on people seeking access to fresh air and medical care and supplies, although perhaps justifiable from an infection control perspective, were not easily reconciled with the directions issued to ‘diagnosed persons’ and ‘close contacts’ under the Public Health and Wellbeing Act.

100. On 16 July 2020, the Ombudsman notified the Minister for Health (also being the Minister for the Coordination of Health and Human Services: COVID-19) and the Secretary to DHHS of her intention to conduct an ‘own motion’ investigation into the treatment of people and conditions of detention at 33 Alfred Street.

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***‘Every day is a problem-solving day. ... We are very clear that we haven’t got things right all the time.’***

- DHHS Operational Commander.

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## **Jurisdiction**

101. DHHS is the Victorian Government department responsible for administering the Public Health and Wellbeing Act.

102. Under the state’s emergency management framework, DHHS is also responsible for leading the Victorian Government’s response to the COVID-19 pandemic, including the operation relating to the lockdown at 33 Alfred Street.

103. Section 16A of the *Ombudsman Act 1973* (Vic) provides that the Ombudsman may conduct an own motion investigation into any administrative action taken by or in an ‘authority’.

104. The definition of ‘authority’ in the Ombudsman Act includes a department such as DHHS.

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## DHHS

DHHS coordinates programs and services for the wellbeing of Victorians in relation to, among other subjects:

- disability
- health and mental health
- housing
- children and families
- prevention of family violence.

DHHS is comprised of several central divisions, including:

- Health and Wellbeing, responsible for administering Victoria's hospital and healthcare system
- Housing and Infrastructure, responsible for the Victorian Government's homelessness and social housing programs
- Regulation, Health Protection and Emergency Management, responsible for monitoring and responding to emerging health threats and coordinating DHHS's emergency management responsibilities.

The Housing and Infrastructure division is responsible for administering the *Housing Act 1983* (Vic), under which DHHS, on behalf of the Director of Housing:

- develops, owns and manages public housing infrastructure in Victoria
- administers and determines applications for social housing, including public housing
- leases public housing properties to tenants in accordance with the *Residential Tenancies Act 1997* (Vic).

DHHS's 'Public Housing Allocations Operational Guideline', dated January 2019, provides that DHHS should act as a 'social landlord' when making decisions relating to public housing.

According to this principle, DHHS is expected to set rents at affordable levels and promote tenant wellbeing and participation, neighbourhood upkeep and community vitality.

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## Terms of reference

105. The terms of reference of the investigation focused on the treatment of people at 33 Alfred Street from 4 July 2020, when the lockdown commenced, and had specific regard to the following issues:
- the conditions under which people were, and continued to be, detained at 33 Alfred Street
  - the nature and accessibility of official communications with residents and advocates
  - the nature and appropriateness of restrictions upon people's access to fresh air, exercise, medical care and medical supplies while detained
  - whether, in relation to the above, DHHS and other relevant authorities acted compatibly with, and gave proper consideration to, human rights identified in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter of Rights Act').
106. Before and during the investigation, the Ombudsman received many requests to investigate the circumstances and treatment of people residing at other public housing towers placed under lockdown on 4 July 2020.
107. While acknowledging the concerns of these parties, the Ombudsman determined to limit the investigation to the treatment of people at 33 Alfred Street, having regard to the prolonged lockdown affecting these residents and the need to ensure that recommendations of the investigation were as timely as possible in the circumstances.
108. It is hoped the conclusions and recommendations from this investigation will have broader application to other public housing estates and the future use of emergency powers under the Public Health and Wellbeing Act.

## Methodology

109. Public health restrictions imposed in response to the COVID-19 pandemic presented significant logistical challenges to the investigation, and the investigation's methodology was accordingly adapted to the circumstances.
110. Ombudsman investigators attended 33 Alfred Street and the nearby Incident Control Centre to observe the conditions of the lockdown and speak with community advocates, emergency service workers and representatives of DHHS.
111. Ombudsman investigators also facilitated online discussion sessions with affected residents, volunteers and community advocates.
112. Further, the investigation involved:
- assessing information provided by the individuals who complained to the Ombudsman about the public housing lockdowns
  - reviewing relevant legislation, including the:
    - o Public Health and Wellbeing Act
    - o Charter of Rights Act
    - o Housing Act
    - o *Emergency Management Act 1986* (Vic)
    - o *Emergency Management Act 2013* (Vic)

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- considering emergency management protocols and public health guidelines relevant to the COVID-19 pandemic, including the:
    - *Victorian State Emergency Management Plan and State Health Emergency Response Plan*
    - *Victorian COVID-19 Pandemic Plan for the Victorian Health Sector*
    - *Victorian Outbreak Management Plan – COVID-19*
    - Commonwealth Department of Health’s *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)*
    - Communicable Diseases Network Australia’s *National Guidelines for Public Health Units – COVID-19*
  - seeking and considering information and written submissions from:
    - residents and other people directly affected by the lockdown
    - community volunteers and advocates
    - community-based organisations and other parties involved in the intervention
  - making enquiries with DHHS and considering its responses dated 31 August, 16 September and 29 September 2020
  - taking sworn evidence from DHHS officers and other senior officials involved in implementing the public housing lockdowns
  - undertaking research into the design, construction and history of Melbourne’s public housing towers, including 33 Alfred Street
  - obtaining and reviewing records concerning the public housing lockdowns, including:
    - housing, occupancy and COVID-19 testing data relating to 33 Alfred Street
    - written directions and other materials issued to residents during the lockdown
    - records relating to the administration of the lockdown, including minutes of the Emergency Management, Incident Management and DHHS Leadership teams responsible for the operation
    - records of requests made to DHHS during the lockdown
    - policies, protocols and other instructions implemented by DHHS during the lockdown
  - seeking and considering additional information and records from Victoria Police, Ambulance Victoria, the Victorian Multicultural Commission, Public Record Office Victoria, Emergency Management Victoria and community health provider Cohealth
  - providing a draft version of this report to DHHS, Victoria Police, the Secretary of the Department of Premier and Cabinet, the Premier of Victoria and individual witnesses interviewed by the investigation, for factchecking and comment
  - considering and addressing responses received from:
    - the Deputy CHO, on 7 December 2020
    - DHHS, on 9 December 2020
    - Victoria Police, on 9 December 2020
    - the Emergency Management Commissioner, on 10 December 2020.

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113. Throughout the investigation, the Ombudsman and the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') received weekly briefings from DHHS to monitor developments at the Flemington and North Melbourne public housing estates and resolve complaints informally.
114. DHHS and all other authorities cooperated with the investigation and, where necessary, assisted Ombudsman investigators to identify and retrieve records relevant to the investigation.
115. The Ombudsman acknowledges the assistance provided by residents, community volunteers and advocates, many of whom were willing to share their experiences with the investigation while still dealing with the immediate effects of the lockdown, and in some cases, while recovering from COVID-19.
116. Organisations that provided submissions to the investigation are listed in Appendix B.

### Sworn evidence

117. As part of the investigation, Ombudsman officers took sworn evidence by online interview with the following people:
- Operational Commander and then-Deputy State Controller, Operation Benessere ('DHHS Operational Commander')
  - Deputy Commander and Site CEO for North Melbourne, Operation Benessere ('DHHS Deputy Commander')
  - Deputy CHO – the person acting as Victoria's Chief Health Officer on 4 July 2020
  - Associate Secretary to DHHS
  - Emergency Management Commissioner.

118. The investigation also took evidence from the then-Secretary to DHHS ('the Secretary') by way of statutory declaration, prior to her departure from the Department in November 2020.
119. All interviews were conducted as 'voluntary appearances' under the Ombudsman Act, and each witness provided their full cooperation to the investigation.

### Summoned materials

120. The Ombudsman issued a summons to DHHS requiring the production of:
- documents evidencing DHHS's consideration of human rights under the Charter of Rights Act in relation to the detention and treatment of people at 33 Alfred Street
  - legal advice obtained or provided to DHHS concerning the detention of people at 33 Alfred Street, including following revocation of the *Detention Directions (33 Alfred Street)* on 9 July 2020.
121. The Ombudsman also issued a summons to community health provider Cohealth for the production of records relating to requests made to this organisation during the lockdown.

### Assistance of VEOHRC

122. Under the Ombudsman Act, the Ombudsman's functions include to enquire into or investigate:
- whether administrative actions are compatible with the human rights set out in the Charter of Rights Act
  - whether, in the case of actions involving a decision, there has been a failure to give proper consideration to relevant human rights set out in the Charter of Rights Act.

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123. The Ombudsman's human rights functions complement those of VEOHRC, which include:

- to provide education about human rights and the Charter of Rights Act
- to review the operation of the Charter of Rights Act, as well as laws and government practices with the potential to affect human rights
- to intervene in court and tribunal proceedings in relation to questions of law concerning the Charter of Rights Act.

124. VEOHRC developed an online tool for legal observers to document incidents and record feedback and information relating to the treatment of residents during the public housing lockdowns.

125. To assist the investigation, VEOHRC provided the Ombudsman with de-identified reports received through this mechanism.

126. In recognition of the shared human rights functions of the two offices, VEOHRC also agreed to second a senior officer to the Ombudsman to assist the investigation.

127. The Ombudsman is grateful for the expertise and assistance provided by VEOHRC.

## OPCAT

128. The investigation was conducted with regard to the United Nations Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT'), which was ratified by the Commonwealth Government on 21 December 2017.

129. OPCAT is an international human rights instrument that aims to prevent abuse of people in detention through regular independent inspections by:

- a United Nations committee of international experts called the Subcommittee on Prevention of Torture
- local inspection bodies called 'national preventative mechanisms'.

130. OPCAT inspections help:

- detained persons by protecting their human rights
- detaining authorities, by providing early warnings about poor practices that could lead to abuses and helping them manage that risk.

131. While OPCAT is commonly understood to relate to the treatment of people in prisons and police cells, it applies to any place under the jurisdiction or control of the state where people are or may be deprived of liberty, 'either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.

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132. In response to the COVID-19 pandemic, the Subcommittee on Prevention of Torture has emphasised that 'any place where a person is held in quarantine and from which they are not free to leave is a place of deprivation of liberty' subject to inspection under OPCAT.<sup>1</sup>

133. In a submission to the investigation, the Association for the Prevention of Torture – the leading international non-government authority on OPCAT – observed:

The public housing lockdown was both temporary and took place in an environment that would not usually be considered a place of deprivation of liberty. ... Nevertheless, it is clear that the public housing lockdown meets the definition of deprivation of liberty under the OPCAT.

134. The COVID-19 pandemic poses particular risks and challenges for monitoring the treatment of people deprived of their liberty. The World Health Organisation ('WHO') and other international bodies have nevertheless recognised detained people may be at increased risk of ill-treatment during this time due to restrictions introduced in response to the pandemic and lack of independent scrutiny of their conditions.<sup>2</sup>

135. These international bodies have emphasised that the COVID-19 pandemic should not be used by authorities as justification for departing from the international human rights standards applicable to the treatment of persons deprived of their liberty, including the prohibition on ill-treatment enshrined in the United Nations Convention Against Torture.

136. The investigation notes that application of some of these international human rights standards to non-custodial detention has not been settled at law. Nevertheless, it is universally accepted that a person must not be subject to arbitrary detention nor deprived of their liberty except in accordance with law.

### About this report

137. This report sets out the investigation's observations about the lockdown of 33 Alfred Street, including:

- how the lockdown was implemented and administered by authorities
- how the lockdown was experienced by people at 33 Alfred Street
- ongoing consequences for residents.

138. The Ombudsman was guided by the civil standard of proof, the balance of probabilities, in determining the facts of this investigation – taking into consideration the nature and seriousness of actions and decisions and the gravity of the consequences that may result from forming any adverse opinion.

139. This report includes case studies describing individuals' experiences during the lockdown. Names have been changed and other details have been removed to protect the privacy of the individuals concerned.

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1 Subcommittee on Prevention of Torture, 'Advice of the Subcommittee on Prevention of Torture to the National Preventive Mechanism of the United Kingdom of Great Britain and Northern Ireland regarding Compulsory Quarantine for Coronavirus', adopted 10-14 February 2020.

2 See eg WHO, 'Addressing Human Rights as Key to the COVID-19 Response', 21 April 2020; Subcommittee on Prevention of Torture, 'Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic', adopted 25 March 2020.

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140. Using an OPCAT-style framework, parts of this report are structured according to recommended areas for detention-monitoring, including:
- (a) **Protective measures** examining the safeguards against ill-treatment available to people detained at 33 Alfred Street, including whether decisions to impose and continue the lockdown were compatible with human rights set out in the Charter of Rights Act
  - (b) **Humane treatment** addressing the conditions under which people were detained at 33 Alfred Street, including restrictions on accessing fresh air and exercise
  - (c) **Health and wellbeing** addressing the health impacts of the lockdown, including restrictions on accessing medical care and medical supplies.
141. The report seeks to identify risks that increase the potential for ill-treatment to occur when people are detained during public health emergencies, and measures that can help to reduce those risks.
142. Although this investigation focused on the treatment and conditions of detention at 33 Alfred Street, many of the risks and measures identified are relevant to other public housing estates and high-density residential settings in Victoria.

### Procedural fairness

143. This report contains adverse comments about DHHS. In accordance with section 25A(2) of the Ombudsman Act, the Ombudsman gave DHHS a reasonable opportunity to respond to a draft report. This final report fairly sets out its response.
144. DHHS's full response is included as Appendix A of this report.
145. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable in this report are not the subject of any adverse comment or opinion. They are identified because the Ombudsman is satisfied:
- it is necessary or desirable to do so in the public interest; and
  - identifying those persons will not cause unreasonable damage to their reputation, safety or wellbeing.

# Melbourne's public housing towers

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146. Constructed by the former Housing Commission of Victoria following the Second World War, close to 50 high-rise public housing towers are today distributed across inner Melbourne.
147. The Housing Commission was established in 1938 following passage of the *Housing Act 1937* (Vic), in response to growing concern about the 'shocking housing conditions' in North Melbourne.
148. Among other things, the Housing Commission was responsible for:
- reclamation and re-planning of unsanitary housing areas
  - addressing and preventing housing overcrowding
  - constructing and providing suitable houses for 'persons of limited means'.
149. To discharge these functions, the Housing Commission set about compulsorily acquiring land in selected areas of Melbourne, in a process known as 'slum reclamation' (see Figure 1 below).
150. Although initially stalled by the need to provide wartime housing during the Second World War, the Housing Commission's slum reclamation work hastened in the 1950s and into the 1960s, when availability of materials and advances in architecture allowed for cheaper and more efficient methods of construction.
151. By 1959, the Housing Commission began to prioritise the development of 'high-rise elevator flats' throughout inner Melbourne, both as a means of better offsetting the costs of land acquisition and to provide 'more generous' recreational spaces to urban tenants.
152. In the 1960s, this initiative led to the development of North Melbourne's 900-unit 'Hotham Estate', comprising several high-rise buildings between Alfred and Canning Streets.

**Figure 1: Newspaper report concerning first meeting of the Housing Commission**



Source: The Argus (Melbourne, 2 March 1938)

Figure 2: Photograph of former Hotham Estate including 33 Alfred Street (top left), 1968



Source: Public Record Office Victoria

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### 33 Alfred Street

- 153. One of the last high-rise housing complexes to be constructed as part of the Hotham Estate, 33 Alfred Street is situated at the intersection of Boundary Road and Alfred Street, North Melbourne, approximately 3km north-west of Melbourne's CBD.
- 154. Completed in 1968, 33 Alfred Street is a 12-floor high-rise building comprising 152 residential apartments ranging from two to three bedrooms in size. Each floor is serviced by two central lifts and four stairwells.
- 155. Somewhat notable for Housing Commission projects of the era, apartments at 33 Alfred Street were constructed without balconies – research at the time suggesting that public housing tenants preferred access to greater indoor storage space.

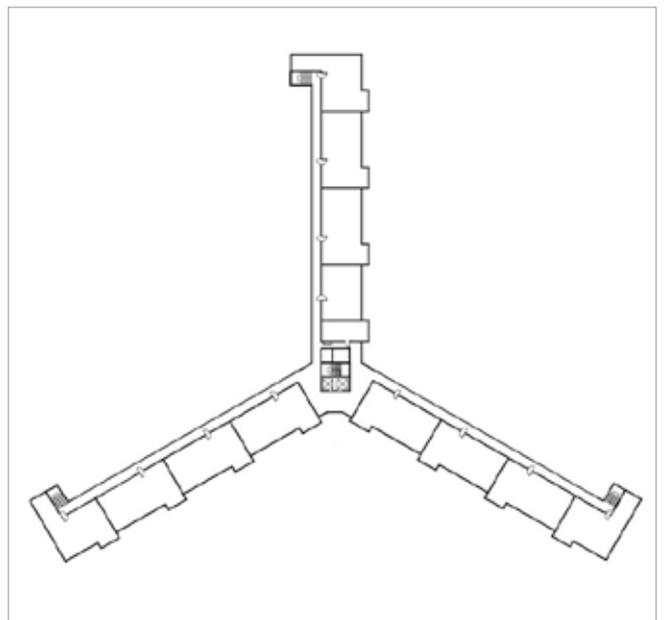
- 156. Today, 33 Alfred Street forms part of a three-building public housing precinct, sharing communal grounds with high-rise towers located at 12 Sutton Street and 159 Melrose Street, North Melbourne.
- 157. This precinct, together with nearby public housing towers located at 76 Canning Street and 9 Pampas Street, forms the area identified in this report as the 'North Melbourne public housing estate'.
- 158. The North Melbourne public housing estate is located approximately 600m south-east of the 'Flemington public housing estate', comprising four high-rise public housing towers at 120, 126 and 130 Racecourse Road and 12 Holland Court, Flemington.
- 159. 33 Alfred Street is owned and managed by DHHS. Residential premises within the building are leased exclusively to public housing tenants.

**Figure 3: Photograph of children playing outside 33 Alfred Street, 1978**



Source: Heritage Collection, Department of Education and Training

**Figure 4: Typical floor plan for 33 Alfred Street**



Source: DHHS

Figure 5: North Melbourne and Flemington public housing estates			
	Address	Floors	Population (approx)
North Melbourne	33 Alfred Street	12	484 residents
	76 Canning Street	20	274 residents
	159 Melrose Street	12	109 residents
	9 Pampas Street	6	69 residents
	12 Sutton Street	20	368 residents
Flemington	12 Holland Court	20	388 residents
	120 Racecourse Road	20	399 residents
	126 Racecourse Road	20	452 residents
	130 Racecourse Road	20	446 residents

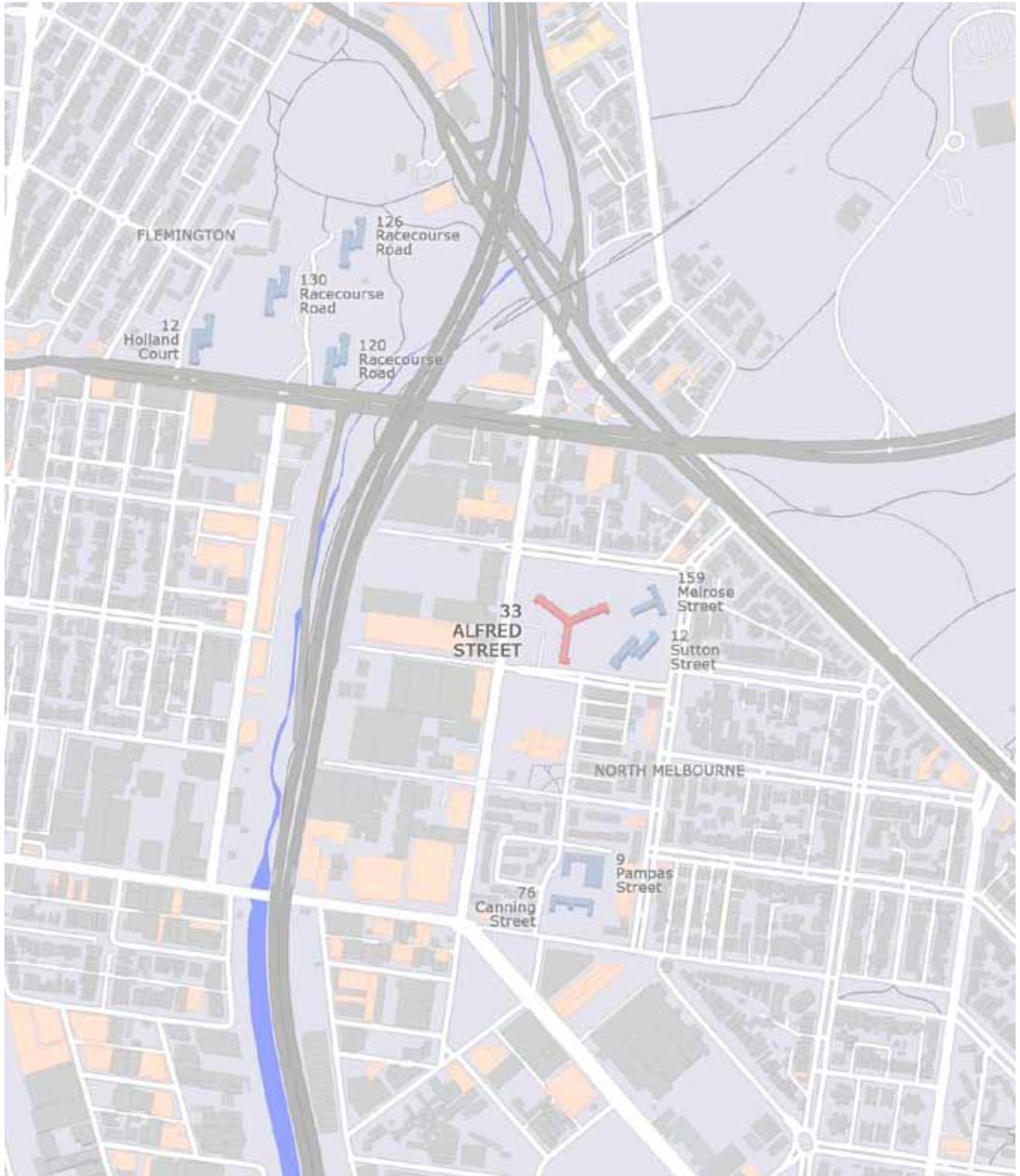
Source: Victorian Ombudsman; data from DHHS (collated)

**Figure 6: North Melbourne public housing precinct, including 33 Alfred Street (right)**



Source: Imagery ©2020 Google

Figure 7: Flemington and North Melbourne public housing estates



Source: Victorian Ombudsman

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## Occupancy and demographics

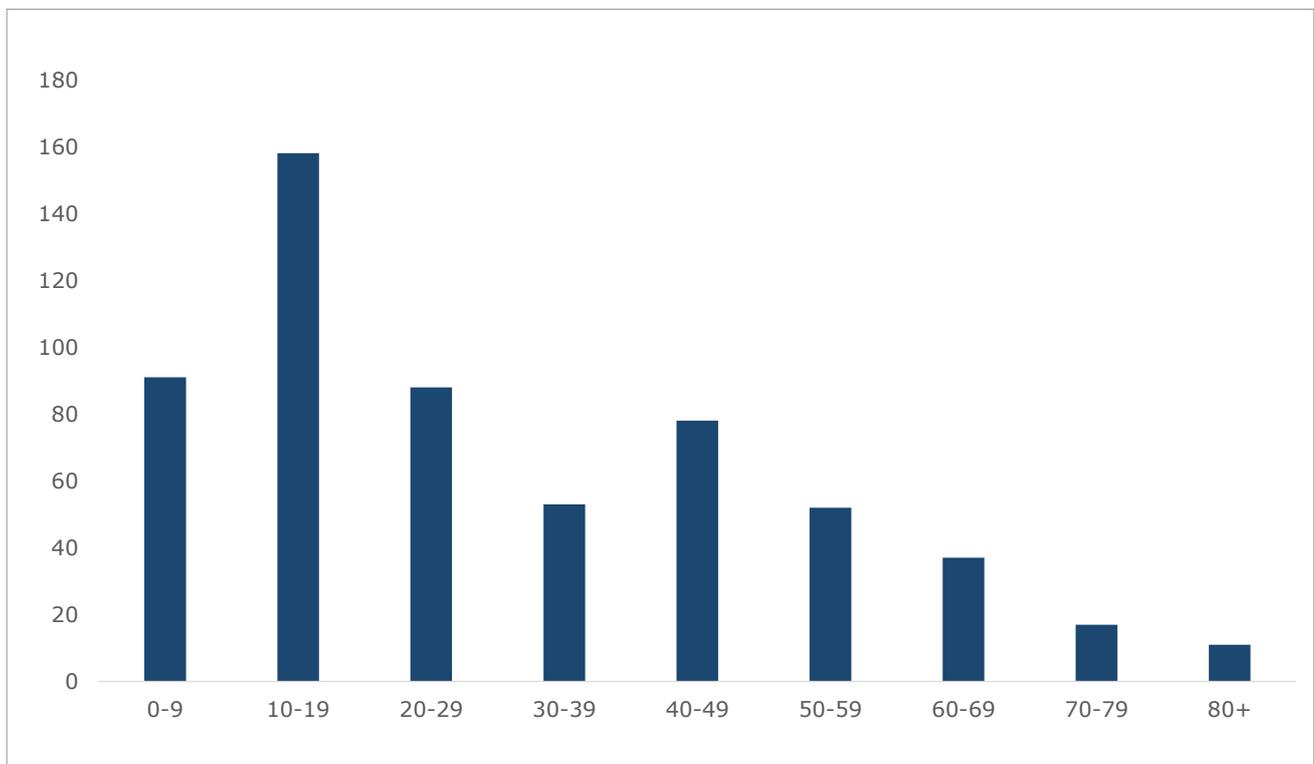
160. As at around 4 July 2020, there were 484 registered residents living at 33 Alfred Street recorded on the public housing register maintained by DHHS.

161. According to this data:

- more than half of registered residents were under 30 years of age, with almost 45 per cent being children under the age of 18
- 70 per cent of registered residents preferred English, with other common languages including Somali, Vietnamese and Arabic
- 38 registered residents lived on their own
- one registered resident identified as Aboriginal.

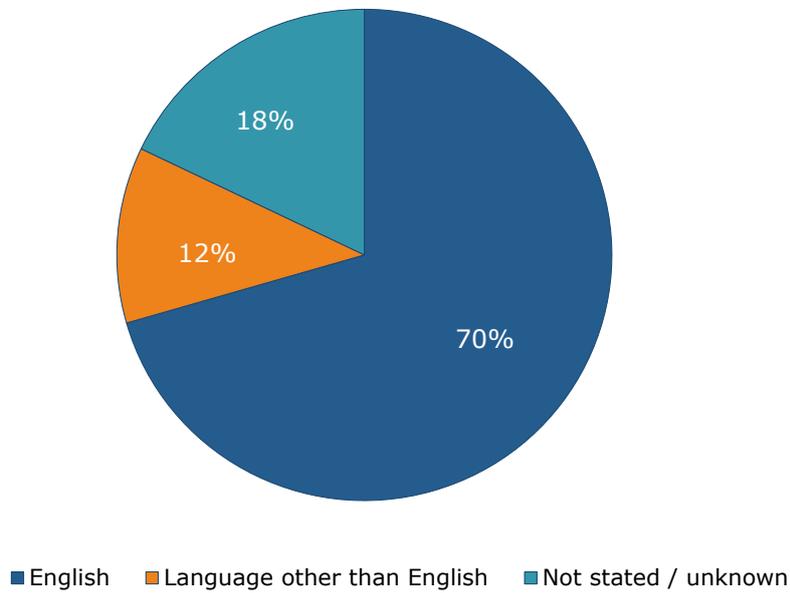
162. COVID-19 testing data compiled by DHHS and reviewed by the investigation suggested there were as many as 103 non-registered individuals visiting or living at 33 Alfred Street when the lockdown commenced.

**Figure 8: Age of registered residents at 33 Alfred Street, 4 July 2020**



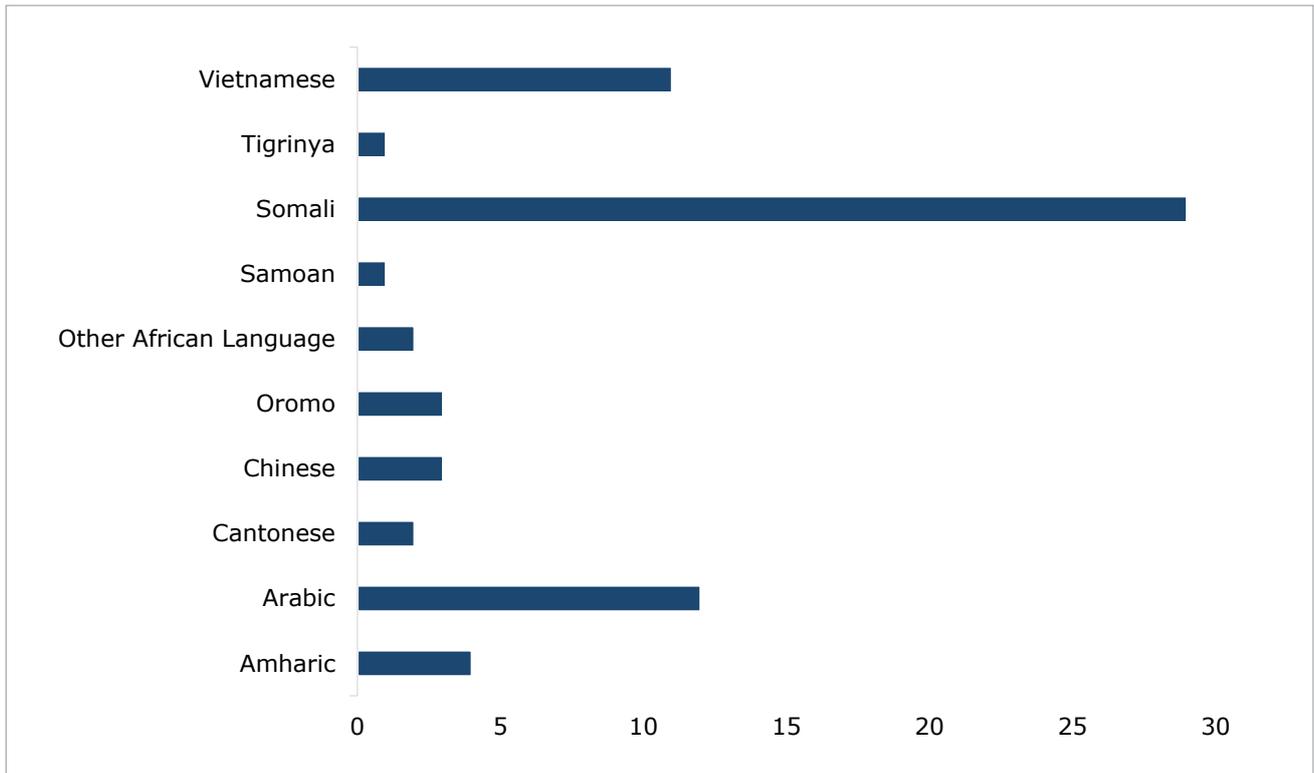
Source: Victorian Ombudsman; data supplied by DHHS

Figure 9: Preferred language of registered residents at 33 Alfred Street, 4 July 2020



Source: Victorian Ombudsman; data supplied by DHHS

Figure 10: Preferred language of registered residents at 33 Alfred Street (excluding English), 4 July 2020



Source: Victorian Ombudsman; data supplied by DHHS

# COVID-19 state of emergency

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## COVID-19 pandemic

163. COVID-19 is an infectious disease caused by a new strain of coronavirus.
164. According to the WHO, people with COVID-19 most commonly experience fever, dry cough and tiredness. While many people infected with COVID-19 recover relatively easily, others may develop serious symptoms such as difficulty breathing, chest pain and loss of speech or movement. COVID-19 may be fatal.
165. COVID-19 is primarily spread through saliva droplets or nasal discharge when an infected person coughs or sneezes. People can catch COVID-19 by breathing in these droplets or by touching objects or surfaces exposed to them and then touching their eyes, nose or mouth.
166. According to the Commonwealth Department of Health, the following people are at greater risk of contracting COVID-19:
- travellers recently returned from overseas
  - people who have been in close contact with somebody infected with COVID-19
  - people in prisons and other detention settings
  - people in group residential settings.
167. The following people are more likely to be at higher risk of serious illness if infected with COVID-19:
- Aboriginal and Torres Strait Islander people 50 years and older with chronic medical conditions
  - people 65 years and older with chronic medical conditions
  - people 70 years and older
  - people with chronic conditions or compromised immune systems
  - people in aged care facilities
  - people with disabilities.
168. On 11 March 2020, the WHO declared COVID-19 to be a pandemic. As of early December 2020, more than 1.5 million people have died from COVID-19 worldwide, including more than 800 people in Victoria.
169. There is presently no cure or approved vaccine for COVID-19 in Australia.

## Public health emergencies

170. In response to the COVID-19 pandemic, many governments around the world and in Australia have exercised emergency powers relating to the protection of public health.
171. In Victoria, section 198 of the Public Health and Wellbeing Act provides that the Minister for Health may, on the advice of the Chief Health Officer ('CHO') and after consultation with the Emergency Management Commissioner, declare a state of emergency 'arising out of any circumstances causing a serious risk to public health'.

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## Public health emergency powers

172. During a state of emergency declared under the Public Health and Wellbeing Act, the CHO may authorise use of the following public health emergency powers to eliminate or reduce a serious risk to public health:

- the power to detain people within the emergency area (section 200(1)(a))
- the power to restrict the movement of people within the emergency area or to restrict people from entering the emergency area (sections 200(1)(b) and (c))
- the power to give other directions considered 'reasonably necessary to protect public health' (section 200(1)(d)).

173. These emergency powers are able to be exercised by 'Authorised Officers' appointed under the Public Health and Wellbeing Act.

174. Exercise of the public health emergency powers is subject to certain legislative requirements.

175. In particular, the Public Health and Wellbeing Act provides that:

- people detained during a public health emergency must be provided with reasons for their detention
- the detention of a person must be reviewed by an Authorised Officer at least once every 24 hours.

176. The legislative requirements are summarised in Figure 11 below.

<b>Figure 11: Legislative requirements applying to exercise of public health emergency powers under the Public Health and Wellbeing Act</b>	
<b>Power</b>	<b>Requirement</b>
All emergency powers	Where practicable, before exercising the power, the Authorised Officer must warn the person of the consequences of refusing or failing to comply (section 200(4))
Detention of a person	Before detaining the person, the Authorised Officer must briefly explain the reason why it is necessary to do so (or, if this is not practicable, the Authorised Officer must do so as soon as it becomes practicable) (sections 200(2) and (3))
	The Authorised Officer must facilitate any reasonable request for communication made by the detained person (section 200(5))
	At least once every 24 hours, an Authorised Officer must review whether the continued detention of the person is necessary to eliminate or reduce a serious risk to public health (section 200(6))
	As soon as reasonably practicable, an Authorised Officer must give written notice to the CHO: <ul style="list-style-type: none"> <li>• that the person has been detained</li> <li>• that, following any review, the person will continue to be detained (section 200(7)).</li> </ul>

Source: Victorian Ombudsman

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177. Under Part 2 of the Public Health and Wellbeing Act, the public health emergency powers must be exercised in accordance with the following principles:

- the **principle of evidence-based decision-making**, which recognises that the most effective use of resources to promote and protect public health and the most effective and efficient public health and wellbeing interventions should be based on available evidence that is relevant and reliable
- the **precautionary principle**, which recognises that lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control serious public health risks
- the **principle of primacy of prevention**, which recognises that the prevention of disease, illness, injury, disability or premature death is preferable to remedial measures
- the **principle of accountability**, which recognises that people engaged in the administration of the Public Health and Wellbeing Act should as far as practicable ensure that decisions are transparent, systematic and appropriate, and that members of the public should therefore be given access to reliable information in appropriate forms to facilitate a good understanding of public health issues, together with opportunities to participate in policy and program development
- the **principle of proportionality**, which recognises that decisions and actions under the Public Health and Wellbeing Act should be proportionate to the public health risk sought to be addressed and not made or taken in an arbitrary manner

- the **principle of collaboration**, which recognises that public health and wellbeing can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.

178. The Public Health and Wellbeing Act requires the Minister for Health to report to Parliament concerning any public health emergency powers exercised during a state of emergency.

### Declared emergency areas

179. In addition to the public health emergency powers identified in the Public Health and Wellbeing Act, the Emergency Management Act 1986 provides Victoria Police power to restrict access to declared 'emergency areas'.

180. Under section 36B(1) of this Act, a police officer may close any 'road, footpath or open space' providing access to the emergency area and prohibit persons from entering or passing through the area. Failure to obey such a direction without reasonable excuse constitutes an offence (section 36C(1)).

181. Where a police officer has reason to suspect that an offence against the Emergency Management Act 1986 is being or is about to be committed, they may:

- order a person to leave the emergency area
- use such force as is 'reasonable necessary' (sic) to remove the person from the emergency area or to prevent the person from entering the emergency area (section 36B(5)).

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## Victoria's emergency management framework

The *Emergency Management Act 2013* (Vic) establishes governance arrangements for the management of emergencies in Victoria and provides for the appointment of the state's Emergency Management Commissioner.

Under the Emergency Management Act, the Emergency Management Commissioner is responsible, among other things, for:

- managing Victoria's primary control centre for the management of emergencies ('State Control Centre')
- preparing and administering Victoria's *State Emergency Management Plan*.

The *State Emergency Management Plan*:

- identifies the agency primarily responsible for responding to each type of emergency (the 'control agency')
- specifies and provides for the coordination of other agencies supporting the control agency
- identifies that emergency response operations should be managed through three operational tiers (state, regional and incident).

Under the *State Emergency Management Plan*:

- DHHS is designated as the control agency for plagues, epidemics or contaminations relating to human diseases
- Victoria Police is designated as a relevant support agency, providing personnel and transport as part of emergency responses coordinated by other agencies.

The *State Emergency Management Plan* also incorporates a number of subordinate plans, including:

- the *State Health Emergency Response Plan* ('Health Emergency Response Plan')
- the *Victorian Health Management Plan for Pandemic Influenza* ('Victorian Pandemic Management Plan')
- the *Victorian Action Plan for Influenza Pandemic*.

Published in September 2017, the Health Emergency Response Plan sets out specific arrangements for the management of health emergencies in Victoria.

Under this document and the Emergency Management Act, this may include appointment of a State Controller (Health) to lead and manage the response to the emergency.

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Among other things, the Health Emergency Response Plan recognises that major health emergencies, such as those relating to complex, geographically dispersed pandemics, may engage all three operational tiers identified in the *State Emergency Management Plan*.

The Health Emergency Response Plan also specifies the reporting relationships and responsibilities that exist when responding to health emergencies.

Prior to the COVID-19 pandemic, the Victorian Pandemic Management Plan provided a specific framework for DHHS, government and the health sector to minimise risks and manage impacts associated with pandemic influenza.

In February 2020, the Minister for Health issued the *COVID-19 Pandemic Plan for the Victorian Health Sector* ('Victorian COVID-19 Pandemic Plan'), based on principles and proposed actions in the Victorian Pandemic Management Plan and the *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)* ('Australian COVID-19 Health Response Plan').

Among other things, the Victorian COVID-19 Pandemic Plan specifies infection prevention and control measures to be adopted depending on the stage of the COVID-19 pandemic.

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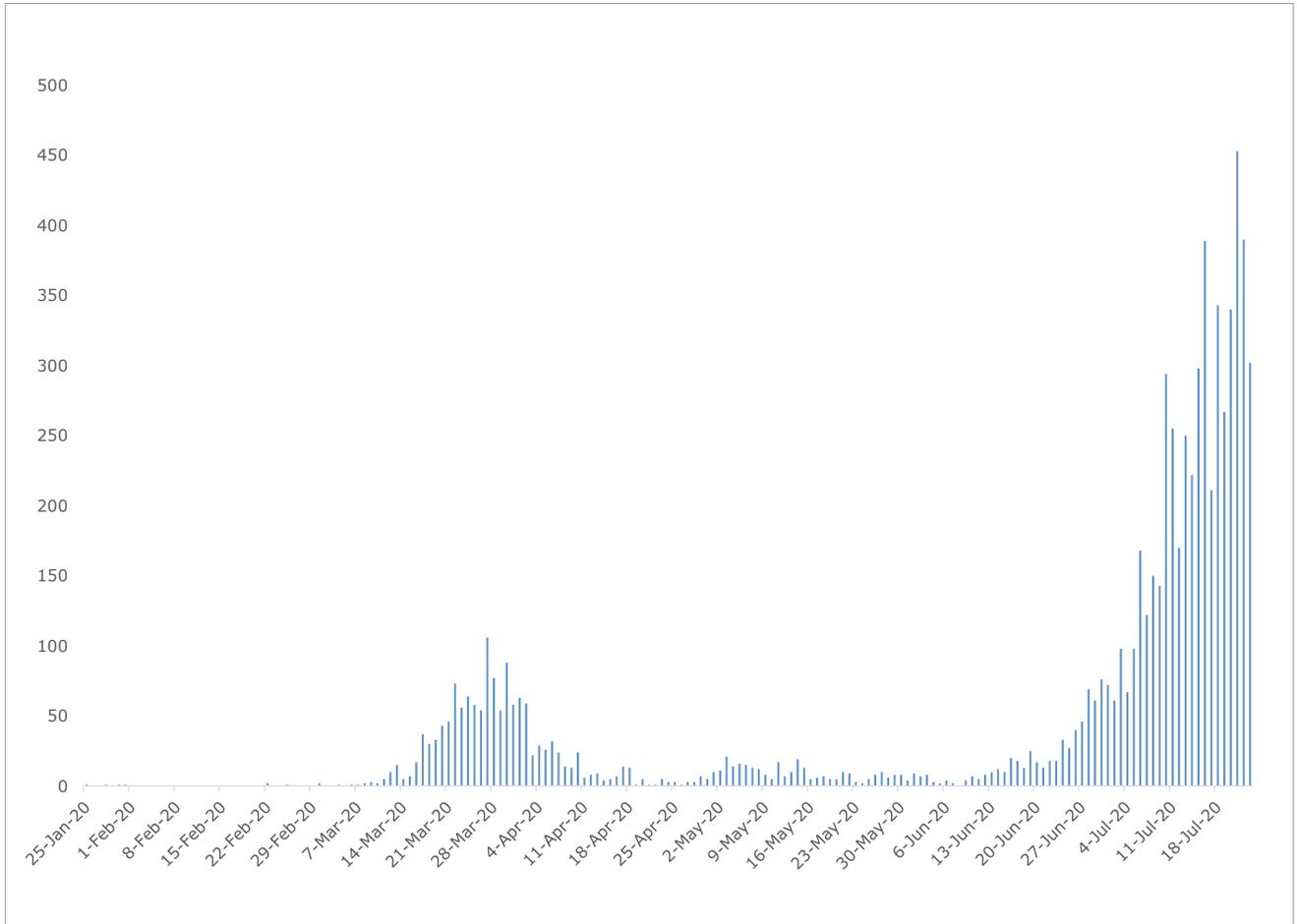
## Public health restrictions in Victoria

182. The first recorded case of COVID-19 in Australia was confirmed in Victoria in late January 2020.
183. On 11 March 2020, Victoria's State Control Centre was activated to oversee and coordinate Victoria's response to the pandemic.
184. On 16 March 2020, as the first suspected cases of community transmission of COVID-19 were identified in the state, the Minister for Health declared a state of emergency throughout Victoria under the Public Health and Wellbeing Act.
185. The declaration of a state of emergency was subsequently extended into and beyond July 2020. At the time of this report, the state of emergency remains in effect.
186. Between 18 March and 23 March 2020, as the daily number of infected people in the state continued to steadily increase, the Deputy CHO – the public health expert ordinarily responsible for leading Victoria's response to outbreaks of infectious diseases – exercised emergency powers in the Public Health and Wellbeing Act:
- restricting mass gatherings
  - requiring persons diagnosed with COVID-19 to self-isolate
  - prohibiting the operation of non-essential businesses.<sup>3</sup>
187. On 30 March 2020, the Deputy CHO issued the *Stay at Home Directions*. Under these restrictions, people in Victoria were required to remain at home, other than for the following reasons:
- obtaining necessary goods or services
  - care and other compassionate reasons
  - attending work or education
  - to exercise.
188. In Victoria, the above restrictions are generally referred to as 'Stage 3' restrictions.
189. In May 2020, many of the restrictions upon Victorians were relaxed as the number of daily new infections remained relatively low. However, in July 2020, restrictions were reintroduced across metropolitan Melbourne and the Mitchell Shire Council area in response to rising rates of infection.
190. This rise in cases is generally referred to as Victoria's 'second wave' of COVID-19 infections.

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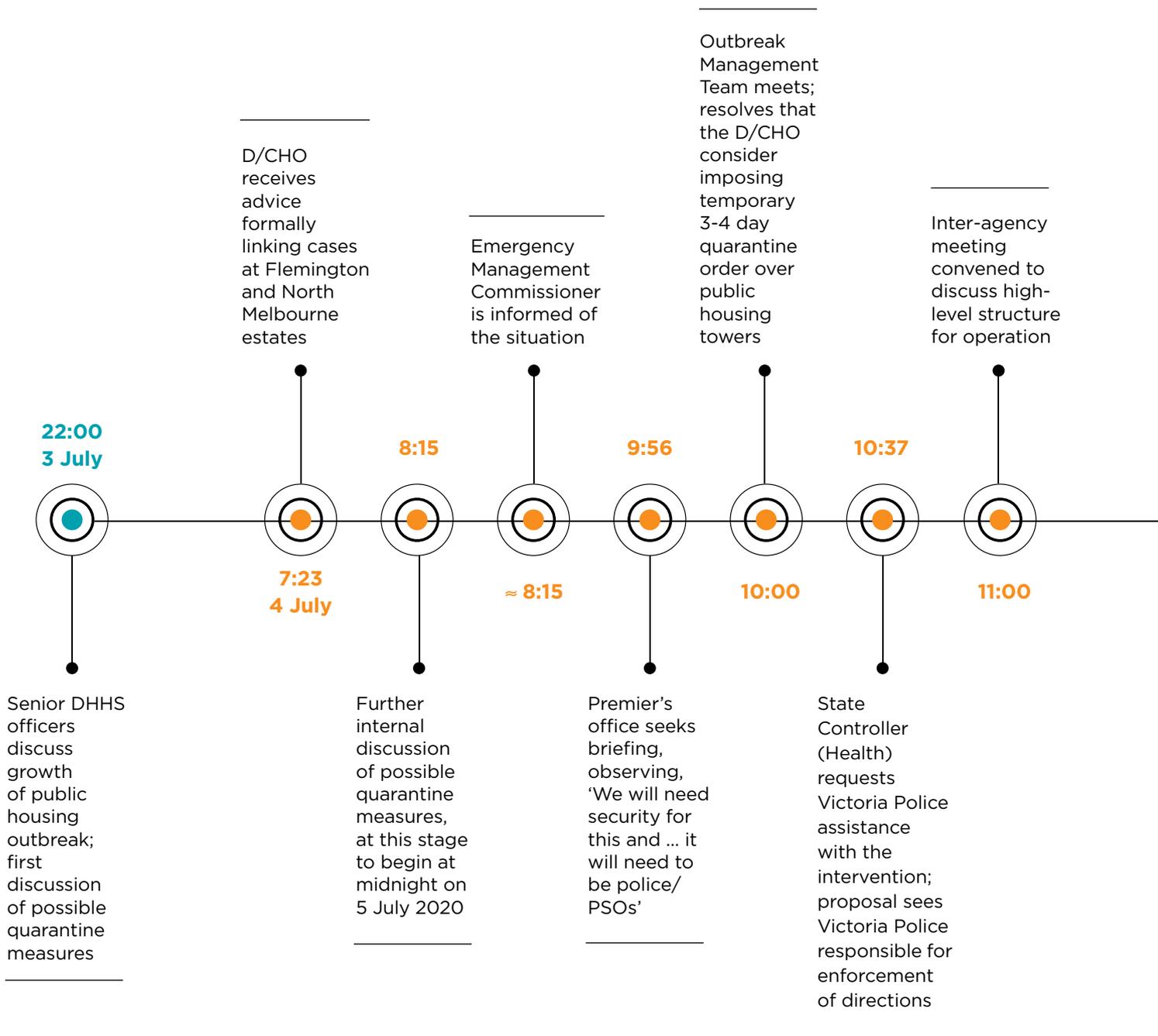
<sup>3</sup> The Deputy CHO is an Authorised Officer appointed by the Secretary to DHHS. During the relevant period, this officer was authorised by the CHO to exercise any of the public health emergency powers under the Public Health and Wellbeing Act.

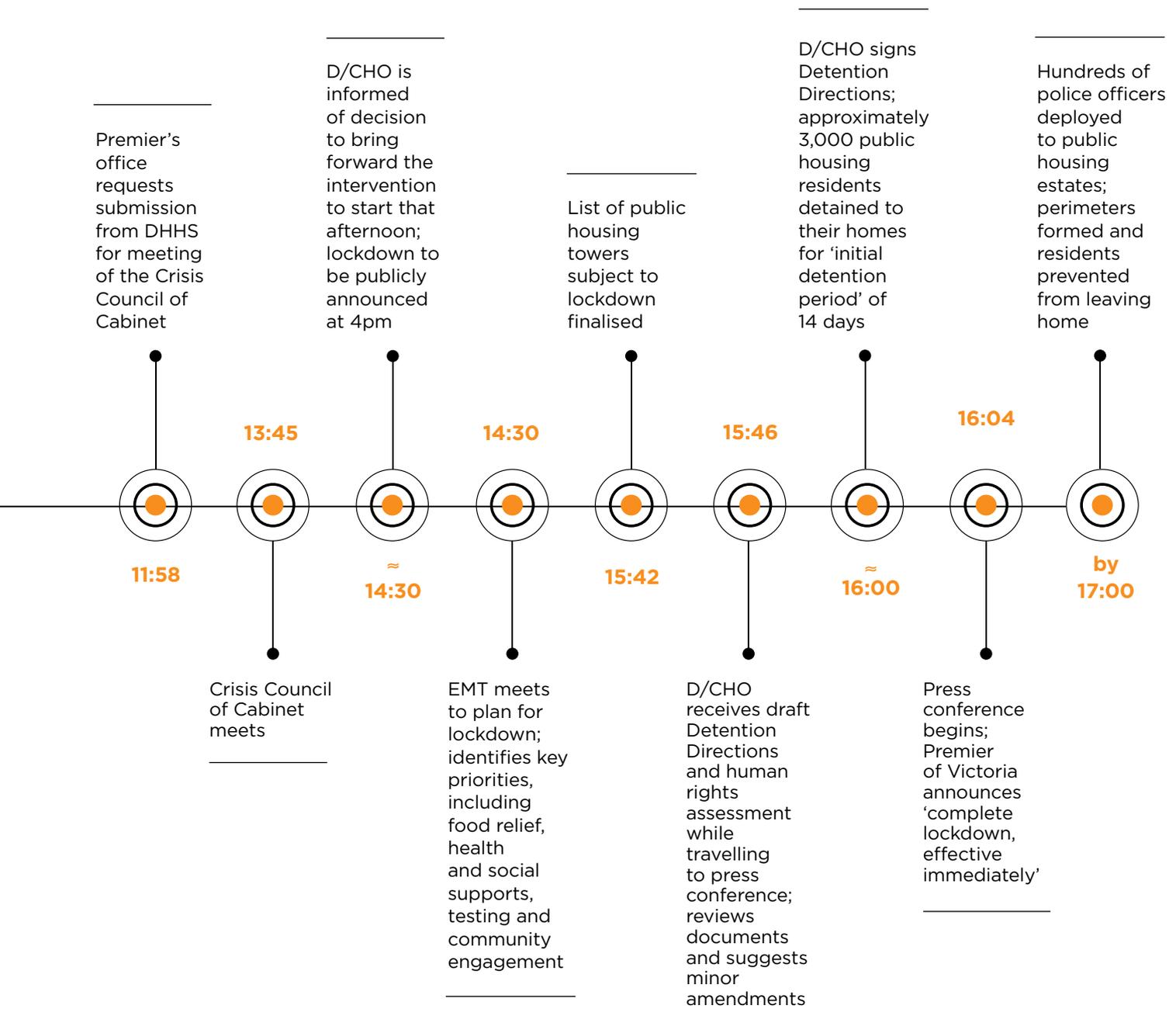
Figure 12: Daily new COVID-19 cases in Victoria, 25 January - 18 July 2020



Source: Victorian Ombudsman; data supplied by DHHS

# Timeline of key events – focus on 4 July 2020





# Public housing lockdowns

## Inner North and Flemington outbreaks

191. On 1 July 2020, the Deputy CHO issued the *Stay at Home Directions (Restricted Postcodes)* and *Area Directions* in response to rising rates of infection in parts of metropolitan Melbourne.

192. These directions effectively reimposed Stage 3 restrictions upon residents living in 10 'hotspot' postcodes, including the suburbs of Broadmeadows, Fawkner and Albanvale.

193. While the neighbouring suburbs of Flemington and North Melbourne were not initially included in the *Stay at Home Directions (Restricted Postcodes)* and *Area Directions*, over the days that followed DHHS began to identify 'rapid' growth in the number of daily confirmed COVID-19 cases in these areas.

### Victoria's COVID-19 Outbreak Management Plan

As at July 2020, Victoria's CHO had approved a COVID-19 Outbreak Management Plan ('Victorian COVID-19 Outbreak Management Plan') setting out key aspects of DHHS's expected response to outbreaks of COVID-19.

Under this document, an 'outbreak of COVID-19' is defined as:

- a single confirmed case of COVID-19 in a resident or staff member of a residential care facility
- two or more epidemiologically linked cases outside of a household with symptom onset within 14 days.

The Victorian COVID-19 Outbreak Management Plan recommends an Outbreak Management Team be formed whenever an outbreak of COVID-19 is identified. This team is then responsible for coordinating the full outbreak response.

The initial Outbreak Management Team meeting is expected to make decisions concerning the initial assessment, control measures and communications priority tasks relating to the outbreak. The Outbreak Management Team is then expected to meet at least once every day while the outbreak is being actively managed.

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## Inner North outbreak

194. During the afternoon of 2 July 2020, DHHS convened an initial Outbreak Management Team meeting to discuss a situation then identified as the 'Inner North outbreak'.
195. By this time, DHHS had identified nine recently confirmed COVID-19 cases associated with the North Melbourne public housing estate. Testing and tracing evidence indicated there were at least five households affected, each located on a different floor of the public housing tower situated at 33 Alfred Street.
196. Following discussion, DHHS resolved to continue investigating links between cases and arrange for on-site COVID-19 testing at the building. Information concerning the outbreak was also communicated to DHHS's 'Outbreak Squad' in preparation for a site visit the following morning.
197. A further meeting of the Outbreak Management Team was convened during the afternoon of 3 July 2020.
198. During this meeting it was reported that contact tracers had identified an additional two cases of COVID-19 associated with 33 Alfred Street. DHHS had also identified a link between the outbreak and three recently identified cases associated with a second public housing tower at 130 Racecourse Road, Flemington.
199. In light of this further information, DHHS commenced preparations for a full asymptomatic COVID-19 testing sweep within the two public housing towers, to be promoted through engagement with local health providers and multicultural community leaders.

## Flemington outbreak

200. Late in the evening of 3 July 2020, an Outbreak Report was issued in relation to a significant rise in COVID-19 cases associated with the Flemington public housing estate.
201. This now included a third public housing tower located at 12 Holland Court, Flemington.
202. During her interview with the investigation, the Deputy CHO explained the concerns raised by this report:

It was a quick, quick onset. ... We were still in double figures in those days, so, you know, 10 or 12 cases in a day was a big number in those days.

So it was concerning for a few reasons. Firstly, the number of cases. Secondly, the fact that it was across a couple of different residences in other sites. ... And the onset date of the different cases indicated that it was quite possible there had been more than one generation of spread already.
203. That same evening, the Deputy CHO telephoned the Secretary and Associate Secretary to DHHS to discuss the situation, including the possible connection with the Inner North outbreak.
204. In her declaration to the investigation, the Secretary to DHHS recalled discussing the matter with the Deputy CHO:

I received a first message from [the Deputy CHO] at 11:10pm raising her concern about the rapidly increasing spread of COVID-19 in the past 48 hours and the risk of exponential spread through the towers and surrounding suburbs.

She advised me that she considered it likely that the extension of postcode restrictions could be required for North Melbourne and Flemington and that additional restrictions could be required for residents of the public [housing] towers. She also noted that rapid decisions in the morning would be important to avoid putting people at risk.

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205. At interview, the Associate Secretary similarly recalled being contacted by the Deputy CHO:

It was one of those calls that you don't forget. ... [The Deputy CHO] was very concerned about the transmission between households, about the connections between the different families in those settings and had become extremely concerned about what was causing this. It wasn't entirely clear to her and to some extent is still not clear, what was causing the very high level of transmission. ... I don't think I was in any doubt that we were going to have to do some kind of very significant intervention at that point.

206. The Deputy CHO told the investigation:

With those numbers and the sharp increase in the North Melbourne towers I was very worried, and so ... we'd had some preliminary discussions about what we might consider doing, and whether that was thinking about a *cordon sanitaire*, so to speak, which is discussed not infrequently in pandemic or outbreak situations.

207. According to the Deputy CHO, similar methods had previously been used in Victoria with some success:

We had done mini ones [*cordons sanitaires*], so to speak, on a number of occasions in aged care facilities and in workplaces, although that's a different scenario somewhat, because obviously from their workplace they go home. ...

Once we had a critical mass of transmission, it was very difficult to tell who'd been exposed and who'd not been exposed. So the approach that we took for [other] types of places, Cedar Meats [*abattoir*], for example, the hotel outbreaks, a number of other very large workplaces and nursing homes, is that we shut the workplace down, everybody left, everybody got tested so that we could see exactly what the problem was that we were dealing with, and who might've been exposed, and at what time. And then, from that first round of testing, [we] decided if everybody then needed to stay in quarantine for another 14 days.

208. The merits and practicalities of such an intervention were next discussed early in the morning of 4 July 2020, during a meeting attended by the Secretary, the Deputy CHO – acting as Victoria's Chief Health Officer on the day – and representatives of DHHS's Legal Services team.

209. An Outbreak Management Team meeting was later convened at 10am to discuss the situation in further detail.

210. Those present noted the apparent connection between the new cases and the Inner North outbreak and expressed concern at the 'high' potential for rapid spread of the virus within the Flemington and North Melbourne estates.

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***'It was one of those calls that you don't forget. ... I don't think I was in any doubt that we were going to have to do some kind of very significant intervention at that point.'***

– Associate Secretary

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211. Following discussion, the Outbreak Management Team resolved to consider applying a 'temporary 3-4 day quarantine order' over the three public housing towers to facilitate a 'full sweep' of cleaning, testing and contact tracing.

212. DHHS also resolved to add the postcodes incorporating Flemington and North Melbourne to the list of areas subject to Stage 3 restrictions.

213. These actions were assigned to the Deputy CHO for resolution.

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***'With those numbers and the sharp increase in the North Melbourne towers I was very worried ... Once we had a critical mass of transmission, it was very difficult to tell who'd been exposed and who'd not been exposed.'***

– Deputy CHO

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## **‘Sensitive’ and ‘high-risk’ outbreak settings**

The Victorian COVID-19 Outbreak Management Plan emphasises the need for early detection and rapid management of COVID-19 outbreaks occurring in ‘sensitive’ settings.

This document defines ‘sensitive’ settings as those ‘where there is a high risk of rapid transmission of COVID-19 and/or where there are vulnerable people who are at high risk of serious illness or death’.

At the time of the Inner Melbourne and Flemington outbreaks, specific examples of ‘sensitive’ settings given in the document included:

- residential and aged care facilities
- healthcare and mental health settings
- accommodation with shared facilities
- boarding schools and other group residential settings.

DHHS has issued specific COVID-19 guidelines for the prevention and management of COVID-19 outbreaks in the following ‘sensitive’ settings:

- residential aged care facilities
- alcohol and other drug residential services
- disability services.

Each of these documents emphasises the importance of developing an Outbreak Management Plan for activation in the event of a COVID-19 outbreak in the setting.

The Communicable Diseases Network Australia has also issued specific COVID-19 guidelines for the following ‘high-risk’ settings:

- Aboriginal and Torres Strait Islander rural and remote communities
- residential care facilities
- correctional and detention facilities.

As in the Victorian context, each of these documents recommends the preparation of a specific Outbreak Management Plan.

The Deputy CHO told investigators the Victorian COVID-19 Outbreak Management Plan was amended following the public housing lockdowns to specifically identify high-density public housing as a ‘sensitive’ setting.

Since August 2020, the Communicable Diseases Network Australia has also included ‘high-density public housing’ in its examples of ‘high-risk’ outbreak settings.

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## Inter-agency meeting

214. At 11am on 4 July 2020, the Deputy CHO, the Secretary and other senior DHHS officials met with the State Controller (Health), Victoria's Emergency Management Commissioner and representatives of Victoria Police to discuss the proposed quarantine and testing operation in more detail.
215. During this meeting, those present discussed a proposed high-level structure for the operation, setting out the division of responsibilities between agencies and relevant personnel.
216. Under this structure:
- DHHS was to be responsible for preparing any necessary directions under the Public Health and Wellbeing Act, together with community engagement and the delivery of health and housing supports to residents affected by the proposed operation
  - Victoria Police was to assume responsibility for forward command and issues of enforcement and security associated with the public health intervention.
217. By this time, planning for the operation anticipated that residents of the public housing towers associated with the outbreaks would be required to quarantine at home for an initial period of five days, after which, following analysis of COVID-19 testing data, a determination would be made about whether to relax or extend restrictions.
218. The Deputy CHO told investigators there was no specific discussion of the use of emergency detention powers during this meeting:
- The determination from Legal around what the most appropriate element or use of the [Public Health and Wellbeing] Act to enact this hadn't been [reached]. So detention orders weren't being discussed at that point in time. It was all being discussed in terms of quarantine and testing.
219. According to the Deputy CHO, a recommendation was developed by DHHS following the 11am meeting, providing details of the proposed public health intervention.
220. The Deputy CHO said she believed this recommendation did not anticipate the intervention commencing until approximately 6 July 2020.
221. In their evidence to the investigation, both the Secretary and Associate Secretary confirmed the accuracy of the Deputy CHO's recollection concerning this issue.
222. The Secretary observed:
- My recollection is consistent with [the Deputy CHO]'s evidence. At the meeting of 11am it was proposed that ... directions comparable with 'quarantine directions' would be put in place from midnight 5 July 2020 for the towers, for a period of 5 days[.]
223. Somewhat in contrast, the Emergency Management Commissioner told the investigation he could not recall any particular discussion about timing at the 11am meeting, but was nevertheless always of the impression the intervention would start later that same day.
224. Neither DHHS nor the Emergency Management Commissioner were able to produce minutes relating to the meeting.

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## Supporting evidence

While the 11am meeting appeared not to have been minuted, other contemporaneous records reviewed by the investigation tended to support the evidence of the Deputy CHO, Secretary and Associate Secretary regarding the initial timing of the proposed public health intervention.

This included a draft **Public Housing Testing Project Plan** prepared by DHHS between 11:48am and 1:48pm on 4 July 2020, which anticipated ‘start-up’ COVID-19 testing operations commencing at 33 Alfred Street and 120 Racecourse Road at 4pm on 4 July 2020, with ‘full stand-up ... by Monday’.

This document appeared to raise concerns that a large operational presence ‘before [the] lockdown [was] in effect’ would cause residents to leave the outbreak sites.

The investigation noted DHHS’s **human rights assessment** relating to the lockdown, finalised at approximately 3:46pm on 4 July 2020, stated (incorrectly) that the public health directions relating to the lockdown would ‘apply from 11:59:00pm on 4 July 2020 until 11:59:00pm on 19 July 2020 ... for a period of 14 days’.

This in fact described a period of 15 days. For the directions to have operated for 14 days and concluded at 11:59pm on 19 July 2020, they would have needed to commence at 11:59pm on 5 July 2020 – the date and time identified by the Secretary in her declaration to the investigation.

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## Meeting of the Crisis Council of Cabinet

225. The investigation was informed a meeting of the Crisis Council of Cabinet was convened at 1:45pm on 4 July 2020.
226. Evidence given by the Minister for Police and Emergency Services to the Public Accounts and Estimates Committee of Parliament indicates a recommendation was put to this body and a decision made in relation to management of the Inner North and Flemington public housing outbreaks.
227. Section 19(1) of the Ombudsman Act provides that a person cannot be required or authorised under the Ombudsman Act to furnish any information or answer any question or produce or inspect so much of any document which relates to the deliberation of Ministers.
228. The Ombudsman wrote to the Premier of Victoria to request Cabinet authorise the production of documents relating to the deliberations of the Crisis Council of Cabinet on 4 July 2020, insofar as these were relevant to the lockdown at 33 Alfred Street.
229. This request was declined, and the investigation accordingly did not have access to the agenda and minutes of the Crisis Council of Cabinet relating to the 4 July 2020 meeting.
230. The Victorian Government's response to the Ombudsman's request is included in Appendix C.

### Crisis Council of Cabinet

The Crisis Council of Cabinet was established by the Premier of Victoria on 3 April 2020 to act as the 'core decision making forum' for the Victorian Government on matters relating to the COVID-19 public health emergency.

The Crisis Council of Cabinet was chaired by the Premier and initially included seven Ministers given specific portfolios with responsibility for leading COVID-19 response activities in their respective departments.

At this time, the Premier also established the Mission Coordination Committee to act as the key administrative forum to support delivery of several core missions relating to the COVID-19 pandemic. The Mission Coordination Committee was initially chaired by the Secretary to the Department of Premier and Cabinet and comprised the Secretaries of all Victorian Government departments, assigned 'Mission Lead' responsibilities.

The Mission Coordination Committee supported the Crisis Council of Cabinet by coordinating and reviewing the agenda for Crisis Council of Cabinet meetings and, on occasion, reviewing and discussing submissions to this body.

The Crisis Council of Cabinet and Mission Coordination Committee concluded in November 2020, following containment of Victoria's second wave of COVID-19 infections.

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## Detention Directions

### Immediacy of the intervention

231. At interview, the Deputy CHO said she was next approached to discuss the proposed public health intervention during the early afternoon of 4 July 2020.

232. The Deputy CHO told the investigation she was at this point informed by the Deputy Secretary for Public Health Emergency Operations that, contrary to earlier discussions, a decision had been made to commence the intervention later that same day. This was to coincide with an announcement made during a Victorian Government press conference scheduled for 4pm.

233. The Deputy CHO said she was not aware who made the decision to bring the operation forward:

I'm not certain who made the decision about commencement time. But by sort of one or two o'clock in the afternoon it had become apparent that that was the intention. So then there was a flurry of legal drafting and back and forth conversations around that.

234. She said she did not provide health advice that it would be necessary to commence the intervention that day:

It wasn't discussed with me, and therefore I didn't advise that for infection control purposes it needed to happen instantaneously. ... I didn't have the whole story and I still don't necessarily know what information was put forward pertaining to that decision.

235. In his interview with the investigation, the Emergency Management Commissioner told investigators his understanding regarding the timing of the proposed intervention 'firmed up' over the course of the late morning and early afternoon of 4 July 2020.

236. This officer said he was unable to recall precisely when it became clear to him the intervention would commence that day, or who informed him of this fact.

237. At interview, the DHHS Operational Commander similarly indicated he became aware of the imminent commencement of the intervention during the early afternoon of 4 July 2020.

238. This officer indicated he was not involved in any discussions relating to the timing of the operation and was not aware who made the decision to commence the intervention that afternoon.

239. The Secretary and Associate Secretary to DHHS each informed the investigation they were not authorised to divulge information relating to the deliberations of Cabinet, and therefore could not disclose when it became clear to them the intervention would commence on the afternoon of 4 July 2020 or precisely why this decision was taken.

### Proposed directions

240. An inter-agency Emergency Management Team meeting was convened at approximately 2:30pm on 4 July 2020 to plan for the then-imminent public health intervention.

241. In the meantime, DHHS continued to collect and review intelligence relating to the public housing outbreaks in an effort to determine the scope of the directions to be issued under the Public Health and Wellbeing Act.

242. This ultimately led to a determination to extend the operation to encompass all nine public housing towers located at the Flemington and North Melbourne estates.

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243. Proposed directions relating to the public health intervention were later emailed to the Deputy CHO, while this officer was travelling by car from DHHS's office on Lonsdale Street to the Victorian Government press conference at Treasury Place.
244. Under the proposed directions, all residents of the Flemington and North Melbourne public housing estates were to be detained to their homes for an 'initial detention period' of 14 days, effective from 3:30pm that same day.
245. The directions were accompanied by an associated brief relating to the COVID-19 pandemic and a 15-page human rights assessment prepared by DHHS's Legal Services team.
246. The Deputy CHO told investigators she reviewed the proposed directions and associated materials on her mobile phone and suggested certain typographical corrections. Copies of the proposed directions were printed upon her arrival at the Office of the Premier. She then reviewed and signed the directions before joining the press conference.
247. The directions signed by the Deputy CHO in relation to 33 Alfred Street are reproduced in Appendix D ('Detention Directions').
248. The investigation established the Detention Directions and associated human rights assessment were emailed to the Deputy CHO at 3:46pm on 4 July 2020. Evidence indicates the press conference commenced at approximately 4:04pm.

249. The Deputy CHO told investigators this was the shortest period she had ever been afforded to consider proposed directions under the Public Health and Wellbeing Act:

The printing of the directions and them happening in that fashion, was, I suppose, a by-product of the decision that the Detention Directions would be announced at the press conference, essentially, because it was brought forward, the implementation was brought forward.

So that wasn't necessarily a decision that they would be printed there, but it was a-- you know, they were done as quickly as they could possibly be done by Legal, given the timelines that they were given. But I don't know who made the decision as to why the timeline would be brought forward like that.

250. The Deputy CHO told investigators she was 'not entirely' comfortable with the process observed on the occasion and would have preferred more time to consider the human rights consequences of the proposed directions:

A. It was the shortest time I had had to date to consider that [human rights assessment], so I considered it, but perhaps less fulsomely than I would've liked to have done.

Q. Did you feel as if you were in a position to potentially put the brakes on this thing? Would you have felt comfortable delaying signing the directions in the situation?

A. At the time?

Q: Yes.

A: No.

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251. When asked whether she might have reached a different decision if given more time to consider the matter, the Deputy CHO responded:

I'm not sure to be honest. ... It might've been that we came to the exact same conclusion. But I'd have liked a little bit more time to have discussed the options in further detail.

252. The Deputy CHO nevertheless emphasised further restrictions on movement at the Flemington and North Melbourne public housing estates were, in her view, necessary to control the spread of the outbreak:

I was confident, and remain confident ... that, left unchecked, or even left with the regular [Stage 3] Stay at Home Directions ... these outbreaks would spread broadly and rapidly, and that it would be not very long before all of the towers were impacted, and particularly the older person's tower. And that the morbidity and mortality would be at the higher level for many people in this population, rather than the lower level, given what we'd seen like in black and minority ethnic populations in the UK and the US.

So I was quite terrified, to be honest, that we would see within a week many hundreds of cases if we continued and so it was a very, very difficult decision. ... I absolutely didn't take it lightly, but I am still convinced, looking at the way those curves go up and the number of potential people - there were 3,000 people in those combined towers; there were well and truly enough people for that [COVID-19 growth rate] to just keep going up, and I suspect it would have.

253. Despite this, the Deputy CHO told investigators she considered it would have been possible to effectively manage the outbreak had the operation commenced later, as originally proposed:

I think from a public health perspective it would've been [possible] ... Because we did impose the [Stage 3] Stay at Home orders [that evening] ... I think a full sweep of testing probably would still have been necessary, particularly for ... the couple of towers in Flemington and 33 Alfred Street of North Melbourne, but ... I don't think that one day would've made a hugely significant difference to the longer-term epidemiology of that outbreak.

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***'I don't think that one day would've made a hugely significant difference to the longer-term epidemiology of that outbreak.'***

- Deputy CHO

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254. Responding to the Ombudsman's draft report, the Deputy CHO added to her evidence concerning this issue:

[A]lthough not hugely significant I do think that there would have been some consequences to waiting even one day. The primary consequence is that a few additional infections would probably have occurred during that extra day - whether that was one, two, three or more is not possible to say - and that may have affected the overall number of infections in the towers because those additional infections may then have infected others.

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## **COVID-19 ‘hard lockdowns’**

The Flemington and North Melbourne public housing tower lockdowns were unprecedented in Australia for their scope, terms and duration.

While emergency detention powers had previously been used to quarantine overseas travellers returning to Victoria, the restrictions imposed at Flemington and North Melbourne involved the first use of such powers to manage an outbreak of COVID-19 within the Victorian community and the first ‘hard lockdown’ of a high-density residential building in Australia.

The Victorian Pandemic Management Plan, prepared prior to the COVID-19 pandemic, recognised that during some pandemics it could become necessary to isolate or quarantine members of the community to prevent or limit transmission of a virus. This document indicated that such measures were expected to be ‘voluntary and home-based’.

While both the Victorian COVID-19 Pandemic Plan and the Australian COVID-19 Health Response Plan similarly recognise the need to isolate or quarantine people to prevent or limit transmission of the virus, neither document clarifies the circumstances in which health authorities should consider exercising detention powers to manage an outbreak of COVID-19.

Use of detention powers is also not addressed in national guidelines issued by the Communicable Diseases Network Australia or the Victorian COVID-19 Outbreak Management Plan.

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## Commencement of the lockdown

255. The public housing tower lockdowns were publicly announced by the Premier of Victoria at approximately 4:08pm on 4 July 2020. Residents were not given prior notice of the decision.

256. Remarks delivered by the Premier during the televised press conference indicated the Detention Directions would remain in place for a minimum of five days to allow time for all affected residents to be tested for COVID-19.

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***'The nine towers ... will be locked down for at least five days, because that is deemed the appropriate period to test everybody, every single resident, other than those who have already tested positive, across those towers, and to have those tests processed by the labs. That data will then guide us as to what the next steps should be. But at this stage, it is at least that five-day hard lockdown effective from right now.'***

- Premier of Victoria, televised statement, 4 July 2020

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257. Around this time, several hundred Victoria Police officers were deployed to the Flemington and North Melbourne public housing estates.

258. Operating from command posts established at each location, Victoria Police immediately established a perimeter around the affected public housing towers, restricting access under the Emergency Management Act 1986.

259. Residents approaching these perimeters were notified of the lockdown and directed to immediately return to their homes. Those seeking to leave the building were similarly prevented from doing so.

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***'I found out [about the lockdown] when I came down and there were police and they said the building is locked.'***

- Oral submission from resident

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260. Over the days that followed, around 170 uniformed Victoria Police officers maintained a visible, 24-hour presence at the Flemington and North Melbourne estates, controlling access to and egress from each public housing tower and conducting foot patrols in and around the buildings.

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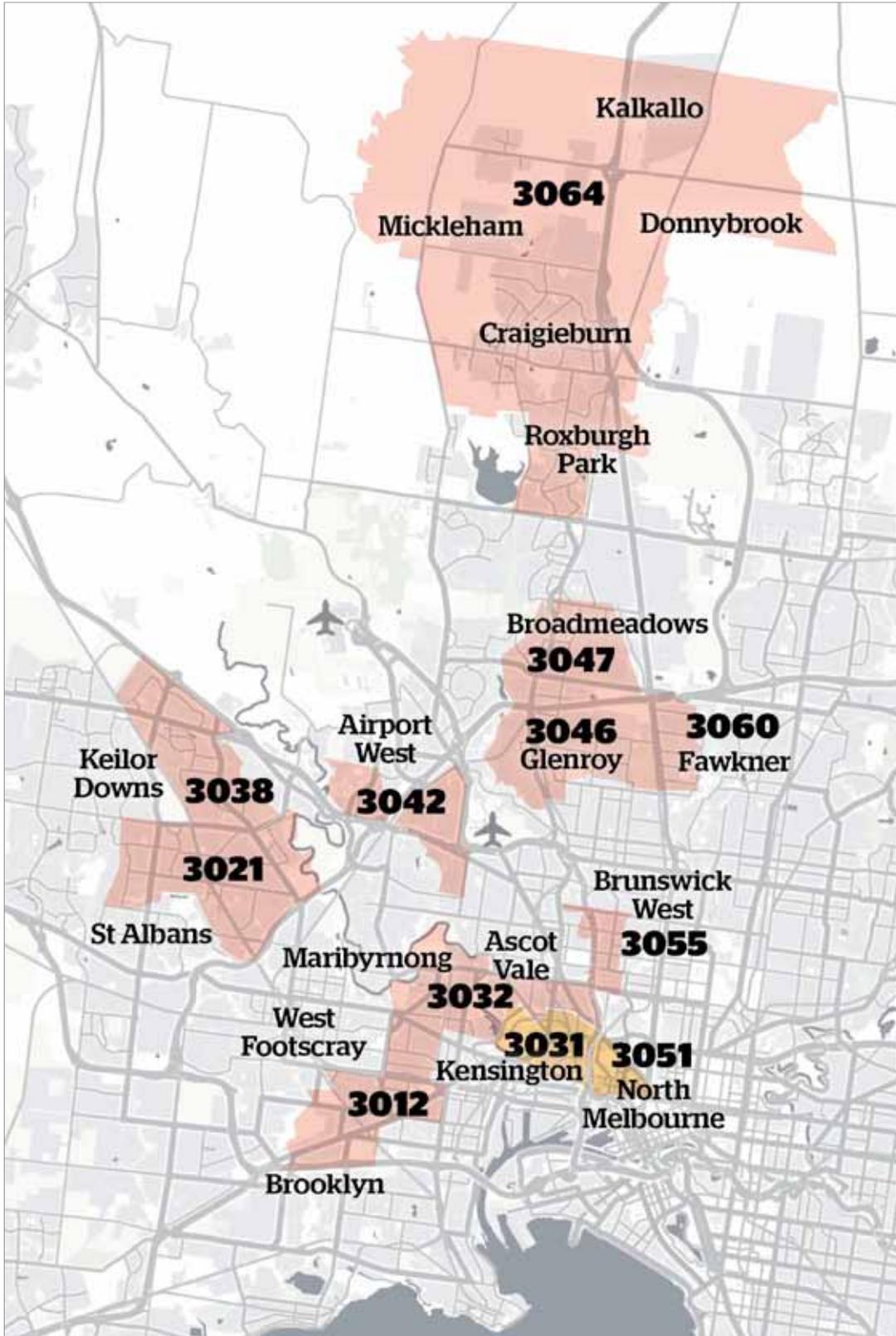
***'It was a moment of panic and chaos.'***

- Oral submission from community volunteer

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261. Incident Control Centres were later established at Flemington and North Melbourne.

Figure 13: Melbourne postcodes subject to Stage 3 public health restrictions at 11:59pm on 4 July 2020



Source: The Age

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## Operation Benessere

262. In accordance with Victoria's emergency management framework, DHHS was the 'control agency' responsible for coordinating the response to the Flemington and North Melbourne outbreaks.

263. This response was designated 'Operation Benessere'.

264. Operation Benessere was coordinated and administered through:

- an Emergency Management Team operating through the State Control Centre, at various times comprised of:
  - o the State Controller (Health)
  - o a Deputy State Controller (Health) – a Victoria Police Commander specifically appointed to lead the operation, reporting to the State Controller (Health)<sup>4</sup>
  - o senior representatives of Victoria Police, DHHS and other authorities
- a site-level Incident Management Team chaired by an Incident Controller, comprised of representatives from DHHS, Victoria Police and other support agencies
- a DHHS 'Leadership Team' responsible for coordinating the health and human services response to the outbreak.

265. Victoria's Emergency Management Commissioner attended some meetings of the Emergency Management Team as an observer and received updates from the State Controller (Health).

266. These teams each met several times per day for the duration of the public housing tower lockdowns.

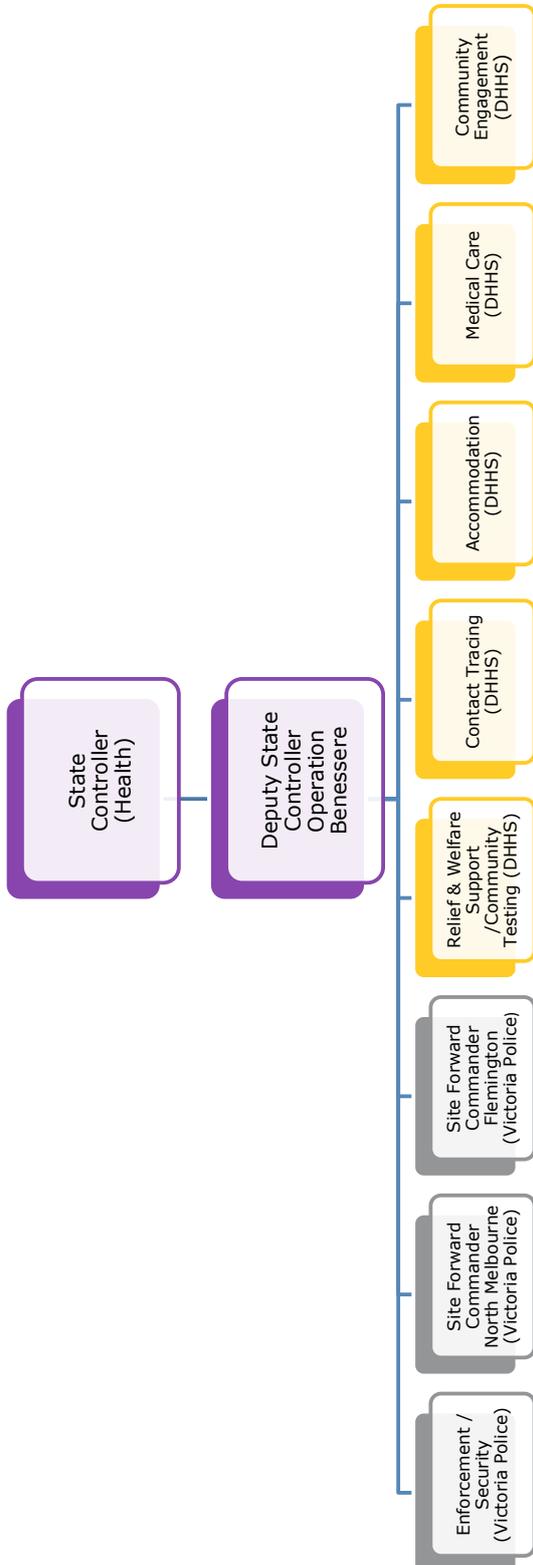
267. Operation Benessere was assisted by a number of support agencies providing essential services, personnel and other resources to the operation.

268. The initial Operation Benessere command structure and participating agencies are identified in Figures 14 and 15.

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<sup>4</sup> The DHHS Operational Commander was subsequently appointed Deputy State Controller (Health) for Operation Benessere in September 2020.

Figure 14: Initial Operation Benessere command structure, 4 July 2020



Source: DHHS

**Figure 15: Government authorities engaged in Operation Benessere**

Role	Authority
Control	DHHS
Support	Ambulance Victoria
	Country Fire Authority
	Emergency Management Victoria
	Fire Rescue Victoria
	Forest Fire Management Victoria
	Melbourne City Council
	Moonee Valley City Council
	Royal Melbourne Hospital
	Sheriff's Office Victoria
	State Emergency Service
Victoria Police	

Source: Victorian Ombudsman

## Relief operations

269. Those administering the lockdown, including DHHS's Operational Commander, were notified of the imminent commencement of the operation during the early afternoon of 4 July 2020.
270. At the time, there was no Victorian Government contingency plan in place for imposition of a building-wide 'hard lockdown' to manage an outbreak of COVID-19 within the community.
271. There was also no specific Outbreak Management Plan in place in relation to the Flemington and North Melbourne public housing estates nor Melbourne's high-density public housing settings more generally.
272. Consequently, and despite being made immediate priorities of the operation, detailed plans for the distribution of food relief, community engagement and health and housing supports were largely under development when the intervention began.
273. At interview, DHHS's Operational Commander acknowledged the operation would have benefited from further preparation:
- I think a whole range of activities could have been anticipated and prepared for, so that there was, you know, a more detailed plan about how you would enact a response of this nature. ... With the benefit of ... hindsight, I think you would have to say that some of the preparation was just not sufficient for what we've had to then contend.

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274. DHHS and other authorities assisting Operation Benessere continued to develop and implement arrangements for the provision of food relief and other supports over the hours and days following commencement of the lockdown.

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***'I think we were all under the impression that we would be having a day to a day-and-a-half to commence and prepare.'***

- Deputy CHO

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275. With the assistance of the Victorian Multicultural Commission, a Community Working Group was also formed to facilitate communication with multicultural community leaders.

276. Community sector briefings were also conducted, through which information concerning the intervention was communicated to more than 100 community support agencies.

277. During this initial period, DHHS and the other authorities administering the lockdown also:

- set up field primary care and urgent care clinics near the affected towers
- established a dedicated 24-hour telephone hotline to field requests from residents, volunteers and advocates
- arranged for the provision of financial support to residents, including:
  - o two weeks' rent relief
  - o an additional hardship payment to all households
  - o a further supplement to households previously earning income from employment.

278. At interview, the Associate Secretary to DHHS commented on these efforts:

I accept the idea that we could have been better planned for an outbreak this severe in a tower, and I have to take accountability for that. We had not envisaged an outbreak this significant in this kind of close context.

But if you get beyond that into the point [where] you kind of turn up at work one morning and discover, 'Wow, 3,000 people that, for public health reasons, and public health decision-making, are confined to their accommodation, how do you get the response that they need very rapidly?' You know, I really think that the team did an extraordinary job at achieving that.

279. Many initiatives were also assisted by community volunteers and support agencies such as Cohealth, the City of Melbourne and the Australian Muslim Social Services Agency.

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***'I accept the idea that we could have been better planned for an outbreak this severe in a tower. ... [However] I really think that the [response] team did an extraordinary job.'***

- DHHS Associate Secretary

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Figure 16: Extracts from minutes of Operation Benessere Emergency Management Team and DHHS Leadership Team concerning distribution of food relief, 4 July – 8 July 2020

**Emergency Management Team, 4 July 2020 at 5:00pm**

2 x teams assembled across both locations. Food relief underway.

**DHHS Leadership Team, 5 July 2020 at 4:30pm**

Food available on site. ... Have sourced contractors to door knock and drop food packages in a contactless manner.

**Emergency Management Team, 6 July 2020 at 4:00pm**

Distribution of food has commenced and is making its way through the towers to residents. ... Final distribution plan will commence tomorrow and progress throughout the week to ensure regular supply of food is provided.

**DHHS Leadership Team, 6 July 2020 at 5:00pm**

Some thousands of food hampers delivered to the sites by lunch time. Took some time to deliver packages to residents' doors. ... There are food deliveries happening at 6pm and 8pm this evening. ... We have under-estimated the people required to carry out the deliveries.

**Emergency Management Team, 7 July 2020 at 12:00pm**

Slow start re food distribution – has been hard to determine who is responsible for distribution.

**Emergency Management Team, 7 July 2020 at 4:00pm**

Delivery and distribution of food is going well, DHHS have advised food is now getting to residents. Very comfortable with incident coordination and control. Trying to get into a pattern with testing however managing carefully.

**Emergency Management Team, 8 July 2020 at 8:00am**

Trucks were turned away last night due to lack of people on the ground to deliver food. Residents very unhappy last night when Islamic community members were turned away when trying to deliver food. Food was delivered to Flemington however not to North Melbourne. A priority for today is to have halal meals delivered to residents. Still experiencing issues with scheduling relating to delivery and resource allocation. Hoping to refine to enable a smooth process going forward.

## Continuation of the lockdown at 33 Alfred Street

280. Under the Detention Directions, residents at the Flemington and North Melbourne public housing estates were notified they would be detained for a further 10 days if they refused to be tested for COVID-19 upon request.

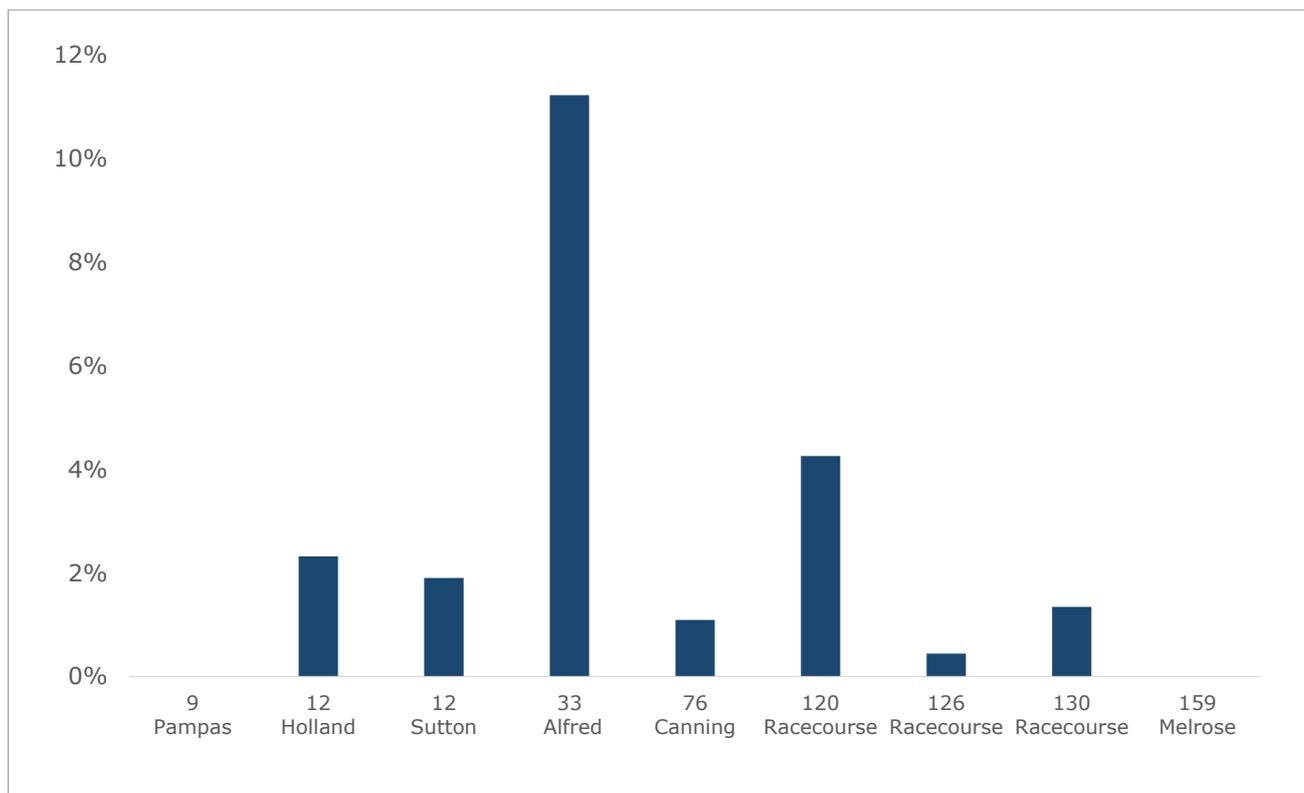
281. Between 5 July and 8 July 2020, authorities administered more than 2,500 COVID-19 tests across the two estates.

282. Results from these tests were collated and reviewed as the intervention progressed. As part of this process, DHHS continued to develop and refine metrics for the possible relaxation of restrictions within specific buildings.

283. By the morning of 9 July 2020, final results of the COVID-19 testing blitz indicated there were at least 158 cases of COVID-19 among residents of the two public housing estates.

284. Of these, more than one-third were associated with 33 Alfred Street, equating to approximately 11 per cent of people known to be living in the building – a prevalence rate almost three times higher than the next-most affected building.

**Figure 17: Prevalence of confirmed COVID-19 cases per public housing tower, 9 July 2020**



Source: Victorian Ombudsman; data supplied by DHHS

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285. On the afternoon of 9 July 2020, the Deputy CHO revoked the Detention Directions applying to all nine public housing towers, including 33 Alfred Street.

286. Residents of towers other than 33 Alfred Street were thereafter generally permitted to leave their homes in accordance with the Stage 3 restrictions then in place throughout metropolitan Melbourne.

287. At the same time, DHHS resolved to continue the lockdown at 33 Alfred Street under the existing *Diagnosed Persons and Close Contacts Directions* ('Close Contacts Directions').

### **'Diagnosed persons' and 'close contacts'**

From 11:59pm on 9 July 2020, all residents at 33 Alfred Street were confined to their homes as 'close contacts' under the Close Contacts Directions.

Under this instrument, a person is considered a 'close contact' if:

- an officer of DHHS determines they are a close contact of a diagnosed person, having regard to the Victorian COVID-19 Pandemic Plan; and
- they have received notice of the determination (whether orally or in writing), specifying the time when they will no longer be required to self-quarantine.

The Victorian COVID-19 Pandemic Plan and associated *Case and Contact Management Guidelines* recommend taking a precautionary approach when assessing whether a person is a close contact.

However, generally speaking, a person will be considered a close contact under these documents if they:

- have had more than 15 minutes cumulative face-to-face contact with a diagnosed person
- have shared a close space with a diagnosed person for more than two hours.

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288. The lifting of the lockdown at the eight other public housing towers and the decision to continue the lockdown of 33 Alfred Street was announced during a press conference convened by the Premier of Victoria and the Minister for Housing during the afternoon of 9 July 2020.

289. Residents at 33 Alfred Street were not given prior notice of the decision.

290. During the press conference, authorities indicated that residents at 33 Alfred Street would be required to remain in their homes for a further nine days.

291. During her interview, the Deputy CHO explained the decision to continue the lockdown at 33 Alfred Street:

There'd been a lot of discussion around the case numbers and the epidemiology in the preceding days. ... There'd also been more in-depth analysis of the movement of cases between floors and between houses, and there was indication that there were households with cases for whom there were no other sources outside of the fact that they lived in that building; they weren't linked to any other outbreaks and they weren't known to have been in contact with any other cases. ...

[33 Alfred Street] was determined to be at significant risk of there being a large number of further cases that were already incubating. ... As it turned out, I think they got up to 100 cases in that tower, which was, I believe, close to 20 per cent of the population and a large number of those came up in the ... 'day eleven' testing at the end of that quarantine period.

## Conclusion of the lockdown

292. During the second phase of the lockdown, authorities administering Operation Benessere continued to coordinate food relief and other supports for residents at 33 Alfred Street.

293. During this period, DHHS:

- developed and implemented a supervised fresh air and exercise program
- offered optional hotel quarantine arrangements for residents testing positive to COVID-19.

294. A second COVID-19 testing blitz was also conducted at 33 Alfred Street on 15 July 2020.

295. This resulted in identification of more than 30 additional cases of COVID-19 within the building.

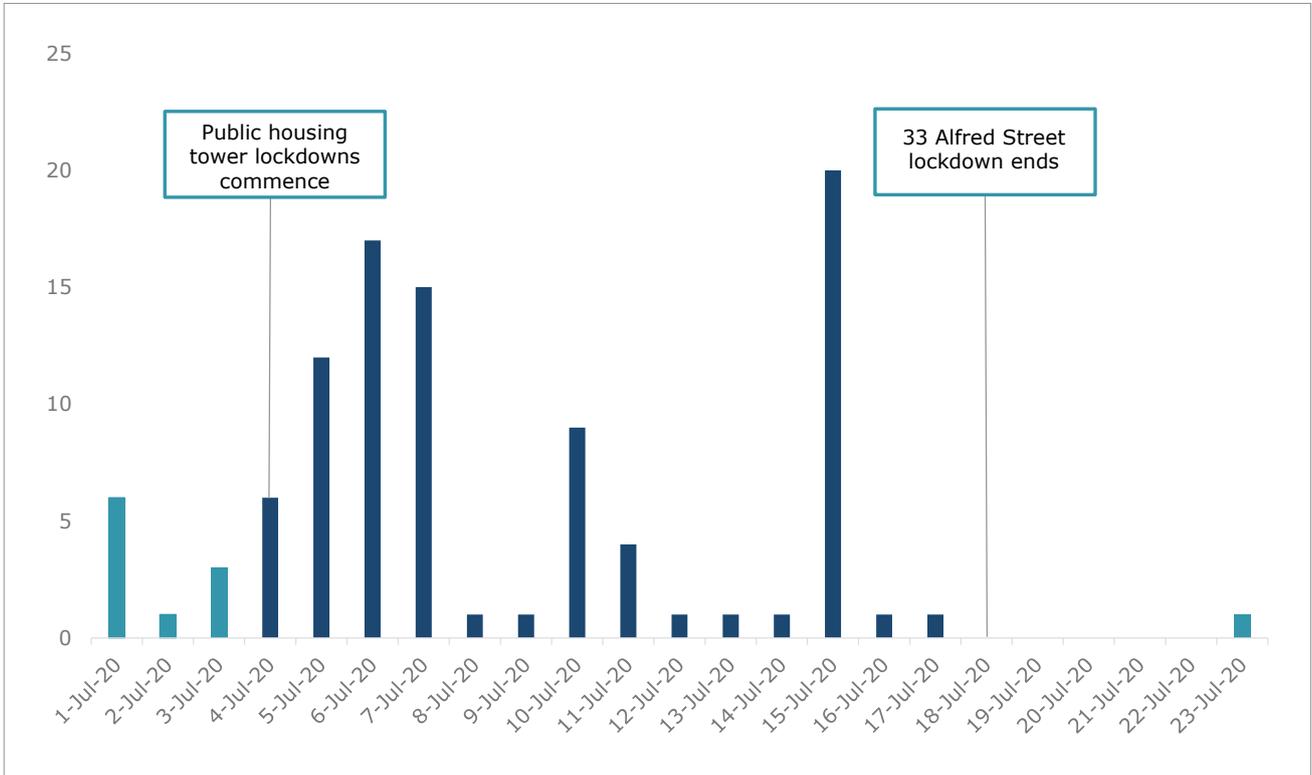
296. Following analysis of testing data, DHHS commenced preparations to relax restrictions for the majority of residents testing negative for COVID-19.

297. From 11:59pm on 18 July 2020, these individuals were no longer deemed to be 'close contacts' for the purposes of the Close Contacts Directions and were thereafter permitted to leave their homes in accordance with the Stage 3 restrictions in place throughout metropolitan Melbourne.

298. This marked the end of the substantive lockdown at 33 Alfred Street.

299. Those diagnosed with COVID-19 and their immediate contacts – approximately 123 people in total – were required to remain in isolation or quarantine for a further period under the Close Contacts Directions.

Figure 18: Daily confirmed COVID-19 cases at 33 Alfred Street, North Melbourne



Source: Victorian Ombudsman; data supplied by DHHS

# Human rights engaged by the lockdown

300. Victoria is one of only three jurisdictions in Australia with dedicated human rights legislation.

301. The Charter of Rights Act identifies the fundamental human rights, freedoms and responsibilities of people in Victoria.

302. Under the Charter of Rights Act, it is generally unlawful for public authorities, including Victorian Government departments such as DHHS, to:

- act in a way that is incompatible with a human right
- fail to give proper consideration to a relevant human right when making a decision.

303. Public authorities must comply with both of these requirements for a decision to be lawful.

*“It is possible for a public authority to make a decision that will interfere with rights in a way that would be demonstrably justifiable, even though the decision-maker did not give any, or any adequate, consideration to the human rights issues that were involved. In that situation, the public authority will nevertheless have acted unlawfully, because rights will not have been properly considered as part of the decision-making process. This is a matter of real practical significance even if the decision that was made involved a justifiable interference with rights, because if rights had been properly considered a different decision might have been made.”*

*Source: Certain Children v Minister for Families and Children (No 2) [2017] VSC 251 per Dixon J at [226]*

304. The Charter of Rights Act recognises that human rights are not absolute and may be limited in certain circumstances. However, for a limitation to be reasonable (and therefore lawful) it must be ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.

305. To consider whether human rights have been limited by an action, and whether any such limitations are justified, it is first necessary to identify the scope of the rights engaged, taking a broad approach.<sup>5</sup>

306. This section of the report briefly identifies the scope of the human rights engaged by the lockdown at 33 Alfred Street.

## Right to equality

307. Section 8 of the Charter of Rights Act recognises that every person:

- has the right to recognition as a person before the law
- has the right to enjoy their human rights without discrimination
- is equal before the law and is entitled to equal protection of the law without discrimination
- has the right to equal and effective protection against discrimination.

308. The meaning of the term ‘discrimination’ is consistent with the *Equal Opportunity Act 2010* (Vic) and is confined to certain protected characteristics such as race, disability, parental status and religious belief or activity.

<sup>5</sup> *Re Application under Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381, [80]. According to the Supreme Court of Victoria, a human right is engaged or relevant when a decision, action or proposal has the potential to affect the human rights of a person or class of persons: *Certain Children v Minister for Families and Children* (No 2) [2017] VSC 251 at [190].

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309. The protection against discrimination also applies to indirect discrimination where an unreasonable requirement, condition or practice disadvantages people with a particular protected characteristic.

310. Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including:

- the extent of the disadvantage caused
- whether the disadvantage was proportionate to the result sought
- whether reasonable adjustments could have been made to reduce the disadvantage.

311. The right to equality would have been engaged in circumstances where residents with protected characteristics were disadvantaged by the lockdown, for example, due to:

- interruptions to disability treatments and supports
- impediments to undertaking worship and cultural activities, including accessing food to meet cultural or religious requirements
- the way in which restrictions and entitlements were communicated to residents from culturally and linguistically diverse backgrounds.

## Right to life

312. Section 9 of the Charter of Rights Act recognises that every person has the right to life and the right not to be arbitrarily deprived of life.

313. During the lockdown at 33 Alfred Street, the right to life would have been engaged by actions relating to:

- access to medical care and treatment
- access to medication and medical supplies
- infection prevention and control
- contact between persons exposed to COVID-19 and other residents.

## Protection from cruel, inhuman or degrading treatment

314. Section 10 of the Charter of Rights Act recognises that people in Victoria must not be:

- subjected to torture
- treated or punished in a cruel, inhuman or degrading way
- subjected to medical or scientific experimentation or treatment without their full, free and informed consent.

315. Whether the protection from torture and cruel, inhuman or degrading treatment is engaged depends on all the circumstances of the case, including:

- the purpose of the treatment
- whether the severity or intensity of the treatment could result in bodily injury or physical or mental suffering
- the duration of the treatment and the particular vulnerabilities of the person impacted.<sup>6</sup>

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<sup>6</sup> *Certain Children v Minister for Families and Children* (No 2) [2017] VSC 251 at [250].

316. The Supreme Court of Victoria has recognised that very long periods of solitary and prolonged confinement may engage the prohibition on cruel, inhuman and degrading treatment, in addition to the right to humane treatment when deprived of liberty.<sup>7</sup>
317. During the lockdown at 33 Alfred Street, the protection against cruel, inhuman or degrading treatment would have been engaged by actions relating to:
- access to food, medication and disability supports
  - access to fresh air and outdoor exercise
  - in the case of residents living by themselves, access to meaningful human contact.
318. The protection against medical treatment without full, free and informed consent would also have been engaged by actions relating to the testing of residents for COVID-19.

## Freedom of movement

319. Section 12 of the Charter of Rights Act recognises that every person lawfully in Victoria:
- has the right to move freely within Victoria
  - has the right to enter and leave Victoria
  - has the freedom to choose where to live.
320. The right to freedom of movement was engaged by the very nature of the lockdown at 33 Alfred Street.

## Privacy, family and home

321. Section 13 of the Charter of Rights Act recognises that every person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with.
322. The right to privacy has been interpreted broadly and may extend to restrictions on the ability to work, given the 'intrinsic connection' between employment, dignity and private life.<sup>8</sup>
323. During the lockdown at 33 Alfred Street, this right would have been engaged by actions relating to:
- access to employment
  - access to goods and services in the home, including mail and deliveries
  - the ability of residents and non-residents to return to their homes.

## Freedom of religion and cultural rights

324. Section 14 of the Charter of Rights Act recognises that every person in Victoria has the right to freedom of thought, conscience, religion and belief, including the freedom to demonstrate their religion or belief in worship, observance and practice as part of the community.
325. Additionally, section 19 of the Charter of Rights Act recognises that every person with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background:
- to enjoy their culture
  - to declare and practice their religion
  - to use their language.

<sup>7</sup> *Certain Children v Minister for Families and Children* [2016] VSC 796 (21 December 2016) at [169].

<sup>8</sup> *ZZ v Department of Justice* [2013] VSC 267, [86]. See also *Kracke v Mental Health Review Board* (2009) VCAT 646, [620]; *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327, [55].

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326. This section also recognises that Aboriginal people hold distinct cultural rights and, among other things, must not be denied the right, with other members of their community, to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

327. During the lockdown, religious and cultural rights would have been engaged by actions relating to:

- the ability of residents to gather for cultural and religious purposes
- the ability of residents to engage in other cultural and religious practices outside the home.

## Peaceful assembly and association

328. Section 16 of the Charter of Rights Act recognises that every person has:

- the right of peaceful assembly
- the right to freedom of association with others.

329. These rights were engaged by the very nature of the lockdown at 33 Alfred Street.

## Protection of families and children

330. Section 17 of the Charter of Rights Act recognises that families are the ‘fundamental group unit of society’ and are entitled to be protected by the State.

331. This section also recognises that every child has the right, without discrimination, to protection as needed in accordance with their best interests.

332. The definition of family is broad and extends beyond the relationship between parents and children.<sup>9</sup>

333. During the lockdown, the right to protection of families and children would have been engaged by actions relating to:

- shared parenting arrangements
- access to other familial activities and responsibilities, including hospital visits, funerals and the giving or receiving of informal care.

## Right to liberty

334. Section 21 of the Charter of Rights Act recognises that every person has the right to liberty and security and must not be:

- subject to arbitrary arrest or detention
- deprived of liberty except on grounds and in accordance with procedures established by law.

335. The right to liberty is not limited to a person’s interactions with the criminal justice system, and encompasses all deprivations of liberty beyond mere restrictions on freedom of movement. The difference between deprivation of liberty and restriction on freedom of movement is one of degree or intensity, not nature or substance.<sup>10</sup>

336. The Supreme Court of Victoria has observed that exercise of the power to detain a person under a statute will only be compatible with the right to liberty in circumstances where it is undertaken in accordance with the law.<sup>11</sup>

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9 See eg *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328, [33].

10 *Kracke v Mental Health Review Board* [2009] VCAT 646, [664]. For discussion of the distinction in the context of the COVID-19 pandemic, see *Loiello v Giles* [2020] VSC 722 and *Nottingham v Ardern* [2020] NZCA 144.

11 See *Antunovic v Dawson* [2010] VSC 377, [135].

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337. The right to liberty would have been engaged by the lockdown at 33 Alfred Street:

- during the first phase of the lockdown, when people were detained to their premises
- during the second phase of the lockdown, when people continued to be restricted from leaving their premises other than under escort and supervision by DHHS.

## Right to humane treatment when deprived of liberty

338. Section 22 of the Charter of Rights Act recognises that all persons deprived of their liberty must be treated with humanity and respect for the inherent dignity of the human person.

339. The Supreme Court of Victoria has observed that the right to humane treatment when deprived of liberty can be distinguished from the protection against degrading treatment because, instead of protecting against 'bad conduct', this right mandates 'good conduct' towards people who are detained.<sup>12</sup>

340. The right to humane treatment when deprived of liberty was engaged by the very nature of the lockdown at 33 Alfred Street.

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<sup>12</sup> *Castles v Secretary, Department of Justice* [2010] VSC 310, [99].

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## When can human rights be limited under international law?

The International Covenant on Civil and Political Rights ('ICCPR'), upon which the rights identified in the Charter of Rights Act are based, recognises that some (but not all) human rights may be limited in times of public emergency 'to the extent strictly required by the exigencies of the situation', provided these limitations are not inconsistent with other obligations under international law and do not involve prohibited discrimination.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ('Siracusa Principles'), in seeking to clarify when rights recognised in the ICCPR may be validly limited, recognise, among other things:

- some rights, including the right to life and the right to freedom from torture, cruel, inhuman or degrading treatment or punishment, cannot be limited, even during national emergencies
- other rights may be validly limited by authorities to allow them to take measures dealing with a serious threat to public health
- in such circumstances, 'due regard' should be had to the International Health Regulations of the WHO, which require that public health responses to the international spread of disease be implemented 'with full respect for the dignity, human rights and fundamental freedoms of persons'.

The Siracusa Principles otherwise provide that any limitation of rights under the ICCPR must:

- be consistent with domestic law (provided that law is not arbitrary or unreasonable)
- pursue a legitimate aim and be proportionate to that aim
- be no more restrictive than required to achieve the purpose of the limitation.

The United Nations Human Rights Committee has emphasised that any deviation from the obligations in the ICCPR in response to the COVID-19 pandemic must only be 'to the extent strictly required by the exigencies of the public health situation'.

The Human Rights Committee has also observed that, where possible, authorities should replace measures that prohibit activities relevant to the enjoyment of rights under the ICCPR with 'less restrictive measures that allow such activities to be conducted, while subjecting them as necessary to public health requirements, such as physical distancing'.

The WHO has emphasised that quarantine and other restrictive measures implemented in response to the COVID-19 pandemic should be implemented 'only as part of a comprehensive package of public health and social measures' and in a manner that is 'fully respectful of the dignity, human rights and fundamental freedoms of persons'.

The Subcommittee on Prevention of Torture has similarly emphasised that while quarantine may be imposed for the public benefit, 'it must not result in ill-treatment of those detained'.

The Subcommittee on Prevention of Torture has observed that people in quarantine settings should be able to benefit from the fundamental safeguards against ill-treatment, including:

- information concerning the reasons for their detention
- access to independent medical advice and legal assistance
- access to psychological support, during and after quarantine.

# Protective measures

341. This section of the report examines the nature and implementation of different measures intended to safeguard the rights and dignity of those detained at 33 Alfred Street.

342. It considers:

- whether decisions to impose and continue the lockdown were compatible with human rights recognised in the Charter of Rights Act
- whether people at 33 Alfred Street received appropriate notice of the lockdown and the terms under which they were being detained
- whether the lockdown was subject to regular and appropriate review
- whether people at 33 Alfred Street had recourse to an appropriate complaints process.

## Was the decision to impose the lockdown compatible with human rights?

343. The first phase of the lockdown at 33 Alfred Street was imposed by the Detention Directions.

344. Under this instrument, people at 33 Alfred Street were:

- generally prohibited from leaving their homes
- generally prohibited from allowing other people to enter their homes
- informed they would be detained for a further period if they refused to be tested for COVID-19 when requested by an Authorised Officer.<sup>13</sup>

345. Other than in emergency situations, people at 33 Alfred Street were only authorised to leave their homes if granted permission to do so by DHHS, and only for the following reasons:

- for the purposes of attending a medical facility to receive medical care
- where 'reasonably necessary' for their physical or mental health
- on compassionate grounds.

### Detention Directions

The Detention Directions operated from the beginning of the lockdown at 33 Alfred Street until 11:59pm on 9 July 2020, when all residents at 33 Alfred Street were designated 'close contacts' under the Close Contacts Directions.

The Detention Directions were made by the Deputy CHO under sections 200(1)(a), (b) and (d) of the Public Health and Wellbeing Act, being:

- the power of detention
- the power to restrict movement within an emergency area
- the power to make other directions considered reasonably necessary to protect public health.

The Detention Directions commenced with immediate effect and were subsequently revoked on 9 July 2020.

<sup>13</sup> Under the Detention Directions, the term 'premises' was defined to exclude 'land available for communal use'.

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## Compatibility with human rights

346. Under section 38(1) of the Charter of Rights Act, it is generally unlawful for a public authority to act incompatibly with a human right.

347. When determining whether a public authority has acted compatibly with human rights it is necessary to consider:

- whether a human right identified in the Act has been engaged or is otherwise relevant in the circumstances
- whether the public authority has limited or interfered with the human right through its action or inaction
- whether any limitation imposed was reasonable and justified having regard to all relevant factors, including:
  - o the nature of the right
  - o the importance of the purpose of the limitation
  - o the nature and extent of the limitation
  - o the relationship between the limitation and its purpose
  - o any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>14</sup>

348. The investigation considered the following human rights of people at 33 Alfred Street were limited by imposition of the Detention Directions:

- the right to liberty
- the right to humane treatment when deprived of liberty
- the right to freedom of movement
- rights relating to freedom of religion and culture
- rights relating to peaceful assembly and freedom of association
- rights relating to privacy
- rights relating to the protection of families and children.

349. In a written response to the investigation, DHHS explained the decision to issue the Detention Directions was based on COVID-19 testing data, which indicated there were:

- at least 23 recently confirmed cases of COVID-19 associated with the Flemington and North Melbourne public housing estates
- numerous observed instances of social mixing between public housing towers and estates.

350. DHHS observed the Flemington and North Melbourne outbreak fell within the context of a broader, state-wide escalation in COVID-19 cases.

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<sup>14</sup> See eg *Baker v DPP* [2017] VSCA 58, [56]; *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, [108].

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351. According to DHHS, the decision to issue the Detention Directions also took into account the demographic profile of the Flemington and North Melbourne public housing estates, particularly:

- the relatively high number of residents from culturally and linguistically diverse backgrounds – whom, based on contact tracing evidence, were considered more likely to engage in large family gatherings in indoor areas
- the relative prevalence of aged and health-compromised residents.

352. DHHS observed:

[T]he isolation, detention and testing of the residents was an appropriate course of action that properly balanced the rights under the Charter, including the right to life and the public health risks involved in the localised public health emergency.

353. Having regard to this explanation and the evidence provided by the Deputy CHO and other senior DHHS officers, and on reviewing available records, the investigation accepted the temporary detention of residents at 33 Alfred Street may have been a justified and reasonable response to the outbreak of COVID-19 associated with the Flemington and North Melbourne public housing estates.

354. In arriving at this conclusion, the investigation noted, among other things:

- the circumstances and nature of the COVID-19 outbreak affecting 33 Alfred Street and the other public housing towers, including the potential for rapid spread of COVID-19 within the Flemington and North Melbourne estates
- the precautionary principle identified in the Public Health and Wellbeing Act
- the serious risk to public health sought to be prevented or reduced by the lockdown
- the obligation to take positive steps to protect life and health under the Charter of Rights Act
- the exemptions to detention included in the Detention Directions
- the legislative safeguards relating to the use of emergency powers under the Public Health and Wellbeing Act, including the requirement that the detention of residents be reviewed every 24 hours
- the apparent absence of other, less restrictive measures to manage the public housing outbreak.

355. Despite this assessment, the investigation had significant reservations about the decision to detain residents immediately on the afternoon of 4 July 2020, absent further preparation.

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356. Evidence indicated that this was not originally a feature of the proposed public health intervention developed by DHHS in response to the public housing outbreaks.
357. The decision to impose an immediate lockdown did not appear to have been based on direct advice from the Deputy CHO, who told investigators she was not consulted regarding this issue and was of the view that delaying the operation would not have made a 'hugely significant difference' to the longer-term consequences of the outbreaks.
358. On the other hand, imposition of an immediate lockdown was likely to have significant impacts on the rights of people living at the Flemington and North Melbourne public housing estates, insofar as it resulted in the lockdown being implemented before detailed plans for the provision of food relief, community engagement and other supports had been developed by DHHS.
359. This appeared to have significantly increased the risk of people being detained without sufficient food, medication and other supports, and in the absence of an appropriate explanation of what was happening – thereby increasing the extent to which the intervention was likely to limit the right to humane treatment when deprived of liberty.
360. The investigation was not persuaded this element of the intervention was compatible with the rights of people at 33 Alfred Street – noting, in light of the Deputy CHO's evidence, there appeared to be a less restrictive option reasonably available in the circumstances.
361. Responding to the Ombudsman's draft report, DHHS submitted this conclusion was incorrect and 'ignored the jurisprudence' on the proper application of section 38(1) of the Charter of Rights Act.
362. DHHS submitted that the right to humane treatment when deprived of liberty was not limited by any aspect of the immediate lockdown because, while the hardships faced by residents at 33 Alfred Street were 'intrusive and unpleasant', DHHS 'took positive steps to ensure the provision of food relief, daily essentials, social and wellbeing supports and laundry services to residents'.
363. DHHS observed:
- the conditions at 33 Alfred Street came nowhere near the treatment that has constituted a breach of the right to humane treatment in any other case as recognised over the course of many decades in Victoria or around the world.
364. DHHS submitted that even if the right to humane treatment was limited by the immediate lockdown, any such limitations would have been compatible with this right.
365. DHHS observed that the Charter of Rights Act does not require the least restrictive means be adopted, and that it was necessary to consider whether the immediate lockdown fell within the 'range of reasonably available options'.
366. DHHS observed:
- A challenge on the basis of proportionality should not succeed merely by establishing that alternative, less restrictive measures could have been used to achieve the aim.

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367. Noting, among other things, the many significant negative consequences for residents at 33 Alfred Street, the investigation remained of the view that the immediacy of the lockdown unreasonably limited the right to humane treatment when deprived of liberty.

368. This was despite the steps taken by DHHS to mitigate the impacts of the lockdown which, although positive, fell short of ensuring residents had sufficient access to culturally appropriate food, medicine and other supports during the initial stages of the intervention – as demonstrated by many of the case studies included in this report.

369. While the Charter of Rights Act did not require DHHS to select the least restrictive means of containing the outbreak of COVID-19 associated with the North Melbourne and Flemington public housing estates, the investigation noted:

- commencing the lockdown at 11:59pm on 5 July 2020 was a less restrictive option that would have allowed for greater preparation
- according to the Deputy CHO's evidence, this alternative would also have been a reasonably practicable means of containing the outbreak of COVID-19
- such an approach was originally considered appropriate by DHHS and, to the extent it was abandoned, this did not appear to have been based on direct public health advice that it was necessary to do so to protect human life.

### Proper consideration of human rights

370. Under the Charter of Rights Act, it is also generally unlawful for a public authority to fail to give proper consideration to a relevant human right when making a decision.

371. When determining whether a public authority has given proper consideration to relevant human rights, it is necessary to consider whether, prior to the decision, the decision-maker:

- understood in general terms which rights of people affected by the decision were relevant and how they would be interfered with by the decision
- turned their mind to the possible impact of the decision on a person's human rights and the implications for the person
- identified the countervailing interests or obligations
- balanced competing private and public interests in accordance with the process identified in the Charter of Rights Act.<sup>15</sup>

372. The investigation established that the decision to impose the lockdown was the subject of a detailed DHHS human rights assessment.

373. This document identified the likely impacts of the Detention Directions and explained why imposition of the lockdown was considered compatible with human rights and reasonably necessary in the circumstances.

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<sup>15</sup> *Certain Children v Minister for Families and Children* [2016] VSC 796, [190]-[191]; *Castles v Secretary of the Department of Justice* [2010] VSC 310 [185]-[186]; *Bare v IBAC* [2015] VSCA 197, [221]-[224].

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374. Despite this, the document:

- did not meaningfully consider whether other less restrictive measures were available in the circumstances – for example, the delayed quarantine and testing proposal originally developed by DHHS
- incorrectly stated the lockdown would begin at 11:59pm on 4 July 2020, instead of with immediate effect – thereby underestimating the likely impacts of the decision.

375. Responding to the Ombudsman’s draft report, DHHS observed that proper consideration of human rights is a mental process that does not require a documented human rights assessment.

376. DHHS observed:

What matters for the purposes of section 38(1) of the Charter is the nature of the decision-maker’s consideration, not how factually accurate was the legal advice she received.

377. The investigation accepted these comments, but noted it remained important that advice provided to the Deputy CHO concerning the human rights implications of the decision to impose the lockdown be accurate and complete, particularly given the extraordinary nature of the intervention.

378. Of greater concern to the investigation was the extent to which the Deputy CHO was permitted to consider this document when determining whether to issue the Detention Directions.

379. The evidence indicates that due to circumstances largely outside of her control, the Deputy CHO was given less than 20 minutes to consider the human rights assessment and the terms of the Detention Directions before the scheduled announcement of the lockdown.

380. While exhibiting a genuine appreciation of the significance of the decision and its consequences for residents, the Deputy CHO acknowledged to investigators this was less time than she needed to properly weigh up the human rights implications of the Detention Directions.

381. A decision relating to the public housing outbreaks needed to be made quickly, but the investigation noted this was not a lawful basis for a decision-maker to fail to give proper consideration to relevant human rights, as made clear by the Victorian Supreme Court.

*“In an emergency or extreme circumstance, or where critical decisions have to be made with great haste, there are grave risks that human rights may be overlooked or broken, if not life or limb endangered. The existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights.”*

*Source: Certain Children v Minister for Families and Children [2016] VSC 796 per Dixon J at [188]*

382. Responding to the Ombudsman’s draft report, DHHS submitted:

regardless of how long the [Deputy CHO] had to review the [human rights assessment], ... it cannot be said that [the Deputy CHO] only spent 20 minutes in considering the rights of those in the towers, how [the lockdown] would affect them and why it was necessary to impose a lockdown.

383. DHHS observed that the Deputy CHO had made many directions under the Public Health and Wellbeing Act during the COVID-19 pandemic and was ‘sufficiently educated in Charter rights’ to assess the impacts of the lockdown, even without a written human rights assessment.

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384. In this regard, DHHS submitted the Ombudsman's draft report applied an 'unduly stringent standard' for proper consideration of human rights.
385. The investigation noted, among other things, imposition of an immediate lockdown was first contemplated by the Deputy CHO in the early afternoon of 4 July 2020, and that the specific terms of the Detention Directions were only made clear to the Deputy CHO at 3:46pm, less than 15 minutes before the press conference announcing the operation.
386. Notwithstanding the considerable experience of the Deputy CHO, this was also to be the first use of emergency detention powers to manage an outbreak of COVID-19 in the community and in many ways the most restrictive measures imposed to date in response to the pandemic.
387. Fundamentally, the investigation was also guided by the Deputy CHO's own reflections concerning the matter, in which she clearly indicated she was provided less time than was needed to properly consider the human rights implications of the decision.
388. This is not intended as criticism of the Deputy CHO, who was clearly placed in a difficult position by the apparent decision to 'bring forward' the intervention and the timing of the public announcement.
389. The circumstances surrounding the making and announcement of the decision also caused the investigation significant concerns about whether, on considering the human rights implications of the lockdown, the Deputy CHO could realistically have declined to execute the Detention Directions.

## Was the decision to continue the lockdown compatible with human rights?

390. The Detention Directions were revoked on the evening of 9 July 2020, marking the end of the first phase of the lockdown at 33 Alfred Street.
391. Residents at 33 Alfred Street were thereafter confined to their homes as 'close contacts' under the Close Contacts Directions.
392. This differed from the approach taken in relation to the other public housing towers subject to the initial lockdown, where restrictions were substantially lifted for most residents.
393. At the relevant time, the Close Contacts Directions prohibited people designated as 'close contacts' from leaving their homes, except:
- to obtain medical care or medical supplies
  - in an emergency situation
  - for the purposes of exercise, on condition they:
    - o take reasonable steps to maintain a distance of 1.5 metres from other people
    - o not enter any other building
  - if required to do so by law
  - if permitted to visit a patient in hospital
  - if granted a written exemption from the CHO or Deputy CHO.

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## Close Contacts Directions

The Close Contacts Directions were first made by the Deputy CHO on 11 May 2020 and, subject to modification, continue to apply throughout Victoria.

Two versions of the Close Contacts Directions were in operation during the lockdown at 33 Alfred Street:

- the *Diagnosed Persons and Close Contacts Directions (No 4)*, which were in operation at the beginning of the lockdown and continued in force until 11:59pm on 15 July 2020
- the *Diagnosed Persons and Close Contacts Directions (No 5)*, which operated from 11:59pm on 15 July 2020.

The latter clarified the circumstances in which close contacts were permitted to leave their homes for exercise.

The Close Contacts Directions were made under sections 200(1)(b) and (d) of the Public Health and Wellbeing Act, being:

- the power to restrict movement within an emergency area
- the power to make other directions considered reasonably necessary to protect public health.

## Compatibility with human rights

394. The investigation considered the following human rights were limited by the decision to classify all residents at 33 Alfred Street as close contacts:

- the right to freedom of movement
- rights relating to freedom of religion and culture
- rights relating to peaceful assembly and freedom of association
- rights relating to privacy and family
- rights relating to the protection of families and children.<sup>16</sup>

395. In a written response to the investigation, DHHS explained the decision to apply the Close Contacts Directions to residents at 33 Alfred Street was informed by analysis of COVID-19 testing data collected during the first phase of the lockdown.

396. This data indicated:

- 53 residents at 33 Alfred Street had tested positive for COVID-19
- a further 30 residents qualified as 'close contacts' under conventional contact tracing principles.

397. DHHS emphasised the actual number of conventional 'close contacts' within the building was likely much higher because an 'average confirmed case' at the time had approximately 3-4 close contacts.

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<sup>16</sup> Unlike in the case of the Detention Directions, the investigation considered the rights to liberty and humane treatment when deprived of liberty were not automatically limited by the decision to classify residents as 'close contacts'. This was because application of the restrictions on movement, assembly and association in the Close Contacts Directions would not ordinarily result in the denial of liberty.

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398. DHHS observed:

The proportion of residents in 33 Alfred Street who were COVID-19 positive was well above the proportion in other, similar, high rise towers. There was at the time some uncertainty, from a public health perspective, of what was causing the significantly higher rates of infection at 33 Alfred St.

This could have been the ordinary effect of the virus but could potentially have had a more local cause such as specific features of the building and its services.

This decision was also informed by knowledge that the residents of this estate include some of the most vulnerable members of our community, and they are therefore some of the most vulnerable to coronavirus (COVID-19). In particular, one elderly persons' tower was next door at 159 Melrose. Protecting the health and safety of residents was the number one priority.

399. This was consistent with evidence provided to the investigation by the Deputy CHO, who emphasised there were also concerns that undetected cases of COVID-19 were continuing to incubate within the building.

400. Evidence available to the investigation indicates DHHS also initially considered easing some restrictions at 33 Alfred Street, before ultimately concluding to apply the Close Contacts Directions to the building.

401. Having regard to all the relevant circumstances, the investigation accepted that continued limitation of the rights engaged by the Close Contacts Directions was likely a justified and reasonable response to the ongoing outbreak of COVID-19 within the building.

402. This assessment is based on the terms of the Close Contacts Directions and not the manner in which the directions were interpreted and enforced during the lockdown.

403. As discussed later in this report, some of the restrictions imposed on residents during this period were in fact more significant than contemplated by the Close Contacts Directions.

### **Proper consideration of human rights**

404. The decision to continue the lockdown at 33 Alfred Street was not the subject of a documented human rights assessment.

405. Despite this, the Deputy CHO affirmed to investigators the decision was informed by consideration of the rights of people living at 33 Alfred Street.

406. According to the Deputy CHO, this included consideration of the 'greater emphasis' on access to fresh air and outdoor exercise within the Close Contacts Directions.

407. The investigation considered the decision to continue the lockdown under the Close Contacts Directions should have been the subject of a documented human rights assessment.

408. This was because:

- the terms of the Close Contacts Directions materially differed from the Detention Directions
- the decision engaged, and in some cases, substantially limited, the human rights of a significant number of people
- it was necessary to record why it remained justified and reasonable to limit the rights of people at 33 Alfred Street, having regard to the testing and tracing data collected during the first phase of the lockdown.

409. Responding to the Ombudsman's draft report, DHHS submitted the above conclusion involved a 'mischaracterisation of the decision that was made on 9 July 2020'.

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410. DHHS submitted:

- a decision was made to revoke the Detention Directions on 9 July 2020
- once the Detention Directions were revoked 'all of the residents in the affected towers were subject to the general directions in place at the time', including the Close Contacts Directions
- the Close Contacts Directions were themselves subject to a documented human rights assessment.

411. DHHS otherwise observed that the Charter of Rights Act did not require that proper consideration of human rights be documented.

412. The investigation noted clause 6(1)(a) of the Close Contacts Directions required that an officer of DHHS determine a person to be a 'close contact' for the obligation to self-quarantine to apply.

413. Also contradicting DHHS's response, the Deputy CHO confirmed during interview that such a decision was made in the case of residents at 33 Alfred Street.

414. The investigation accepted there was no obligation under the Charter of Rights Act to document proper consideration of human rights, but considered this would still have been preferable in the circumstances, having regard to the significance of the decision to continue the lockdown.

## Did residents receive appropriate notice and explanation of the initial lockdown?

415. International human rights standards emphasise that when making decisions to deprive a person of their liberty, decision-makers should, as soon as practicable:

- provide the person with a copy of the detention order and reasons for their detention<sup>17</sup>
- provide the person with information about their rights during detention and how to exercise them.<sup>18</sup>

416. While these requirements have not been incorporated into relevant Victorian law, the Public Health and Wellbeing Act does require Authorised Officers to provide detained persons with a brief explanation of the reasons for their detention.

417. Under sections 200(2) and (3) of the Public Health and Wellbeing Act, this explanation must be delivered prior to exercise of the power of detention or, if this is not practicable, as soon as it becomes practicable to do so.

418. Many residents at 33 Alfred Street who spoke with the investigation complained they did not receive adequate notice or explanation of the terms of the lockdown.

419. These individuals referred to:

- lack of official notification of the lockdown before and after it was implemented
- significant delays or issues in receiving copies of the Detention Directions
- difficulties in obtaining other information about the terms under which they were being detained, particularly after the Detention Directions were revoked on 9 July 2020.

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<sup>17</sup> *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* ('Detention Principles'), principle 11(2). For the standards applicable to prisoners, see Mandela Rules, rule 119(1).

<sup>18</sup> Detention Principles, principle 13. For the standards applicable to prisoners, see Mandela Rules, rule 54(b).

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## Aaron's experience

Aaron, a community worker living at 33 Alfred Street, told investigators he first learned of the lockdown while watching the news on television.

Aaron said, 'When I saw the news, it said North Melbourne and Flemington [towers], so I called everyone to tell them. The police came straight away.'

Aaron was critical of the information provided by DHHS and told investigators his household did not receive a copy of the Detention Directions during the initial phase of the lockdown.

According to Aaron, the first written communication he received from DHHS arrived on 'day six or seven' and concerned the decision to continue the lockdown. Aaron told investigators the first written materials concerning the lockdown in community languages arrived on 'day nine or ten'.

Aaron also criticised the information initially broadcasted over the building's PA system, stating, 'There was only one announcement of the lockdown ... and it was in English.' Aaron recalled a later announcement that was translated into Arabic: '[It said] something like, "the lockdown is continuing and there are another nine days to go." ... It wasn't very clear.'

Aaron said he became involved in delivering food to residents after a friend telephoned him offering a food donation. For the next few days, Aaron coordinated requests for food from residents and forwarded these to DHHS. Aaron said there was 'no structure' to the food delivery arrangements until 'about day four', when it seemed to become more organised.

Aaron described the overall experience of the lockdown as a 'nightmare'. Aaron said to investigators:

We grew up here, we were born here, we know the system. We have doctors among us, psychologists ... It felt like, 'are we in a safe place anymore, or not?' ... We felt unworthy, just people who live in public housing.

While Aaron told investigators the first written materials he received from DHHS related to the decision to continue the lockdown, it is possible he was referring to a letter explaining the Detention Directions, which continued to be delivered to residents at 33 Alfred Street until 9 July 2020.

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## Lack of prior notification

420. Residents at 33 Alfred Street were not provided prior notice of the decision to impose a lockdown at the building.

421. At interview, the Associate Secretary to DHHS explained the decision to commence the intervention in this manner:

There are people who are living there, who aren't on the rent-roll and there are people who are not living there who are on the rent-roll. ... I guess one of the things that was pretty clear to us pretty quickly was that people would move in and out of those locations, and that, depending on the action that we took, there would be an equal and opposite reaction from the residents and from the community, and that we needed to predict it and to think that through, and not imagine a kind of a perfect sequential response to what we were doing. ...

If we had announced that there would be a lockdown at some future point, it's pretty clear to me that there wouldn't have been many people in the tower at the point at which the lockdown started.

422. This explanation was consistent with the evidence of other witnesses interviewed by the investigation.

423. Responding to the Ombudsman's draft report, the Deputy CHO observed:

[G]iving people additional notice of what was coming may have [meant] some people might have left and gone out into a less restricted postcode, as we had seen occur at other times when some geographical areas were subject to restrictions and others weren't. Some of those people could have been incubating, which may have resulted in further community transmission.

424. While acknowledging the considerations informing the decision, the investigation noted this feature of the lockdown materially increased risks to health and wellbeing associated with the intervention.

425. Among other consequences, commencing the intervention in this manner denied residents at 33 Alfred Street the opportunity to make arrangements to mitigate the effects of the lockdown, increasing the risk of people being detained without sufficient food, medication and other necessary supplies.

426. In this regard, the investigation was concerned to observe that the implications of this feature of the lockdown were not identified or addressed in the human rights assessment informing the intervention.

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***'If we had announced that there would be a lockdown at some future point, it's pretty clear to me that there wouldn't have been many people in the tower at the point at which the lockdown started.'***

– Associate Secretary

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427. At a minimum, there was need to explain why the decision to impose the lockdown without notice was considered compatible with the right to humane treatment when deprived of liberty.

428. Further, there was need to reconcile this decision with section 200(2) of the Public Health and Wellbeing Act, which, if practicable, required residents receive a brief explanation of the reasons for the intervention before it commenced.

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429. Responding to the Ombudsman's draft report, DHHS observed that the Charter of Rights Act does not require a decision-maker to document aspects of a decision to limit human rights.

430. DHHS also submitted that there was 'no need to reconcile' the decision to commence the lockdown without notice to residents with the requirement in section 200(2) of the Public Health and Wellbeing Act, because section 200(3) allowed for delayed notification where it was not practicable to do otherwise.

431. Accepting there was no legislative requirement to document and address the reasons for this aspect of the intervention, the investigation remained of the view that such an approach would have been preferable in the circumstances, while also acknowledging the significant constraints under which DHHS was operating at the time.

### **Notification of the initial lockdown**

432. The investigation examined DHHS's attempts to notify residents of the terms of the lockdown following its commencement.

433. The investigation established that among other things, DHHS:

- arranged for posters concerning the lockdown to be displayed in communal areas
- delivered copies of the Detention Directions to residents' doors from 5 July 2020
- later prepared and delivered letters explaining the terms of the lockdown in English and seven community languages, including Arabic, Somali and Vietnamese.

434. The English-language version of the letter delivered to residents is reproduced in Appendix H.

435. The delivery of written materials was supplemented by telephone calls to residents between 6 July and 10 July 2020.

436. As part of this process, more than 100 DHHS housing officers were temporarily designated Authorised Officers for the purposes of briefly explaining the Detention Directions to residents. Telephone calls to residents were conducted in accordance with a script prepared by DHHS, using interpreters where necessary.

437. The script used by Authorised Officers is included in Appendix I.

438. Records reviewed by the investigation indicated Authorised Officers made approximately 465 attempted calls to residents at 33 Alfred Street during the first phase of the lockdown, using interpreters where necessary.

439. While noting the different measures employed by DHHS to notify residents of the purpose and terms of the intervention, the investigation observed these efforts were not without significant shortcomings.

440. In particular, records reviewed by the investigation indicated:

- copies of the Detention Directions were in some cases not delivered until the afternoon of 6 July 2020, corresponding with the third day of the lockdown
- some residents did not receive a copy of the letter explaining the Detention Directions in plain English and other languages until 9 July 2020 – the day these directions were revoked.

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441. Further, the investigation noted almost half of all households at 33 Alfred Street were not telephoned by an Authorised Officer – whether successfully or otherwise – before telephone notification activities ceased on 10 July 2020.

442. While acknowledging the need to provide complete and accurate information to residents, the investigation also held concerns about the script used during these telephone calls – the length and complexity of which appeared inconsistent with plain English communication principles.

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***‘We have no doubt that departmental staff did their best and worked excessive hours to deliver the supports required to people in the locked down buildings, [however] they should never have been put in a position of needing to coordinate a significant logistical operation in a complex environment, with no notice.’***

– Submission from Victorian Public Tenants Association

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443. DHHS informed the investigation that efforts to telephone residents encountered several challenges, including:

- absence of phone numbers for some registered tenants
- incorrect contact information within DHHS’s systems
- difficulties successfully placing calls, including lack of response and reports of poor reception within some apartments.

444. Similarly, DHHS acknowledged the delivery of written materials was sometimes interrupted by other activities deemed of greater priority, such as those relating to COVID-19 testing and the distribution of food relief.

445. The investigation noted that delays and issues in providing notification of the Detention Directions appeared to have significant consequences for residents.

446. For example, residents, volunteers and advocates informed the investigation there was:

- initial uncertainty of the terms of the lockdown, including in relation to the ability to seek permission to leave the building on compassionate and other grounds
- later confusion about the import of the Detention Directions and explanation letter, with some residents believing this constituted notice of changes to the terms of the lockdown.

447. The investigation also received anecdotal evidence from residents and advocates that:

- some households did not receive a copy of the Detention Directions at all
- some residents continued to receive information concerning the Detention Directions after the directions were revoked.

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***‘When the ... extended lockdown of 33 Alfred Street was announced ... reports were made to us that residents there had once again received limited and conflicting information, and were confused and distressed about the directions, with some thinking extended detention directions had been issued upon receiving new but out-of-date written DHHS correspondence under their doors.’***

– Submission from Inner Melbourne Community Legal

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448. While it was not possible to verify the former assertion, the latter appeared corroborated by records reviewed by the investigation.

449. For example, information supplied by DHHS indicated Authorised Officers continued to telephone residents concerning the Detention Directions during the morning of 10 July 2020, the day after these directions were revoked.

450. While acknowledging the significant logistical challenges faced by DHHS, shortcomings in notifying residents of the purpose and terms of the intervention also appeared attributable to the limited time allocated towards preparation for the operation.

451. Responding to the Ombudsman's draft report, DHHS submitted:

[DHHS] objects to the suggestion implicit in the above statement that the Department refused or failed to 'allocate' time to preparing for the operation, in circumstances where the Department was required to act swiftly in order to reduce a serious risk to lives.

452. DHHS otherwise observed:

[Section] 200(3) of the Public Health and Wellbeing Act acknowledges that the timing of the relevant notice will be dependent on what is practicable in the circumstances. Where resources are stretched and communication is difficult, the standard demanded will accommodate those difficulties.

453. DHHS submitted that, even with additional days of planning, it would not have had the 'time or resources' to undertake the 'fine-tuned communications program' expected by the Ombudsman.

454. The investigation did not consider a 'fine-tuned communications program' would have been feasible and acknowledged the significant constraints and competing priorities facing DHHS. However, the investigation remained of the view that it would have been appropriate, if nothing else, to provide residents with a copy of the Detention Directions and a brief explanation of the lockdown when the intervention began, and that this would have been possible had the lockdown commenced at 11:59pm on 5 July 2020, as originally planned.

<b>Figure 19: Telephone notifications to residents at 33 Alfred Street</b>	
<b>Description</b>	
Total telephone calls attempted	465
Number of individuals successfully contacted	192
Percentage of calls successfully placed	41%
Number of adults known to be living at 33 Alfred Street	280
Percentage of adults successfully contacted	67%
Number of distinct households at 33 Alfred Street	141
Number of distinct households with attempted contact	79
Percentage of distinct households with attempted contact	56%

Source: DHHS

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## **Case studies – early confusion at 33 Alfred Street**

Many residents, advocates and community volunteers who spoke with investigators described the beginning of the lockdown as chaotic and confusing.

### **Diric**

Diric, a resident at 33 Alfred Street, said he learned of the lockdown when he received a text message from a friend alerting him to the Premier’s press conference.

Diric said he then went downstairs and spoke with police at the entrance to the building: ‘They [police] were looking to me [as a resident] for guidance, which was odd. ... There were [other residents] downstairs saying, “What’s going on, what’s happening?”’ Diric said he found it difficult to locate up-to-date information about the lockdown on DHHS’s website: ‘I was relying on The Guardian [and] The Age, rather than government websites.’

### **Calaso**

Calaso, a community volunteer, said she attended 33 Alfred Street on the morning of the second day of the lockdown to deliver medication and supplies to her family.

Calaso told investigators there was initially ‘no process’ for facilitating deliveries to residents. According to Calaso, police officers at the site told her to ‘speak with DHHS’ about this; however, there did not seem to be any DHHS officers present and there was no other information available at the site to assist.

Calaso later telephoned the public housing hotline for assistance. DHHS’s records show that Calaso’s request for medication was then classified as urgent and allocated within two hours.

### **Yuusuf**

Yuusuf, a community support worker and former resident at 33 Alfred Street, told investigators he attended the site on the first day of the lockdown to provide assistance to residents.

Yuusuf said DHHS’s early communication with residents was ‘absolutely shocking’. According to Yuusuf, authorities implementing the lockdown initially did not seem to have a clear idea of how to support residents. Referring to an early inter-agency meeting he witnessed, Yuusuf said, ‘Everyone was just looking at each other going, “How’s it going to work?” ... There was half an hour of nonsense, where no one was putting their hand up to go into the building.’

Figure 20: Poster displayed at 33 Alfred Street, 5 July 2020



Source: DHHS

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## Notification of continuation of the lockdown

455. Residents at 33 Alfred Street were notified of DHHS's determination to classify residents as 'close contacts' under the Close Contacts Direction by way of a factsheet delivered to households on 10 July 2020.

456. Using simple terms, this factsheet:

- informed residents of the determination
- advised the lockdown would continue until 11:59pm on 18 July 2020
- confirmed DHHS would continue to provide services to the building during this period
- advised that residents would be able to exercise outside under supervision.

457. The factsheet was promptly translated into 12 community languages, including Amharic and Somali. The contents of the English-language version of the factsheet are included in Appendix G.

458. The investigation considered this factsheet was a notable improvement on notifications previously issued to residents. In particular, the factsheet:

- provided simple notice of the decision and its consequences for residents
- was drafted in plain English
- included information about accessing interpreters and translated materials
- was distributed in key community languages.

459. Despite overall improvements, the investigation noted the factsheet did not refer to the Close Contacts Directions by name, nor did it include specific information about how to access these directions – limiting awareness of the terms of the second phase of the lockdown.

460. Preparation and distribution of this factsheet also lagged behind the public announcement of the decision to continue the lockdown.

461. Again, this appeared to result in initial confusion about the decision and the terms under which people at 33 Alfred Street were being detained.

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## **Case studies – confusion after revocation of the Detention Directions**

### **Community legal representative**

On the afternoon of 10 July 2020, a community legal representative contacted the Ombudsman's office to seek urgent assistance in clarifying the circumstances of the continuation of the lockdown at 33 Alfred Street.

This representative explained residents had contacted the community legal service seeking advice concerning the terms under which they were being detained. At this time, at least one of these residents had yet to receive notice of the determination under the Close Contacts Directions.

The representative noted the Detention Directions had been revoked and that no further public health directions relating to 33 Alfred Street had been published on DHHS's website. The representative explained they had sought clarification about this through the public housing hotline, but a response was not immediately forthcoming.

Following enquiries with DHHS and a visit to the Incident Control Centre, Ombudsman officers were able to inform the community legal representative of DHHS's determination under the Close Contacts Directions.

### **Mary**

Around this time, Mary, a community member, contacted the Ombudsman to complain about her treatment.

Mary told investigators she was visiting 33 Alfred Street when the lockdown began and remained in the building to assist members of her family through the experience.

Mary said the first written information she received about the lockdown was a letter from DHHS explaining the terms of her detention. Mary said she received this letter on 9 July 2020, and for this reason understood it to relate to the decision to continue the lockdown. In fact, the letter explained the Detention Directions, which were revoked that same day.

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## Was the lockdown subject to appropriate review?

462. International human rights standards emphasise that people deprived of their liberty should have the right to challenge the appropriateness of their detention.<sup>19</sup>

463. The Public Health and Wellbeing Act does not include a specific mechanism for people to challenge their detention during a public health emergency.

464. However, section 200(6) of the Public Health and Wellbeing Act provides that the detention of a person under public health emergency powers must be reviewed by an Authorised Officer at least once every 24 hours.

465. In a written response to the investigation, DHHS stated it developed a process between 4 July and 8 July 2020 to 'ensure a consistent approach' was adopted for reviews undertaken in accordance with this requirement.

466. According to DHHS, under this process, Authorised Officers were expected to determine whether the detention of a resident continued to be necessary, having regard to:

- whether the resident was ordinarily a resident at 33 Alfred Street at the time of the lockdown
- whether the resident remained at 33 Alfred Street at the time of the review
- information about the resident collected during spot and welfare checks

- other relevant information about the resident, including:
  - o whether the resident had displayed symptoms of COVID-19
  - o whether the resident had previously been infected with COVID-19 and cleared
  - o whether the resident had recently tested negative for COVID-19 in Australia
  - o any other physical or mental health concerns relating to the resident's wellbeing
  - o any special requirements for the resident's detention.

467. Notwithstanding the above, DHHS informed the investigation it was unable to produce records of any reviews conducted in accordance with this process in relation to the detention of residents at 33 Alfred Street.

468. The investigation accordingly could not be satisfied the lockdown at 33 Alfred Street complied with section 200(6) of the Public Health and Wellbeing Act.

469. In the circumstances, this also appeared incompatible with the right not to be deprived of liberty other than in accordance with procedures established by law, as identified in the Charter of Rights Act.

470. Responding to the Ombudsman's draft report, DHHS said the above conclusions were incorrect, because it considered reviews were conducted by Authorised Officers during the initial phase of the lockdown in accordance with the process described above.

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<sup>19</sup> Detention Principles, principles 11(1)-(3).

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471. DHHS submitted:

Although it is unfortunate that there is no 'daily record' of review by each Authorised Officer, it is both understandable and proper that the priority at the time was to ensure that the reviews were in fact conducted, while dealing with an unprecedented emergency situation, with many resources already deployed in other areas of the pandemic response.

472. DHHS otherwise observed that people detained in Victoria 'can challenge the lawfulness of their detention in the Supreme Court of Victoria using the writ of *habeas corpus*'. DHHS submitted that as this mechanism 'was available regardless of whether reviews occurred', any detention of residents at 33 Alfred Street was not contrary to law.

473. The investigation was wholly unpersuaded by these submissions, noting:

- efforts to telephone residents did not commence until the third day of the intervention
- a significant proportion of residents were not telephoned at all by an Authorised Officer during the first phase of the lockdown
- even fewer residents were telephoned each day
- materials supplied by DHHS concerning the telephone calls made by Authorised Officers did not refer to the requirement to undertake reviews under section 200(6) of the Public Health and Wellbeing Act, nor suggest that the purpose of these calls was to perform such a review

- section 200(7) of the Public Health and Wellbeing Act required that the CHO be provided with written notice of all reviews conducted under section 200(6), and no such notices were produced by DHHS in response to the investigation's request for records, nor in response to the Ombudsman's draft report.

474. While legally correct, DHHS's submission regarding the availability of the writ of *habeas corpus* revealed a concerning lack of insight into the circumstances of people living at the Flemington and North Melbourne public housing estates.

475. The investigation accepted there were many and varied competing priorities facing DHHS throughout the lockdown, but noted the requirement to undertake reviews under section 200(6) of the Public Health and Wellbeing Act was one of relatively few legislative safeguards applicable to the exercise of the emergency detention power.

476. While appearing to fall short of legislative requirements, the investigation was largely satisfied that DHHS monitored testing and tracing data and information gathered through welfare checks in an effort to determine whether the lockdown remained necessary and proportionate to the circumstances.

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## Was the lockdown subject to an appropriate complaints process?

477. International human rights standards emphasise that detained people should have the right to complain to authorities about their treatment.<sup>20</sup>
478. Section 185(1) of the Public Health and Wellbeing Act provides that any person may make a complaint about the exercise of a power by an Authorised Officer under the legislation.
479. This includes exercise of an emergency power, such as the power to detain a person during a public health emergency.
480. Under the Public Health and Wellbeing Act, such complaints:
- must be made to the Secretary to DHHS (in the case of Authorised Officers appointed by DHHS)
  - may be made in writing or in any other form approved by the Secretary to DHHS.
481. Upon receiving a complaint, the Secretary to DHHS must:
- investigate the complaint
  - provide a written response to the complainant concerning the results of the investigation.

482. In a written response to the investigation, DHHS observed that no complaints relating to the lockdown at 33 Alfred Street were received by the Secretary under this provision.
483. Information available to the investigation indicated DHHS did not notify residents at 33 Alfred Street of their entitlement to make a complaint about the lockdown under the Public Health and Wellbeing Act.

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***'I think honestly it was only until [a community advocate] posted it [information about making a complaint] on the WhatsApp group that we made a complaint to the Ombudsman.'***

- Oral submission from resident

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484. Prior to the lockdown, DHHS had published a guide to making complaints on its website. This guide was made available in Easy English and more than 20 community languages.
485. However, the guide:
- did not include specific information about making complaints about the exercise of powers by Authorised Officers
  - did not identify what methods had been approved by the Secretary for making such complaints, if any
  - was not distributed to residents at 33 Alfred Street during the lockdown.

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<sup>20</sup> Detention Principles, principles 33(1)-(4).

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486. Information relating to the COVID-19 pandemic on DHHS's website also did not refer to the ability to make complaints about the exercise of emergency powers under the Public Health and Wellbeing Act.
487. DHHS was nevertheless quick to resolve complaints made to the Ombudsman during the lockdown and demonstrated a genuine willingness to brief investigators on aspects of the intervention as it progressed.
488. Responding to the Ombudsman's draft report, DHHS submitted that it was 'not required' to provide individual notice of the statutory complaints mechanism to residents at 33 Alfred Street.
489. DHHS submitted there was an 'established mechanism' for submitting complaints on its website, and that other methods of engagement with residents and community leaders allowed 'practical avenues' for complaints to be submitted to the Secretary.

# Humane treatment

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490. This section of the report examines the conditions under which people were detained at 33 Alfred Street, including:

- restrictions imposed upon people's access to fresh air and outdoor exercise
- the enforcement model for the lockdown
- the circumstances in which people were granted exemptions to detention.

## Access to fresh air and exercise

491. The Public Health and Wellbeing Act does not guarantee people detained during public health emergencies access to fresh air and outdoor exercise.

492. However, both international law and the Charter of Rights Act emphasise people deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person.<sup>21</sup>

493. In this regard, international courts have recognised access to fresh air and outdoor exercise is relevant to ensuring that people deprived of their liberty are treated humanely.<sup>22</sup>

## Restrictions on accessing fresh air and outdoor exercise - initial phase of the lockdown

494. The Detention Directions - under which people at 33 Alfred Street were detained during the first phase of the lockdown - did not specifically permit residents to leave their homes to access fresh air and outdoor exercise.

495. Nevertheless, residents were eligible to receive permission from an Authorised Officer to leave their homes if considered 'reasonably necessary' for their physical or mental health or on other compassionate grounds.

496. The investigation was unable to identify any examples of residents at 33 Alfred Street being provided permission to leave their homes to access fresh air and exercise during the initial phase of the lockdown.

497. In this regard, the investigation noted records maintained by DHHS suggested no specific requests for fresh air or outdoor exercise were communicated through the public housing hotline during this period.

498. Residents who spoke with investigators said they were either unaware they could request permission to leave their homes during the first phase of the lockdown or thought requests relating to exercise were unlikely to be granted by DHHS.

499. Other residents told investigators they had requests for outdoor exercise refused by personnel controlling entry and exit to the building.

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***'My [family member] is pregnant, she wanted fresh air - they [authorities] said no. But they were letting dogs out to walk. How does that work?'***

- Oral submission from resident

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500. In a written response to the investigation, DHHS acknowledged arrangements for residents to access fresh air and outdoor exercise were not in place during the first phase of the lockdown.

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<sup>21</sup> Charter of Rights Act, section 22(1); ICCPR, article 10(1).

<sup>22</sup> See eg *Ananyev and Ors v Russia* (European Court of Human Rights, Application Nos. 42525/07 and 60800/08, 10 January 2012); *Muršić v. Croatia* (European Court of Human Rights, Grand Chamber, Application No. 7334/13, 20 October 2016).

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501. DHHS attributed this to the limited time available to establish safe practices relating to these arrangements, as well as the need to prioritise other activities, such as those relating to COVID-19 testing and the distribution of food relief.

502. While acknowledging this explanation, the investigation considered the absence of specific processes for residents to access fresh air and exercise during the initial phase of the lockdown undoubtedly increased risks to health and wellbeing associated with the intervention.

503. Responding to the Ombudsman's draft report, DHHS reiterated that there were practical barriers to providing safe access to fresh air and outdoor exercise during this period, and that it necessarily took time to develop a suitable exercise program.

504. DHHS submitted:

The absence of those amenities was both permissible under law and proportionate to the need to protect people from infection. The primary human rights guidance on exercise and fresh air has been developed in the context of imprisonment for criminal activity, not detention for infection control.

505. The investigation noted DHHS later considered it possible to provide residents at 33 Alfred Street with scheduled access to fresh air and outdoor exercise, and that the development of such arrangements took less than 48 hours, once actually commenced.

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***'[T]he Victorian Charter of Human Rights and Responsibilities is clear that if you are not giving people an option to exercise then you are effectively putting them in prison and that is not something that can be done for a case of coronavirus or for anyone else for that matter.'***

- Chief Health Officer, reported in The Australian,  
28 July 2020

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## Rights relating to fresh air and exercise in detention settings

Several international human rights standards and guidelines recognise that detained people have the right to fresh air and outdoor exercise. These include:

- the *United Nations Standard Minimum Rules for the Treatment of Prisoners* ('Mandela Rules'), which require that prisoners be provided with 'at least one hour of suitable exercise in the open air daily if weather permits'
- the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ('Havana Rules'), which provide that juveniles deprived of their liberty 'should have the right to a suitable amount of time for daily free exercise, in the open air wherever weather permits'
- the *UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, which recognise that asylum-seekers deprived of their liberty should be provided with '[t]he opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational facilities ... as well as access to suitable outdoor space, including fresh air and natural light.'

In Victoria, the *Corrections Act 1986* (Vic) recognises that people in prison have the right to 'be in the open air for at least an hour each day, if the weather permits'. The Subcommittee on Prevention of Torture has emphasised that during the COVID-19 pandemic authorities administering places of detention must continue to '[r]espect the minimum requirements to daily outdoor exercise, while also taking into account the measures necessary to tackle the current pandemic'.

## Bashiir's experience of the lockdown

Bashiir and his wife, both residents of 33 Alfred Street, survived civil war and a dictatorship before resettling in Australia. Prior to the lockdown, Bashiir developed a medical condition placing him at risk of developing blood clots. Owing to his condition Bashiir would take prescription medication and go for several walks each day.

DHHS's records indicate that members of Bashiir's family telephoned the public housing hotline to ensure he was provided with his blood pressure medication. Despite this, Bashiir's health deteriorated over the course of the lockdown and he was ultimately hospitalised.

Members of Bashiir's family told investigators they were concerned about DHHS's communications with residents at 33 Alfred Street. They explained that Bashiir did not speak English and that DHHS officers ignored their request to notify family before arriving unannounced at Bashiir's home. They observed that, having lived in a dictatorship, Bashiir and his wife found unannounced visits by government officials to be extremely distressing.

Members of Bashiir's family told investigators Bashiir and his wife were law-abiding people who would never knowingly disobey a government direction. They attributed Bashiir's hospitalisation to his inability to go for walks during the lockdown. The investigation noted that Bashiir's entry on the public housing register incorrectly identified his preferred language as English.

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## Restrictions on accessing fresh air and outdoor exercise – second phase of the lockdown

506. Unlike the Detention Directions, the Close Contacts Directions permitted both ‘diagnosed persons’ and ‘close contacts’ to leave their premises for the purposes of exercise, provided they:

- took reasonable steps to maintain a distance of 1.5 metres from other people (unless self-isolating or self-quarantining with the other person)
- did not enter any other building.

507. Despite these provisions, DHHS continued to restrict the circumstances in which residents at 33 Alfred Street could access outdoor exercise during the second phase of the lockdown.

508. In practice, residents were not permitted to leave their homes for exercise except as part of a rostered fresh air and exercise program, commencing on the evening of 11 July 2020.

509. Under the fresh air and exercise program, residents were permitted to exercise in designated areas for periods of approximately 20-30 minutes. Residents participating in the program were escorted to and from their homes by DHHS representatives and were prohibited from leaving the building grounds.

510. DHHS informed the Ombudsman this arrangement was implemented to give ‘practical effect’ to the requirement to maintain social distancing when exercising under the Close Contacts Directions:

In the practical circumstances of the 33 Alfred Street premises, where every person on every floor is subject to the Direction, it is very challenging and likely not possible for individuals to ‘take reasonable steps’ [to maintain social distancing] on an individual basis[.]

511. While acknowledging the ostensible purpose of these restrictions, the investigation was concerned about the lawfulness of them being imposed upon residents seeking to leave their homes for the purposes of accessing exercise.

512. This was because the restrictions did not appear consistent with the terms of the Close Contacts Directions, which, subject to certain conditions, generally permitted ‘diagnosed persons’ and ‘close contacts’ to leave their homes for the purposes of exercise.

513. In this regard, the investigation noted:

- under the Close Contacts Directions, ‘diagnosed persons’ and ‘close contacts’ were not automatically prohibited from leaving their homes for the purposes of exercise where ‘reasonable steps’ to maintain social distancing could or would prove unsuccessful
- once having permitted residents to exit the building, there appeared to be no basis under the Close Contacts Directions for DHHS to confine people to the building grounds.

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514. These additional requirements, considered together with other restrictions on movement imposed during the period, resulted in the de facto detention of residents at 33 Alfred Street.
515. This was significant because, in imposing the restrictions, DHHS officers did not appear to have consciously exercised the power of detention under the Public Health and Wellbeing Act, nor complied with the legislative safeguards applying to its use.
516. In the circumstances, this was likely incompatible with the right not to be deprived of liberty except in accordance with procedures established by law, as identified in the Charter of Rights Act.
517. Responding to the Ombudsman’s draft report, DHHS submitted this conclusion was incorrect and ‘ignored important jurisprudence’ concerning the Public Health and Wellbeing Act and the Charter of Rights Act.
518. DHHS observed there was a distinction between the concepts of detention, quarantine and isolation, and submitted residents at 33 Alfred Street were subject to restrictions on freedom of movement, rather than detention, while confined to their homes under the Close Contacts Directions.
519. DHHS said it also did not agree that the second phase of the lockdown limited the right to liberty, or that any such limitations would have been incompatible in the circumstances.
520. The observation that residents were subject to ‘de facto detention’ was based on the degree and intensity of the restrictions placed upon people living at 33 Alfred Street during the second phase of the lockdown, which differed in substantial ways from the terms of the Close Contacts Directions.
521. Fundamentally, it was difficult to distinguish the restrictions placed upon residents between the first and second phases of the lockdown.
522. As noted elsewhere in this report, the investigation accepted the requirement to self-isolate or self-quarantine under the Close Contacts Directions would not ordinarily limit the right to liberty.
523. Records supplied to the Ombudsman suggest that DHHS first attempted to reconcile the restrictions imposed upon residents seeking to leave their premises for exercise with the terms of the Close Contacts Directions on 14 July 2020, following enquiries from the Ombudsman.
524. These discussions appear to have formed the basis for amendments to the Close Contacts Directions, implemented from 11:59pm on 15 July 2020, which inserted the following clarification regarding the entitlement to exercise:
- Note: Where a person is unable to take reasonable steps to maintain a distance of 1.5 metres from any other person when exercising, an authorised officer may direct that person to comply with another exercise program in order to mitigate a risk to public health, if that person wishes to exercise during their period of self-isolation or self-quarantine, as the case may be.

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## Fresh air and exercise program

525. DHHS implemented a program for residents to access fresh air and outdoor exercise during the second week of the lockdown.

526. This followed the announcement of such a program during a televised Victorian Government press conference on 9 July 2020.

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***‘They will need to remain in their flat, in their unit, except for medical care and for supervised daily exercise. We will support each and every one of those families.’***

- Premier of Victoria, televised statement on 9 July 2020

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***‘One of the differences will be they will be able to access exercise and fresh air, and we’ll be working through that with the health teams and with the police about how we do that as safely as possible from a health perspective.’***

- Minister for Police and Emergency Services, televised statement on 9 July 2020

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527. The investigation established DHHS did not begin to develop the fresh air and exercise program until the morning of 10 July 2020, after it was publicly foreshadowed by the Minister for Police and Emergency Services.

528. Consequently, the program was not ready to start until the evening of 11 July 2020.

529. Several residents who spoke with investigators said they were frustrated to find requests for fresh air and outdoor exercise refused or deferred during the interim period.

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***‘After the press conference, I called up [to request exercise] and was told it wasn’t an urgent request.’***

- Oral submission from resident

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530. Records supplied by DHHS indicate approximately two dozen requests for fresh air and outdoor exercise were made through the public housing hotline during the period between the televised press conference and commencement of the fresh air and exercise program.

531. Both the DHHS Operational Commander and DHHS Deputy Commander told investigators they could not recall whether they or the Emergency Management Team administering the lockdown were provided advanced notice of the matters announced at the press conference.

532. Records available to the investigation do not clarify whether the Emergency Management or Incident Management Teams were briefed on the decisions to continue the lockdown at 33 Alfred Street or provide residents access to fresh air and exercise, prior to this announcement.

533. DHHS’s Deputy Commander told investigators she was first approached to develop a fresh air and exercise program for 33 Alfred Street on the morning following the press conference:

It was only the Friday morning that the light bulb went off for me, when the [Emergency Management Commissioner] said, ‘And how are people going to get access to exercise?’

534. Responding to the Ombudsman’s draft report, the Emergency Management Commissioner noted that although he did not recall this specific conversation, he did ‘recall raising this issue with DHHS at around that time.’

Figure 21: Excerpts from DHHS public housing hotline register, 5 July – 18 July 2020

2 residents would like an opportunity to go outside for some exercise and fresh air as soon as possible. Tenant has depression and anxiety and feels she needs to go outside to refresh. Both residents have tested negative.

Tenant phoning as she received a letter from DHHS advising people in her building will be permitted outside for supervised exercise. She went downstairs and was denied. Advised her details will be passed on and someone will schedule a time with her.

Tenant requesting exercise for herself and her father. Tenants have been locked down for 8 days. Father has Rheumatoid Arthritis and requires regular exercise. Please arrange exercise as soon as possible. They are happy to wait until tomorrow morning at the latest. However happy to work in with whatever works just so they get an opportunity to go outside.

Tenant also enquiring as to whether her dad would be allowed to go and turn his car motor over just so battery does not die. Just enquiring, understands if not possible but just asking.

the house hold wants to know when is the supervised exercise going to start

██████████:- Mum is asthmatic & diabetic ██████████ - Father High Cholesterol, High Blood Pressure , Asthma and ██████████ All the family suffer from anxiety and depression due to family trauma earlier this year. Exercise is imperative for the tenant's well being and control of their medical conditions. ██████████ rung several times in regards to this

desperate to know when supervised exercise will commence

Wanting to tell us thanks for organizing the walk she was so happy that she got fresh air

Someone called last night and said they would come and take them out for exercise at 8am this morning. She is ready and has the kids ready to go out but no one has come yet.

2 residents would like an opportunity to go outside for some exercise and fresh air as soon as possible. Tenant has depression and anxiety and feels she needs to go outside to refresh. Both residents have tested negative.

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## Use of temporary fencing on the evening of 11 July

535. The terms and conditions under which people at 33 Alfred Street were permitted to leave their homes under the fresh air and exercise program featured prominently in complaints to the Ombudsman and submissions to the investigation.
536. Many residents and advocates who spoke with investigators referred to the use of temporary fencing to restrict the movement of residents during the first evening of the program.
537. Temporary fencing was erected around a designated exercise area on the evening of 11 July 2020 and removed early the following day.
538. Ombudsman investigators spoke with residents who were required to exercise in the fenced area, as well as others who witnessed the erection of the fencing, and viewed photographs and video recordings of residents accessing the area.
539. Residents told investigators the use of temporary fencing made them feel humiliated and unsafe, with many likening it to a 'cage' or prison exercise space.
540. Representatives of DHHS and other authorities who spoke with Ombudsman investigators at the site the following day said they had not been involved in the decision to erect the temporary fencing. Some representatives said they were surprised and concerned by the decision.

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***'It was unfortunate, in hindsight. [It was] overkill. I got here and said, "We need to fix this."'***

- Statement by DHHS representative to Ombudsman officers, 14 July 2020

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541. Some community volunteers told investigators they had previously received assurances from DHHS that temporary fencing would not be used at the site and were later dismayed to learn fencing had been erected around the exercise area.
542. Records indicate the use of temporary fencing as part of the fresh air and exercise program was first discussed by DHHS's leadership team on the morning of 11 July 2020. These records confirm that, by 5pm that day, the leadership team was aware of 'some concern' about the proposal.

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***'It was a concrete area - a cage. I counted 20 plus police officers. I thought, "Am I going in here?" ... I said, "Is there a need for all these police officers?" DHHS shrugged and said, "What can we do?"'***

- Oral submission from resident

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***'It directly opposes the decisions that were made in the EMT [Emergency Management Team] meetings. ... They [residents] are saying that being out here behind cages - behind bars - and having police patrolling around them is reinforcing the idea that they're incarcerated.'***

- Community volunteer, video recording supplied to investigation

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543. In a written response to the investigation, DHHS submitted erection of temporary fencing around the exercise area arose from a 'miscommunication' with the supplier:

The fence had been ordered for installation at the car park of 33 Alfred Street, near the administrative offices. It was intended to enable safe movement for residents around the estate when they were getting fresh air and exercise by more clearly demarcating the boundaries of the estate and preventing unauthorised access from people outside the property.

When it arrived, there was a miscommunication between the contracted supplier and the Incident Controller. The fence was erected at the rear of the estate in error. As soon as the on-site Incident Controller was made aware of the issue, the fence was taken down.

544. While neither officer said they were directly involved in the erection of the fencing, both the DHHS Deputy Commander and DHHS Operational Commander affirmed this explanation at interview.

545. The DHHS Deputy Commander observed:

It was around about this time we were really getting anxious about being able to test the fresh air program and I remember the team saying to me that the fence had gone up, but it didn't really register on my radar in terms of a thing. It was just ... 'a fence has gone up'. I was just [thinking], 'I need to get somebody downstairs and take them for a walk and we need to do that soon.'

546. The DHHS Operational Commander told the investigation:

It was positioned in the wrong location - the optics were terrible. The original intent was to have the fencing at the car park side of the building, where we'd just delineate the sort of space and make sure that we were really separating the public from the area of exercise. But that wasn't where it was positioned unfortunately. ...

It was really a miscommunication about where the fence should've been positioned and where it ultimately was positioned. As we became aware of the situation - and I recall these conversations happening, I think it was the Saturday night - the Incident Controller was on his way home when he called me to say, 'This is where it's been positioned. I've got to go back and just, you know, pull it down.' ... It was just one of those really unfortunate situations.

547. The investigation considered the requirement that residents exercise in the area surrounded by temporary fencing was incompatible with both the protection against degrading treatment and the right to humane treatment when deprived of liberty.

548. This was because:

- it did not appear to be necessary or proportionate to the purpose of designating the boundaries of the housing estate
- it was not the least restrictive measure practicably available in the circumstances.

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***'It was positioned in the wrong location - the optics were terrible ... It was just one of those really unfortunate situations.'***

-DHHS Operational Commander

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549. Responding to the Ombudsman's draft report, DHHS submitted that the above conclusions were incorrect and 'ignored important jurisprudence' relevant to the Charter of Rights Act.

550. DHHS submitted:

[N]o decision was made to require residents to exercise within an area surrounded by temporary fencing, although residents did exercise within a fenced area for a very short period before the fence was dismantled and removed from the site.

551. DHHS submitted that the treatment of residents in this manner fell 'very far short' of the kind of treatment that would engage the protection from degrading treatment and the right to humane treatment when deprived of liberty recognised by the Charter of Rights Act.

552. The investigation noted the erection of temporary fencing and the requirement that residents actually exercise in this area were distinct issues.

553. In this case, the experiences shared by residents, including Jamilah in the case study on the following page, and the direct observations made by volunteers, advocates and investigators, supported the conclusion that the latter action was incompatible with the human rights identified above.

## Jamilah's experience of the lockdown

Five days into the lockdown, Jamilah, a resident at 33 Alfred Street, told DHHS she was desperate to know when she would be allowed to leave her apartment for fresh air and exercise.

Over the next few days, Jamilah continued to telephone DHHS about her request. Jamilah said that she was beginning to feel anxious and was experiencing panic attacks about the lack of fresh air. She said that she had spoken with police at her building, who informed her that they would be willing to escort her outside for exercise if given permission by DHHS. Jamilah complained that she had called DHHS several times and was yet to receive an answer to her request.

Jamilah told investigators she first learned of the ability to request access to fresh air after watching the government's press conference on 9 July 2020. Jamilah said she then contacted DHHS to try and access this program. According to Jamilah, she was offered mental health support by DHHS but was otherwise informed that there was 'no action plan' in place for exercise at the time.

According to Jamilah, two male nurses then arrived unannounced at her home on the evening of 11 July 2020. The nurses told Jamilah they were there to escort her downstairs for exercise. While Jamilah was leaving, she received a telephone call advising that DHHS staff were 'on their way' to her apartment. Once downstairs, two Victoria Police officers escorted Jamilah from the building entrance to an outdoor area enclosed by temporary fencing.

Jamilah told investigators that she was 'surrounded' by approximately 18 police officers during her exercise time. Jamilah told investigators she felt like she was there 'for their [Police's] amusement', and that even the police officers seemed to feel their presence was disproportionate to the circumstances. Jamilah described the exercise area as being like a 'cage'.

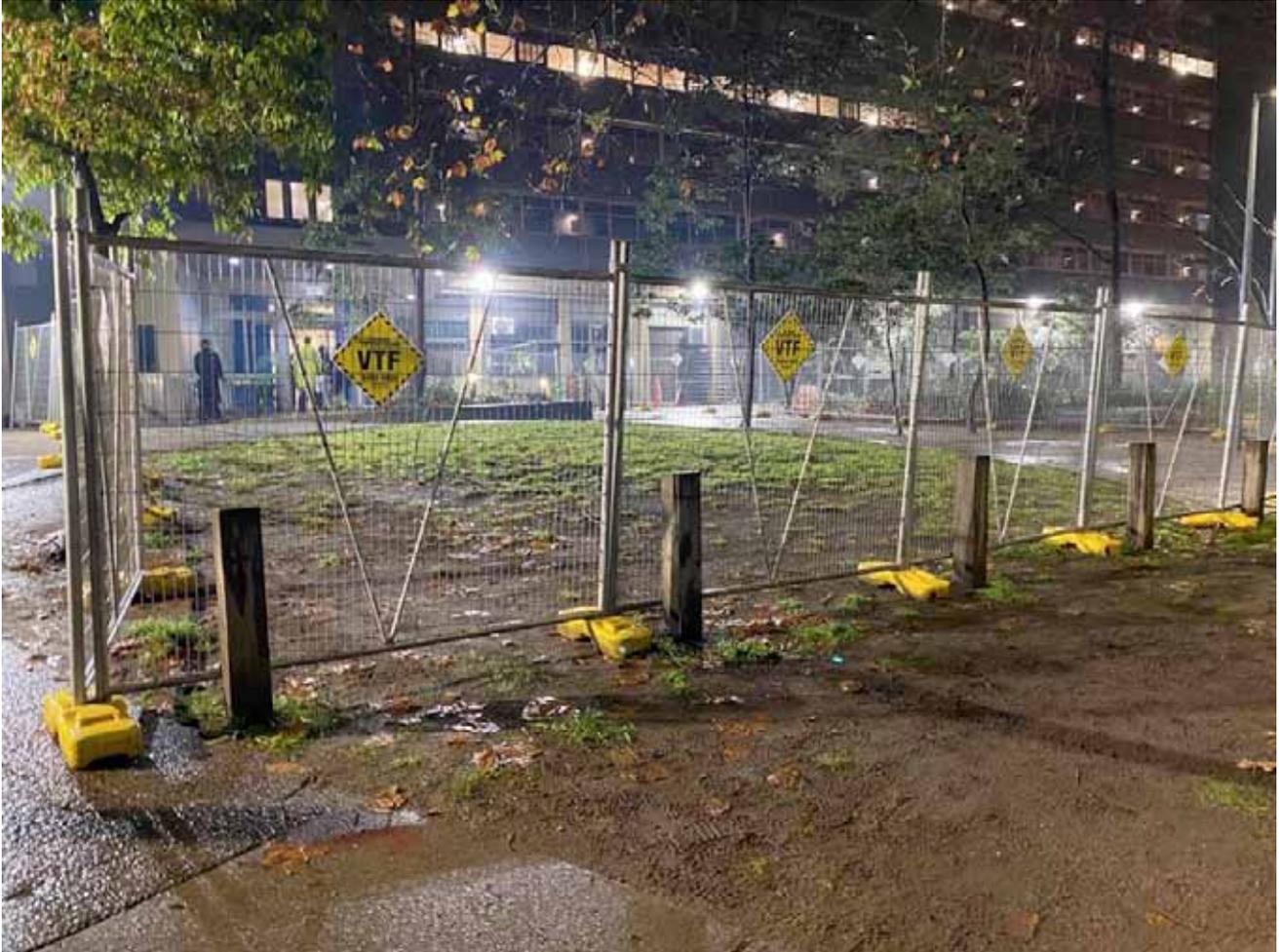
Jamilah told investigators, 'I didn't feel safe; with 20 police officers around you, you don't feel safe.'

**Figure 22: Message from community volunteer to Ombudsman officers, 11 July 2020**



Source: Victorian Ombudsman

Figure 23: Photograph of temporary fencing erected at 33 Alfred Street, 11 July 2020



Source: Flemington and Kensington Community Legal Centre

Figure 24: Media article concerning erection of temporary fencing, 12 July 2020



Source: The Age

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## Escort and supervision arrangements

554. DHHS confirmed residents accessing the fresh air and exercise program were initially escorted to and from the building by Victoria Police officers.

555. The investigation was informed Victoria Police personnel were also initially stationed around the designated exercise area, leading to the perception police were 'guarding' residents accessing the space.

556. According to the DHHS Deputy Commander, steps were later taken to reduce the perceived involvement of Victoria Police in the program, leading to the appointment of dedicated 'exercise support' workers:

I think it was partly exacerbated by the fence, by the way it looked - because the Police were sort of on the periphery where the fence was ... it felt like they were too close and it was too much of a presence, so we actually asked Police to really step back and be much less of a presence. ...

They [Victoria Police] weren't necessary to, you know, guard the people. They were really just patrolling the secure [area] - which was always the intention. And we involved the Authorised Officers more on the second day. So, they were again on the periphery and really the Health Concierge staff doubled up as the sort of exercise support staff, which then became more of a formal role and we booked additional staff from there on.

557. DHHS told the investigation exercise support workers were generally responsible for:

- escorting residents to and from their apartments
- providing education around the safe use of personal protective equipment and social distancing requirements
- checking-in with residents in relation to their health and wellbeing
- safe disposal of used personal protective equipment.

558. Some residents who spoke with investigators said that, while these officers were generally courteous in their behaviour, their presence was largely unnecessary and demeaning to residents.

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***'We have our own agency; we're human.'***

- Oral submission from resident

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559. Other residents said they declined opportunities to access the fresh air and exercise program because they did not wish to be 'escorted by Police'.

560. Evidence available to the investigation indicates DHHS at one stage considered the possibility of allowing residents access to 'unfettered' exercise.

561. This proposal was not implemented following the receipt of public health advice, which emphasised that a 'supervised exercise regime' was necessary to ensure appropriate social distancing among those entering and exiting the building.

562. In the circumstances, the investigation accepted that the escort and supervision of residents was a justified and reasonable infection prevention and control measure.

563. Nevertheless, it was clear initial association of Victoria Police with the fresh air and exercise program - perceived and actual - resulted in mixed messages about the purpose of these arrangements.

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## Bookings

564. Records supplied by DHHS indicate there were 102 enquiries relating to fresh air and exercise made to the public housing hotline from 10 July 2020, resulting in 121 bookings to the program.

565. Of these bookings, approximately two-thirds appeared to have been fulfilled – with the remainder either declined by residents or missing relevant information.

566. The investigation established approximately 41 of 141 distinct households participated in the fresh air and exercise program during this period.

567. Residents were generally allocated approximately 20-30 minutes to exercise under the program. Records show that about 60 per cent of sessions took place after 4pm.

568. Some residents who spoke with investigators said they were dissatisfied with the limited amount of time allocated to bookings under the program. Others said they would have appreciated greater opportunity to exercise during daylight hours.

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***‘I wanted sunshine, daytime ... I wanted grass.’***

– Oral submission from resident

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569. Several residents and advocates who spoke with investigators also complained that bookings made to the program were sometimes dishonoured by DHHS or rescheduled without notice.

570. This appeared corroborated by DHHS’s register of calls made to the public housing hotline during the relevant period and other records reviewed by the investigation.

571. When speaking to Ombudsman officers at the site, DHHS representatives were forthcoming about the challenges associated with facilitating access to fresh air and exercise in a way that complied with principles of infection prevention and control.

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***‘We’re trying to do as much as we can to enable as many people to safely come down as possible.’***

– DHHS Deputy Commander

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572. In a written response to the investigation, DHHS elaborated:

The design and layout of 33 Alfred Street presented some critical challenges for implementing a fresh air and exercise policy. ... The building at 33 Alfred has narrow corridors and only two lifts, which makes it very difficult to comply with the [social distancing] requirements of the directions.

Other major logistical challenges on site included the food deliveries which were three times daily, and laundry visits. These took a considerable amount of time which meant the fresh air program could not run safely whilst those activities were underway. The logistical challenge of only two small lifts in the building limited the access in and out of the building.

573. The investigation accepted these issues necessarily limited the availability and length of bookings that could be made available under the program.

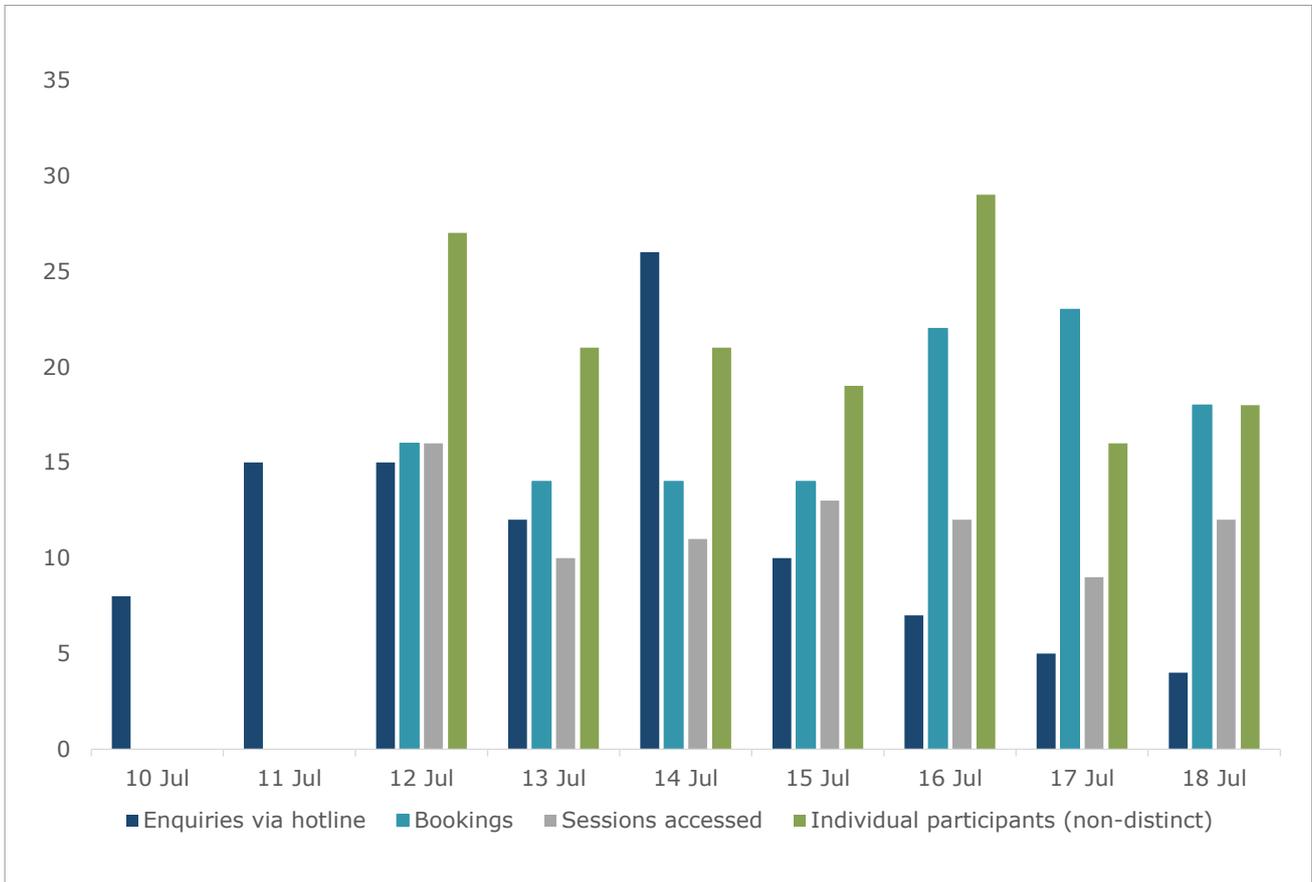
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***‘You can’t tell people to social distance in 33 Alfred Street – it’s impossible.’***

– Oral submission from community volunteer

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Figure 25: Bookings made to fresh air and exercise program, 10 July - 18 July 2020



Source: DHHS

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## **Jemal's experience of the lockdown**

Jemal was staying with a family member at 33 Alfred Street when the lockdown commenced.

Jemal told investigators he was away from the building when he heard a lockdown had been announced by the Premier of Victoria. Jemal said he immediately visited the supermarket to purchase essential supplies but, upon returning to 33 Alfred Street, found he was unable to take these up to his apartment in one trip. After some negotiation, Jemal was allowed to return to his car under police escort to collect the remaining groceries.

Of the first few days of the lockdown, Jemal said, 'The way they were treating us was worse than prisoners.'

Jemal told investigators a member of his family had a condition that warranted regular access to fresh air but was fearful of approaching police to request this. Jemal said he approached police several times himself to request fresh air for his family member, but his requests were repeatedly denied. Jemal said he was frustrated to observe that authorities were permitting pets to leave the building for fresh air and exercise but not people. When asked why this was the case, a police officer reportedly replied to Jemal, 'That's not for me to answer.'

Jemal said he was later contacted by a representative of DHHS, who told him he and his family member would shortly be permitted to leave the building as part of the fresh air and exercise program. According to Jemal, two nurses subsequently escorted members of his household outside the building to a fenced area surrounded by 'dozens' of police officers.

Jemal told investigators several further bookings for fresh air and exercise were not honoured by DHHS. Jemal said he would only become aware of this when DHHS officers failed to show up at the rostered time. According to Jemal, these sessions were not automatically rescheduled, and it was upon him to call the public housing hotline to make another booking. This appeared corroborated by records reviewed by the investigation.

Jemal said that while staff on the public housing hotline were 'lovely', some DHHS officers on the ground were difficult to deal with and unhelpful. Jemal told investigators he thought it would have been better if DHHS had arranged for all COVID-positive residents at 33 Alfred Street to be accommodated in hotels, instead of locking down the building.

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## Enforcement model

574. While the actions of Victoria Police were not a subject of the investigation, many submissions to the Ombudsman criticised the decision to involve Victoria Police in implementing and enforcing the lockdown.

### Involvement of Victoria Police

575. When the lockdown commenced, Victoria Police was already generally responsible for enforcing compliance with public health restrictions introduced in Victoria in response to the COVID-19 pandemic.
576. This was pursuant to a request made by the CHO under section 202(2) of the Public Health and Wellbeing Act during the early stages of the pandemic.
577. Victoria Police was also expected to provide support to DHHS as control agency during public health emergencies in accordance with the State Emergency Management Plan and Health Emergency Response Plan.
578. The Chief Commissioner of Police informed the investigation he was first notified of the possible lockdown at the Flemington and North Melbourne public housing estates during the morning of 4 July 2020, when he received a telephone call from the Emergency Management Commissioner.
579. During his interview with the investigation, the Emergency Management Commissioner explained this telephone call followed discussions within the State Control Centre concerning the possible appointment of a Deputy State Controller (Health) to oversee the operation:

My thinking was that it would require someone that was well-versed in emergency management arrangements, that had proven experience and expertise around running complex operations involving a number of different agencies and departments.

I actually had someone in mind that I knew from Victoria Police when I rang the Chief Commissioner and it was with a view to getting agreement so that person could take on the role of Deputy State Controller.

580. According to the Emergency Management Commissioner, the decision to seek Victoria Police's assistance in the operation was also supported by senior DHHS representatives:

Thinking about what was being proposed, it was certainly in my mind, 'How would we do this?', 'What sort of resources?', 'What sort of organisations would we need to involve?' ... There were subsequent conversations – the Deputy Chief Health Officer became involved, and the Secretary of DHHS – where again, they reinforced the point that they [DHHS] did not have the capability, or the capacity, to actually operationalise what they wanted to do based on public health advice.

581. Representatives of Victoria Police subsequently attended the 11am inter-agency meeting convened to discuss the proposed operation.
582. By this time, the State Controller (Health) had issued a memorandum to the Chief Commissioner of Police, copied to the Secretary to DHHS, seeking Victoria Police supply a Deputy State Controller (Health) for the operation.
583. This memorandum identified a proposed structure for the operation, under which Victoria Police would assume responsibility for issues of enforcement and security arising from the lockdown.
584. These arrangements were later formalised during the early afternoon of 4 July 2020.
585. Victoria Police was thereafter responsible for developing an enforcement model for the public health intervention, resulting in the deployment of large numbers of Victoria Police officers to the Flemington and North Melbourne public housing estates.

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586. During interview, the Deputy CHO, DHHS Operational Commander and Emergency Management Commissioner each stated they could not recall participating in detailed discussions relating to this enforcement model, although all indicated they were aware that Victoria Police personnel were to be deployed to the public housing estates as part of the intervention.

587. The Associate Secretary told the investigation he couldn't recall specifically discussing how the police presence might be perceived by residents, but considered it inconceivable that it wasn't thought about or discussed:

[W]e know these communities; we know that policing in these communities is sensitive. We know in particular that policing the Flemington community is sensitive, so it's inconceivable that it wasn't on our minds.

588. Referring to this issue, the Associate Secretary told the investigation:

There's been a little bit of discussion about, you know, 'Was it a police-driven response, or a public health-driven response?' ... The way I saw it at the time was that there were a whole variety of tasks that needed to be done. First and foremost among those were the public health and wellbeing tasks. And for our agency, we needed to focus on that. And in order for us to focus on that, in a very unusual situation that no one had ever managed before, we needed someone else to focus on other parts of the response. ... I appreciate this is a controversial topic, but I would say that the VicPol [Victoria Police] presence enabled us to provide the public health response that we needed.

589. The Associate Secretary later observed:

This was the worst localised public health crisis, certainly in generations, perhaps with the exception of the Hazelwood Mine fire. This was a public health emergency of very significant proportions at a very specific location.

We [DHHS] are not an agency that is in the business of cordoning off whole blocks of suburbs and patrolling the perimeter of them and making sure no one comes in, or leaves, without authorisation. It was clear to me that this wasn't something that was within our capabilities.

590. The Deputy CHO told the investigation:

I don't have specific recollections of there being [a discussion], 'Will police come? Will they not come?' I understand that there was a [sense] that there did need to be a degree of site control based on the movement of people between sites, and an understanding that there were, on occasion, volatile situations that came up in these sites.

I think there were concerns about security and also that they [Victoria Police] were a workforce that could be stood up very quickly – as opposed to the Authorised Officers, who were already deployed in a number of other areas. My understanding is that there was a sort of a dual element of both an immediate workforce who could be made available, but also a true need for there to be some police presence.

591. The Deputy CHO ventured the early emphasis on enforcement arose in part from the abruptness of the lockdown:

I think the immediacy of the announcement in some ways fed into the perception that [a significant police presence] was needed, and that perhaps a more staged approach with some more engagement over a 24-hour period, and preparation of residents, would've meant that that was perhaps not as necessary as it might've been, given the immediacy.

592. When asked about the decision to involve Victoria Police in coordination and enforcement of the lockdown, the Secretary to DHHS told the investigation:

My recollection is that I was informed by the Premier's Office that the ... public health response would be a joint operation between DHHS and Victoria Police to ensure broader public safety, while protecting tenants of the estates from exponential spread of COVID-19[.]

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593. This appeared corroborated by an email sent by a representative of the Office of the Premier to the Secretary at 9:58am on 4 July 2020, following a briefing delivered by DHHS to the Office of the Minister for Health.

594. This email requested a written briefing concerning aspects of the proposed public health intervention and relevantly stated:

20. We will need security for this and it can't be private security, it will need to be police/PSOs [Protective Services Officers].

595. The investigation noted that by this time, prominent concerns had been raised about the involvement of private security personnel in Victoria's hotel quarantine scheme.

596. The Deputy CHO told investigators she was not specifically consulted in relation to the enforcement model adopted by the operation.

597. When asked whether she would have been likely to endorse this enforcement model, the Deputy CHO responded:

I'm not sure. This entire outbreak and the things that we have done - I would say there have been a lot of things to which pre-COVID me would have said, ... 'We would never do something like that.' And then there comes a point where you are weighing up the potential of many hundreds or many thousands of deaths [or] taking away significant liberties. ... I think I probably would've advocated for it to be less imposing than it was in the initial times.

598. When asked whether it fell within her functions or responsibilities to provide advice on issues of enforcement, the Deputy CHO responded:

I think that's a difficult question. I'm not sure it would've made any difference.

I didn't necessarily agree with the extent of the police presence, and there had been previous conversations about police involvement in outbreak management in general, and I had expressed concern about that, particularly given, at that point, the population with whom we were dealing, or for whom this outbreak was impacting, which was a significantly different population to the returned travellers in the March/April cohort.

I couldn't tell you if those conversations are documented in writing, but I certainly recall having them with various members of the State Control Team and it didn't necessarily impact the degree of police involvement.

599. The Deputy CHO nevertheless confirmed the decision to involve police in enforcement of the lockdown featured in her consideration of the human rights impacts of the lockdown:

Knowing the demographics of the populations in these towers, I was acutely aware ... that these were populations which came from countries [where], when the police came knocking at your door, people disappeared and didn't come back. And, you know, not universally obviously, but there was a significant number of people who had been detained against their will before, who had been victims of torture under dictatorships, and that this was likely to cause significant trauma and distress for them. ...

There was, you know, a real balance between doing things which would have a collective positive impact on health in terms of the spread of disease and doing things that would have an individual negative impact.

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***'This entire outbreak and the things that we have done - I would say there have been a lot of things to which pre-COVID me would've said, ... "We would never do something like that." And then there comes a point where you are weighing up the potential of many hundreds or many thousands of deaths ...'***

- Deputy CHO

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### **‘Broader public safety concerns’**

Several witnesses who spoke with the investigation indicated the decision to involve Victoria Police personnel in implementation of the lockdown arose in part from security concerns relating to the Flemington and North Melbourne public housing estates.

In this regard, the investigation was informed that members of DHHS’s Infection Control Team had previously been required to withdraw from the public housing estates due to a significant security incident.

DHHS’s human rights assessment relating to the decision to impose the lockdown stated that Victoria Police had been ‘chosen to lead the control and coordination of Operation Benessere’ due to ‘broader public safety risks’ considered likely to be associated with the Flemington and North Melbourne public housing estates, ‘including but not limited to child safety, sex offenders and family violence.’

During his interview with the investigation, the Emergency Management Commissioner observed this statement appeared incorrect on its face, as Victoria Police were not given control of Operation Benessere.

The latter assumption relating to ‘broader public safety risks’ also appeared contradicted by information later collected by authorities administering the lockdown. For example:

- on 5 July 2020, DHHS identified there were eight known child protection cases within the Flemington and North Melbourne public housing estates, none of which were classified as ‘high risk’
- on 6 July 2020, the Emergency Management Team identified there were 11 ‘persons of interest’ to Corrections Victoria within the public housing towers, none of whom were deemed to present a risk to authorities.

The investigation noted these figures did not appear to be substantially disproportionate to state-wide levels.

DHHS’s human rights assessment did not address the question of whether the significant police presence at the Flemington and North Melbourne public housing estates was likely to limit the right to humane treatment when deprived of liberty, nor did it consider whether possible alternatives existed to this arrangement.

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## Perception and issues of coordination

600. Many submissions to the investigation criticised the decision to deploy large numbers of Victoria Police personnel to the Flemington and North Melbourne public housing estates when the lockdown commenced.

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***‘There will be at least 500 police officers per shift. There will be a number of VicPol staff on each floor of these towers, and then a larger number of Victoria Police members will essentially police that hard lockdown at access points to these towers.’***

- Premier of Victoria, televised statement on 4 July 2020

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601. Victoria Police maintained a visible presence at 33 Alfred Street during both phases of the intervention, although the number of police officers deployed to the site was progressively reduced during the period following revocation of the Detention Directions.

602. Many residents who spoke with investigators said they and their family members found the image of police officers encircling and entering their building to be extremely confronting.

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***‘It was absolutely horrifying. They blocked every road, every entry. They were sitting down in the foyer like they owned the place. This is our home.’***

- Oral submission from resident.

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603. These individuals observed many people living at 33 Alfred Street had previously lived under authoritarian regimes and were likely to experience the police presence very differently to other Victorians.

604. Residents and advocates also referred to a poor existing relationship between Victoria Police and Flemington and North Melbourne public housing residents, including previously litigated concerns about racial profiling of African Australians.

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***‘There were a lot of police officers coming down from country regions who didn’t have much experience dealing with communities like ours.’***

- Oral submission from resident.

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605. Some health workers engaged in the operation told investigators they also thought the significant police presence was unreasonable and possibly counterproductive to the public health objectives of the lockdown.

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***‘The presence of such large numbers of police certainly did not appear to assist with the public health aspects of the response[.]’***

- Submission from clinician.

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606. Many complaints and submissions to the Ombudsman said the decision to deploy Victoria Police officers to 33 Alfred Street as ‘first responders’ also resulted in significant confusion about the terms under which residents were being detained.

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607. These individuals observed it effectively fell upon Victoria Police officers to inform residents of the lockdown and interpret and apply the terms of the Detention Directions.

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***'A few of us set up a WhatsApp group to quickly disseminate information. ... Some of us spoke with Police downstairs - they at least gave us some clarity around delaying the hard lockdown until 12am. ... There were more police [officers present] than people.'***

- Oral submission from resident.

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***'I think everybody in the first couple of days [was] a little bit ... "confused" might be the word I'd use, in terms of, "What does this really mean, what are the parameters of these orders?"'***

- DHHS Deputy Commander

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608. While the investigation was informed that Authorised Officers were deployed during the first evening of the lockdown, records indicate that within hours of the lockdown commencing, DHHS was notified of concerns from community leaders that 'no one [was] supporting VicPol [Victoria Police] on the ground'.

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***'Why was it a police-led operation, rather than a community-led arrangement?'***

- Oral submission from community volunteer

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***'Our members were forced to use their initiative in order to fulfil a welfare role for which it appeared that DHHS had no immediate plan or capacity to undertake.'***

- Submission from Police Association of Victoria

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609. Many residents and advocates who spoke with investigators also said the use of Victoria Police to enforce compliance with the lockdown led to inefficiencies and significant delays in obtaining necessary supplies.

610. Several community volunteers who spoke with investigators said it was not uncommon for requests to be approved by DHHS only to then be delayed or declined by Victoria Police officers controlling access to the building, and vice versa.

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***'Police were acting as gatekeepers to a process about which they had no knowledge, and whose real gatekeepers (DHHS) were kept at arm's length and isolated from clients and service providers.'***

- Report submitted to VEOHRC

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611. This appeared corroborated by DHHS's register of calls made to the public housing hotline.

612. Despite this, several residents reported positive interactions with Victoria Police, sometimes contrasting the perceived helpfulness of individual police officers with their difficulties in obtaining assistance through other channels such as the public housing hotline.

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613. The investigation was also informed that coordination between DHHS and Victoria Police generally improved with the passage of time, as processes and lines of authority came to be better understood.

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***‘DHHS had time to better prepare a response to outbreaks in high density housing, such that the mobilisation of Victoria Police members and other agency workers within a matter of hours may not have been necessary or may have been avoidable altogether.’***

- Submission from Police Association of Victoria.

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616. At a minimum, this should have been addressed in the human rights assessment informing the decision to impose the lockdown.

617. Responding to the Ombudsman’s draft report, DHHS observed that no alternative workforce ‘capable of effectively preventing a person from crossing the *cordon sanitaire* has been identified’.

618. The investigation maintained that DHHS, as control agency and the authority responsible for imposing the Detention Directions, bore ultimate responsibility for ensuring implementation and perception of the intervention remained consistent with its public health objectives.

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***‘Police should not be the primary contact point for a health response and should have been far less visible throughout the lockdown.’***

- Submission from health service provider

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### Consideration of alternatives

614. Information available to the investigation indicated the enforcement model adopted by the intervention was not the subject of significant debate during planning for the lockdown.

615. While the investigation was satisfied the Deputy CHO considered the human rights implications of this aspect of the operation when determining to impose the lockdown, overall, it appeared that insufficient consideration was given by DHHS to how the significant police deployment was likely to be perceived and experienced by residents, and whether any practical alternatives existed.

Figure 26: Excerpts from DHHS public housing hotline register, 5 July – 18 July 2020

10 year old son has asthma and has run out of his preventer. Also requires food

This tenant has advised that they have not received any flyer to stay in unit or how to access food etc. She received an email from the school telling her to go down to the Lobby to get food and there was no food. She spoke to the police and they advised of phone number for her to call us.

Tenant has prescription for essential medication for his mother. 2nd request for today. Tenant would also like to apply for support/hardship payments. [REDACTED] advises that there is no one downstairs except for police who are unable to assist with these issues. Urgent medicinal needs.

Volunteers having issues with inconsistent management between the buildings and having issues with the police. He fears there will be a confrontation if things are not addressed soon.

Tenant is being refused entry to the block, he has provided id showing his address and is still being refused entry, he is being forced to live in his car, he understands the consequences of re entering the units, why is he being refused entry. I can confirm the DHHS records indicate he is listed as a tenant. He has nowhere else to go.

possible infected eye - advised to seek assistance from medics on site

tenant went down stairs and was advised to call us -

reiterated speak to police or security on property she was going to speak with police to seek medical attention

Tenant returned to the block 33 Alfred Street when the lockdown first occurred as he was in another building that had been locked down. He was at [REDACTED] He tried to return to Alfred St and showed Police the Detention Direction Letter but was refused exit form [REDACTED] block and re-entry to his property and not able to return . He now wants to return to his unit tonight as he is effectively homeless. He has tested Negative to Covid 19. Please call back [REDACTED] as a matter of urgency.

[REDACTED] is waiting on a parcel from her work to be delivered a head set she has called multi times and police have it but want us to confirm to hand the parcel over. leading sergeant needs confirmation.

spoke to [REDACTED] and them [REDACTED] still no access to the item.

she has already missed work meetings and needs this head set urgently. if she misses many more she will not have a job.

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## Access to exemptions

619. Both the Detention Directions and Close Contacts Directions included provisions under which people at 33 Alfred Street could receive permission to leave their homes on compassionate and other grounds.
620. Under the Detention Directions, people at 33 Alfred Street could leave their homes if permitted to do so:
- to receive medical care
  - where reasonably necessary for their physical or mental health
  - on compassionate grounds.
621. Under the Close Contacts Directions, people at 33 Alfred Street could receive a written exemption from self-isolation or self-quarantine requirements from the CHO or Deputy CHO, if considered appropriate, having regard to:
- the need to protect public health
  - the principles in the Public Health and Wellbeing Act, including the precautionary principle and the principle of proportionality.
622. In practice, residents seeking to leave their homes during the lockdown for compassionate and other reasons were required to request permission from an Authorised Officer stationed on-site or by telephoning the public housing hotline.
623. According to DHHS, requests for exemptions were referred to an Authorised Officer embedded within the Victoria Police command, 'ensuring that requests on the ground could be acted upon quickly'.
624. Despite this, the investigation noted residents did not appear to have been formally advised of the process for making requests for exemptions under either the Detention Directions or the Close Contacts Directions.

625. Some residents who spoke with investigators indicated they were aware that others had obtained permission to leave the building, but overall there appeared to be limited understanding of the process and circumstances under which such requests could be made.

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***'There was no clear or defined method of obtaining ... an exemption quickly or even basic information for residents [about how to do so].'***

- Submission from Inner Melbourne Community Legal

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## Exercise of discretion

626. DHHS maintained a register of residents granted temporary leave from 33 Alfred Street during the lockdown.
627. According to this register, between 5 July and 18 July 2020:
- two residents were granted permission to self-isolate in hotel accommodation
  - nine residents were granted permission to leave the building for the purposes of receiving medical treatment or accompanying another resident receiving such treatment.
628. This register did not appear to provide a complete list of exemptions granted by Authorised Officers.
629. Investigators received anecdotal evidence of other cases where residents were permitted to temporarily leave their homes in compassionate circumstances.
630. Records reviewed by the investigation tended to indicate requests to leave 33 Alfred Street for compassionate and other grounds were treated with an appropriate level of discretion.
631. However, it appeared some requests for exemptions were not recognised as such or escalated to Authorised Officers for consideration.

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## Case studies – exercise of discretion

### Asma's request

During the second day of the lockdown, Asma telephoned the public housing hotline to seek clarification about the lockdown requirements. Asma explained that her mother ordinarily lived alone at 33 Alfred Street but was temporarily staying with family in another suburb when the lockdown began. Asma explained that her mother's disabilities meant she required assistance with daily tasks.

Asma asked DHHS whether in the circumstances her mother was required to return home to 33 Alfred Street.

Records supplied by DHHS do not suggest Asma's request was escalated to an Authorised Officer for consideration. It nevertheless appears Asma's mother was not compelled to return to 33 Alfred Street.

### Kim's request

During the second day of the lockdown, Kim telephoned the public housing hotline to seek permission to leave 33 Alfred Street to collect his children for a scheduled visit. The DHHS officer who spoke with Kim recommended that he receive a follow-up call to discuss the matter further. At this time, the officer flagged concerns that Kim did not seem to be 'coping emotionally' with the issue.

Two days later, Kim telephoned the public housing hotline again to follow-up his request. Kim indicated he had spoken with Victoria Police officers who informed him he needed 'something in writing' from DHHS to facilitate the access visit. Kim confirmed he had recently tested negative for COVID-19.

When asked about the outcome of this request, DHHS confirmed an officer telephoned Kim to offer emotional support.

DHHS did not clarify whether Kim's request to collect his children was escalated to an Authorised Officer for consideration of an exemption, and it is unclear whether the access visit was ultimately allowed to take place.

### Faduma's request

During the second week of the lockdown, Faduma contacted DHHS to request permission to leave 33 Alfred Street to pay her respects to a dying family member in hospital. Faduma told DHHS she had tested negative to COVID-19 and that she could provide a letter from the hospital confirming the details.

DHHS's records indicate Faduma's request was escalated to an Authorised Officer, who identified that the hospital was not prepared to authorise Faduma's visit under the *Hospital Visitor Directions* (which generally prohibited hospital visits by people required to self-quarantine during the COVID-19 pandemic).

Later that afternoon, Authorised Officers telephoned Faduma's family to discuss this outcome.

# Health and wellbeing

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632. This section of the report examines the nature and appropriateness of restrictions on people's access to medical care and medical supplies while detained at 33 Alfred Street.

637. The United Nations Human Rights Committee has similarly recognised that access to healthcare is relevant to ensuring that people deprived of liberty are treated humanely.<sup>25</sup>

## Access to medical care and supplies

633. Although there is no Victorian or Commonwealth legislation explicitly enshrining the right to health, the objectives of the Public Health and Wellbeing Act recognise the 'significant role' of the Victorian Government in promoting and protecting the public health and wellbeing of people in Victoria.

634. International human rights standards recognise that people have the right to enjoy the highest attainable standard of physical and mental health conducive to living a life in dignity.<sup>23</sup>

635. As noted in the preceding section of this report, within Victoria, the Charter of Rights Act also recognises that people deprived of their liberty should be treated with humanity and respect for their inherent dignity.

636. The Supreme Court of Victoria has recognised access to healthcare is a key feature of this right:

Access to health care is a fundamental aspect of the right to dignity. ... Like other citizens, [detained people] have a right to a variety of facilities, goods, services and conditions necessary for the realisation of a high standard of health. That is to say, the health of a [detained person] is as important as the health of any other person.<sup>24</sup>

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23 See *International Covenant on Economic Social and Cultural Rights*, article 12(1).

24 *Castles v Secretary, Department of Justice* [2010] VSC 310, per Emerton J at [108].

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25 See eg *Mpandanjila v. Zaire*, Human Rights Committee, Communication No. 138/1983, UN Doc. CCPR/C/27/D/138/1983 (26 March 1986); *Madafferi v. Australia*, Human Rights Committee, Communication No 1011/2001, UN Doc. CCPR/C/81/D/1011/2001 (26 August 2004).

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## Rights relating to medical care and treatment in detention settings

Several international human rights standards and guidelines explicitly guarantee access to medical care and treatment to detained persons.

These include:

- the Detention Principles, which provide that people under detention or imprisonment should be provided with medical care and treatment whenever necessary
- the Mandela Rules, which require prisons to have a health-care service for 'evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs' and provide for access to health care services that ensure continuity of treatment and care and protect and improve physical and mental health
- the Havana Rules, which provide that juveniles deprived of their liberty should 'receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated'
- the *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*, which provide for gender-specific health-care services for women at least equivalent to those available in the community.

Within Australia, the *Australian Charter of Healthcare Rights* recognises that people in healthcare settings have the right to:

- access healthcare services and treatment
- be treated as an individual, and with dignity and respect
- have culture, identity, beliefs and choices recognised and respected.

In Victoria, the Corrections Act recognises that people in prison have the right to 'have access to reasonable medical care and treatment necessary for the preservation of health'.

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## Restrictions on accessing medical care and supplies – initial phase of the lockdown

638. Under the Detention Directions, people at 33 Alfred Street were entitled to leave their premises if granted permission to do so:

- for the purposes of attending a medical facility to receive medical care
- where ‘reasonably necessary’ for their physical or mental health
- on compassionate grounds.

639. People at 33 Alfred Street did not require permission to leave their homes in an emergency situation.

640. While the Detention Directions generally prohibited people at 33 Alfred Street from allowing other people to enter their homes, an exception existed for individuals ‘authorised to be there for a specific purpose’, including for ‘medical reasons’.

## Restrictions on accessing medical care and supplies – second phase of the lockdown

641. Under the Close Contacts Directions, ‘diagnosed persons’ and ‘close contacts’ were authorised to leave their premises:

- for the purposes of obtaining medical care or supplies
- in any emergency situation
- for the purposes of visiting a patient in hospital if permitted to do so under the *Hospital Visitor Directions* issued by the Deputy CHO during the COVID-19 pandemic.

642. Unlike the Detention Directions, the Close Contacts Directions did not require ‘diagnosed persons’ or ‘close contacts’ to obtain permission to leave their premises for the purposes of obtaining medical care or supplies.

643. However, in practice, residents at 33 Alfred Street were not able to leave their homes to access medical care or supplies during this period without obtaining permission from DHHS.

644. Under the Close Contacts Directions, ‘diagnosed persons’ and ‘close contacts’ were permitted to allow other people to enter their homes:

- where necessary for medical or emergency purposes
- where the other person was a disability worker and it was necessary for that person to provide a disability service
- where necessary to provide personal care or household assistance as a result of a person’s age, disability or chronic health condition.

## Primary and emergency care

### Access to primary care

645. Ambulance Victoria officers were deployed to the Flemington and North Melbourne public housing estates during the first evening of the lockdown to attend to immediate medical needs.

646. DHHS meanwhile developed and implemented an on-site healthcare provision model for the operation.

647. Under this model, Royal Melbourne Hospital Field Emergency Officers were engaged from the morning of 5 July 2020 to provide 24-hour basic on-site primary care.

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648. At the request of DHHS, on 6 July 2020 community health provider Cohealth also established field primary care clinics at each public housing estate.

649. Services provided by Cohealth included:

- primary care clinical consultations
- delivery of medication
- immediate care for injuries or illnesses, including:
  - o minor lacerations
  - o psychological distress
  - o clinical care for chronic conditions, pending the resumption of usual care arrangements with existing providers.
- clinical care and social support for residents testing positive to COVID-19.

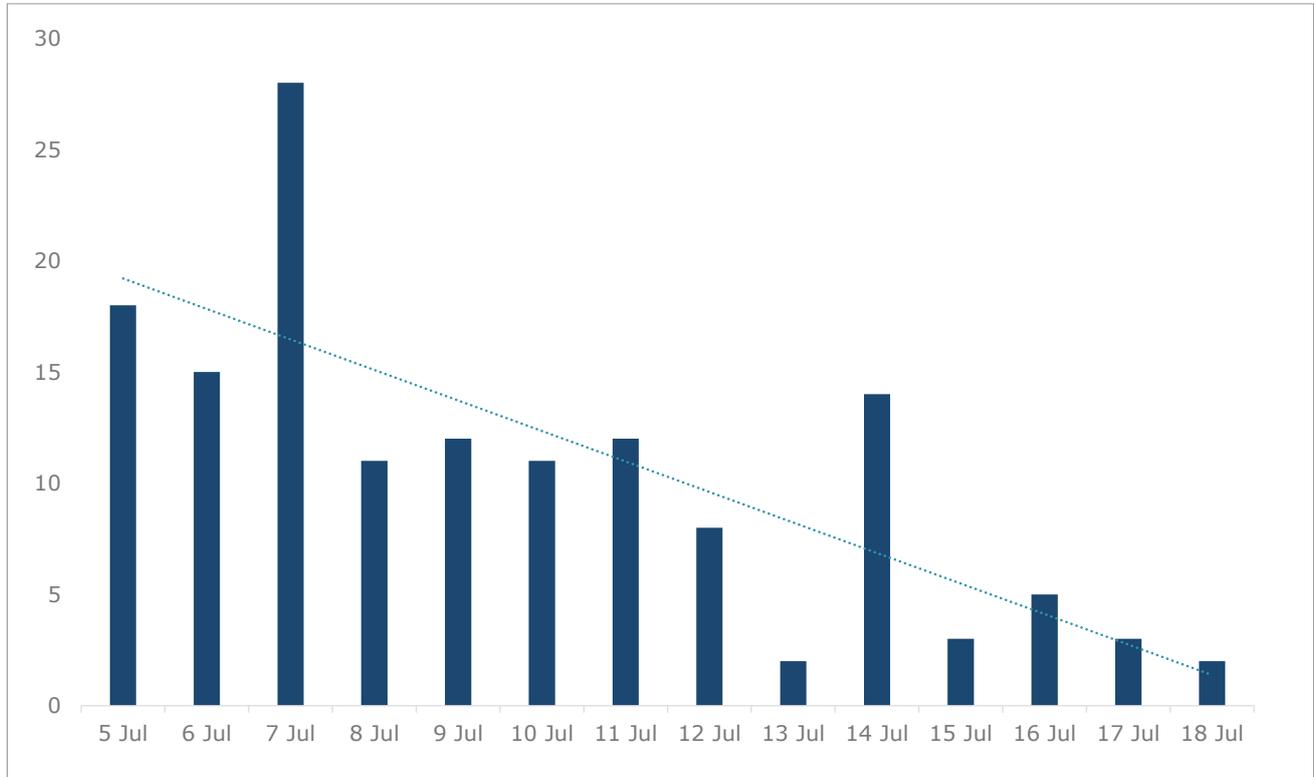
650. In a submission to the investigation, Cohealth observed its service-delivery model benefited from an existing relationship with communities living at the Flemington and North Melbourne public housing estates:

Approximately one third of residents were identified as existing clients of Cohealth and we arranged for offsite Cohealth staff to start calling them to let them know what was happening and ascertain the primary health care supports they required. We tried to use staff who were familiar to the clients to make the calls to minimise residents' anxiety.

651. During the initial phase of the lockdown, residents seeking access to medical care were generally required to telephone the public housing hotline.

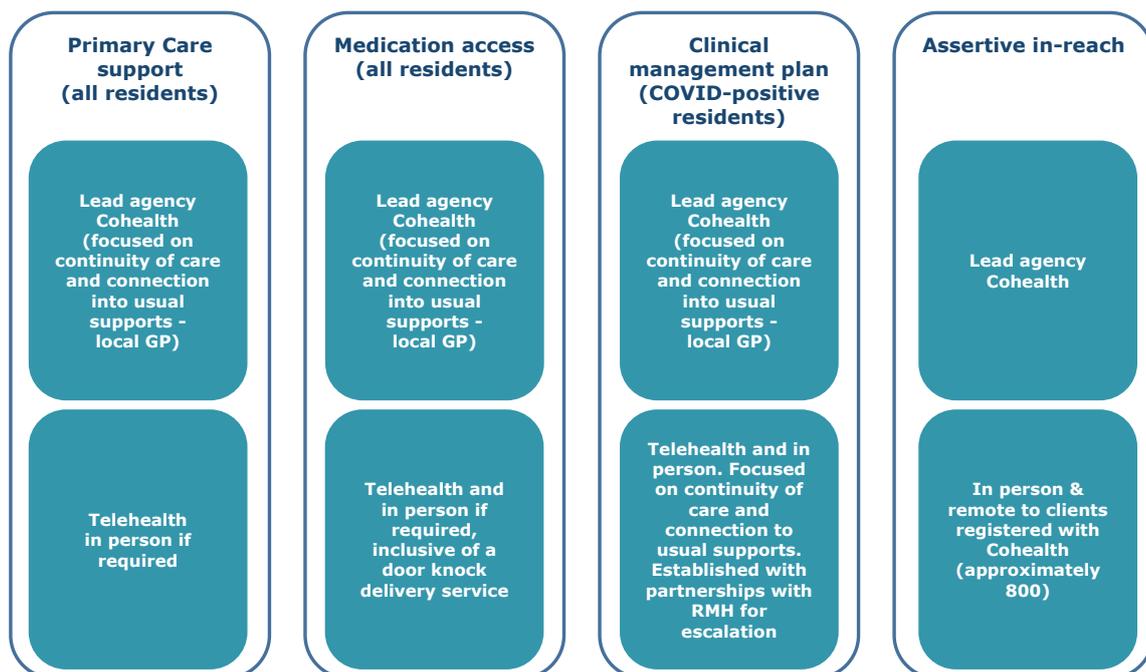
652. In response to significant call volumes, Cohealth later established and maintained a dedicated health hotline, the availability of which was promoted through flyers, proactive phone calls and in response to requests made to the existing DHHS hotline.

**Figure 27: Requests made to DHHS public housing hotline relating to medical care and supplies (33 Alfred Street)**



Source: Victorian Ombudsman; data supplied by DHHS

**Figure 28: Cohealth primary care model**



Source: Cohealth

653. During the second phase of the lockdown, a health concierge was also established at the base of 33 Alfred Street to conduct temperature checks and provide personal protective equipment to residents and staff.
654. According to DHHS, from 14 July 2020 the Royal Children's Hospital, Royal Women's Hospital and Royal Melbourne Hospital also agreed to provide acute medical advice to residents through a dedicated 24-hour hotline.
655. Records available to the investigation indicate primary healthcare services were generally well-established and functioning by the afternoon of 6 July 2020.
656. While in some cases significantly delayed, materials distributed to residents tended to provide clear and accessible information about the processes for seeking medical attention.

657. The investigation was nevertheless informed the immediacy of the operation created logistical challenges for service providers engaged in the health response.

658. Cohealth observed it was first approached by DHHS on 4 July 2020, the day the lockdowns commenced:

Cohealth was advised of the lockdown by DHHS officials on Saturday 4 July and immediately mobilised to be on the ground at the public high rise on Sunday morning.

Early challenges included finding a suitable space to establish a medical clinic, accessing information on which residents had tested positive for COVID, creating a system to triage patients and to establish stable IT connections and basic administrative support. Cohealth staff on the ground were required to be remarkably adaptable and come up with quick solutions where there wasn't time to establish formal structures or pathways.

**Figure 29: Excerpts from English and Arabic-language factsheets issued to residents on 5 July and 7 July 2020, respectively**

**What if I need medical attention?**

If you are feeling unwell, please call **1800 961 054** and explain that you need medical help. If you need a translator, please call **131 450** first.

When you call this phone number you will be connected to a doctor or nurse who can give you advice or organise a face-to-face appointment if you need one.

If you have a medical emergency, ring **Triple Zero (000)** and ask for an ambulance.

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**ماذا يحدث إذا كنت بحاجة للعناية الطبية؟**

إذا كنت تشعر بالتوجع، الرجاء الإتصال بالرقم 1800 961 054 وأن توضح أنك بحاجة للمساعدة الطبية. وإذا كنت بحاجة إلى مترجم يجب عليك أن تتصل أولاً بالرقم 131 450.

عندما تتصل برقم الهاتف المذكور سيتم تحويل إتصالك إلى طبيب أو ممرضة ويمكنهم تزويدك بالنصيحة أو الترتيب لموعد وجهاً لوجه إذا كنت بحاجة لتحديد موعد طبي.

إذا كنت تواجه طارئاً طبياً، إتصل بالرقم ثلاثة أصفار (000) واطلب الإسعاف "أمبولنس".

Source: DHHS

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659. The investigation was informed provision of primary care was also sometimes undermined by confusion about lines of authority on the ground and issues of coordination between DHHS and Victoria Police.

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***‘The police were placed in a leading role in implementing the lockdown and tightly enforced restrictions on who could enter and exit the apartment towers. This led to difficulties in Cohealth staff obtaining permission to enter the flats to fulfil their role in providing primary health care.’***

– Submission from Cohealth

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660. The investigation was also informed that although Cohealth was engaged to provide primary care from the beginning of the lockdown, it was not initially given details of which residents had tested positive for COVID-19.

661. Cohealth observed:

[W]e were not provided with details of which residents were COVID positive until nine days after the commencement of the lockdown. Cohealth staff requested this information daily so our on the ground GPs and nurses could contact and outreach to residents to assess their health and welfare needs. We were advised that this information could not be provided due to Victorian legislation prohibiting the sharing of information with non-government organisations, including clinicians.

662. The DHHS Deputy Commander explained to investigators it took time for DHHS to establish protocols for sharing information with Cohealth:

There are some tight privacy rules around public health data, so I don't know that there were the necessary protocols in place immediately to share that information between Public Health and Cohealth. And because Cohealth were not conducting the testing at that point in time they wouldn't have been the primary providers, or the handlers of that medical information.

Royal Melbourne were formally the sort of clinical governance lead and doing the testing and in receipt of the data, which they then shared with Public Health. Over time we were able to establish a process whereby Public Health informed State Control who informed me. I then shared that information with Cohealth.

663. The investigation considered disclosure of this information to Cohealth would have been readily permissible under the *Privacy and Data Protection Act 2014* (Vic) and *Health Records Act 2001* (Vic).<sup>26</sup>

### **Arrangements for accessing inpatient treatment and emergency care**

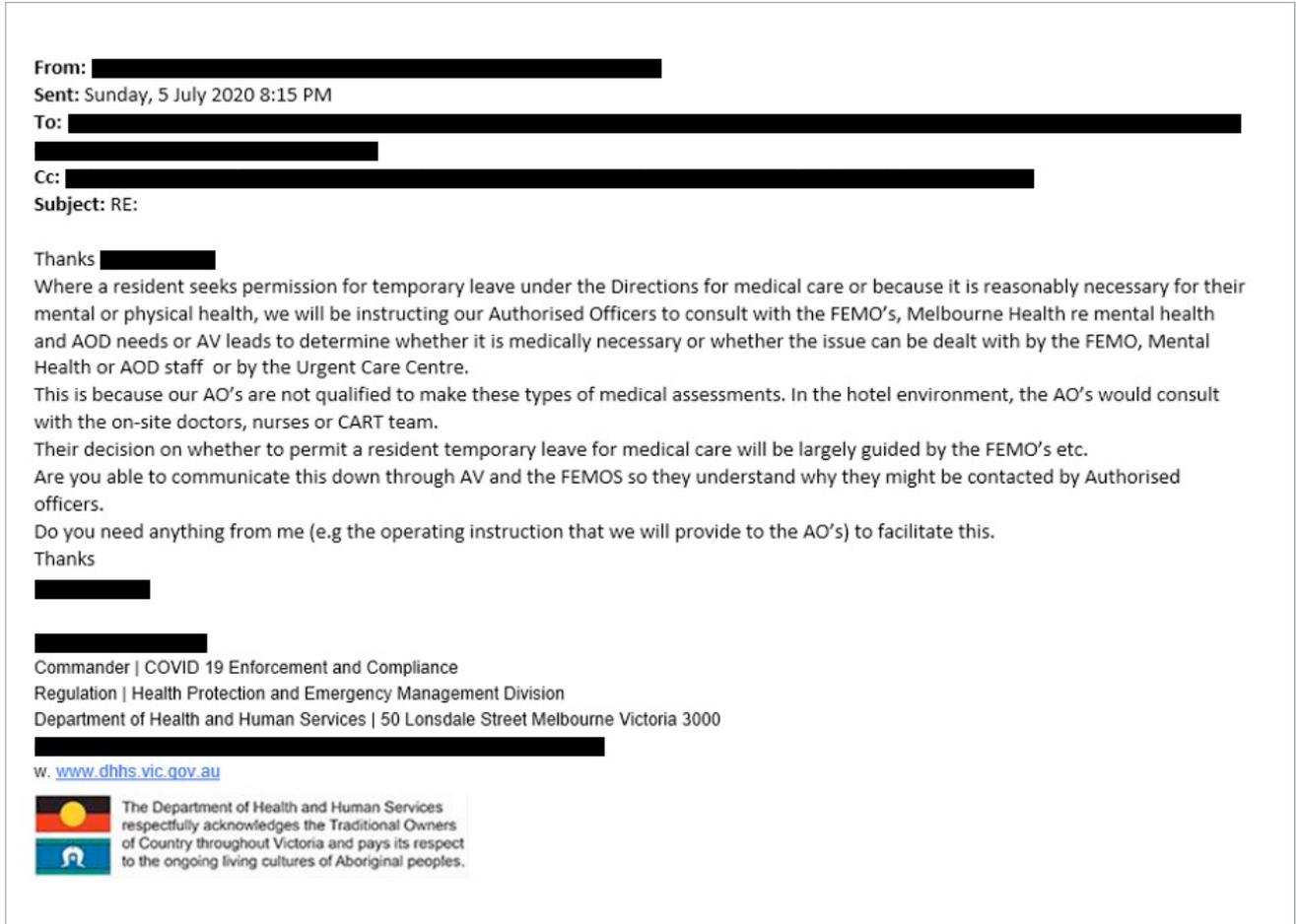
664. Requests for permission to leave 33 Alfred Street on medical grounds were required to be considered by Authorised Officers.

665. As the following email supplied by DHHS shows, in practice, these individuals were expected to consult with clinical staff before determining to temporarily release a person from the building for health purposes.

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<sup>26</sup> See *Privacy and Data Protection Act 2014* (Vic), Schedule 1, Information Privacy Principle 2.1(d)(ii); *Health Records Act 2001* (Vic), Schedule 1, Health Privacy Principle 2.2(h)(ii). See also the information sheet prepared by the Office of the Victorian Information Commissioner and the Health Complaints Commissioner on *Privacy and COVID-19*, dated April 2020 available online: <https://ovic.vic.gov.au/wp-content/uploads/2020/04/Privacy-and-COVID-19.pdf>.

Figure 30: Extract of internal DHHS email, 5 July 2020



Source: DHHS

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666. The investigation observed that several residents at 33 Alfred Street appeared to have been promptly transported to hospital for inpatient treatment or emergency care over the course of the lockdown.

### **Case studies - emergency care and inpatient treatment**

#### **Sahra's procedure**

During the first week of the lockdown, a member of the family telephoned the public housing hotline to report Sahra had developed painful growths on her skin. This person asked that Sahra be examined by a doctor within the next few days.

DHHS's records show the request was initially referred to the nurse on call at the North Melbourne public housing estate. After examining Sahra, the nurse on call recommended she be treated immediately.

According to DHHS's records, Sahra was subsequently permitted to leave 33 Alfred Street to undergo a procedure at the Royal Children's Hospital, accompanied by another member of the household.

#### **Zhen's emergency treatment**

During the first week of the lockdown, a member of the family telephoned the public housing hotline to report Zhen was suffering health complications associated with a previous physical injury. The family member explained Zhen had been receiving specialist treatment prior to the lockdown but was now in significant pain.

DHHS's records show it immediately arranged for an ambulance to attend 33 Alfred Street to transport Zhen to hospital for treatment.

Several days later, Zhen was permitted to leave 33 Alfred Street again for further treatment.

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667. As part of Operation Benessere, Ambulance Victoria undertook command of pre-hospital health resources, triaging, and treatment and transport of patients to hospital.
668. Some residents and community volunteers told the investigation they believed requests for paramedics to attend 33 Alfred Street during the lockdown required 'clearance' from DHHS.
669. In response to enquiries from the investigation, Ambulance Victoria confirmed this was not the case.
670. During the lockdown, Ambulance Victoria operated in accordance with its established 'Revised Clinical Response Model', which focuses on assessing individual patient needs and the most appropriate response to ensure ambulances are available for emergencies.<sup>27</sup>
671. In some cases, this may have led Ambulance Victoria to determine transport to hospital was not the most appropriate response to a resident's needs.
672. Responding paramedics attending 33 Alfred Street received an automated warning that they were attending a location known to be accommodating COVID-19 positive people.
673. Ambulance Victoria informed the investigation this was the standard approach for such locations and was customary for other identified risks to paramedics arising during ordinary business.

## Arrangements for accessing medical supplies

674. Residents seeking access to medication and other medical supplies were initially required to telephone the public housing hotline. From 11 July 2020, residents were also able to telephone the direct hotline operated by Cohealth.
675. Requests for medical supplies submitted to the public housing hotline were assessed for urgency and then allocated to Cohealth or another relevant support agency for action.
676. Residents, community volunteers and advocates who spoke with the investigation described frustrations with accessing medical supplies during the lockdown.
677. These individuals referred to:
- significant delays in receiving medication, including over-the-counter items such as paracetamol
  - difficulties getting prescriptions to pharmacists
  - challenges delivering medication to residents after it arrived at the North Melbourne public housing estate.
678. Many residents and advocates who spoke with investigators reported that DHHS initially struggled to fulfil requests for medication made to the public housing hotline.
679. This appeared corroborated by DHHS's register of calls received during this period.

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<sup>27</sup> See Ambulance Victoria 'Revised Clinical Response Model Evaluation Report' (June 2017) available online at: <https://www.ambulance.vic.gov.au/wp-content/uploads/2017/06/av-revised-clinical-response-model-evaluation-report.pdf>.

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680. According to these records:

- between 5 July and 18 July 2020, approximately 700 calls were made to the public housing hotline in relation to 33 Alfred Street
- of these, the most common approaches concerned requests for groceries and other supplies (29 per cent), access to fresh air and exercise (12 per cent) and access to medical supplies (11 per cent).

681. The investigation observed that most requests appeared to have been allocated to a responsible officer or support agency within 24 hours, but around 11 per cent were not processed within this period.

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***‘You spend all day making phone calls, just for something as simple as Panadol. You’d ask for Panadol at 8am and if you’re lucky, you’d get it at midnight, if not the next morning. ... If it wasn’t for community organisations such as AMSSA [Australian Muslim Social Services Agency], people would have been starving three days into the lockdown.’***

- Oral submission from resident

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682. Of the requests not allocated within 24 hours, the overwhelming majority (75 per cent) were received between 5 July and 7 July 2020, corresponding with the first three days of the hotline’s operation.

683. The investigation noted that approximately 10 per cent of all calls made to the public housing hotline related to previous requests that did not appear to have been followed-up with residents.

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## **Case studies – requests made to the DHHS public housing hotline**

### **Khaled's request for culturally appropriate food and medical supplies**

Khaled, a resident at 33 Alfred Street, telephoned the public housing hotline during the afternoon of the second day of the lockdown to inform DHHS his household lacked enough food to last the evening. Khaled requested that DHHS deliver enough halal food for nine people.

Khaled also informed DHHS that residents within his household had tested positive for COVID-19. Khaled requested that paracetamol, hand sanitiser and masks be provided.

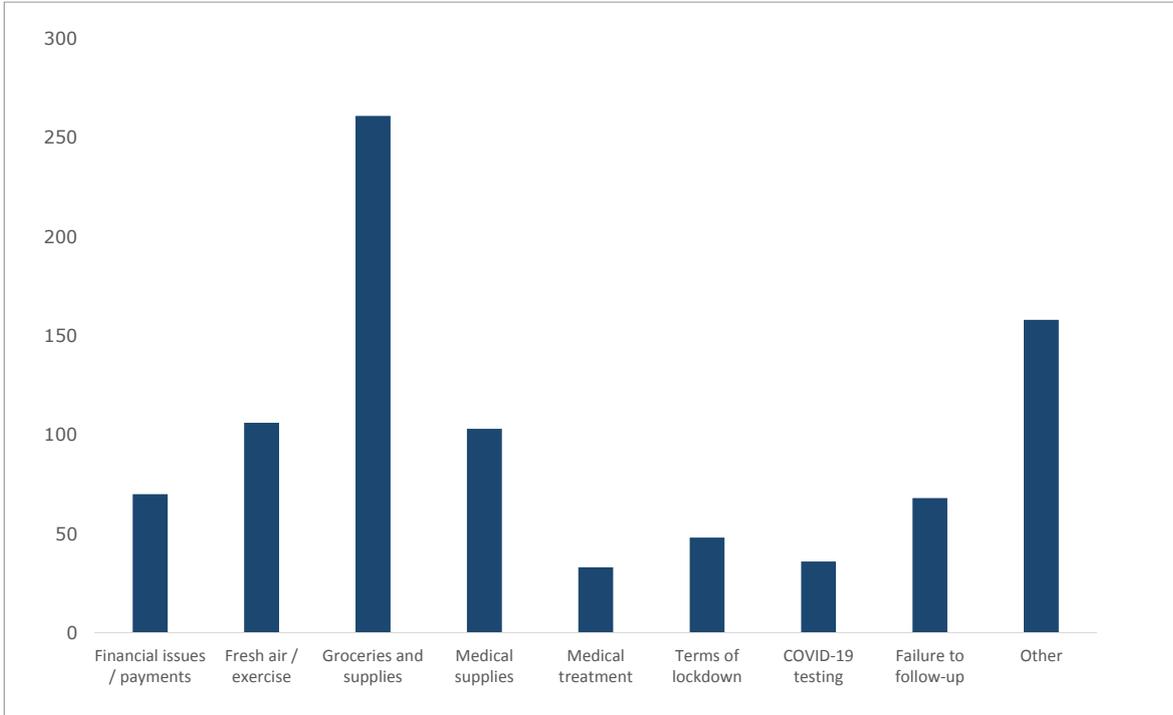
Later in the afternoon, Khaled called DHHS again to follow-up the matter. According to DHHS's records, Khaled's request was not deemed urgent and was not allocated to a staff member for resolution until the evening of 7 July 2020, more than 48 hours after Khaled first telephoned the hotline.

### **Cam's request for groceries and medical treatment**

Cam, a resident at 33 Alfred Street with a physical disability, telephoned the public housing hotline approximately one week into the lockdown to request medical treatment and specific groceries for her household. Cam was referred to Cohealth for assistance with her medical issue and later that day received a delivery of food and other supplies.

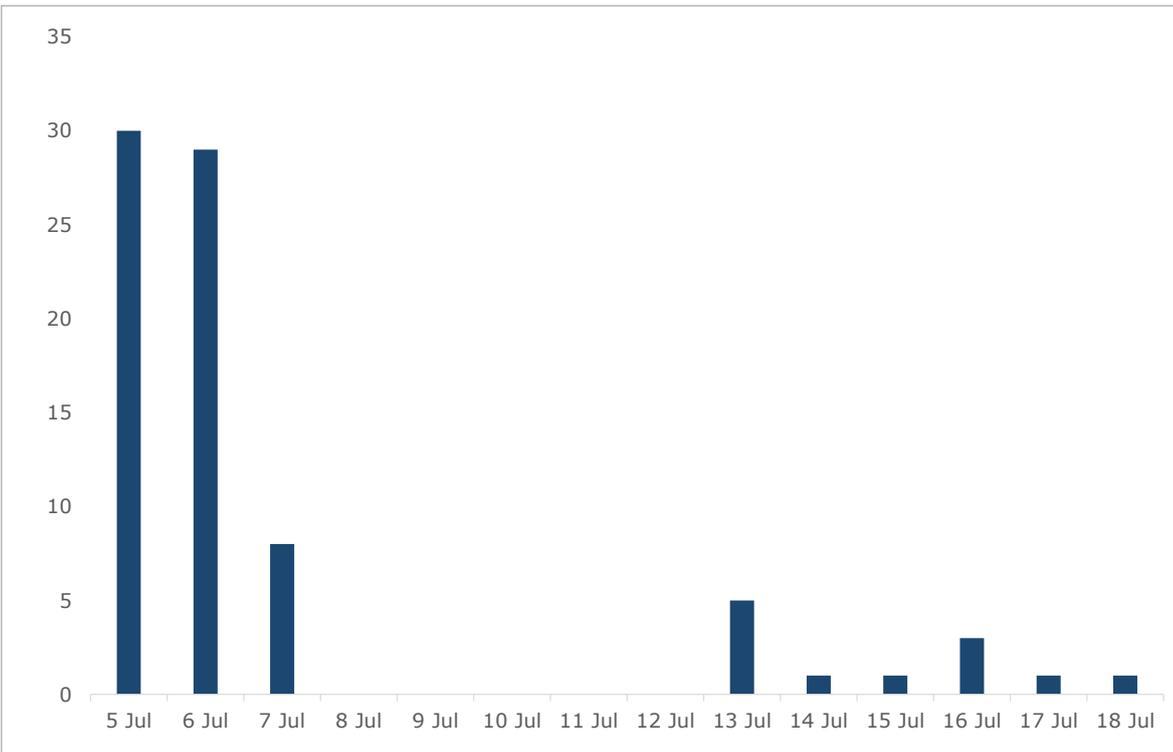
Cam later called the hotline to express gratitude for the assistance. Cam said the DHHS manager she spoke with onsite was 'fantastic' and doing a 'wonderful job'.

**Figure 31: Issues identified by individuals calling DHHS public housing hotline**



Source: Victorian Ombudsman; data supplied by DHHS

**Figure 32: Requests made to DHHS public housing hotline not allocated within 24 hours**



Source: Victorian Ombudsman; data supplied by DHHS

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684. The investigation was informed residents were in some cases forced to rely upon family or community volunteers outside the building to collect and deliver medication.

685. According to community volunteers, this placed them in the difficult position of having to inquire into residents' personal circumstances or assess the relative urgency of individual requests.

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***'I was scared if I got it wrong. Had to get them to spell out medicine, Google it, check I had it right.'***

- Oral submission from resident

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686. The investigation noted processes around obtaining medical supplies appeared to improve with the passage of time, as initial demand subsided and distribution methods were streamlined.

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***'Getting through to this number certainly improved over time. The first call made to the hotline had [our] staff member on hold for more than 20 minutes. One-two days later the call response time was 1-2 minutes. Initially there wasn't a callback option[.]'***

- Submission from community advocate

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687. However, the investigation was informed a lack of clarity around the allocation system and the progress of individual requests continued to frustrate residents during this period.

688. Records supplied by Cohealth indicated the majority of requests for medical supplies were fulfilled within 24 hours of allocation.

689. However, cross-referencing this information with data supplied by DHHS highlighted clear inefficiencies in the allocation process.

690. Some delays appeared attributable to a 'referral chain' between DHHS and the relevant support agencies.

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***'The call centre staff were great! Really empathetic! However, their hands were tied because they often didn't have the information sought by the residents to pass on ... and there was no way of receiving information about the progress of requests already made.'***

- Submission from community advocate

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691. In some cases reviewed by the investigation, requests for medication allocated to other support agencies did not appear to have been promptly escalated to Cohealth.

692. In the circumstances, the investigation considered resolution of requests for medical supplies would have benefited from a centralised case management system and greater coordination and oversight from DHHS.

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***'DHHS were asking me about what kind of medication it was, "Is it important?"; "Does she need it urgently?" I was continuously saying "I'm not a medical practitioner, she's prescribed to have it every day, so it is obviously urgent." ... [We were] Googling medications, asking residents for personal medical information - crossing boundaries with people.'***

- Oral submission from community volunteer

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693. Responding to the Ombudsman's draft report, DHHS submitted that it 'did provide timely and reasonable access to medication, even if there were some delays in individual cases'.

694. This observation was not supported by the evidence reviewed by the investigation, as demonstrated in many of the case studies included in this report.

## **Case studies - allocation process**

### **Hussein's request for Ventolin**

During the afternoon of the fourth day of the lockdown, Hussein called DHHS to request that a Ventolin inhaler be delivered to his mother at 33 Alfred Street as soon as possible.

DHHS's records show that, while Hussein's request was flagged as urgent, it was not allocated to a support agency until 10pm the following evening.

Records available to the investigation indicate this support agency referred Hussein's request to Cohealth the next day. The inhaler was then sourced and delivered to Hussein's mother, approximately two days after Hussein's original request to DHHS.

### **Mariam's request for prescribed medication**

Early in the lockdown, Mariam called the public housing hotline to report that her mother and elderly grandmother needed medication for arthritis, blood pressure and diabetes. Mariam requested someone call her to discuss the request.

DHHS's records indicate Mariam's request was flagged as urgent. Despite this, it was not allocated to a support agency for more than 24 hours.

According to DHHS's records, Mariam called the public housing hotline again several days later to follow-up her family's request, which she indicated was yet to be fulfilled. Mariam said she was willing to fill the prescriptions herself and drop them off at 33 Alfred Street but was unsure if this would be allowed.

DHHS's records show that Mariam called the public housing hotline again two days later to report that her mother and grandmother still hadn't received their medication. This call was flagged as urgent and allocated to the original support agency for action.

Records supplied by Cohealth indicate it was only then notified of Mariam's request. While the request was promptly actioned by Cohealth, in all, it took approximately one week for Mariam's family members to receive their medication.

### **Roda's request for over-the-counter medication**

Roda, a resident at 33 Alfred Street, called the public housing hotline during the third day of the lockdown to request paracetamol and non-prescription sinus medication.

DHHS's records show that, while Roda's request was flagged as urgent, it was not allocated to a support agency for approximately 32 hours.

Records supplied by Cohealth indicate this support agency referred Roda's request to Cohealth the next day. While the request was promptly actioned by Cohealth, in total, it took more than two days for Roda to receive the over-the-counter medication.

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## **Case studies – assistance from family and volunteers**

### **Yasmiin’s experience assisting a non-English speaking resident**

Yasmiin, a community volunteer, told investigators she was contacted by a non-English speaking resident at 33 Alfred Street for assistance obtaining medication for their mental health condition.

This resident told Yasmiin their mental state had deteriorated due to restrictions on accessing exercise during the lockdown. The resident said they had telephoned the health hotline to request medication but had not heard anything back for two days.

Yasmiin told investigators she and the resident spoke to a doctor on the afterhours line, who agreed to provide the resident with a prescription. However, once filled, the prescription was delivered to the Flemington public housing estate rather than North Melbourne. During this period, the resident told Yasmiin they didn’t know what they would do if they didn’t receive their medication.

According to Yasmiin, Victoria State Emergency Service officers later delivered the medication to 33 Alfred Street; however, by this time, DHHS had finished daily deliveries inside the building. Yasmiin told investigators she had to then negotiate to have the medication taken up by a DHHS worker, escorted by two Victoria Police officers.

### **Sofia’s experience obtaining cancer medication**

Sofia, a non-English speaking resident at 33 Alfred Street, was taking prescription cancer medication when the lockdown commenced. During the third day of the lockdown, a member of Sofia’s family telephoned DHHS to report Sofia had only one tablet of medication left.

DHHS’s records show that Sofia’s request was flagged as urgent but was not allocated to a support agency for more than 24 hours. During this period, another family member telephoned DHHS to say they had filled the prescription themselves so it could be delivered to Sofia as soon as possible.

### **Semret’s experience assisting a non-English speaking resident**

Semret, a community volunteer, told investigators she was contacted by a non-English speaking resident of 33 Alfred Street late in the evening during the lockdown, who told her they had not received their blood pressure medication, despite providing DHHS with their prescription seven hours earlier.

According to Semret, the resident was distressed because their doctor had previously said they risked having a stroke if they did not take the medication.

Semret told investigators she took the resident’s concerns to the North Melbourne command centre, but, given the late hour, no DHHS staff were around to assist. Instead, Semret said she had to translate a discussion between the resident, police and Ambulance Victoria. Semret told the investigation she was initially asked to tell the resident ‘to calm down and go to sleep without medication’.

Semret said that, ultimately, through her advocacy, paramedics agreed to examine the resident and a new prescription was provided. Semret was later informed the medication had been delivered to the resident.

## Welfare and disability supports

### Welfare checks

695. Following commencement of the lockdown, DHHS arranged for telephone welfare checks to be made to residents deemed at particular risk during the intervention, including:

- residents of particularly advanced age
- Aboriginal and Torres Strait Islander residents
- residents with disabilities.

696. According to DHHS, housing officers telephoning residents to provide notification of the Detention Directions were also expected to undertake a basic welfare check. This appeared corroborated by records reviewed by the investigation.

697. The investigation was informed further welfare checks were undertaken between 11 and 13 July 2020 by officers supplied under the Victorian Government 'surge workforce' roster. These telephone calls prioritised residents who had tested positive to COVID-19 and their close contacts.

698. In a submission to the investigation, Cohealth confirmed it also made outreach calls to existing clients of the service, as well as to residents who tested positive to COVID-19 after DHHS commenced sharing this information.

Figure 33: Screenshot of system used during telephone welfare checks to residents

Start Page

Back Next First Page

Save Record

Should a tenant disclose any support needs there will be a script and details uploaded that will point you in the right direction i.e.  
1. For general consumables and support needs please transfer tenant to 1800 901 054  
2. If there are significant & immediate medical concerns contact coHealth on 03 9448 5551

**Health and Safety questions Cont.**

1. Is there anything else that we need to help you with? Options... # No Details [2/11]

2. Do you have any other concerns? Options... # No Details [2/11]

Notes [Notes]

Finished and Thank you

Source: DHHS

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699. Some residents who spoke with investigators said they or their family members did not receive a welfare check from DHHS during the first few days of the lockdown. Others stated they did not receive any unsolicited telephone contact from DHHS or other support agencies for the duration of the lockdown.

700. The investigation conducted a review of DHHS's records of telephone welfare checks made to residents at 33 Alfred Street between 6 July and 9 July 2020.

701. This review compiled and analysed data relating to a random sample of 25 registered tenants and 25 individuals selected from COVID-19 testing data.

702. The review identified:

- a total of 104 attempted telephone calls were made to the selected households, of which 43 per cent were successful
- 96 per cent of selected households received at least one attempted telephone call
- 76 per cent of selected households were successfully contacted at least once
- seven selected households were telephoned with the assistance of an interpreter.

703. While the review did not involve detailed examination of specific cases, available information indicated concerns raised by residents during telephone welfare checks were generally escalated appropriately.

704. The investigation noted that DHHS's inability to successfully contact some households generally appeared attributable to:

- incorrect or out-of-date data stored in DHHS's systems, including disconnected telephone numbers

- incoming call restrictions on some residents' phones
- residents declining to answer some calls.

705. In all such cases reviewed by the investigation, multiple attempts were made to contact the relevant household during the relevant period.

706. The results of the review are summarised in Appendix J.

707. The DHHS Operational Commander explained there was a multi-faceted approach to welfare checks during the lockdown that capitalised on interactions with residents:

We would always enquire about whether they had any additional needs, any support needs and again link them with the relevant service providers that were responsible for each of the towers to provide that support. And then, obviously, our social care responses and providers who were interacting with the residents would've been [another] way for understanding the different needs and the requirements for residents. ...

There was, particularly in the early days, a fair bit of engagement happening with the residents through the testing. Again, we used every opportunity to enquire about how they were managing and whether they had any support needs, and we would again activate that.

708. The investigation nevertheless noted the welfare support model adopted by the operation did not encompass regular welfare checks to all residents at scheduled intervals.

709. While DHHS otherwise appeared to have made genuine efforts to monitor the welfare of residents, particularly during the early days of the operation, implementation of a more structured, comprehensive approach to such activities would have decreased risks to health and wellbeing associated with the intervention.

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## **Case studies - welfare checks**

### **Tahiil**

Tahiil and his wife live together at 33 Alfred Street, having resettled in Australia as refugees.

Members of Tahiil's family told investigators that, despite being elderly and having significant medical needs, Tahiil did not receive a telephone welfare check from DHHS until late in the second week of the lockdown.

DHHS's records show that it unsuccessfully attempted to telephone Tahiil and his wife on three occasions between 6 July and 8 July 2020. These records suggest the telephone number stored in DHHS's systems had been disconnected.

### **Salma**

Salma, aged in her seventies, ordinarily lived alone at 33 Alfred Street.

According to records reviewed by the investigation, DHHS made several attempts to telephone Salma during the first few days of the lockdown. With the assistance of an interpreter, DHHS eventually confirmed that Salma was being supported in her property by her adult son. While Salma did not report any concerns about her situation, she told DHHS she was worried about her neighbours, some of whom did not speak English and were not receiving the correct medication.

### **Filsan**

Filsan was housesitting for his friend at 33 Alfred Street when the lockdown began.

DHHS's records show housing officers initially telephoned Filsan's friend, who confirmed she was living elsewhere with her partner and provided Filsan's contact information. DHHS then called Filsan to check on his welfare. Filsan confirmed he had enough food in the property to last for several days but told DHHS he was desperate for a cigarette.

### **Michael**

Michael was staying with a member of his family at 33 Alfred Street when the lockdown began.

Michael told investigators he received very little information from DHHS and found it necessary to make enquiries with other residents to understand the terms of the lockdown.

DHHS's records show it attempted to telephone Michael's household several times over the first few days of the lockdown. On 8 July 2020, DHHS managed to speak with Michael's brother, who confirmed Michael was staying in the home and indicated the household was doing OK. Michael's details were later forwarded to DHHS's public health team for inclusion in the COVID-19 testing program.

Figure 34: Excerpts from register of telephone welfare checks made to residents, 6 - 9 July 2020

There are six adults living in property. [REDACTED] advised they are positive with COVID-19. They are struggling to get the food they need and are not receiving enough of it. Requesting to be able to have food delivered and the police to bring it up to them, they advised they are willing to pay for their own food but what they are currently receiving from the government is not sufficient. They also require medication. The 1800 number has not been helpful and they do not receive call backs.

Tenant said that him and his family were grateful to the government for everything, they are all good and had their COVID test done 3 days ago

Spoke with [REDACTED] and informed of reason of call, while on phone [REDACTED] phoned her son [REDACTED] who acted as an interpreter, while on phone [REDACTED] where listening on Speaker and [REDACTED] translated information provided. All is good, it was advised that the family need medications but will be okay until the end of the week. They will require to get further prescriptions filled after this time.

spoke with [REDACTED] and advised I was from Dept of Health and Human Services, HSO spoke with [REDACTED], then [REDACTED] and then a male person who stated he was a resident at the property. Household members confirmed, a [REDACTED] is also residing at the household at this time). [REDACTED] got all the adult household members to listen to information directive provided. Enquiries raised was regarding cleaning at the complex - common areas (what is being done) and if lockdown was going to be longer than 5 days will there be exemptions ie level 3 retrictions.

Spoke to [REDACTED] mum. She said both [REDACTED] are currently residing with her in [REDACTED] and are not needing any assistance at the moment. I have given them the 1800 number should they seek any further assistance (I have also emailed this to housing support)

The neighbour in [REDACTED] has mental health issue and has had a few disturbing episodes and neighbours are concerned about him.

would be great if someone can check in with that person

Phoned tenant today and she would like to thank all the services that the govt has provide for her and her 7 children. She has more than enough food and they have just been tested and all results were negative.

Spoke with [REDACTED]. All going well, she is aware of the 1800 number. Advised that she has been asked twice to take the test and stated she is happy to take the test but does not want to go downstairs as she does not want to expose her two year old daughter. She has advised of this when speaking with services.

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## Mental health supports

710. DHHS engaged NorthWestern Mental Health to provide on-site mental health services to residents during the lockdown.
711. Some residents who spoke with investigators said they were not aware of the availability of on-site mental health supports until after the lockdown ended.

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*‘If they were on site, I don’t know where they were. I was on site so many nights and I was informed by DHHS to call them. They didn’t say, “[NorthWestern Mental Health] are here.”’*

– Oral submission from community volunteer

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712. Responding to the Ombudsman’s draft report, DHHS commented that clients of NorthWestern Mental Health received in-reach calls while other residents could ‘access mental health supports through other service providers or the public housing hotline’:

It is to be expected, therefore, that individuals who were not clients of NorthWestern Mental Health were unaware of the on-site services they provided, as the support available to them was from other providers.

713. Some individuals who spoke with investigators said they were aware of incidents of self-harm among residents that were believed to be linked to the conditions of the lockdown and an overall disregard for residents’ mental health during the intervention.

714. This included reports that as many as 12 residents of the Flemington and North Melbourne public housing estates had attempted suicide during the lockdown.
715. Records indicate DHHS made enquiries into these allegations after they were raised during a meeting of the site-level Incident Management Team on 21 July 2020.
716. While DHHS was unable to obtain further details regarding specific incidents, enquiries with Ambulance Victoria, mental health providers and Victoria Police indicated no emergency callouts for suicide or attempted suicide were made to the Flemington and North Melbourne estates during the lockdown.

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*‘A lot of us feel wary of accessing traditional mental health support ... Being a person of faith, my faith has really helped me survive this. ... The attitude [of Government] was, “We know what you want, we’re forcing these services on you.”’*

– Oral submission from resident

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717. The investigation noted the availability of specific mental health supports appeared to have been only first promoted to residents in a factsheet circulated during the second week of the lockdown.
718. Records indicated some residents were also provided information about these services when telephoning the public housing hotline, or through engagement with other service providers.

**Figure 35: Extract from minutes of site-level Incident Management Team meeting, 22 July 2020**

**DHHS Health Support:** What we are being told is that community members were aware of people that were in need at a particular point in time, but are not anymore.

Source: DHHS

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## Disability supports

719. Both the Detention Directions and Close Contacts Directions included provisions under which carers and disability workers could seek authorisation to enter 33 Alfred Street.
720. Records available to the investigation showed there were approximately 91 people with support packages under the National Disability Insurance Scheme ('NDIS') known to be living at the Flemington and North Melbourne public housing estates during the lockdown.
721. DHHS's Intensive Support Team was engaged to proactively assist residents to connect with the National Disability Insurance Agency ('NDIA') and relevant support providers during the initial period of the intervention.
722. DHHS informed the investigation the Intensive Support Team also conducted doorknocks within the building for residents not responding to calls from the NDIA.
723. In a submission to the investigation, VEOHRC noted it had received reports from community volunteers that disability workers assisting residents with NDIS packages were not permitted to enter the Flemington and North Melbourne estates during the lockdown.
724. The report made to VEOHRC stated this was because DHHS had determined that 'nobody in the cohort needed feeding or toileting [assistance]'.
725. While the DHHS Operational Commander and Deputy Commander were unable to provide specific examples of disability workers being permitted to enter 33 Alfred Street during the lockdown, both indicated they were unaware of any policy decision to deny disability workers access to the building.

726. Records indicated residents with NDIS packages were initially encouraged to link with providers remotely, while arrangements for workers to access the building were resolved.

## COVID-19 testing

727. COVID-19 testing was conducted by Royal Melbourne Hospital, with the assistance of community health providers such as Cohealth.

### Initial testing

728. Under the Detention Directions, residents were informed they would be detained for an additional 10 days if they refused to be tested for COVID-19 when requested by DHHS.
729. An initial sweep of testing was conducted between 5 July and 8 July, during which more than 2,500 COVID-19 tests were administered to residents of the Flemington and North Melbourne public housing estates.
730. Records available to the investigation indicate a relatively small number of residents at the Flemington and North Melbourne estates were issued with extended detention notices as a consequence of refusing to be tested.

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***'There was confusion regarding mandatory testing, residents were advised testing was mandatory, then they were advised it wasn't mandatory, but they would be required to be in isolation [or] lockdown if they didn't have the test.'***

- Oral submission from resident

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731. The investigation was encouraged to observe that DHHS continued to engage with these residents and offer further opportunities to be tested.

732. Some residents and advocates told investigators information about how and when COVID-19 testing would occur was confusing, and left residents concerned they would be required to congregate at on-site mobile testing clinics.

733. The investigation was informed that residents at 33 Alfred Street were initially required to submit to COVID-19 testing at the base of the building.

734. Following concerns about efficiency and participation rates, the testing process was revised to a door-to-door model, administered by healthcare workers escorted by Victoria Police personnel.

735. The DHHS Deputy Commander told investigators the escort arrangements were requested by health services staff entering the building and were subsequently relaxed as these officers became more confident in the role:

Primarily [the police escort] was to provide, I would argue reassurance actually, to the health staff going into the building to do the testing, so that they felt safe. ... We would allocate a pair of police officers per group of testing teams, who would do a floor at a time. ... The police remained at the lifts, they didn't go door-to-door with the testing teams, but they were nearby should someone want to call upon them.

And then over time, actually, the need for that became less and less, obviously as confidence grew. As we got a sense of how residents were receiving the staff going into the building, we felt much more confident that there were no staff safety issues.

736. According to the DHHS Deputy Commander, the door-to-door model benefited from increased privacy and reduced stigma around those being tested:

Stigma was something that people talked about, particularly where it [COVID-19 testing] was happening in a more visible sense. People felt that a more private setting at their door was preferable.

737. The DHHS Operational Commander observed:

We were trying to facilitate testing rather than making it difficult for people, so whatever made it easier.

738. The investigation also heard concerns about insufficient interpreters and translated information being made available before and during the testing process.

739. This was partly corroborated by records supplied to the investigation, which indicated DHHS's Leadership Team was notified on 8 July 2020 of concerns about 'inadequate interpreters accompanying medical staff'.

740. According to DHHS's Operational Commander, community volunteers and local community leaders were later embedded in door-knocking activities, providing informal interpretation support.

**Figure 36: Extract from DHHS 'Tower Testing Workforce and Procedure', 6 July 2020**

Required PPE for Nursing Staff	Surgical mask Gown Gloves Protective eyewear
Required PPE for Police	Surgical mask Coveralls (disposable) Protective eye wear (e.g. goggles or face shield) Gloves
Procedure to collect sample	Knock on door and explain test requirement and procedure Confirm each occupant of the apartment's identity Record on patient registration form <ol style="list-style-type: none"> <li>1. First Name</li> <li>2. Surname</li> <li>3. DOB</li> <li>4. Address: Apartment XX, 120 or 126 or 130 Racecourse Rd Flemington or 12 Holland Court Flemington 3031</li> <li>5. Mobile phone number (or home phone number)</li> <li>6. Medicare No</li> </ol> Take throat and mid nasal swab Place lab sticker on swab Place matching sticker on pathology request form Place matching sticker on patient registration form Wipe all swab containers, and any other test containers down with green Clinell wipes Change gloves and perform hand hygiene Place sample in first specimen bag, once closed wipe with green Clinell wipes. Place wiped specimen bag in second specimen bag
Post swab completion for each resident	Remove gloves Perform hand hygiene Don new pair of gloves

Source: DHHS

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## Further testing

741. Residents at 33 Alfred Street were requested to participate in a second COVID-19 testing sweep on 15 July 2020, resulting in an additional 253 COVID-19 tests being administered.
742. Unlike the initial round of testing, residents refusing to participate in this process were not made liable for an additional period of detention.
743. Some residents nevertheless told investigators there was confusion about the consequences of declining to be tested during the second sweep, said to have been exacerbated by unclear or inconsistent information provided by DHHS and testing staff.
744. For example, one resident relayed the following experience to investigators:
- I underwent the first test. Then two nurses came by 11 days in. They said it was time for a second test. I asked, 'Is it compulsory?' They said they weren't sure. I referred to a letter from DHHS which said we would be isolated for an extra 10 days if we refused. But this referred to the first test only. I did [that] one. I asked the nurses, 'Will I be punished if I refuse this test?' They said, 'You've got to get tested'.
745. The investigation accepted there was a strong public interest in encouraging residents to undertake further COVID-19 testing, but considered further efforts could have been made by DHHS to explain the consequences for non-participation, if any.

# Diversity and community engagement

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746. This section of the report considers DHHS's engagement with culturally and linguistically diverse residents at 33 Alfred Street, including:

- accessibility of information provided to residents
- broader community engagement concerning the lockdown.

747. Victoria is generally considered to be one of the most culturally diverse places in the world, with data from the most recent Australian census indicating almost half of all Victorian residents were born overseas or have at least one parent born overseas.

748. Within Victoria, the Flemington and North Melbourne public housing estates are also generally regarded as having a high number of residents from culturally and linguistically diverse backgrounds.

749. The Victorian Government's *Multicultural Policy Statement* recognises that:

- government services should be accessible to people from culturally and linguistically diverse backgrounds
- government authorities should engage and listen to diverse communities.

750. DHHS's most recent *Cultural Diversity Plan* recognises that departmental initiatives should be accessible, equitable, culturally sensitive and developed through collaboration with multicultural communities.

751. Both the Victorian COVID-19 Pandemic Plan and the Australian COVID-19 Health Response Plan emphasise the importance of preparing specific public health messaging for culturally and linguistically diverse communities.

## Accessibility of information

752. While DHHS was unable to provide the investigation with country of origin data, information supplied from the public housing register indicated a sizeable proportion of residents at 33 Alfred Street preferred to speak a language other than English.

753. The investigation noted DHHS's records appeared likely to understate the proportion of tenants from non-English speaking backgrounds.

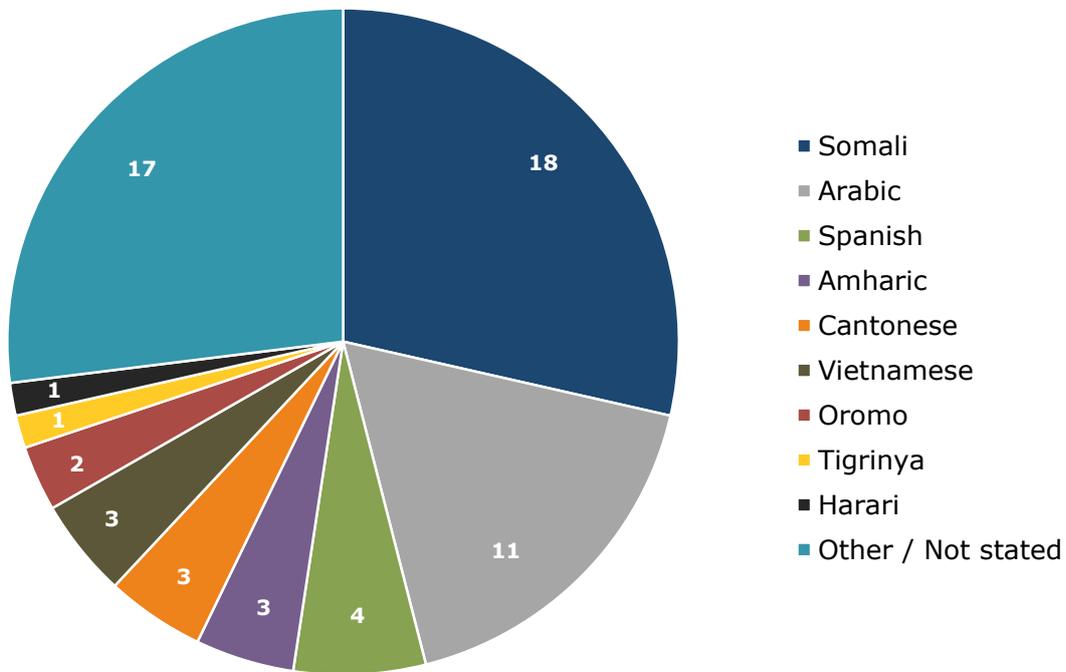
754. In several cases reviewed by the investigation, language preferences recorded on the public housing register appeared to conflict with information disclosed by residents and their advocates.

755. Residents, advocates and service providers who spoke with the investigation stated residents from culturally and linguistically diverse backgrounds found it comparatively more difficult to obtain timely information concerning the lockdown and the availability of services and supports coordinated by DHHS.

756. Among other things, these parties emphasised the importance of:

- timely communication of information in community languages, including through use of culturally appropriate and accessible communication methods
- availability of qualified interpreters.

Figure 37: Languages spoken by residents the subject of requests to DHHS public housing hotline, excluding English (number of calls)



Source: Victorian Ombudsman; data supplied by DHHS

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## Translated materials

757. The lockdown at 33 Alfred Street was announced in English on 4 July 2020.
758. Materials in community languages were not provided to residents at 33 Alfred Street until the fourth day of the intervention, when a translated factsheet about available services and supports was first distributed to households.
759. This was followed by a letter explaining the purpose and terms of the lockdown in seven community languages, distributed between 8 July and 9 July 2020.
760. Over the course of the intervention, DHHS continued to produce and deliver translated factsheets – sometimes in as many as 12 community languages – and made multilingual announcements concerning the lockdown through the building’s PA system.
761. The factsheets produced by DHHS are identified in Figure 38 on page 155.
762. While DHHS generally appeared to have made reasonable efforts to ensure written communications about the lockdown were translated into community languages, there were obvious delays in preparing and distributing these materials to residents.
763. In other cases, time constraints appeared to have resulted in some factsheets being produced in a reduced number of languages.
764. The DHHS Operational Commander acknowledged there were delays in distributing translated materials to residents:

Inevitably, [with] the practicality of developing the initial English materials, then the mechanism of translation approvals [and] distribution, there was a delay. ... I think we got better at it, in terms of the cadence of how we were developing the material and instantaneously then trying to do the translation. But in the initial days ... there was a lag.

765. Residents and advocates observed that owing to initial lack of official information in community languages, it primarily fell upon younger, English-speaking family members and community volunteers to explain details of the lockdown to non-English speaking residents.
766. Perceived shortcomings in information provided by DHHS also saw some community organisations produce and distribute their own materials explaining the lockdown for multicultural communities.

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***‘Organisations working at the frontline undertook to develop their own immediate audio and SMS messages. Several days into the crisis, grassroots initiatives were filling gaps that should have been [a] government responsibility.’***

– Submission from Translators and Interpreters  
Australia

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767. Delays in distributing materials in languages other than English undoubtedly made it more difficult for culturally and linguistically diverse residents to understand their rights and the availability of services and other supports during the intervention.
768. While some delay in the production of translated materials may have been unavoidable, early inadequacies also appeared attributable to the limited period of time allocated towards preparation for the operation.

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## **Aida's experience of the lockdown**

Aida was visiting family at 33 Alfred Street when the lockdown began.

Aida told investigators it was fortunate she was present for the lockdown because her parents did not speak English. According to Aida, while DHHS distributed English language factsheets that included information about accessing interpreters, it wasn't until the second week of the lockdown that her family began to receive materials in their language.

Aida told investigators the lockdown was particularly difficult for her father, who suffered from a chronic medical condition. Aida said she spoke with police on the morning of the second day of the lockdown to enquire about accessing medication for her father. Police directed Aida to call the DHHS public housing hotline; however, Aida found that this service was not yet running. Aida said she eventually contacted her cousin, who picked up the medication and delivered it to her through the police lines.

Aida told investigators her family came to Australia from a war-torn country, and, due to past experiences of law enforcement, her parents were fearful of engaging with police. Aida said, for this reason, none of her family members requested access to outdoor exercise during the lockdown. Aida said her parents were also unwilling to sit by the window for fresh air, for fear of being photographed by the media.

Of the lockdown, Aida said:

It was a mixed feeling - at one point you understand this is a health crisis, but why target this building? ... Because we [public housing tenants] are considered second-class citizens, it was easy for the government to shut us off.

Investigators reviewed information from the public housing register and noted the preferred language of Aida's parents was in each case incorrectly recorded as English.

**Figure 38: Factsheets distributed to residents at 33 Alfred Street**

<b>Date</b>	<b>Title</b>	<b>Language(s)</b>
5 July	How to Access the Services You Need	English
7 July	How to Access the Services You Need (community languages)	Amharic, Arabic, Dari, Dinka, Farsi, Oromo, Simplified Chinese, Somali, Tigrinya, Traditional Chinese, Turkish, Vietnamese
9 July	Update for Residents at 33 Alfred St	English, Amharic, Arabic, Dari, Dinka, Farsi, Oromo, Simplified Chinese, Somali, Tigrinya, Traditional Chinese, Turkish, Vietnamese
13 July	Food Delivery and Special Orders - 33 Alfred Street	English, Amharic, Arabic, Dari, Dinka, Farsi, Oromo, Simplified Chinese, Somali, Tigrinya, Traditional Chinese, Turkish, Vietnamese
15 July	Update for Residents at 33 Alfred St	English
16 July	Laundry Service - Alfred Street Residents	English
18 July	Update for Residents at 33 Alfred Street - Stage 3 Restrictions	English, Arabic, Somali, Vietnamese
	Update for Residents at 33 Alfred St - If You Have COVID-19	English, Arabic, Somali, Vietnamese
	Update for Residents at 33 Alfred St - If You Are a Close Contact	English, Arabic, Somali, Vietnamese
20 July	Update for Residents - Support to Help You with COVID-19 Restrictions	English, Arabic, Dinka, Oromo, Simplified Chinese, Somali, Traditional Chinese, Turkish, Vietnamese
	Update for Residents - If You Are a Close Contact	English

Source: DHHS

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## Access to interpreters

769. Qualified interpreters were embedded at the Flemington and North Melbourne estates from 5 July 2020, providing assistance to officers administering COVID testing and other community engagement activities.

770. The investigation was informed that community volunteers assisting authorities also acted as ‘informal’ interpreters during this period.

771. Additionally:

- an on-demand telephone interpreting service was made available to DHHS officers
- factsheets issued to residents included information about accessing the Commonwealth Government’s Translating and Interpreting Service.

772. The investigation established that interpreters were not engaged to assist authorities until the second day of the lockdown.

773. When asked about this issue, the DHHS Operational Commander told investigators he was not sure whether DHHS took any steps to arrange for interpreters to be present at the Flemington and North Melbourne estates during the initial evening of the operation.

774. The investigation noted the absence of on-site interpreters during this critical period would have made it difficult for some residents to communicate with Victoria Police officers and other officials enforcing the lockdown.

775. This was significant because some of these residents may have had grounds to temporarily leave the building under the terms of the Detention Directions.

776. Some residents who spoke with investigators said they found it necessary to assist others from non-English speaking households to understand verbal directions from Victoria Police officers during the initial hours of the lockdown.

777. The investigation also received anecdotal evidence that some residents from non-English speaking backgrounds did not initially understand the reason for the police presence or were turned away when seeking to return to their homes during this period.

778. In a submission to the investigation, Flemington and Kensington Community Legal Centre stated:

A resident who was unaware of the lockdown orders returned to the estate confused by the large Police presence. They drove up to a police checkpoint and had trouble communicating to the Police officers that they were a resident of the estate as no translators were available. Concerned, confused and not wanting to escalate the issue the resident continued driving and had nowhere else to stay. They proceeded to sleep in their vehicle over the next three days which resulted in them being hospitalised[.]

779. While this could not be substantiated, the investigation was informed that community organisations were frequently approached by residents from non-English speaking backgrounds for assistance liaising with DHHS and other authorities administering the lockdown.

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***‘We had people ringing up the AMSSA [Australian Muslim Social Services Agency] line when they got frustrated or couldn’t communicate through the 1800 number.’***

– Oral submission from community volunteer

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## Community engagement

780. Residents, advocates and service providers emphasised the importance of timely and proactive engagement with multicultural community leaders concerning the lockdown.

781. For example, in a submission to the investigation, the Victorian Public Tenants Association observed:

Communities that live in buildings like 33 Alfred Street are close knit and resilient. This is a significant strength, and natural leaders within communities are best placed to speak to what the people need, what their concerns are and what issues they are facing. It appears that, had community leaders been consulted with and involved in planning for hard lockdowns, then significant problems could have been avoided[.]

782. The investigation established the decision to impose the lockdown was not preceded or informed by consultation with multicultural community leaders.

783. When asked whether this would have been practicable, the Deputy CHO responded:

I think it would've been preferable. I think it would've been possible had we had another day to get things up and running. It ... well it wasn't possible given the timing that did occur, but I think it would've been preferable.

784. Records preceding announcement of the lockdown indicate DHHS nevertheless immediately recognised the need to engage with the Victorian Multicultural Commission and community leaders to ensure 'strong, culturally appropriate communications with tenants'.

785. Despite this, information available to the investigation indicated decisions were largely not collaborative during the early stages of the intervention.

786. Consultation with community leaders during this period appeared reactive in nature, driven in part by community concern about the way the lockdown was announced and implemented.

787. The investigation noted community engagement concerning the lockdown appeared to improve with the passage of time.

788. In particular, the investigation received generally positive feedback about the decision to establish a Community Working Group on 7 July 2020, following initial public forums convened by the Victorian Multicultural Commission.

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***'I think it [consultation with community leaders] would have been preferable. I think it would've been possible had we had another day to get things up and running.'***

- Deputy CHO

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**Figure 39: Extract from Operation Benessere Community Engagement Review, 17 July 2020**

Our mode of engagement has become more consultative and geared to the expressed needs of the community, but we will be more successful if residents and community organisations are active participants and join with us in sharing and solving problems.

Source: DHHS

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789. Comprised of representatives of DHHS, Victoria Police and more than 20 multicultural community associations, the Community Working Group was co-chaired by the Chair of the Victorian Multicultural Commission and the former Executive Director of the Brotherhood of St Laurence and met daily for the duration of the lockdown at 33 Alfred Street.

790. Under its terms of reference, the Community Working Group was established to:

- provide a forum for community representatives to communicate concerns to authorities administering the lockdown
- facilitate communication of information about the lockdown to community representatives
- identify things working well and those in need of improvement.

791. The Chair of the Victorian Multicultural Commission informed the investigation:

It was clear that given the very short lead time and urgency of the implementation of the lockdowns that there was an urgent need to clarify the roles and systems needed to be put in place and to ensure that the residents were adequately informed and their needs supported.

792. The investigation reviewed records maintained by the Community Working Group and noted this initiative appeared effective in identifying and resolving issues raised by community representatives.

793. Representatives of the Victorian Multicultural Commission and the Community Working Group were also invited to attend the on-site Incident Management Team meetings relating to the lockdown.

794. The investigation received positive feedback concerning this initiative and was informed this was likely the first time community representatives had been included in such a way within an emergency management structure in Victoria.

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***'The feedback received on the inclusion of community representatives was extremely positive from all the stakeholders and [indicated] that this approach of having the community involved in the decision-making processes on the ground could be replicated in future emergency management responses.'***

- Submission from Victorian Multicultural Commission

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795. Despite this, some residents who spoke with investigators emphasised the need for authorities to listen directly to residents, as well as community leaders.

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***'Please stop making meetings about us without us.'***

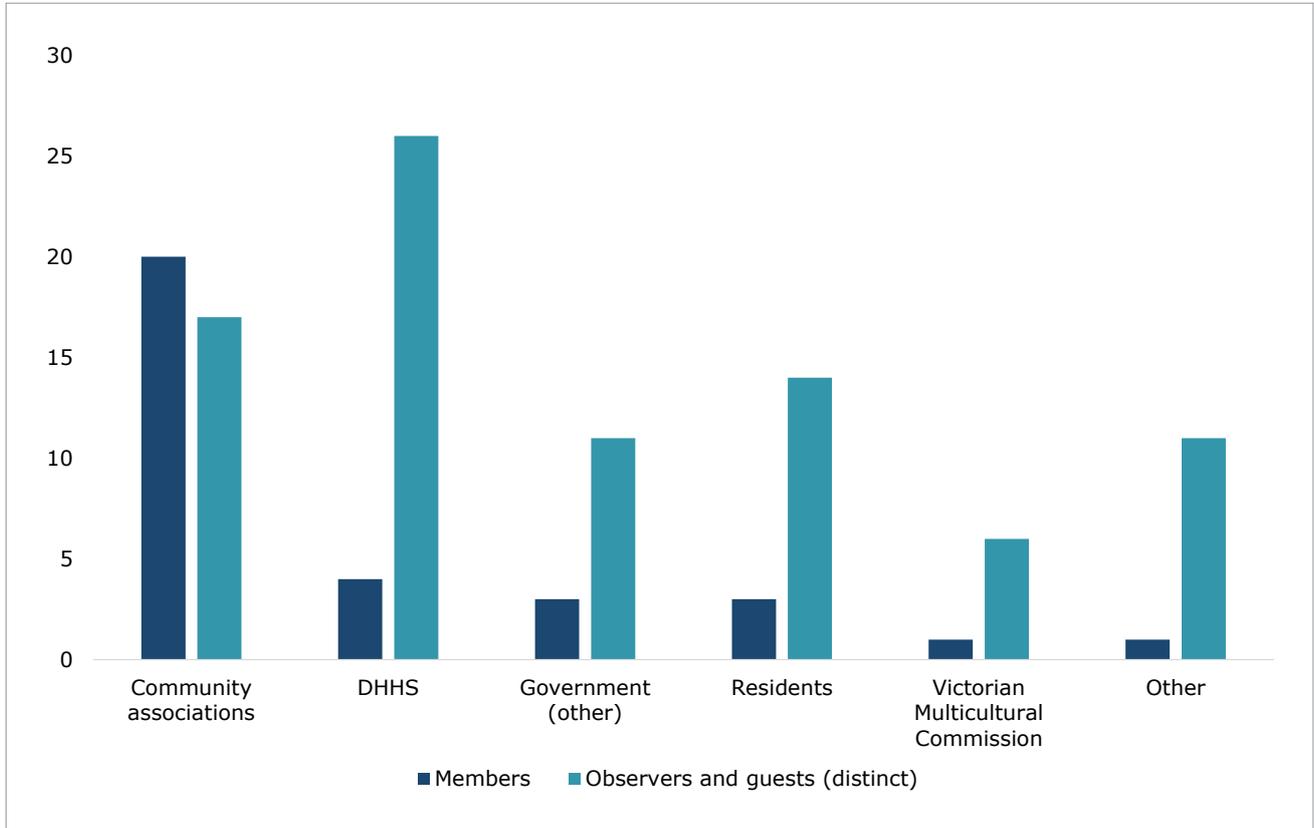
- Oral submission from resident

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796. At interview, DHHS's Deputy Commander acknowledged that a dedicated forum for residents may also have helped authorities identify and respond to the needs of residents during the lockdown:

In hindsight I think it would have [been helpful]. Certainly, I know in my role that's exactly what we tried to do; ... increase contact with residents and amplify the resident voice.

Figure 40: Community Working Group members and observers



Source: Victorian Ombudsman; data supplied by Victorian Multicultural Commission

**Figure 41: Survey completed by members of North Melbourne and Flemington Community Working Group, 22 July 2020**

<b>1. Overall, how effective has the Working Group been in achieving its objectives? (scale: 1-5, 1 negative, 5 positive)</b>	
All respondents	4.25
Community representatives	4.35
Government representatives	3.5
<b>2. To what extent have we had the right people in the meetings?</b>	
All respondents	4.25
Community representatives	4.43
Government representatives	3
<b>3. To what extent have people been able to be heard and freely raise issues or make comment?</b>	
All respondents	4.38
Community representatives	4.57
Government representatives	3
<b>4. To what extent has the agenda and format of the meetings facilitated achieving its objectives?</b>	
All respondents	4.31
Community representatives	4.5
Government representatives	3
<b>5. To what extent have the issues that were raised been adequately acted upon and the outcomes reviewed?</b>	
All respondents	4.06
Community representatives	4.31
Government representatives	3
<b>6. How effective is the chairing of the meetings?</b>	
All respondents	4.38
Community representatives	4.43
Government representatives	4
<b>7. How appropriate has the frequency of the meetings been?</b>	
All respondents	4.19
Community representatives	4.43
Government representatives	2.5
<b>8. Thinking about the transition from crisis to longer term responses, are you able to comment on whether a group such as this may be of value?</b>	
All respondents	4.67
Community representatives	4.7
Government representatives	4.5

Source: Victorian Multicultural Commission

# Consequences of the lockdown

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797. While acknowledging the substantial difficulties for residents arising from the operation, DHHS observed the lockdown at 33 Alfred Street ultimately proved 'extremely effective' at containing the outbreak of COVID-19 associated with the building.

798. DHHS noted:

- as at 5 July 2020, the number of active COVID-19 cases associated with the Flemington and North Melbourne public housing estates represented almost seven per cent of all active cases in Victoria
- at this time, the growth rate for COVID-19 cases among residents of the Flemington and North Melbourne estates peaked at approximately 40 per cent – more than three times the Victorian average
- after 11 July 2020, the growth rate for COVID-19 cases among residents fell to four per cent – one quarter the Victorian average – and thereafter remained below the latter figure
- the second round of COVID-19 testing within 33 Alfred Street resulted in half as many people testing positive to COVID-19 – a 'very significant reduction' given the nature of the outbreak.

799. By contrast, the number of active COVID-19 cases in Victoria continued to grow during the same period, peaking at 6,776 cases on 7 August 2020.

800. DHHS observed that active case data from other COVID-19 'hotspots' in Victoria illustrated a rising 'trajectory of infections' that would likely have been replicated at the Flemington and North Melbourne public housing estates in the absence of the intervention.

801. In a written response to the investigation, DHHS submitted:

Although we will never be able to test the counterfactual, the trend in active cases across Victoria during this time indicates that the intervention prevented many people within 33 Alfred Street from contracting COVID-19. Based on the experience of other locations and other countries, case numbers in the public housing estates would have continued to rise, presenting unacceptable risks to health and life for the residents, in the absence of a significant public health intervention.

802. DHHS observed the lockdown likely also had broader benefits for the Victorian COVID-19 public health response:

Cases linked to 33 Alfred Street and the eight other public housing high rises would, in addition, likely have contributed to further infections in the community, potentially accelerating Victoria's second wave and further challenging the public health response.

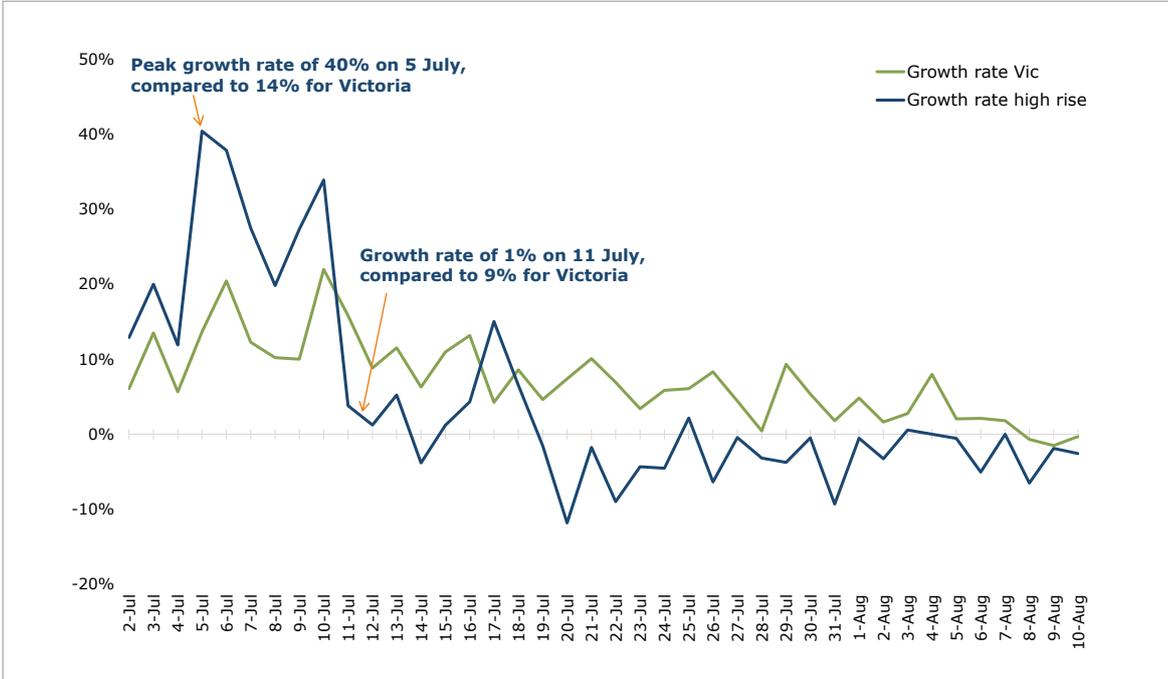
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***'Although we will never be able to test the counterfactual, the trend in active cases across Victoria during this time indicates that the intervention prevented many people within 33 Alfred Street from contracting COVID-19.'***

- DHHS

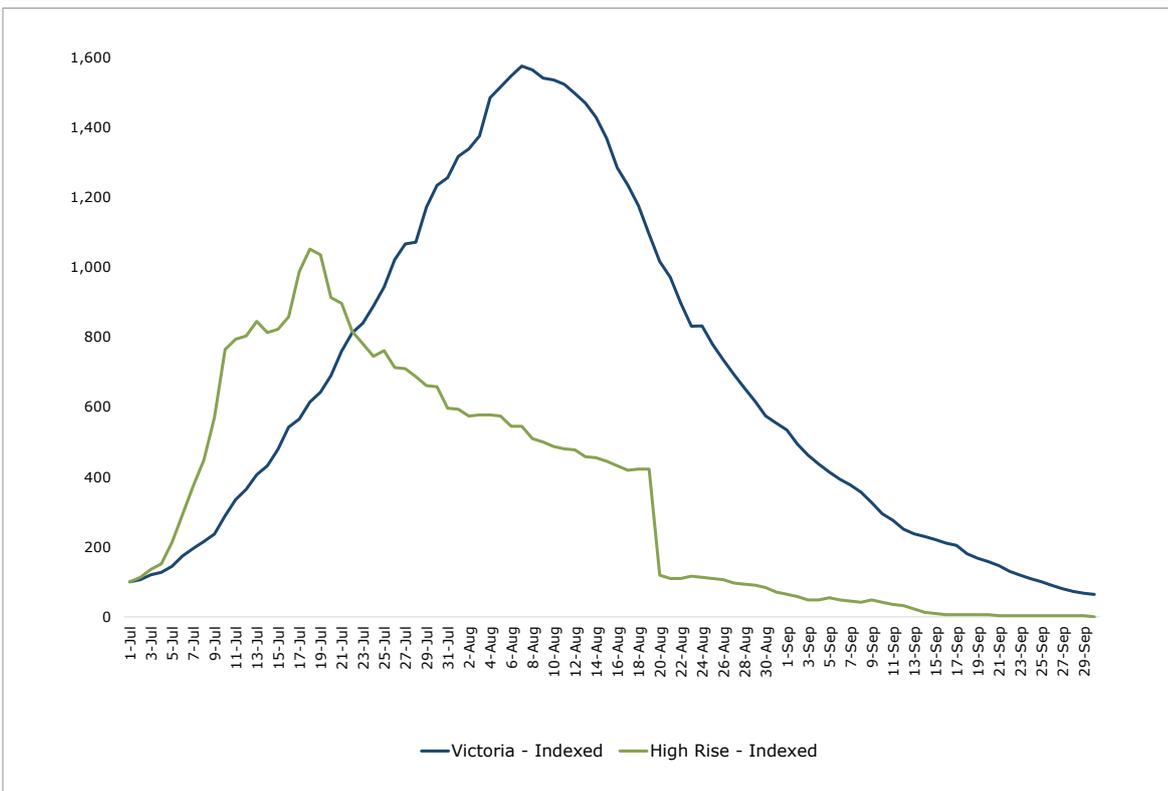
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**Figure 42: Growth rate for active COVID-19 cases in Victoria vs high-rise public housing estates**



Source: DHHS

**Figure 43: Active COVID-19 cases in Victoria vs high-rise public housing estates (indexed to 100), July–October 2020**



Source: DHHS

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803. Residents, community volunteers and advocates nevertheless informed the investigation the immediacy of the lockdown, coupled with the challenges they faced in the days and weeks that followed, were not without lasting consequence for those living at 33 Alfred Street.

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***‘I’ve seen and heard things that will stick with me for a very long time.’***

– Oral submission from community volunteer

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804. These parties said the fact and nature of the lockdown was distressing for residents, particularly those with past experiences of trauma.

805. Some individuals said they believed restrictions on accessing fresh air and outdoor exercise during the lockdown also resulted in lasting health complications for themselves or family members.

806. Several residents who spoke with investigators said the lockdown had resulted in significant distrust of DHHS and other public authorities.

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***‘How could you trust someone like that after what they had just done to us in the last two weeks?’***

– Oral submission from family member of resident

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807. In discussions with investigators, DHHS representatives acknowledged there was a need to rebuild trust with residents at 33 Alfred Street following the lockdown.

808. In a written submission, DHHS observed the experience of the public housing lockdowns was an ‘important catalyst’ for reviewing aspects of its relationship with public housing residents and associated communities:

The department acknowledges that there is healing that needs to occur in the public housing communities of North Melbourne and Flemington and the department is continually trialling ways to do this that are meaningful for residents.

809. The investigation was informed that on 23 July 2020 the Operation Benessere Incident Management Team was stood down and an ongoing team appointed to continue coordinating health care and supports and other services to the Flemington and North Melbourne public housing estates.

810. In weekly briefings to the Ombudsman and VEOHRC, DHHS also detailed several new measures to mitigate the risks of COVID-19 across Melbourne’s high-density public housing estates.

811. These included:

- training and employing residents to provide an ongoing ‘health concierge’ service at all high-rise public housing towers, encompassing:
  - o temperature checks
  - o reinforced public health messaging
  - o provision of personal protective equipment
  - o welfare checks and other supports
- expanded testing programs across all high-density public housing estates
- engaging directly with COVID-positive residents to support them and any close contacts to effectively quarantine

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- continuing Community Working Groups to provide advice on approaches to health promotion, messaging and resident engagement at each site and assist in the identification of local issues or risks
  - hosting thematic resident-only forums relating to issues such as infection prevention and control, childcare, employment, education and mental health
  - increasing deep cleaning of all high-rise towers, including shared spaces and touchpoints
  - increased engagement with local councils and other local area groups, to build awareness of non-government high-risk accommodation settings to enable preventative cleaning efforts and infection control education.
812. The investigation was informed that following the intervention, DHHS also commissioned a program aimed at early prevention, preparation and response to COVID-19 cases in high-risk shared accommodation settings.
813. According to DHHS, this model – called the ‘High-Risk Accommodation Response’ – is intended to ensure there are appropriate public health measures, as well as ‘adequate, culturally appropriate and accessible service supports’ and community engagement strategies in place.
814. The investigation received generally positive feedback about DHHS’s engagement with residents and community leaders at other public housing estates following the lockdowns at Flemington and North Melbourne.

815. For example, one community advocate observed:

It appears that the workers in Carlton were able to learn from the successes and failures of the North Melbourne and Flemington experience. Community engagement and activation [at the Carlton public housing estates] occurred right from the start, ‘local’ community leaders were engaged and trained to support the testing efforts in Carlton, door to door testing was advocated for and implemented, local agencies were engaged to support residents.

It was a relief to see that the experiences of the communities in North Melbourne and Flemington were not repeated in Carlton.

816. Despite this, some residents and advocates said they continued to have concerns about the adequacy of infection prevention and control measures within 33 Alfred Street and the other public housing towers subject to the initial lockdown.
817. Some residents said there was also a need for the Victorian Government to publicly acknowledge the harm and distress caused by the intervention.

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***‘It would be good to get the department to apologise for what happened. A lot of residents have been asking about that.’***

– Oral submission from resident

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***‘I would like to hear an apology from the Premier.’***

– Oral submission from resident

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**Figure 44: Extract from DHHS presentation to Flemington and North Melbourne Community Working Group, 5 August 2020**

This is the start, to then get us to a better place and deliver better outcomes. It has been a difficult journey you have all travelled through and we have joined you. There is no playbook for where we are today and how we get to the future place. ... [We have] put measures in place to halt the virus. This has been fairly successful so far, but we want to acknowledge the pain people have gone through. Now we are getting into a more normalised approach and a stronger focus on what the journey to recovery looks like.

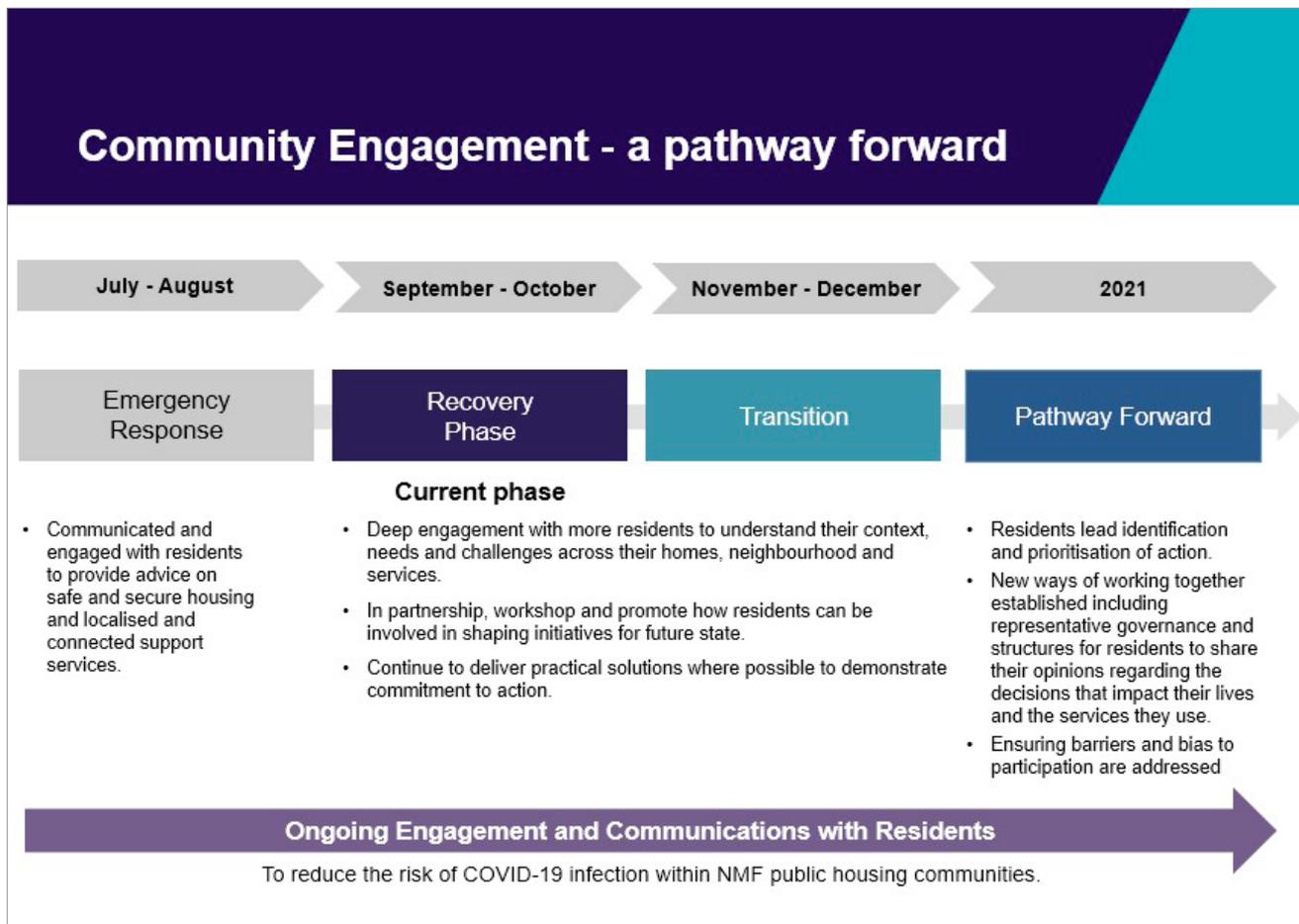
*Source: DHHS*

**Figure 45: Submission from community representative to Community Working Group Review, 22 July 2020**

These are some of the most marginalised communities who have never had access to or ability to raise their health and wellbeing concerns directly with a range of high level bureaucrats — the disproportionate and ongoing impacts of COVID will only magnify the existing inequalities across all areas of life before the pandemic. Let's use this to have a very targeted response for recovery as an ongoing model of working with marginalised groups.

*Source: DHHS*

Figure 46: Extract from North Melbourne and Flemington Community Working Group transition plan, 21 September 2020



Source: DHHS

# Conclusions

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## COVID-19 and human rights

818. Many governments around the world have found it necessary to impose restrictions on public movement, association and assembly to manage and control risks associated with the COVID-19 pandemic.
819. Within Victoria, public health legislation provides authorities with substantial powers to detain individuals, restrict movement and impose other limitations on the rights of people during declared public health emergencies.
820. Although extraordinary in nature, exercise of these powers remains subject to specific principles identified in the Public Health and Wellbeing Act.
821. This includes the precautionary principle and the principle of primacy of prevention – both of which emphasise the importance of taking early and decisive action to prevent or limit the consequences of serious risks to public health.
822. On the other side of the equation lies the principle of proportionality, which cautions against implementing arbitrary measures disproportionate to the public health risks sought to be addressed.
823. The latter finds further expression in the legislative principles applying to the management and control of infectious diseases. While recognising the responsibility of all Victorians to take reasonable precautions to protect public health, the Public Health and Wellbeing Act emphasises that the spread of an infectious disease should ordinarily be prevented or minimised with the ‘minimum restriction’ on the rights of the individual.<sup>28</sup>
824. Victoria is one of the few jurisdictions in Australia with dedicated human rights legislation.
825. The Charter of Rights Act recognises that public authorities have a particular responsibility to respect, protect and act compatibly with human rights.
826. At the same time, this instrument recognises that human rights are not absolute and may be subject to reasonable limitations.
827. Such limitations must be ‘demonstrably justified’ and go only so far as is necessary in the interests of a free and democratic society based on human dignity, equality and freedom.
828. When making decisions, public authorities are required to give ‘proper consideration’ to human rights – they must identify in general terms which human rights are relevant, how these will be impacted and then balance the competing private and public interests.
829. In this way, the Charter of Rights Act acts as a compass under which those exercising public power are expected to make the right decisions, for the right reasons.
830. It is within this context that many of the public health restrictions introduced in response to the COVID-19 pandemic have engaged – and in some cases, substantially limited – the human rights of people living in Victoria.
831. While necessarily arising from a state of emergency, imposition and enforcement of these restrictions remains subject to the protections afforded by the Charter of Rights Act.

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<sup>28</sup> Ginnane J recently observed that the principles in section 111 of the Public Health and Wellbeing Act may not apply to the operation of public health emergency powers; see *Loiolo v Giles* [2020] VSC 722, [188].

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## Public housing outbreak

832. The outbreak of COVID-19 associated with the North Melbourne public housing estate was first identified on 2 July 2020, in the early stages of Victoria's 'second wave' of COVID-19 infections.
833. At the time, the Victorian COVID-19 Outbreak Management Plan emphasised the need for early detection and rapid management of COVID-19 outbreaks occurring in 'sensitive' settings. Although not specifically identified in the document, Melbourne's high-density public housing estates were clearly such environments.
834. Prior to the July outbreak, DHHS as the landlord had not prepared a specific Outbreak Management Plan for the Flemington and North Melbourne public housing estates or Melbourne's high-density public housing settings more generally. Both Victorian and Commonwealth guidelines relating to other 'sensitive' and 'high risk' settings recommended the preparation of such a document.
835. An Outbreak Management Team was nevertheless promptly formed. Among other things, this team initially resolved to escalate testing and contact tracing efforts at 33 Alfred Street – at the time, the centre of the known cases.
836. By the afternoon of 3 July 2020, DHHS had identified a connection between the situation at 33 Alfred Street and a small number of recently confirmed COVID-19 cases at the nearby Flemington estate. The Outbreak Management Team resolved to continue investigating links between cases and engage with local health providers and multicultural leaders in preparation for a full COVID-19 testing sweep at both locations.
837. Late in the evening, understanding of the outbreak developed again. By this time, almost two dozen recently confirmed cases of COVID-19 had been connected to the Flemington and North Melbourne estates. This now included a third public housing tower at Flemington.
838. For the first time, senior DHHS officials began to discuss the possibility of imposing a temporary quarantine order over those living at the outbreak sites.
839. Discussions continued throughout the evening and into the early morning. The State Controller (Health) and Emergency Management Commissioner were notified of the situation. The Chief Commissioner of Police was approached to provide an experienced Victoria Police Commander to act as Deputy State Controller (Health) for the envisaged operation.
840. A further Outbreak Management Team meeting was convened at 10am on 4 July 2020. Those present expressed significant concern at the potential for rapid spread of the virus within the Flemington and North Melbourne estates. The Deputy CHO – the public health expert ordinarily responsible for leading Victoria's response to outbreaks of infectious diseases – was 'terrified' by the health consequences for residents that would likely follow.
841. The Outbreak Management Team resolved to promptly apply 'Stage 3' stay-at-home restrictions to the Flemington and North Melbourne postcode areas. The Deputy CHO also undertook to give further consideration to imposing a 'temporary quarantine order' over the affected public housing towers.

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842. Representatives of DHHS and Victoria Police later met with the Emergency Management Commissioner and State Controller (Health) at 11am to discuss a high-level structure for the latter operation.

843. By this time, the proposed public health intervention was starting to take shape. Residents of the public housing towers associated with the outbreak would be required to quarantine at home for an initial period of five days. Results of a COVID-19 testing blitz would inform a subsequent decision to relax or extend restrictions associated with the intervention.

844. Senior DHHS officers leaving the meeting, including the Deputy CHO, expected these arrangements would not commence for approximately 36 hours.

## Meeting of the Crisis Council of Cabinet

845. A meeting of the Crisis Council of Cabinet was convened at 1:45pm on 4 July 2020.

846. It is a matter of public record that a recommendation was put to this body and a decision made in relation to management of the Flemington and North Melbourne outbreak.

847. Section 19(1) of the Ombudsman Act prevented the Ombudsman from compelling production of information and documents relating to the deliberations of the Crisis Council of Cabinet.

848. The Victorian Government declined to voluntarily provide the investigation with these materials.

849. The investigation was accordingly unable to conclusively determine the nature of the submission to the Crisis Council of Cabinet or what decision was made at this time.

## Lockdown

850. The Deputy CHO was next approached by a DHHS colleague to discuss the proposed public health intervention during the early afternoon of 4 July 2020.

851. At this time, the Deputy CHO was informed that a decision had been made to bring forward the quarantine and testing operation. Directions were to be made under the Public Health and Wellbeing Act and announced at a Victorian Government press conference that afternoon. DHHS's Legal Services team had been tasked with preparing the necessary documents.

852. An inter-agency Emergency Management Team meeting was convened at approximately 2:30pm to plan for the imminent intervention.

853. In the meantime, DHHS continued to collect and review intelligence relating to the outbreak, ultimately determining to extend restrictions to encompass all nine public housing towers located at the Flemington and North Melbourne estates.

854. The Deputy CHO was later emailed proposed public health directions relating to the operation, while travelling by car from Lonsdale Street to Treasury Place, the location of the press conference.

855. Under the proposed directions, nearly 3,000 Victorians living at nine public housing towers were to be immediately detained to their premises for an 'initial detention period' of 14 days – unable to leave home save for in exceptional circumstances.

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856. This was to be the first use of emergency detention powers to manage an outbreak of COVID-19 within the Victorian community, and the first 'hard lockdown' of a high-density residential building anywhere in Australia in response to the global pandemic.

857. There were no Victorian or Commonwealth guidelines relating to such an intervention – or indeed, the exercise of emergency detention powers more generally. The human rights implications of the decision were extraordinary and required careful consideration.

858. The press conference announcing the operation was scheduled to begin in less than 15 minutes.

859. The proposed directions were accompanied by a brief relating to the COVID-19 pandemic and a 15-page human rights assessment. The latter recognised the significance of the decision and explained why the intervention was considered reasonably necessary and, on balance, compatible with human rights set out in the Charter of Rights Act.

860. The human rights assessment did not, however, meaningfully address whether any less restrictive measures were available in the circumstances – for example, the delayed operation originally anticipated by those planning the intervention. It also did not explain why DHHS considered it necessary to detain residents immediately and without warning.

861. The Deputy CHO reviewed the human rights assessment and signed the proposed directions before immediately joining the press conference. She was 'not entirely' comfortable with the process observed on the occasion – this was the shortest period she had ever been provided to consider the human rights impacts of proposed directions relating to the COVID-19 pandemic.

862. While convinced of the need to impose additional public health restrictions at the outbreak sites, the Deputy CHO would have preferred an opportunity to consult with multicultural community leaders and further time to discuss the available options.

863. Later, given the opportunity to reflect on the severity of the intervention, the Deputy CHO told the investigation she was not convinced delaying the lockdown by a day would have made a 'hugely significant' difference to containing the outbreak.

## Implementation

864. No contingency plans existed for imposing a building-wide 'hard lockdown' to manage an outbreak of COVID-19 within the Victorian community.

865. There was urgent need to devise and implement arrangements to provide food relief, as well as health and social supports for the thousands of people likely to be affected by the intervention.

866. Authorised Officers and qualified interpreters needed to be sourced on short notice. Those operating on the ground required advice on appropriate infection prevention and control protocols. Meanwhile, there was need to develop a community engagement strategy and brief multicultural community leaders about the intervention.

867. Despite the dedicated efforts of those coordinating the operation, many of these matters remained outstanding or only just under development when the intervention commenced.

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## Notification

868. The Premier of Victoria publicly announced the public health directions made by the Deputy CHO during a televised press conference at approximately 4:08pm on 4 July 2020.
869. Hundreds of uniformed Victoria Police officers were immediately deployed to the North Melbourne and Flemington estates. Police perimeters were formed around the affected public housing towers. Residents were directed to remain inside their homes.
870. While DHHS quickly recognised the need to formally notify residents of the conditions of the lockdown, copies of the Detention Directions – the English-language instrument setting out the purpose and terms under which people were being detained – were not distributed when the intervention commenced. Some households were not provided with a copy of this document until the third day of the operation.
871. The investigation was encouraged to observe that other attempts were made to explain the purpose and terms of the lockdown to residents. DHHS housing officers made more than 450 attempted telephone notifications to people at 33 Alfred Street, using interpreters where necessary. Written correspondence was also produced and translated into several community languages.
872. Yet these measures were not without their own shortcomings. Telephone notifications did not commence until the third day of the intervention and almost half of all households at 33 Alfred Street were still to be contacted by an Authorised Officer, whether successfully or otherwise, when notification activities ceased on 10 July 2020. The length and complexity of the script used during these calls also did not appear consistent with plain English communication principles.
873. Meanwhile, owing to translation and distribution delays, written materials explaining the Detention Directions in community languages were not distributed to households until the fifth and sixth days of the intervention – in the latter case, the same day the directions were revoked.
874. DHHS was forthcoming to the investigation about the difficulties it faced in this regard. Unsurprisingly, records maintained by its Housing Division were not always accurate or complete. There were also significant logistical challenges associated with the delivery of written materials, both arising from the design of the building and the need to develop and observe procedures to assure infection prevention and control. Perhaps understandably, efforts to distribute information to residents were sometimes deferred in favour of other activities deemed of greater priority, such as providing necessary food relief.
875. It nevertheless appeared to the investigation that many of these issues could have been contemplated and better addressed had more time been allocated towards preparation for the operation.
876. Written materials explaining the decision to continue the lockdown, while considerably more accessible, also lagged behind public announcement of the determination and did not refer to the relevant public health directions by name.

## Reviews

877. International human rights standards emphasise that people deprived of their liberty should have the right to challenge the appropriateness of their detention.
878. While not directly incorporating this principle, section 200(6) of the Public Health and Wellbeing Act required the detention of people subject to the lockdown at 33 Alfred Street be reviewed by an Authorised Officer at least once every 24 hours.

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879. This legal requirement was acknowledged in the terms of the Detention Directions and was assigned considerable weight in the human rights assessment justifying the intervention.

880. Despite this, DHHS was unable to produce any records demonstrating the detention of residents at 33 Alfred Street was reviewed by an Authorised Officer each day – or, for that matter, at all.

881. This appeared contrary to section 200(6) of the Public Health and Wellbeing Act and incompatible with the right to liberty identified in the Charter of Rights Act.

882. While this appeared to fall short of legislative requirements, the investigation accepted DHHS monitored testing and tracing data and information gathered through welfare checks in an effort to determine whether the lockdown remained necessary and proportionate to the circumstances.

## Complaints

883. International human rights standards also emphasise that detained people should have the right to complain to authorities about their treatment.

884. Section 185(1) of the Public Health and Wellbeing Act provided a mechanism under which residents could complain directly to the Secretary to DHHS about many of the conditions of the lockdown.

885. However, information distributed to residents at 33 Alfred Street did not refer to this provision. Unsurprisingly, DHHS informed the investigation no complaints relating to the lockdown at 33 Alfred Street were received or investigated by the Secretary.

886. Information about the COVID-19 pandemic on DHHS's website at the time of the intervention also did not refer to the ability to make complaints about the exercise of emergency powers under the Public Health and Wellbeing Act or clarify the process for doing so.

887. The investigation recognised that DHHS was nevertheless quick to resolve complaints made by residents to the Ombudsman during the lockdown, and demonstrated a genuine willingness to brief investigators on aspects of the intervention as it progressed.

## Access to fresh air and outdoor exercise

888. Residents at 33 Alfred Street were not provided access to fresh air and outdoor exercise during the first week of the lockdown.

889. Even allowing for the extraordinary nature of the operation and the need to address other immediate concerns, the absence of specific processes for residents to access fresh air and outdoor exercise during the first phase of the lockdown undoubtedly increased risks to health and wellbeing associated with the intervention.

890. Again, arrangements for outdoor exercise and access to fresh air could have been contemplated and developed, had more time been allocated towards preparation for the lockdown.

891. DHHS first began developing a fresh air and exercise program relating to 33 Alfred Street on 10 July 2020, after the availability of exercise arrangements was foreshadowed during a Victorian Government press conference. The investigation was unable to determine whether those administering the lockdown were provided advance notice of this announcement.

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892. The fresh air and outdoor exercise program was first trialled the following evening. Those invited to participate in the program were escorted by Victoria Police officers to an outdoor area enclosed by temporary fencing. Residents who participated in the trial likened the area to a cage or prison exercise space and said they felt ‘surrounded’ by Victoria Police personnel.

893. DHHS attributed this to a misunderstanding and quickly rectified the issue, but the use of temporary fencing in this manner was clearly degrading and incompatible with the right to humane treatment when deprived of liberty.

894. Other restrictions associated with the program, including requirements that residents be escorted through the building and supervised by health staff, were imposed in accordance with public health advice and were not unreasonable in the circumstances.

895. Imposition of the program was nevertheless initially inconsistent with the terms of the Close Contacts Directions, under which residents should generally have been at liberty to leave their homes and the surrounding area for the purposes of exercise.

896. While the Close Contacts Directions were later amended to address this issue, the restrictions imposed on people seeking to leave their homes during the second phase of the lockdown resulted in the de facto detention of residents at 33 Alfred Street.

897. This was significant because when determining to maintain the lockdown under the Close Contacts Directions, DHHS did not appear to have consciously exercised the power of detention under the Public Health and Wellbeing Act, nor complied with the legislative safeguards applying to its use.

898. This was likely incompatible with the right to liberty identified in the Charter of Rights Act.

## Enforcement model

899. The involvement of large numbers of Victoria Police personnel in implementing the lockdown was described by residents, advocates and some health workers as both unnecessary and insensitive to the experiences of many of those living at 33 Alfred Street. It was not difficult to empathise with residents who described immediate impressions of the lockdown as ‘absolutely horrifying’.

900. The decision to foreground Victoria Police personnel in the operation instead of public health officers also appeared to result in significant confusion about the nature and terms of the intervention.

901. Victoria Police was assigned responsibility for developing and implementing the enforcement model used by the operation. The decision was attributable to several considerations.

902. Early planning for the operation anticipated there would be need for a considerable workforce to control movement from and between the public housing towers subject to the intervention.

903. At the time, Victoria Police was generally responsible for enforcing compliance with public health directions arising from the COVID-19 pandemic.

904. Victoria Police was also a support agency for the purposes of Victoria’s emergency management framework; and by the morning of 4 July 2020, had been requested to assist in broader coordination of the intervention.

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905. Communications from the Office of the Premier to DHHS also strongly encouraged the use of Victoria Police personnel, likely due to contemporaneous concerns about the involvement of private contractors in Victoria's hotel quarantine scheme.

906. The investigation was informed there were also security concerns associated with the operation. However, information included in DHHS's human rights assessment regarding this issue appeared at least partly based on incorrect and potentially stereotypical assumptions about the circumstances of those living at the Flemington and North Melbourne public housing estates. It seemed unimaginable that such assumptions, including the 'theatre of policing' that eventually followed, would have accompanied the response to an outbreak of COVID-19 in a more affluent setting.

907. DHHS officers planning the intervention clearly anticipated Victoria Police personnel would be deployed as part of the intervention. Yet the enforcement model developed by Victoria Police did not appear to have been the subject of noteworthy inter-agency discussion or debate, nor based on direct advice from the Deputy CHO.

908. Overall, DHHS as the authority responsible for the operation and the social landlord appeared to have given insufficient consideration to how the significant police deployment was likely to be perceived and experienced by residents. At a minimum, this should have been addressed in the human rights assessment informing the decision to impose the lockdown.

909. DHHS bore ultimate responsibility for ensuring both implementation and perception of the intervention remained consistent with its public health objectives.

## Exercise of discretion

910. Public health directions relating to the lockdown included suitable provisions under which people at 33 Alfred Street could receive permission to leave their homes on compassionate and other grounds.

911. DHHS appeared to have put in place reasonable arrangements for requests of this nature to be escalated to Authorised Officers for appropriate consideration.

912. Several requests to leave 33 Alfred Street were granted during the lockdown. Cases reviewed by the investigation generally pointed to an appropriate use of discretion.

913. The investigation nevertheless observed people at 33 Alfred Street were not formally notified of the process for submitting requests to leave the building, and there appeared to be limited understanding among residents of the circumstances in which such requests could be made.

## Access to medical care

914. Public health directions relating to the lockdown included appropriate provisions under which residents could seek permission to leave their homes to access medical care.

915. Early planning for the lockdown also recognised the importance of ensuring residents were provided access to on-site healthcare services.

916. Ambulance Victoria officers were deployed to the Flemington and North Melbourne public housing estates during the first evening of the intervention, and on-site primary healthcare services were generally well-established and functioning by the afternoon of 6 July 2020.

917. The investigation was generally satisfied reasonable arrangements were put in place for residents to access medical care during the lockdown, including emergency treatment where necessary.

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918. Although in some cases significantly delayed, materials distributed to residents during the lockdown also tended to provide clear and accessible information about the processes for seeking most forms of medical attention.
919. On the other hand, availability of on-site mental health services was not prominently advertised by DHHS or well understood by residents who spoke with the investigation.
920. The delivery of care was also undermined by confusion about lines of authority and issues of coordination between DHHS and Victoria Police personnel controlling access to the building.
921. Initial reluctance to share testing data with community health provider Cohealth in some cases also unnecessarily delayed outreach to residents testing positive for COVID-19.

## Access to medical supplies

922. The investigation identified significant problems with the provision of medication and other medical supplies to residents during the lockdown.
923. Residents seeking access to medical supplies were initially required to telephone a dedicated public housing hotline established by DHHS.
924. Although a largely positive initiative, this service was overwhelmed during the first few days of operation, leading to significant delays in allocating and resolving requests.
925. The investigation identified several cases where fulfilment of seemingly urgent requests for medication was delayed or neglected by authorities administering the lockdown. Residents were in some cases forced to rely upon family or community volunteers to collect and deliver essential supplies.
926. Processes relating to the delivery of medical supplies appeared to improve with the passage of time, as initial demand subsided and following creation of a dedicated health phoneline operated by community health provider Cohealth.
927. However, inefficiencies in the process persisted, which were in some cases attributable to a 'referral chain' between DHHS and relevant support agencies, leading to the delayed escalation of requests to pharmacy providers.
928. Resolving requests for medical supplies would have benefited from a centralised case management system and greater coordination and oversight from DHHS.

## Welfare checks

929. DHHS promptly arranged for telephone welfare checks to be made to residents who were particularly at risk during the intervention, including those of advanced age, Aboriginal and Torres Strait Islander persons and people with disabilities.
930. Housing officers telephoning residents to provide notification of the lockdown also undertook a basic welfare check. Further welfare checks were undertaken during the second phase of the operation, prioritising residents who had tested positive for COVID-19 and their close contacts. Support agencies such as Cohealth also made outreach calls to existing clients impacted by the intervention.
931. Most households appeared to have received at least one telephone welfare check during the initial phase of the lockdown. Concerns raised by residents during these calls were generally escalated appropriately.

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932. Failure to reach other households was mainly attributable to technical difficulties, including inaccurate or incomplete information within DHHS's systems. In all such cases reviewed by the investigation, multiple attempts were made to contact the individuals concerned.

933. DHHS adopted a multi-faceted approach to welfare checks during the lockdown that capitalised on other interactions with residents, including engagement relating to COVID-19 testing and the fresh air and exercise program.

934. This did not encompass regular welfare checks to all residents at scheduled intervals. Implementation of a more structured, comprehensive approach to monitoring resident welfare would have decreased risks to health and wellbeing associated with the intervention.

## COVID-19 testing

935. Under the terms of the intervention, residents of the Flemington and North Melbourne public housing estates risked being detained for a further 10 days if they refused to be tested for COVID-19 when requested by DHHS.

936. Relatively few people were issued with extended detention notices under this provision. The investigation was encouraged to observe that DHHS continued to engage with these residents and offer further opportunities to be tested.

937. Concerns about an absence of sufficient interpreters and information in non-English languages during initial testing operations were partly corroborated by records reviewed by the investigation. Local community leaders and volunteers were later embedded in door-knocking activities, providing informal interpretation support.

938. Residents at 33 Alfred Street were requested to participate in a second sweep of COVID-19 testing during the second phase of the lockdown.

939. The investigation accepted there was a strong public interest in encouraging residents to undertake further COVID-19 testing but considered further efforts could have been made by DHHS to explain the consequences for non-participation.

## Accessibility of information

940. While DHHS made efforts to ensure written materials concerning the intervention were translated into languages commonly spoken within the Flemington and North Melbourne public housing estates, there were nevertheless significant delays in preparing and distributing these materials to residents.

941. Of most concern, written materials explaining the purpose and terms of the lockdown in community languages were not distributed until the fifth and sixth days of the intervention.

942. In other cases, it appeared that time constraints resulted in some factsheets being produced in only a few languages.

943. While some delay in the production of translated materials may have been unavoidable, information concerning the lockdown could have been made more readily accessible to culturally and linguistically diverse residents had further time been allocated towards preparing for the intervention.

944. There was also an unacceptable absence of qualified interpreters at the Flemington and North Melbourne public housing estates during the critical first evening of the lockdown, leaving residents from non-English speaking backgrounds to rely upon the assistance of neighbours, family members and community advocates to understand the circumstances under which they were being detained.

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## Community engagement

945. The decision to impose the lockdown was not preceded or informed by consultation with multicultural community leaders.
946. Earlier community consultation would have been preferred by the Deputy CHO, who indicated the immediacy of the operation largely prevented such activities.
947. Those planning the intervention nevertheless foresaw the need to engage with the Victorian Multicultural Commission and community leaders to ensure communications relating to the lockdown were culturally appropriate and well understood.
948. Despite this, early consultation by DHHS with multicultural communities was largely reactive and non-collaborative in nature, driven in part by community concern about the immediacy and implementation of the intervention.
949. Community engagement appeared to improve with the passage of time, and the investigation received largely positive feedback about the decision to form a Community Working Group to inform the operation. This initiative was effective at identifying and resolving issues raised by community representatives, although the intervention may also have benefited from a dedicated forum for residents.
950. The investigation also received positive feedback about the decision to invite community representatives to participate in meetings of the site-level Incident Management Team – an apparent first for emergency management operations within Victoria.

## Final observations

951. There was a clear and understandable sense of urgency surrounding efforts to contain the outbreak of COVID-19 associated with the Flemington and North Melbourne public housing estates.
952. Senior officers interviewed by the investigation referred to the sense of escalating concern within DHHS as the full extent of the outbreak came to be understood. By the morning of 4 July 2020 – the day the lockdown was implemented – there was broad consensus, informed by expert public health advice, of the need to impose additional restrictions on movement to isolate and contain the spread of COVID-19 within the affected estates.
953. Yet the reasons for commencing the intervention that same day – with just a few hours' planning – were altogether less clear. Such an immediate response was not specifically recommended by the Deputy CHO, who, like other senior DHHS officers, originally anticipated the operation commencing after further preparation.
954. While the investigation was persuaded the temporary detention of residents at 33 Alfred Street may have been an appropriate measure to contain the outbreak of COVID-19 sweeping the building, the imposition of such restrictions with more or less immediate effect, absent further preparation, and without specific health advice recommending such an approach, did not appear justified or reasonable in the circumstances.
955. Indeed, many of the problems associated with implementation of the lockdown appeared attributable to this feature of the intervention.
956. The investigation was also not satisfied proper consideration was given to the rights of those affected by the lockdown at 33 Alfred Street when restrictions were introduced.

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957. This conclusion was unavoidable, having regard to the limited time – less than 15 minutes in all – afforded to the Deputy CHO to consider the human rights implications of the intervention before its scheduled announcement.
958. In fact, the circumstances surrounding the making of the decision gave rise to lingering concerns about the extent to which the Deputy CHO was permitted to bring an independent mind to the issue.
959. While directions relating to the intervention were signed by the Deputy CHO moments before the Victorian Government press conference announcing the operation, the evidence strongly suggested the decision to impose an immediate lockdown was taken by the Crisis Council of Cabinet some two hours earlier, and was not based on direct advice from this public health expert.
960. The conclusions in this report should not be read as criticism of the Deputy CHO, who was clearly placed in an impossible position by the apparent decision to bring forward the intervention. It was plain from the Deputy CHO's evidence and demeanour during interview that the decision to impose the lockdown continued to weigh heavily upon her.
961. Similarly, the errors associated with implementation of the lockdown identified in this report – many of them significant – should not be taken to reflect on the dedicated efforts of the many hundreds of public officials, support agencies and community volunteers who assembled on such short notice to support residents, their families and others affected by the intervention.
962. On one view, the operation was a remarkable success – quickly and decisively halting the rapid growth of COVID-19 cases within the Flemington and North Melbourne public housing estates.
963. Yet it was clear to the investigation that greater effort could have been taken to reconcile aspects of how the intervention was implemented and perceived with its overall public health objectives.
964. In many cases, grievances about implementation of the lockdown were wholly understandable, having regard to the experiences shared by residents, volunteers and advocates with the investigation.
965. DHHS, in responding to the Ombudsman's draft report, expressed concern that the investigation was judging it against the 'gold standard', 'at a time when a considerably lower standard was not only acceptable but essential.'
966. It is acknowledged that the opinions expressed in this report hold DHHS to a high standard, but, as evidenced throughout this report, this standard was not unrealistic, even allowing for resource constraints and the unprecedented events of July 2020. It is the Ombudsman's role to improve public administration, and this necessarily requires the identification of best practice – administrative, and human rights. In many cases, this also meant holding the lockdown to the standards required by Victorian law.
967. In this regard, it was encouraging to observe concerns about the intervention already appeared to have led DHHS to reflect on the need for greater engagement with the diverse communities calling the Flemington and North Melbourne public housing estates home.
968. The investigation also welcomed the many additional measures being implemented by DHHS to mitigate the risks of COVID-19 within Melbourne's high-density public housing estates and other sensitive residential settings – some of which no doubt should have preceded identification of the outbreak in July.
969. Ultimately, there was a common view, voiced by many of the residents, advocates and senior DHHS officers who shared their experiences with the investigation, of the need to restore trust following the intervention.

# Opinion

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## **In light of the above and pursuant to section 23(1)(a) of the Ombudsman Act:**

1. The detention of people at 33 Alfred Street, North Melbourne on 4 July 2020, absent further preparation, appears to have been contrary to law, namely section 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), insofar as it:
  - was incompatible with human rights, including the right to humane treatment when deprived of liberty recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
  - did not result from proper consideration of relevant human rights.
2. The detention of people at 33 Alfred Street following revocation of the *Detention Directions (33 Alfred Street, North Melbourne)* was incompatible with the right not to be deprived of liberty except in accordance with procedures established by law and accordingly appears contrary to section 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
3. DHHS's failure to ensure the detention of residents at 33 Alfred Street was reviewed by an Authorised Officer at least once per day appears to have been contrary to law, namely section 200(6) of the *Public Health and Wellbeing Act 2008* (Vic).
4. The requirement that people at 33 Alfred Street exercise in an area surrounded by temporary fencing on the evening of 11 July 2020 was incompatible with both the protection against degrading treatment and the right to humane treatment when deprived of liberty and accordingly appears contrary to section 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

## **Further, pursuant to section 23(1)(g) of the Ombudsman Act:**

5. DHHS acted in a manner that was wrong, in:
  - (a) failing to provide people at 33 Alfred Street including non-English speaking residents, with timely and accessible notice of the reasons for and terms of their detention
  - (b) failing to notify people at 33 Alfred Street of the ability to complain about aspects of their treatment under section 185(1) of the *Public Health and Wellbeing Act 2008* (Vic)
  - (c) failing to provide people at 33 Alfred Street with access to fresh air and outdoor exercise while detained between 4 July and the evening of 11 July 2020
  - (d) failing to implement appropriate measures to ensure people at 33 Alfred Street were provided timely and reasonable access to required medication while detained.

# Recommendations

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## To the Victorian Government

### Recommendation 1

Apologise publicly to residents of the Flemington and North Melbourne public housing estates for harm or distress caused by imposition of the immediate lockdown on 4 July 2020.

### Recommendation 2

Amend the *Public Health and Wellbeing Act 2008* (Vic) to:

- (a) allow a person subject to detention under section 200(1)(a) to apply to both the Chief Health Officer and VCAT for review of the decision
- (b) require that a person subject to detention under section 200(1)(a) be promptly provided with information concerning the following in a manner and form they are capable of understanding:
  - (i) the purpose and terms of their detention
  - (ii) availability of, and processes for seeking, relevant exemptions
  - (iii) any right(s) of complaint or review
- (c) require that a person subject to detention under section 200(1)(a) be provided with regular and meaningful access to fresh air and outdoor exercise, wherever practicable.

## To the Department of Health and Human Services

### Recommendation 3

Identify all sensitive and high-risk accommodation settings administered by the Victorian Government and invest in them to ensure appropriate COVID-19 outbreak prevention, preparation and response measures are in place.

### Recommendation 4

Establish processes to regularly evaluate implementation and impact of these measures for the duration of the COVID-19 pandemic.

### Recommendation 5

Develop and implement local guidelines, procedures and training relating to exercise of the emergency detention power identified in section 200(1)(a) of the *Public Health and Wellbeing Act 2008* (Vic) in response to an outbreak of an infectious disease, addressing, at a minimum:

- (a) the circumstances in which it may be appropriate to detain a person during a public health emergency
- (b) considerations informing use of the power, including the need to respect and protect the health and wellbeing of those being detained
- (c) legislative safeguards relating to use of the power, specifying, wherever possible, measures to be adopted to ensure compliance with these safeguards
- (d) obligations arising under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

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### **Recommendation 6**

Consider measures to improve DHHS's capability to perform health emergency management functions, including by:

- (a) appointing or investing in staff with relevant emergency management expertise
- (b) clarifying and enhancing surge capacity arrangements for health emergencies
- (c) reinforcing partnerships with relevant service providers in support of emergency preparedness, response and recovery activities.

### **Recommendation 7**

Develop and publish information clarifying the process for making complaints under section 185(1) of the *Public Health and Wellbeing Act 2008* (Vic), including specific information for people seeking to complain about the exercise of emergency powers during the COVID-19 pandemic.

### **Recommendation 8**

In consultation with the Victorian Multicultural Commission, work with community leaders and public housing residents to strengthen trust and engagement, and develop and implement measures to:

- (a) establish avenues for improving the accuracy of public housing records maintained by the Housing Division, including primary/preferred language and country of-origin data
- (b) improve understanding of the needs and preferences of culturally and linguistically diverse people living in public housing

- (c) establish and maintain partnerships with community leaders and residents to support timely communication with people living in public housing
- (d) increase participation of multicultural communities in policy, planning and project activities relating to public housing.

### **Recommendation 9**

Consider other measures to improve relationships between DHHS and residents of the Flemington and North Melbourne public housing estates, including:

- (a) forming one or more tenant representative bodies
- (b) further opportunities for remunerated employment or workplace learning within the Victorian Government that could be made available to residents during and beyond the COVID-19 pandemic
- (c) identifying opportunities to expand the community engagement model adopted during the lockdown to broader departmental activities.

### **Recommendation 10**

Report publicly on steps taken to implement recommendations 3-9 above, on or before 30 June 2021.

# Appendix A

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## DHHS's response to the Ombudsman's draft report

[Note: pinpoint references in this document refer to the Ombudsman's draft report]

### DEPARTMENT'S RESPONSE TO DRAFT REPORT

9 December 2020

1. This document provides the response of the Department of Health and Human Services (the **Department**) to the Draft Report prepared by the Ombudsman on her investigation into the detention and treatment of public housing residents at 33 Alfred Street, North Melbourne in July 2020 (the **Investigation**).
2. The Investigation is being conducted pursuant to the Ombudsman's own motion powers in s 16A of the *Ombudsman Act 1973 (Vic)* (the **Ombudsman Act**). Section 23(1) of the Ombudsman Act outlines the opinions that the Ombudsman may consider forming about the administrative action to which an investigation relates. The Ombudsman's draft opinions are provided in the Draft Report,<sup>1</sup> and are the focus of this response.
3. Section 23(2) of the Ombudsman Act requires the Ombudsman, where the Ombudsman has formed a specified type of opinion, to "report the Ombudsman's opinion and the reasons for it". In its current form the Draft Report does not comply with that requirement because it is not possible to identify the reasons for each opinion reached.
  - 3.1 Although a large number of findings is dispersed throughout the body of the Draft Report, under a range of different headings, the draft opinions set out at pages 159-160 are not cross-referenced to any of those findings by paragraph number or by reference to the broader headings.
  - 3.2 As a result, it is not clear which of the many findings currently recorded in the Draft Report support each of the draft opinions set out at pages 159-160 of the Draft Report. In addition, the Draft Report includes comments on various issues – for example, in relation to the need for informed and free consent to medical testing,<sup>2</sup> and alleged suicide attempts<sup>3</sup> – however the Draft Report does not identify how such comments are connected to the findings, much less the draft opinions, in the Draft Report. That lack of clarity has also made it difficult for the Department to respond thoroughly to the Draft Report.

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<sup>1</sup> Draft Report, pages 159–160.

<sup>2</sup> Draft Report, page 54, paragraph 226.

<sup>3</sup> Draft Report, page 124, paragraphs 562–564.

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- 3.3 If the Department's response below does not address any of the underlying reasons for each of the Ombudsman's draft opinions, that omission is inadvertent and the Department asks that it be notified of any reasons supporting the draft opinions that the Department has not addressed.
4. In summary, the Department disputes the Ombudsman's draft opinions on the following bases:
- 4.1 The draft opinion, that the detention of people at 33 Alfred Street on 4 July 2020, absent further preparation, was contrary to s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (the **Charter**),<sup>4</sup> is incorrect: it has ignored important jurisprudence on the proper application of s 38(1) of the Charter.
- 4.2 The draft opinion, that the detention of people at 33 Alfred Street following revocation of the *Detention Directions (33 Alfred Street)* appears contrary to s 200(1)(a) and (6) of the *Public Health and Wellbeing Act 2008* (the **PHW Act**) and s 38(1) of the Charter,<sup>5</sup> is incorrect: it has ignored important jurisprudence on the proper interpretation of s 200 of the PHW Act and s 38(1) of the Charter.
- 4.3 The draft opinion, that the failure to ensure daily review of detention of residents at 33 Alfred Street was contrary to s 200(6) of the PHW Act,<sup>6</sup> is incorrect: reviews were conducted while residents were detained under s 200(1)(a) between 4 and 9 July 2020. After 9 July 2020, s 200(6) did not apply because residents were no longer detained under s 200(1)(a).
- 4.4 The draft opinion, that the requirement for people at 33 Alfred Street to exercise in an area surrounded by temporary fencing on the evening of 11 July 2020 was degrading and incompatible with the right to humane treatment when deprived of liberty, and appears contrary to s 38(1) of the Charter,<sup>7</sup> is incorrect: it has ignored important jurisprudence on the nature and content of those human rights.

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<sup>4</sup> Draft Report, page 159, Draft Opinion 1.

<sup>5</sup> Draft Report, page 159, Draft Opinion 2.

<sup>6</sup> Draft Report, page 159, Draft Opinion 3.

<sup>7</sup> Draft Report, page 159, Draft Opinion 4.

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4.5 The draft opinion, that the Department acted in a manner that was wrong in failing to:

- (a) document and adequately address the human rights implications of the decision to detain people at 33 Alfred Street without notice and the manner in which detention was enforced;
- (b) provide people at 33 Alfred Street with timely and accessible notice;
- (c) notify people at 33 Alfred Street of their ability to complain under s 185(1) of the PHW Act;
- (d) provide people at 33 Alfred Street with access to fresh air and exercise between 4 and 11 July 2020; and
- (e) provide people at 33 Alfred Street with timely and reasonable access to required medication;<sup>8</sup>

is incorrect because, to the extent that those alleged actions are not disputed, it was *not wrong* for the Department to prioritise the protection of human life, which justified those actions.

5. The Draft Report recognises that, on one view, the lockdown operation was a remarkable success in that quick and decisive steps were taken to halt the rapid growth of COVID-19 cases within the Flemington and North Melbourne Housing estates.<sup>9</sup> However, many of the Ombudsman’s other proposed findings would hold the Department to an unduly high standard of administrative behaviour in the emergency circumstances with which the Department was required to deal.

5.1 Because the Department was responding to an emergency where human life was at stake, the aphorism that “perfection can be the enemy of the good” is particularly relevant here. The Department’s response was *good*, even if not perfect.

5.2 The Ombudsman’s draft findings would hold the Department to a standard that could not have been achieved while protecting lives to the

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<sup>8</sup> Draft Report, pages 159–160, Draft Opinion 5.

<sup>9</sup> Draft Report, page 158, paragraph 810.

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very great extent that they could be protected, which was unashamedly the Department's priority.

6. The following features of the emergency that was faced by the Department at the towers are self-evident:
  - 6.1 there had been an alarming growth in the daily number of infections diagnosed in the public housing towers in the four days up to 4 July 2020;
  - 6.2 the physical features of the towers (high density living, shared communal spaces and only two shared elevators) resembled “vertical cruise ships”, with the inflammatory transmission dynamics to which that description alludes;
  - 6.3 the population of the towers had a range of intersectional vulnerabilities (health vulnerabilities, high social interactivity, high levels of cultural and language diversity and highly mobile employment profiles);
  - 6.4 COVID-19 can result in death (with older members of the community at highest risk) and “long-COVID” (which has been shown to affect young low-risk patients and cause long term damage to multiple organs);
  - 6.5 COVID-19 is highly infectious and in many instances has confounded the prophylactic measures taken by experts and health professionals during the course of the pandemic (infecting even health carers wearing full PPE); and
  - 6.6 the immediate lockdown on 4 July 2020 materially slowed the growth in the infection rate in the towers, when compared to its previous alarming growth rate and when compared to the growth rate in the community outside the towers.
7. The urgency with which the Department acted on 4 July 2020, is readily explained by those self-evident matters. The Department then considered, and still considers, that *acting with immediate speed was absolutely necessary* to:
  - 7.1 serve the PHW Act's objective of “protecting public health and preventing disease ... or premature death”: s 4(2)(a);
  - 7.2 promote the precautionary principle recognised in s 6 of the PHW Act; and

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- 7.3 promote “the prevention of disease ... or premature death”, recognised by s 7(1) of the PHW Act.
8. The Department contends that there are people alive today who may not have been alive if the Department had not acted so quickly.
- 8.1 To the extent that many of the Ombudsman’s criticisms are founded on the haste with which the Department acted, her draft opinions fail to address the fact that, on one side of the ledger, are those saved lives, which the Ombudsman’s preferred response would risk in the interest of administrative perfection.
- 8.2 The Department acknowledges that the residents of 33 Alfred Street experienced the effects of the Department’s urgent action, but this was necessary and justified by the need for the Department to act quickly in order to save lives.
- 8.3 That fact supports both the proportionality of the measures taken for the purposes of s 9(a) of the PHW Act, and the reasonableness of the measures taken for the purposes of s 7(2) of the Charter.
9. This response will address the Draft Report in six parts, which will address in turn:
- 9.1 the relevant factual background;
- 9.2 the factual findings made by the Ombudsman that are disputed by the Department;
- 9.3 the legislative context;
- 9.4 the operation of the Charter;
- 9.5 the decision of *Loiolo v Giles* [2020] VSC 722; and
- 9.6 the response to the draft opinions.
10. As part of this response to the Draft Report, the Department also provides:
- 10.1 a table which sets out the Department’s response to the draft recommendations (**Annexure A**); and

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- 10.2 a table which sets out various factual issues which have been identified in relation to the Draft Report (**Annexure B**).
11. The Draft Report and draft recommendations highlight a number of areas where the Ombudsman considers that the Department's planning and response to a novel public health emergency could have, with the benefit of hindsight, been improved.
- 11.1 As outlined in this response, the Department contends that the actions taken were reasonable and proportionate when all relevant facts and jurisprudence are considered. Nevertheless, the Department has already acted, and will continue to act, in a way which is informed by its dialogue with, and feedback from, the residents and relevant service providers, as well as the Department's own learnings.
- 11.2 The Department welcomes the opportunity to discuss with the Ombudsman any draft recommendations that would assist in strengthening the future planning and readiness activities discussed in Annexure A.

### **Relevant factual background**

12. On 1 June 2020, restrictions across Victoria were relaxed, including enabling up to 20 visitors to a home and the opening of various cultural spaces, such as galleries, museums and drive-in cinemas.
13. By late June 2020, the first evidence of an outbreak in North Melbourne and Flemington became apparent. Epidemiological data identified that increasing confirmed cases of COVID-19 were not spread evenly across Victoria but were concentrated in specific communities in Melbourne.
14. On 20 June 2020, the nine relevant public housing towers were recorded as having zero cases of COVID-19. By 24 June 2020, there were two positive cases in those towers, which doubled to four cases on 27 June 2020, and doubled again to eight cases on 30 June 2020. By 1 July 2020, the number of positive cases in the towers had more than doubled to 17 cases, triggering a more active monitoring by the Department's public health team and by the Director of Housing.<sup>10</sup>

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<sup>10</sup> DHHS response dated 31 August 2020, page 3; email from [redacted] to [redacted] dated 4 July 2020; metrics for postcodes on watch list, 3 July 2020 (period 20 June – 3 July 2020).

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15. On 1 July 2020, the *Diagnosed Persons and Close Contacts Direction (No 4)* (the **Close Contacts Direction**) was made and became operative.
  16. On 4 July 2020, the number of cases in the public housing towers had again doubled to 34 cases. Of these 34 cases, 23 cases were associated with 33 Alfred Street and two of the Flemington public housing sites. It is also significant that the housing tower at 33 Alfred Street is located next door to the 159 Melrose Street housing tower, which houses elderly tenants who are among the most vulnerable to COVID-19.
  17. The exponential increase in cases that had occurred in the period from 24 June 2020 to 4 July 2020 had not been seen previously in Victoria and, because it occurred in the public housing tower setting, it was a source of significant concern for the Department. It “quite terrified” the Deputy Chief Health Officer who was tasked with making the decision to issue directions to address it.<sup>11</sup>
  18. At 3.30 pm on 4 July 2020 the *Detention Direction (33 Alfred Street, North Melbourne)* (the **Detention Direction**) became operative.
  19. In the period from 4 July 2020 to 8 July 2020, the Department urgently developed its review procedure for the purposes of section 200(6) of the Act. From 8 July 2020 the Department implemented the review procedure it had developed for the purposes of s 200(6) of the PHW Act. On 9 July 2020, the *Revocation of Detention Direction (33 Alfred Street, North Melbourne)* (the **Revocation Direction**) was made, which revoked the Detention Direction. On 15 July 2020, the *Diagnosed Persons and Close Contacts Direction (No 5)* became operative and revoked the Close Contacts Direction.
  20. From 11.59 pm on 18 July 2020, the residents of 33 Albert Street were no longer considered close contacts for the purpose of the *Diagnosed Persons and Close Contacts Direction (No 5)* and were permitted to leave their homes in accordance with the restrictions that were in place in Victoria at that time.

### Legislative context

21. The PHW Act provides the legislative framework, which enables the State to respond to public health risks through a graduated scheme that enables a proportionate response to matters ranging from small public health incidents to

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<sup>11</sup> Draft Report, page 41, paragraph 162; DHHS response dated 31 August 2020, page 3; email from [redacted] to [redacted] dated 4 July 2020; metrics for postcodes on watch list, 3 July 2020 (period 20 June – 3 July 2020).

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public health emergencies, such as an influenza pandemic.<sup>12</sup> Section 1 of the PHW Act provides that the purpose of the Act is to provide a legislative scheme that promotes and protects *public health and wellbeing* in Victoria.

22. Division 3 of Pt 10 of the PHW Act provides for certain powers that are available only in a state of emergency, to be exercised by “authorised officers”. Relevantly for present purposes, those powers include public health risk powers (s 190)<sup>13</sup> and emergency powers (s 200).

23. Section 4(3) of the PHW Act provides that it is the “intention of Parliament that in the administration of this Act and in seeking to achieve the objective of this Act, regard should be given to the guiding principles set out in sections 5 to 11A”.

23.1 Those principles relevantly include:

- (a) the principle of evidence based decision-making: s 5;
- (b) the precautionary principle: s 6;
- (c) the principle of primacy of prevention: s 7;
- (d) the principle of accountability: s 8;
- (e) the principle of proportionality: s 9; and
- (f) the principle of collaboration: s 10.

23.2 Those principles therefore apply to all decision-making under the PHW Act, including decisions under s 200 (in Pt 10 of the PHW Act).

24. In addition, s 11 provides that s 111 specifies the principles that are to apply for the purposes of the application, operation and interpretation of Pt 8. The Draft report refers to one of those principles (“minimum restriction” on the rights of the individual) at paragraph 673.

24.1 However none of the powers exercised during the lockdown is in Pt 8 of the PHW Act: they are in Pt 10 (which is discussed below).

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<sup>12</sup> Second Reading speech Public Health and Wellbeing Bill, 1732.

<sup>13</sup> The public health risk powers are also available where a state of emergency has not been declared.

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- 24.2 The Supreme Court has recently confirmed that s 111 does not apply to the exercise of the emergency powers in Pt 10.<sup>14</sup>
- 24.3 To the extent that the Ombudsman’s draft opinions are based on the application of that “minimum restriction” principle, those opinions should be reconsidered.
25. Division 3 of Pt 10 is headed “Emergency powers”. The emergency powers may only be exercised by authorised officers if:
- 25.1 the Minister for Health has, on the advice of the Chief Health Officer (the **CHO**) and after consultation with the Minister and the Emergency Management Commissioner under the *Emergency Management Act 2013* (Vic), declared a state of emergency under s 198; and
- 25.2 the CHO has authorised the exercise of the emergency powers and the public health risk powers by authorised officers under s 199, which the CHO may only do if the CHO believes that it is reasonably necessary to do so to eliminate or reduce a serious risk to public health.
26. The emergency powers are contained in s 200(1) of the PHW Act. All of the Directions were given in exercise of the s 200(1) powers. They relevantly include:
- 26.1 “detain any person or group of persons”: s 200(1)(a);
- 26.2 “restrict the movement of any person or group of persons within the emergency area”: s 200(1)(b); and
- 26.3 “give any other direction that the authorised officer considers is reasonably necessary to protect public health”: s 200(1)(d).
27. The powers conferred by s 200 are framed in broad terms, appropriate for powers exercisable only in a state of emergency.
- 27.1 Rather than setting out a list of the kinds of directions that might be given,<sup>15</sup> the powers are framed broadly so as to permit a suitable response to a wide range of potential public health emergencies, the

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<sup>14</sup> *Loiolo v Giles* [2020] VSC 722 at [188] (Ginnane J).

<sup>15</sup> An example of that approach can be found in s 70 of the *Health Act 1956* (NZ); and in s 25 of the *Emergency Management Act 2004* (SA).

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specific content of which may then be tailored to the particular threat to public health.

27.2 Because of the dynamic nature of public health emergencies, it is important that emergency powers be broad in scope and flexible in nature.

27.3 Read with ss 1, 4, 198 and 199, the specific purpose of s 200 is to give broad and flexible powers to officers authorised by the CHO.

28. As noted in paragraph 23.2 above, the emergency powers fall to be exercised in the context of the principles set out in ss 5–10. Importantly, those principles are not rules to be “complied with” when making a decision — they are principles to guide decision-making. Indeed, those principles may pull in different directions and thus fall to be balanced against each other and given different weight, depending on the circumstances.

29. Parliament has selected the Health Minister as the Minister who declares a state of emergency, but has left the exercise of the emergency powers in the hands of the CHO and those authorised by the CHO.<sup>16</sup>

29.1 That is, the CHO, who must be a person with medical expertise (see s 20(1) of the PHW Act), is given a key decision-making role under the Act, including the authorisation of authorised officers under s 199.

29.2 Such authorised persons must be authorised officers appointed under s 30, which requires that they have suitable training and qualifications.<sup>17</sup>

29.3 The CHO may only authorise the exercise of the emergency powers if a state of emergency exists and the CHO believes that it is reasonably necessary to do so to respond to the serious public health risk: s 199(1).

29.4 The CHO has authorised the Deputy CHO, being a person with medical expertise, to exercise the emergency powers, which she did at the relevant times.

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<sup>16</sup> The PHW Act, ss 20A and 199.

<sup>17</sup> See the PHW Act, s 30(2).

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30. A review of the legislative context confirms that the Department's primary focus on saving life and prioritising health above all else, was mandated by the PHW Act.<sup>18</sup>

### The operation of the Charter

#### *The right to liberty in s 21*

31. The right to liberty in s 21 of the Charter is engaged only when a person is wholly deprived of their liberty, rather than where there are restrictions on movement that fall short of physical detention.<sup>19</sup> In *Kracke*, Bell J described the right in the following way:<sup>20</sup>

The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed to all deprivations of liberty, **but not mere restrictions on freedom of movement**. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. **The difference between a deprivation of liberty and a restriction on freedom of movement is one of degree or intensity, not one of nature and substance.**

32. The European case law has a very well developed jurisprudence in relation to the right to liberty under the *European Convention on Human Rights*. It is also consistent with the scantier jurisprudence under the *International Covenant on Civil and Political Rights* upon which s 21 of the Charter is based. The right is contained in Article 5 of the *Convention*, the relevant parts of which are:

#### **Right to liberty and security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

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<sup>18</sup> It is of note that the Department, under the *Occupational Health and Safety Act 2004* (Vic) also has a duty as an employer, so far as is reasonably practicable, to provide and maintain for its employees, including independent contractors, a working environment that is safe and without risk to health.

<sup>19</sup> *Kracke* (2009) 29 VAR 1 at 124 [588], 140 [664] (Bell J); *Antunovic v Dawson* (2010) 30 VR 355 at 372 [72] (Bell J); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) at p 16.

<sup>20</sup> (2009) 29 VAR 1 at 140 [664] (emphasis added).

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...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

33. Notably, Article 5 specifically provides for the lawful detention of persons where that detention is required to protect the community, such as the detention of people with infectious diseases, drug addicts or alcoholics. The equivalent internal limitations in the Charter, in ss 21(2) and 21(3), do not allow for specific types of detention, but instead allow for detention that is not arbitrary, and for deprivation of liberty “on grounds, and in accordance with procedures, established by law”.
34. The concept of arbitrariness in international human rights law involves considerations of proportionality.<sup>21</sup> In *PJB v Melbourne Health*, Bell J found that arbitrariness:<sup>22</sup>
- ... extends to interferences which, in the particular circumstances applying to the individual, are **capricious, unpredictable or unjust** and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought.
35. Arguably, the internal limitations on the right to liberty reduce the scope of the right itself so that the right is not considered to be limited if the conduct meets the requirements of the internal limitations. That approach has been taken in *Magee v Delaney*,<sup>23</sup> in relation to the internal limitations in s 15 of the Charter, in *LM*,<sup>24</sup> in relation to s 21 of the Charter and finally by Bell J in *PJB v Melbourne Health*,<sup>25</sup> in relation to s 13 of the Charter. The European jurisprudence developed under the *Convention* also considers matters that might otherwise relate to justifiable limits on the right to liberty as part of considering whether

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<sup>21</sup> Although it is not settled whether the “human rights definition” or the “dictionary definition” of arbitrariness applies in the Charter, the better view is that the “human rights definition” applies, consistent with *PJB v Melbourne Health (Patrick’s Case)* [2011] VSC 327 at [85]; *DPP v Kaba* [2014] VSC 52 at [154]; *ZZ v Secretary, Department of Justice* [2013] VSC 267 at [85] and contrary to *WBM v Chief Commissioner of Police* (2010) 27 VR 469; [2010] VSC 219 at [51], [56].

<sup>22</sup> *PJB v Melbourne Health* (2011) 39 VR 373; [2011] VSC 327 at [82]–[85] (emphasis added).

<sup>23</sup> *Magee v Delaney* (2012) 39 VR 50 at [157].

<sup>24</sup> *LM* [2008] VCAT 2084 at [117].

<sup>25</sup> *PJB v Melbourne Health (Patrick’s case)* (2011) 39 VR 373 at [74]–[75].

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the right is limited at all.<sup>26</sup> That is also the approach the Ombudsman should adopt.

36. The Department submits that the right in s 21 is a right not to be unlawfully or arbitrarily deprived of liberty and that no unlawful or arbitrary deprivation occurred at 33 Albert Street, either between 4 July and 9 July 2020 or from 9 July 2020 onwards. Further, after 9 July 2020, the residents were not detained — so they were not deprived of liberty in the relevant sense — rather their freedom of movement was significantly limited.
37. When considering the aspect of the right to liberty that requires that everyone who is deprived of liberty is entitled to take proceedings in a court to test the lawfulness of their detention, the ECHR referred to a previous detention decision of *De Wilde, Ooms and Versyp v Belgium*, in which it had stated:<sup>27</sup>
- Where the decision depriving a person of his liberty is one taken by an administrative body ... Article 5(4) obliges the Contracting States to make available to the person detained **a right of recourse to a court...**
38. Section 21(7) of the Charter provides that persons deprived of liberty are entitled to apply to court for a declaration regarding the lawfulness of his or her detention.
39. Any person detained in Victoria, including under s 200(1)(a) of the Act, can challenge the lawfulness of their detention in the Supreme Court of Victoria using the writ of *habeas corpus* (now through the mechanism provided by Order 57 of the *Supreme Court (General Civil Procedure) Rules 2005*). That right was available to the residents of 33 Albert Street at all times. This mechanism is sufficient to comply with the requirements of s 21(7) of the Charter.

#### *The right to humane treatment in s 22*

40. The right to humane treatment while deprived of liberty recognises the vulnerability of all persons deprived of their liberty and acknowledges that people who are detained should not be subject to hardship or restraint other than the hardship or restraint that is made necessary by the deprivation of

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<sup>26</sup> Article 5 of the Convention contains specific grounds including 'for the prevention of the spreading of infectious diseases' upon which detention is allowed and where the right to liberty is not considered to be limited at all, as long as that detention is 'lawful'. This exhaustive list is designed to ensure that no one is deprived of liberty in an arbitrary fashion: *Engel and Others v Netherlands (No 1)* (1976) EHRR 647.

<sup>27</sup> *Winterwerp v The Netherlands* (1979) 2 EHRR 387 at 407 (emphasis added).

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liberty itself.<sup>28</sup> The international case law is clear that this right will only be limited where a detainee is subjected to hardship that exceeds what is unavoidable given the practical demands of imprisonment,<sup>29</sup> which requires the Court to judge any limits on rights in their practical context. All of the deprivations that arose in the present case resulted from the practical demands arising out of the relevant detention, in particular the infectious nature of COVID-19, the physical layout of the buildings, and the urgency with which the measures needed to be taken in order to give the best protection to the right to life.

41. In *Castles*, Emerton J said that, in analysing the scope of s 22(1) of the Charter, “the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty”.<sup>30</sup> However, her Honour noted that a necessary consequence of the deprivation of liberty was that “[r]ights and freedoms which are enjoyed by other citizens will necessarily be ‘curtailed’, ‘attenuated’ and ‘qualified’ merely by reason of the deprivation of liberty”.<sup>31</sup>
42. In *Dale v Director of Public Prosecutions*,<sup>32</sup> the Court of Appeal noted that the conditions of detention of a dangerous prisoner, which included solitary confinement, strip searches and shackling with leg irons when out of the unit, might raise questions under s 22(1) of the Charter, although it declined to express a view on the matter.<sup>33</sup>
43. In *Taunoa*, conduct which limits the right to humane treatment was described by the appeal court as “conduct which lacks humanity ... which demeans the person ... or which is clearly excessive in the circumstances”.<sup>34</sup> At first instance Justice Ronald Young held that the combination of the conditions of detention, which included lengthy unlawful segregation from other inmates, loss of ordinary inmate entitlements, inadequate exercise considerations, and cell hygiene, bedding and clothing that fell below the standards established by

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<sup>28</sup> *Certain Children v Minister for Families* (2016) 51 VR 473 at [172]–[173].

<sup>29</sup> *Kudla v Poland* [2000] ECHR 512 at [94].

<sup>30</sup> (2010) 28 VR 141 at [108].

<sup>31</sup> (2010) 28 VR 141 at [111].

<sup>32</sup> [2009] VSCA 212.

<sup>33</sup> *Dale v Director of Public Prosecutions* [2009] VSCA 212 at [35]–[39]. See also *DPP v Tiba* [2013] VCC 1075 at [30].

<sup>34</sup> *Taunoa v Attorney General* [2008] 1 NZLR 429 at [177], [201] (Blanchard J).

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prison regulations, amounted to a breach of s 23(5) of the Bill of Rights Act (NZ).<sup>35</sup>

44. The hardships faced by the residents at 33 Albert Street were intrusive and unpleasant, however the Department also took positive steps to ensure the provision of food relief, daily essentials, social and wellbeing supports and laundry services to the residents. The Department submits that the conditions at 33 Alfred Street came nowhere near the treatment that has constituted a breach of the right to humane treatment in any other case as recognised over the course of many decades in Victoria or around the world.
45. In *Certain Children (No 2)*, the Supreme Court of Victoria held that the combined effects of the following factors meant that detention had limited the right to humane treatment in s 22(1) of the Charter:<sup>36</sup>
- 45.1 the extensive use of isolation;
  - 45.2 handcuffing;
  - 45.3 the requirement to take children through the adult prison to get outdoors;
  - 45.4 the physical high security prison environment;
  - 45.5 its lack of natural light and fresh air;
  - 45.6 the noise;
  - 45.7 the visible presence of prison officers;
  - 45.8 the lack of privacy, education, stimulation and time out of doors;
  - 45.9 confined outdoor space; and
  - 45.10 the youth of the detainees.
46. A review of the above combination of features indicates how very far the treatment of the residents at 33 Albert Street was from a breach of the right to humane treatment in s 22(1) of the Charter, by the standards established in Victoria.

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<sup>35</sup> (2004) 7 HRNZ 379.

<sup>36</sup> *Certain Children v Minister for Families and Children (No 2)* (***Certain Children (No 2)***) (2017) 52 VR 441 at 497 [424]–[425] (John Dixon J).

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*The prohibition on cruel, inhuman or degrading treatment in s 10(b)*

47. The rights set out in ss 10(b) and 22(1) of the Charter are directed to different purposes. In *Castles*, Emerton J observed:<sup>37</sup>
- [Section] 22(1) of the Charter ought not to be conflated with s 10(b), which protects persons from treatment or punishment that is cruel, inhuman or degrading. Section 22 is a right enjoyed by persons deprived of their liberty; s 10(b) applies more generally to protect all persons against the worst forms of conduct.
48. There is no definition of what constitutes “cruel, inhuman or degrading” treatment or punishment in either the Charter, the ICCPR or the *Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*.<sup>38</sup> Whether a particular act will amount to torture or to cruel, inhuman or degrading treatment or punishment will depend on the circumstances.<sup>39</sup>
49. Although it is clear that “degrading treatment” involves acts of a less severe nature than cruel and inhuman treatment, any such acts must inflict a level of humiliation or debasement of the victim.<sup>40</sup> In considering whether conduct was “degrading”, the ECHR in *Keenan v United Kingdom* said that it would have regard “to whether its object is to humiliate and debase the person concerned and whether ... the consequences ... adversely affected his or her personality ...”.<sup>41</sup> The court went on to note that this might involve “treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance or driving the victim to act against his will or conscience”.<sup>42</sup>

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<sup>37</sup> *Castles* (2010) 28 VR 141 at 167 [99], citing *Taunoa v Attorney-General* [2008] 1 NZLR 429.

<sup>38</sup> Guidelines for Legislation and Policy Officers in Victoria at 67.

<sup>39</sup> Judicial College of Victoria, *Charter of Human Rights Bench Book: 6.4.3.1. Scope of the right to protection from Cruel, Inhuman or Degrading Treatment or Punishment* (last updated 10 May 2016) [8], available at <http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57426.htm>.

<sup>40</sup> Judicial College of Victoria, *Charter of Human Rights Bench Book: 6.4.3.1. Scope of the right to protection from Cruel, Inhuman or Degrading Treatment or Punishment* (last updated 10 May 2016) [9], available at <http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57426.htm>.

<sup>41</sup> *Keenan v United Kingdom* (2001) 33 EHRR 38 at [109].

<sup>42</sup> *Keenan v United Kingdom* (2001) 33 EHRR 38 at [109].

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50. None of the Department's conduct was degrading of residents in the relevant sense. Far from intending to humiliate and debase residents, the Department sought to protect their lives and their health.

*Proper consideration*

51. Justice Emerton wrote the formative judgment on proper consideration under s 38(1) in *Castles v Secretary of the Department of Justice*.<sup>43</sup> Her Honour explained that it involves:<sup>44</sup>

...understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified. (emphasis added)

52. There can be no doubt that **[the Deputy CHO]** seriously turned her mind to the possible impact on rights and the implications for the affected people – even if she did not identify every nuanced impact on rights that has been identified by the Victorian Equal Opportunity and Human Rights Commission (a recognised expert in its field).<sup>45</sup>

- 52.1 To criticise the decision maker for not identifying every possible nuanced impact, when she has identified how the relevant rights are affected in

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<sup>43</sup> (2010) 28 VR 141.

<sup>44</sup> *Castles* (2010) 28 VR 141 at 184 [185]–[186], cited in *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129 at 219–220 [279]–[280] (Tate JA), 297–298 [535] (Santamaria JA); *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at 442 [311] (Bell J); *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 at 699–700 [139] (Riordan J); *Certain Children v Minister for Families and Children* (2016) 51 VR 473 at 507–508 [186] (Garde J); *Certain Children (No 2)* (2017) 52 VR 441 at 509–510 [222] (John Dixon J). See also *Bare v IBAC* (2015) 48 VR 129 at 198 [217], 199–200 [221]–[222] (Warren CJ); *Giotopoulos v Director of Housing* (2011) 34 VAR 60 at 80 [90] (Emerton J); *Minogue v Dougherty* [2017] VSC 724 at [90] (John Dixon J).

<sup>45</sup> Email from **[redacted]** to **[redacted]** dated 4 July 2020, “I am very concerned that this has already had time for multiple generations of spread in these communities who are extremely vulnerable from a background health status perspective.”

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general terms, is against the weight of authority on the proper application of s 38(1) of the Charter.

- 52.2 The obligation to give proper consideration to any relevant human right required **[the Deputy CHO]** to consider the impact of her decision on the rights of affected individuals in “a practical and common-sense manner”.<sup>46</sup>
- 52.3 The procedural limb of s 38(1) must be applied in a manner that recognises the practical reality of the diverse decisions made by Victorian public authorities, and the diverse nature of those decision makers and the circumstances in which they have to make decisions.
- 52.4 The Charter was intended to apply to the wide array of administrative decisions already being made under existing legislative regimes. The obligations in s 38(1) were intended to be adaptable to the varied contexts and varied powers in which and to which s 38(1) applies.
53. The Supreme Court has confirmed that the context in which the decision is made will affect the nature of the consideration required.<sup>47</sup> In *Certain Children (No 2)*, the Court held the Minister to a higher standard than had been applied in *Castles* because the matter had previously been considered by the Supreme Court and because the consideration was guided by legal advice.<sup>48</sup> The fact that **[the Deputy CHO]** was making a decision under the Act using emergency powers under significant time pressure is highly relevant to the type of consideration that will be considered “proper” in this context.
54. Consistent with the assertion that there are many different ways to comply with the obligations in s 38(1), the Charter does not require that the consideration of human rights be recorded in writing, nor does it contain any independent obligation to give reasons. There may in fact be cases where the impact of a measure on a person’s rights will be “self-evident” given the state of the evidence about the information before a decision-maker.<sup>49</sup> In those cases, an inference ought not be drawn that a decision maker was unaware of a self-evident impact simply because that impact is not specifically mentioned or

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<sup>46</sup> *PJB v Melbourne Health* (2011) 39 VR 373 at [311].

<sup>47</sup> *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251 at [491] (John Dixon J).

<sup>48</sup> *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251 at [491] (John Dixon J).

<sup>49</sup> *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 at [144].

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recorded in writing. Proper consideration can sometimes be inferred, as with any other fact.

*Acting compatibly*

55. The substantive requirement to act compatibly with Charter rights under s 38(1) of the Charter arises when a public authority takes action.<sup>50</sup>
56. A justified limitation on a human right is not unlawful under the Charter.<sup>51</sup> An assessment of “compatibility” involves an assessment of whether any limits on rights are demonstrably justified under s 7(2) of the Charter.<sup>52</sup>

*Reasonable limits under s 7(2)*

57. The Charter recognises that human rights are not absolute and may be limited, according to the standard of demonstrable justification in s 7(2) of the Charter.<sup>53</sup> What is “incompatible” with a human right under s 38(1) is accordingly assessed with reference to s 7(2) of the Charter, which has been described as “an expression of the doctrine of proportionality”.<sup>54</sup>
58. A limitation will be imposed “under law” when the limitation is positively authorised, adequately accessible and formulated with precision.<sup>55</sup> Section 200 satisfies that description.
59. Under s 7(2)(e) of the Charter, one of the factors to be considered when determining compatibility is whether there were any less restrictive means reasonably available to achieve the purpose that the limitation on rights seeks to achieve.
60. Consideration of s 7(2)(e) does not require the least restrictive means to be adopted; rather, the chosen means must fall within the range of reasonably available options. A challenge on the basis of proportionality should not succeed merely by establishing that alternative, less restrictive methods could have been used to achieve the aim.<sup>56</sup>

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<sup>50</sup> *Kracke v Mental Health Review Board* [2009] VCAT 646.

<sup>51</sup> *Kracke v Mental Health Review Board* [2009] VCAT 646 at [99].

<sup>52</sup> *Baker v DPP (Vic)* [2017] VSCA 58 at [57].

<sup>53</sup> *Certain Children (No 2)* (2017) 52 VR 441 at 497 [172] (John Dixon J).

<sup>54</sup> *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at fn 214.

<sup>55</sup> *Kracke* (2009) 29 VAR 1 at 44–51 [162]–[196] (Bell J).

<sup>56</sup> *Sabet* (2008) 20 VR 414 at 442 [188] (Hollingworth J).

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61. It is instructive to have regard to the way less restrictive options are considered by the High Court under “structured proportionality” analysis in constitutional law. In that context, a type of proportionality testing is used to assess the impact of laws on constitutional freedoms, most prominently, the implied freedom of political communication. A majority of the High Court now use structured proportionality as a tool to assist in determining whether a law burdens the implied freedom of political communication.<sup>57</sup>
62. As part of the structured proportionality analysis, one considers whether there are alternative, reasonably practicable means of achieving the same end that have a less restrictive effect on the freedom, compared to the impugned law. If such means are available, the impugned law will not be justified.<sup>58</sup>
63. Importantly, however, the analysis does not involve a “free-ranging enquiry as to whether the legislature should have made different policy choices”.<sup>59</sup> Under a structured proportionality assessment, a law will not be invalid merely because it is possible to conceive of a way in which the law might be altered to impose a lesser burden on those freedoms. In order to be a relevant comparator, any proposed alternative measure must be:
- 63.1 “obvious and compelling”;<sup>60</sup>
  - 63.2 equally as effective as the impugned law to achieve its purpose, and not reduce the efficacy of the statutory scheme;<sup>61</sup> and
  - 63.3 equally available — an alternative measure is not “equally available” if it requires the application of additional personnel and resources.<sup>62</sup>

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<sup>57</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at 195–196 [4] (French CJ, Kiefel, Bell and Keane JJ).

<sup>58</sup> *McCloy* (2015) 257 CLR 178 at 210 [57] (French CJ, Kiefel, Bell and Keane JJ); *Comcare v Banerji* (2019) 93 ALJR 900 at 913 [35] (Kiefel CJ, Bell, Keane and Nettle JJ), 942 [194] (Edelman J).

<sup>59</sup> *Brown v Tasmania* (2017) 261 CLR 328 at 371 [139] (Kiefel CJ, Bell and Keane JJ). See also *McCloy* (2015) 257 CLR 178 at 211 [58] (French CJ, Kiefel, Bell and Keane JJ).

<sup>60</sup> *Monis v The Queen* (2013) 249 CLR 92 at 214 [347] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178 at 211 [58] (French CJ, Kiefel, Bell and Keane JJ), 285–286 [328] (Gordon J); *Brown* (2017) 261 CLR 328 at 372 [139] (Kiefel CJ, Bell and Keane JJ); *Banerji* (2019) 93 ALJR 900 at 913 [35] (Kiefel CJ, Bell, Keane and Nettle JJ), 942 [194] (Edelman J).

<sup>61</sup> *McCloy* (2015) 257 CLR 178 at 211 [61]–[62] (French CJ, Kiefel, Bell and Keane JJ); *Tajjour v New South Wales* (2014) 254 CLR 508 at 572 [116] (Crennan, Kiefel and Bell JJ). See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 61–62 [65] (Kiefel J); *Clubb v Edwards* (2019) 93 ALJR 448 at 518 [317] (Nettle J), 550 [486], 550 [490] (Edelman J).

<sup>62</sup> *Murphy* (2016) 261 CLR 28 at 61–62 [65] (Kiefel J), 110–111 [253]–[254] (Gordon J).

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A law will only fail this aspect of proportionality testing if the comparator would impose a “significantly lesser burden” on the implied freedom.<sup>63</sup>

64. Further, the compatibility question is not a free-standing proportionality exercise: it must be answered by reference to the statute conferring the discretion. Section 7(2) of the Charter requires the limit to be “under law”. The law the limitation is “under” bears on the question of demonstrable justification. This is reinforced by the interplay between s 38(1) and (2).

64.1 Section 38(1) applies because Parliament has conferred a discretionary power; it is thus essential to consider the nature of that discretionary power.

64.2 In that regard, the PHW Act contains various principles to which decision-makers must have regard when administering the Act.<sup>64</sup> Of particular relevance are the precautionary principle: s 6; and the principle of primacy of prevention: s 7, in particular sub-s (1).

65. In conducting the s 7(2) analysis, the purpose and limits imposed by the PHW Act on the discretion are especially relevant to s 7(2)(b),(c), (d) and (e).

65.1 The purpose of the limitation is an evidence-based, precautionary public health purpose. That must be the framework in which the compatibility analysis is performed.

65.2 It appears that the Ombudsman, under the guidance of the Victorian Equal Opportunity and Human Rights Commission, has failed to consider this important context to the application of the reasonable limits provision.

65.3 The reasonableness of any limits on rights that occurred using powers under the PHW Act must be viewed through the lens of the PHW Act, not as objects that are independent of the PHW Act.

### ***Loiolo v Giles* [2020] VSC 722**

66. The Ombudsman does not appear to have taken into account the highly relevant judgment of the Supreme Court in *Loiolo v Giles* when considering the

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<sup>63</sup> *Banerji* (2019) 93 ALJR 900 at 913 [35] (Kiefel CJ, Bell, Keane and Nettle JJ). See also *Clubb v Edwards* (2019) 93 ALJR 448 at 550 [486] (Edelman J).

<sup>64</sup> PHW Act, s 4(3).

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application of the PHW Act and the Charter in the context of the current state of emergency.

67. In that case, the Supreme Court held that s 200 should be interpreted in a manner that facilitates the Act’s contemplation of “the need to act quickly to combat public health emergencies”.<sup>65</sup> The Court also noted that there was not even a requirement for directions under s 200 to be in writing.<sup>66</sup>

68. In *Loiello v Giles*, the Supreme Court of Victoria made the following observations that ought be given significant weight by the Ombudsman in reconsidering the draft opinions and whether they are available on a proper understanding of the law. The Supreme Court articulated the following propositions:

68.1 The right to liberty was not engaged by the imposition of a curfew that prevented people from leaving their homes at night and the curfew did not constitute detention under s 200(1)(a) of the Act. Although the curfew might be considered a limit on liberty in terms of the “common usage” of that term, “in human rights discourse that right is more likely to be characterised as the right to freedom of movement — the s 12 right”.<sup>67</sup>

68.2 When considering whether the use of the powers under the PHW Act reasonably limits human rights, the Statement of Compatibility for the PHW Act should be considered:<sup>68</sup>

The Statement of Compatibility of the PHW Act was tabled in Parliament which described the right to health as being ultimately concerned with the right to life which was the supreme right. Mr Andrews, as Health Minister, stated that the right to health was essential for the enjoyment of many other rights protected by the Charter, particularly the right to life. The Defendant contended that this was consistent with the United Nations Human Rights Committee’s most recent General Comment which described the right to life as a pre-requisite for the enjoyment of all other human rights. In a similar vein, Blackstone listed the right to life as the primary natural right, followed by the right to liberty.

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<sup>65</sup> *Loiello v Giles* [2020] VSC 722 at [127] (Ginnane J).

<sup>66</sup> *Loiello v Giles* [2020] VSC 722 at [128] (Ginnane J).

<sup>67</sup> *Loiello v Giles* [2020] VSC 722 at [217] (Ginnane J).

<sup>68</sup> *Loiello v Giles* [2020] VSC 722 at [239] (Ginnane J) (emphasis added).

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68.3 With respect to the Charter and proper consideration, the Court noted:

The powers in s 200, which can only be exercised in times of emergency, are to be exercised to achieve the important purpose of protecting public health. The decision-maker did not have to adopt the least restrictive means available to protect public health, but her action in making the Curfew Direction had to fall within the range of reasonably available options to achieve that purpose.<sup>69</sup>

The compatibility question under the first limb of s 38(1) must be decided by reference to the scope and objects of the statute conferring the discretion under which the Curfew Direction was made. The discretion that Giles exercised under s 200 was informed by the subject matter, scope and objects of the PHW Act ...<sup>70</sup>

To the extent that Giles was criticised for only having regard to the issue of public health, that was a correct focus because that was the purpose of the emergency powers.<sup>71</sup>

[T]he existence of other options does not mean that they were “less restrictive means reasonably available to achieve the purpose” of protecting public health. In determining what means were “reasonably available”, it was appropriate to consider what means had been tried, what had followed, the urgency of the situation and the risks if infection rates surged again.<sup>72</sup>

There is a question of whether a health expert, such as the defendant, is able to properly balance the social and economic consequences of a decision primarily based on health considerations. However, Parliament has given the discretion to an authorised officer.<sup>73</sup>

## Response to Draft Opinion 1

69. The Department submits that the Ombudsman’s draft opinion, that the initial detention on 4 July 2020, absent further preparation, was contrary to s 38(1) of the Charter, is incorrect and has ignored the jurisprudence on the proper application of that section.

### *Substantive compatibility: the immediate lockdown*

70. The Draft Report records the following finding:<sup>74</sup>

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<sup>69</sup> *Loiello v Giles* [2020] VSC 722 at [240] (Ginnane J) (emphasis added).

<sup>70</sup> *Loiello v Giles* [2020] VSC 722 at [242] (Ginnane J) (emphasis added).

<sup>71</sup> *Loiello v Giles* [2020] VSC 722 at [243] (Ginnane J) (emphasis added).

<sup>72</sup> *Loiello v Giles* [2020] VSC 722 at [251] (Ginnane J) (emphasis added).

<sup>73</sup> *Loiello v Giles* [2020] VSC 722 at [256] (Ginnane J) (emphasis added).

<sup>74</sup> Draft Report, page 61, paragraph 261 (emphasis added).

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Having regard to this explanation and the evidence provided by the Acting CHO and other senior DHHS officers, and on reviewing available records, the investigation accepted the temporary detention of residents at 33 Alfred Street may have been a justified and reasonable response to the outbreaks of COVID-19 associated with the Flemington and North Melbourne public housing estates.

71. However, the Draft Report goes on to conclude that, despite the detention of residents being a justified and reasonable response, an “immediate lockdown” was “not compatible with the rights of people at 33 Alfred Street – noting there appeared to be a less restrictive option reasonably available in the circumstances”.<sup>75</sup>
72. As discussed above, the right not to be unlawfully or arbitrarily deprived of liberty (paragraphs 31–38 above), the right to humane treatment (paragraphs 40–46 above) and the prohibition on degrading treatment (paragraphs 47–50 above) were not limited by any aspect of “the immediate lockdown”. If the Ombudsman considers there was any such limit, that limit was clearly compatible because it was demonstrably justified under s 7(2) of the Charter for the reasons discussed in paragraphs 57–65 above.

*Proper consideration: the immediate lockdown*

73. The Draft Report criticises the document provided to the decision maker, which undertook an assessment of the way in which the directions would impact on the rights of residents and whether the directions were compatible with the Charter, on the basis that the document:<sup>76</sup>
- 73.1 did not meaningfully consider whether other less restrictive measures were available in the circumstances — for example, the delayed quarantine and testing proposal originally developed by the Department;
- 73.2 incorrectly stated the lockdown would begin at 11:59pm on 4 July 2020, instead of with immediate effect, thereby underestimating the likely impacts of the decision.
74. The Charter does not require that the “proper consideration” required by s 38(1) be evidenced in writing — it is a mental process.

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<sup>75</sup> Draft Report, page 62, paragraph 268.

<sup>76</sup> Draft Report, page 63, paragraph 273.

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- 74.1 The Draft Report's focus on the contents of a document that was provided to the decision maker ignores the fact that the decision maker was well aware of the fact that there had originally been an alternative proposal put forward and that the lockdown would begin with immediate effect.
- 74.2 The criticisms of the document might be relevant if the decision maker was not actively involved in the response to the pandemic, as it might have misled the decision maker as to the underpinning facts, which could affect the mental process undertaken by the decision maker.
- 74.3 However there was no chance that the Deputy CHO would be misled about the underpinning facts here because she was directly involved with them.<sup>77</sup>
75. The Draft Report has focused on the accuracy of a document that was merely intended to assist the decision maker in the process of considering the relevant rights. What matters for the purposes of s 38(1) of the Charter is the nature of the decision maker's consideration, not how factually accurate was the legal advice that she received.
76. The Draft Report also takes issue with the amount of time that the decision maker had to review the document: "this officer was provided less than 20 minutes to consider the human rights assessment before the scheduled announcement of the lockdown".<sup>78</sup> The Department again takes issue with the Draft Report's undue focus on the document, which should not be the focus of consideration when assessing whether a decision maker has given proper consideration to relevant rights. Regardless of how long the decision maker had to review the document itself, for the reasons set out in paragraph 77, it cannot be said that the decision maker only spent 20 minutes in considering the rights of those in the towers, how it would affect them and why it was necessary to impose a lockdown.<sup>79</sup>
77. The Deputy CHO has been involved in the response to the pandemic since a state of emergency was first declared on 16 March 2020.

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<sup>77</sup> Metrics for postcodes on watch list, 3 July 2020 (period 20 June – 3 July 2020).

<sup>78</sup> Draft Report, page 63, paragraph 275.

<sup>79</sup> *Diagnosed Persons and Close Contact Direction No 4* dated 1 July 2020, signed by **[the Deputy CHO]**; *Diagnosed Persons and Close Contact Direction No 3* dated 21 June 2020, signed by **[the Deputy CHO]**; *Diagnosed Persons and Close Contact Direction No 2* dated 31 May 2020, signed by **[the Deputy CHO]**.

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- 77.1 In that time, she has made hundreds of directions, including directions requiring the detention of people in hotel quarantine.
- 77.2 Every direction the Deputy CHO has made has been accompanied by an assessment of the Charter rights that are limited by that direction, including an ample description of the nature and contents of each of the rights that were engaged by the towers lockdown.
- 77.3 By the time she was making this decision, the Deputy CHO was well aware of the nature and contents of the rights to freedom of movement, equality, the prohibition on cruel treatment and the requirement for humane treatment when deprived of liberty, and the requirement that liberty only be deprived on a lawful and non-arbitrary basis.
- 77.4 In light of that experience, the Deputy CHO was sufficiently educated in the Charter rights that would be engaged by a decision such as the decision to impose the lockdown, to undertake proper consideration even without a specific Charter assessment being provided to her for the decision (although it was).
78. The Ombudsman has accepted that the Deputy CHO had “a genuine appreciation of the significance of the decision and its consequences for residents”.<sup>80</sup> There can therefore be no doubt that the Deputy CHO has satisfied the requirements of “proper consideration” under s 38(1) of the Charter. The Ombudsman has applied an unduly stringent standard for “proper consideration”, which is inconsistent with the Supreme Court’s guidance on how that standard ought to be applied, which is discussed in paragraphs 51-54 above.

## **Response to Draft Opinion 2**

79. The Department submits that the Ombudsman’s draft opinion, that the later detention at 33 Alfred Street (after revocation of the Detention Directions (33 Alfred Street)) was contrary to s 200(1)(a) and (6) of the PHW Act and s 38(1) of the Charter, is incorrect and has ignored important jurisprudence on the proper application of s 200 of the PHW Act and s 38(1) of the Charter.

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<sup>80</sup> Draft Report, page 63, paragraph 276.

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*There was no “detention” under s 200(1)(a) after 9 July 2020*

80. From the time of the revocation of the *Detention Direction* on 9 July 2020, the residents of 33 Albert Street were not detained pursuant to s 200(1)(a); rather their freedom of movement was limited pursuant to the *Close Contacts Direction*.
81. The *Close Contacts Direction* applied to diagnosed persons and close contacts of diagnosed persons. A “diagnosed person” is a person who has been diagnosed with COVID-19 and who has not been provided with clearance by the Department from self-isolation. A “close contact” is a person who has been determined by the Department to have had recent contact with a diagnosed person and who has been given notice of that determination. A close contact is required to self-quarantine until clearance has been provided by the Department.
82. On 9 July 2020, it was determined by the Department that the level of COVID-19 that had been identified at 33 Albert Street, together with the building layout and limited points of ingress and egress to the building, meant that all residents who were not themselves infected were by definition close contacts of those residents who were infected. As a result, the Department notified the residents that the Department had determined the residents were close contacts and the *Close Contacts Direction* therefore required all residents to self-quarantine or self-isolate depending on whether or not they were infected. The Department gave notice to residents of 33 Albert Street by way of:
- 82.1 individualised letters to affected residents;<sup>81</sup>
  - 82.2 posters at locations within 33 Albert Street;<sup>82</sup> and
  - 82.3 telephone calls to affected residents.<sup>83</sup>
83. It has been the Department’s view for the duration of this state of emergency that Victorians required to self-quarantine or self-isolate under the *Close*

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<sup>81</sup> Letter to affected residents from DHHS, explaining detention dated 7 July 2020: “If you need further information or support, please call 1800 961 054. If you need an interpreter, call TIS National on 131 450.” Factsheet update to residents at 33 Alfred Street: “The 1800 675 398 phone number to report requests (24 hours).”

<sup>82</sup> Poster, multilingual communications to residents of 33 Alfred Street: “Call 9448 5551 for help”.

<sup>83</sup> Allocated 1800 calls for Alfred Street residents 5 July 2020 to 18 July 2020; Call list for 33 Alfred St 5 July 2020 to 6 July 2020.

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*Contacts Direction* and its predecessors are not detained for the purposes of s 200(1)(a) of the Act.

83.1 That direction and its predecessors are not made in reliance on the power in s 200(1)(a) and the Department has not ever performed a daily review of the thousands of Victorians who have self-quarantined or self-isolated over the course of the pandemic.

83.2 It would be of great concern to the Department if the Ombudsman were to take a different view as to the nature of self-isolation or self-quarantine to the view that has underpinned the Department's response to the pandemic to date.

84. There is an important distinction between isolation, quarantine and detention, which has not been recognised by the Ombudsman in the Draft Report. In the public health context of the Act "isolation" and "quarantine" have distinct meanings, as defined in the World Health Organisation's *International Health Regulations 2005*:

84.1 "Isolation" refers to action taken where a person is known to be infected and action is taken from a public health perspective to prevent or limit transmission of an infectious disease during the period when the disease is transmissible.<sup>84</sup> "Self-isolation", for the purposes of the *Close Contacts Direction* refers to the action taken by people bound by that direction to isolate themselves from contact with other people. That direction provided for exceptional circumstances, in which the person was allowed to leave home, without an application being made.

84.2 "Quarantine" refers to action taken where a person has been exposed or potentially exposed to an infectious disease but not confirmed to have been infected. Quarantine may be required in circumstances where a disease is transmissible during the incubation period and asymptomatic disease might be observed.<sup>85</sup> "Self-quarantine", for the purposes of the *Close Contacts Direction*, refers to the action taken by a person bound by that direction to quarantine themselves from contact with other people. That direction provided for exceptional circumstances, in which

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<sup>84</sup> International Health Regulations 2005 3<sup>rd</sup> Ed (WHO), page 8 available at <https://www.who.int/publications/i/item/9789241580496>

<sup>85</sup> International Health Regulations 2005 3<sup>rd</sup> Ed (WHO), page 9 available at <https://www.who.int/publications/i/item/9789241580496>

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the person was allowed to leave home, without an application being made.

85. “Detention” is distinct from “isolation” or “quarantine” and, in the context of the lockdown of a defined geographic area, it is referred to as a *cordon sanitaire*. *Cordon sanitaire* involves confining infected, potentially infected and uninfected persons within a geographical location in an effort to reduce the spread of infection to neighbouring areas. The *cordon* is imposed where it is unclear where the source of infection may be located and there is a need to restrict movement of persons to a particular premises to avoid a serious risk to public health. In the present case, a *cordon sanitaire* was imposed on 4 July 2020 because it was unclear what the level of infection was within the Flemington and North Melbourne public housing estates — in circumstances where the localised infections appeared to be growing exponentially.
86. The Department submits that:
- 86.1 the Ombudsman’s provisional opinion that there was “de facto detention of people at 33 Alfred Street”<sup>86</sup> following revocation of the Detention Direction is incorrect and ignores the internationally recognised distinctions made in the *International Health Regulations 2005*; and
- 86.2 after 9 July 2020, residents were required to isolate or quarantine, within the internationally recognised public health meanings of those terms.

*There was no “deprivation of liberty” under s 21 of the Charter after 9 July 2020*

87. The Draft Report states that in addition to being “de facto detention”, the application of the *Close Contacts Direction* to residents after 9 July 2020 was also “incompatible with the right to liberty”. It is not clear why the Ombudsman asserts the unreasonable limitation of the right to liberty without any explanation of why that right is said to be limited or why s 7(2) is said to be breached. As noted in paragraphs 59–60 above, a limit on a right is only “incompatible” with the right if it limits the right in a way that is not reasonable, applying the test in s 7(2) of the Charter.<sup>87</sup>
88. For the reasons discussed above, the Department does not consider the right to liberty to be limited, because the internal limits within that right have been

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<sup>86</sup> Draft Report, page 81, paragraph 379.

<sup>87</sup> *Baker (a pseudonym) v DPP* [2017] VSCA 58 at [57].

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complied with. In any event, even if internal limits are ignored, any limit was clearly demonstrably justified under s 7(2) of the Charter for the reasons discussed in paragraphs 57–64 above.

*Proper consideration: application of the Close Contacts Direction*

89. The Draft Report has accepted that “continued limitation of the rights engaged by the *Close Contacts Direction* was likely a justified and reasonable response to the ongoing outbreak of COVID-19 within the building”.<sup>88</sup> However the Draft Report states that “some of the restrictions imposed on residents during this period were in fact more significant than contemplated by the *Close Contacts Direction*”,<sup>89</sup> even though those further restrictions were “informed by consideration of the rights of people living at 33 Alfred Street”.<sup>90</sup> Despite the fact that the relevant consideration was given, the Ombudsman has found that there should have been a documented human rights assessment of the decision to continue to lock the towers down under the *Close Contact Direction*.<sup>91</sup>
90. The Department considers that the findings identified in the preceding paragraph involve a mischaracterisation of the decision that was made on 9 July 2020.
- 90.1 A decision was made to revoke the *Detention Direction* on 9 July 2020 — that occurred through the making of the *Revocation Direction*.
- 90.2 Once the *Detention Direction* was revoked, all of the residents in the affected towers were subject to the general directions in place at the time, including the *Close Contacts Direction*.
- 90.3 At the time the *Close Contacts Direction* was made, it was in fact subject to a documented human rights assessment, as with all of the directions.
91. Further, s 38(1) of the Charter does not require that proper consideration be documented. The Ombudsman has imposed a documentation requirement onto s 38(1) in emergency circumstances when the decision maker was least able to comply with additional administrative requirements.

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<sup>88</sup> Draft Report, page 65, paragraph 291.

<sup>89</sup> Draft Report, page 66, paragraph 293.

<sup>90</sup> Draft Report, page 66, paragraph 295.

<sup>91</sup> Draft Report, page 66, paragraph 297.

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*Lack of prior notice*

92. The Draft Report states that the lack of prior notice given to residents “materially increased the risks of ill-treatment associated with the intervention”,<sup>92</sup> and observes that this feature of the intervention was not addressed in the human rights assessment.<sup>93</sup> The Draft Report continues:<sup>94</sup>

At a minimum there was a need to explain why the decision to impose the lockdown without notice was compatible with the right to humane treatment when deprived of liberty.

93. This is one of a number of areas where it is unclear against what standards the Ombudsman is judging the Department. If the minimum standard is said to arise out of the Charter, the Department disputes that the Charter imposes such a requirement. The right to humane treatment when deprived of liberty has never been interpreted as containing a requirement that before a person is detained the person is provided with notice. The right to humane treatment deals solely with a person’s treatment after a person is detained. In any event, as the discussion of the rights in s 10(b) in paragraphs 47–50 above confirms, the right to humane treatment was clearly not limited by anything the Department did during this period.

94. With respect to the decision to lock the towers down without prior notice the Draft Report states:<sup>95</sup>

[T]here was need to reconcile this decision with section 200(2) of the Public Health and Wellbeing Act, which, if practicable, required residents receive an explanation of the reasons for the intervention before it commenced.

95. There was no need to reconcile the decision with s 200(2) because s 200(2) did not apply. Section 200(2) of the PHW Act expressly provides that its obligations only apply “[u]nless subsection (3) applies”. Subsection (3) provides:

If in the particular circumstances in which the power to detain the person is to be exercised, it is not practicable to briefly explain the reason why it is necessary to detain the person before the power is exercised, the authorised officer must do so as soon as is practicable. (emphasis added)

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<sup>92</sup> Draft Report, page 68, paragraph 307.

<sup>93</sup> Draft Report, page 68, paragraph 308.

<sup>94</sup> Draft Report, page 68, paragraph 310.

<sup>95</sup> Draft Report, page 68, paragraph 311.

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96. The word “practicable” in s 200(3) is likely to be interpreted as having its ordinary meaning, as it has in other legislative contexts:<sup>96</sup>

The ordinary everyday meaning of the term “practicable” includes “capable of being put into practice, done or effected, especially with the available means or with reason or prudence; feasible” (Macquarie Dictionary Online) and “able to be done or put into practice successfully; feasible; able to be used; useful, practical, effective” (Macquarie Dictionary Online).

97. The Department furnished evidence that it was not practicable to provide an explanation of why it was necessary to detain before the power was exercised.

97.1 There were almost 3000<sup>97</sup> people living in the relevant towers and, for many of them, English is a second language.

97.2 It took some time to translate the relevant materials into the necessary languages and the Department acted as quickly as it could to do this.<sup>98</sup>

97.3 In the circumstances, s 200(3) clearly applied and the Department’s obligation was simply to provide the relevant reasons within the available resources at the time. That was done.

98. For the avoidance of doubt, the Department submits that the limited notice was consistent with the approach adopted to the implementation of other significant developments in the restrictions that have applied across Victorian during the course of the response to the pandemic. This includes the introduction of the curfew and the requirement to remain at their current place of residence in metropolitan Melbourne for the duration of the Stage 4 restrictions, which took effect from the evening these new restrictions were announced. In each case, the new restriction and the limited notice was driven by the necessity to manage the serious public health risk. The limited notice assisted in managing the increased risk of community transmission which might otherwise have arisen as a direct result of greater notice. In the case of the Detention Directions (33 Alfred Street), greater notice might have resulted in residents, in anticipation of the new restrictions taking effect, undertaking various preparation activities (such as shopping or visiting family), with the risk that those residents with

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<sup>96</sup> *Environment Protection Authority v Unomedical Pty Ltd (No 3)* [2010] NSWLEC 198 at [206].

<sup>97</sup> Draft report, page 19, Figure 4. The total number of residents is 2,989; updated DHHS figures are that there were 2850 residents at the towers on 4 July 2020.

<sup>98</sup> Email dated 4 July 2020 from [redacted] to [redacted], demonstrating translated communications were a feature from day 1: “Cultural advisers to be engaged to be on the ground tomorrow, embedded with police to pass on messages and continue to provide information – need to hold on going down to estates until an approach has been confirmed.”

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COVID-19 might have unwittingly exposed more people to it. In the case of the curfew, greater notice might have resulted in people seeking to leave metropolitan Melbourne to avoid the curfew, again with the risk that those with COVID-19 might spread it beyond metropolitan Melbourne. In each case, providing greater notice of the new restrictions may have resulted in increased community transmission. This would have been counterproductive to the very reason for introducing the new restriction, namely managing the serious risk to public health to save lives.

*Provision of reasons after detention*

99. The Draft Report states:<sup>99</sup>

While acknowledging the significant logistical challenges faced by DHHS, shortcomings in notifying residents of the purpose and terms of the intervention also appeared attributable to the limited time allocated towards preparation for the operation. (emphasis added)

100. The Department objects to the suggestion implicit in the above statement that the Department refused or failed to “allocate” time to preparing for the operation, in circumstances where the Department was required to act swiftly in order to reduce a serious risk to lives. The decision to act immediately was not evidence of a failure: the decision led to a success in averting an approaching health catastrophe.<sup>100</sup>

101. Further, s 200(3) acknowledges that the timing of the relevant notice will be dependent on what is practicable in the circumstances. Where resources are stretched and communication is difficult, the standard demanded will accommodate those difficulties. The requirements imposed by the PHW Act are intentionally flexible to allow for emergency circumstances, such as those faced by the Department at the time.

102. The Draft Report further criticises the provision of information about “the second phase of the lockdown” because it did not refer to the *Close Contacts Directions* by name and lagged behind the public announcement of the decision.<sup>101</sup> Although those comments might be considered appropriate feedback for the conduct of a long-term health program, they appear to display an insufficient consideration of the resource and time constraints confronting the Department

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<sup>99</sup> Draft Report, page 71, paragraph 330.

<sup>100</sup> DHHS submission dated 31 August 2020, page 2.

<sup>101</sup> Draft Report, page 74, paragraphs 335 and 336.

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at the time. The situation at the time was acute. Even with additional days of planning, the Department would not have had the time or the resources to undertake the fine-tuned communications program of the kind that appears to be expected by the Ombudsman in the context of an emergency response.

*Right to challenge detention*

103. The Draft Report observes:<sup>102</sup>

International human rights standards emphasise that people deprived of their liberty should have the right to challenge the appropriateness of their detention.

104. The Draft Report notes that there is no mechanism for challenging detention under the emergency powers in s 200,<sup>103</sup> but that s 200(6) provides for a review to occur every 24 hours.<sup>104</sup> The Draft Report notes that the Department had established a process for those reviews to occur but was unable to produce records of those reviews having been conducted.<sup>105</sup> It appears that it is the lack of records of review that has led to the Ombudsman not being satisfied that “the lockdown” complied with s 200(6).<sup>106</sup> Section 200(6) does not impose a requirement to record any such review, so the lack of records itself is not an indication that the subsection has not been complied with.

105. The Draft Report goes on to state that “this also appeared incompatible with the right to liberty” in the Charter.<sup>107</sup> It is not clear why the Ombudsman has concluded that any potential non-compliance with s 200(6) (which is disputed) is incompatible with the right to liberty in the Charter.

105.1 If that is because international human rights standards require that a person deprived of liberty have the ability to challenge the appropriateness of their detention, s 200(6) should not be viewed as providing that opportunity as the subsection does not provide a relevant mechanism to challenge detention for the purposes of human rights law.

105.2 Any person detained in Victoria, including under s 200(1)(a) of the Act, can challenge the lawfulness of their detention in the Supreme Court of

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<sup>102</sup> Draft Report, page 75, paragraph 338.

<sup>103</sup> Draft Report, page 75, paragraph 339.

<sup>104</sup> Draft Report, page 75, paragraph 340.

<sup>105</sup> Draft Report, page 76, paragraph 343.

<sup>106</sup> Draft Report, page 76, paragraph 344.

<sup>107</sup> Draft Report, page 76, paragraph 345.

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Victoria using the writ of *habeas corpus* (now through the mechanism provided by Order 57 of the *Supreme Court (General Civil Procedure) Rules 2005*). This satisfies the requirements of s 21(7) of the Charter.

105.3 As that mechanism was available regardless of whether reviews occurred (or were required to occur) under s 200(6) of the Act, any detention was not contrary to law.

106. If the Ombudsman considers that the potential non-compliance with s 200(6) (which is disputed) was incompatible with the right to liberty because that non-compliance involved the failure of one the safeguards provided for detained people by the PHW Act, the failure of such a safeguard does not necessarily result in a deprivation of liberty becoming arbitrary.<sup>108</sup>

### Response to Draft Opinion 3

107. The Department submits that the Ombudsman's draft opinion that the failure to ensure daily review of detention at 33 Alfred Street was contrary to s 200(6) of the Act is incorrect, because:

107.1 reviews were conducted while residents were detained under s 200(1)(a) between 4 and 9 July 2020; and

107.2 after that, s 200(6) did not apply because residents were no longer detained under s 200(1)(a).

108. The requirement to review the status of detained persons arises by reason of s 200(6) of the PHW Act, which states:

An authorised officer must at least once every 24 hours during the period that a person is subject to detention under subsection (1)(a) review whether the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health. (emphasis added)

109. The nature of the obligation imposed by s 200(6) on an authorised officer when that officer reviews whether the continued detention of a person under s 200(1)(a) is reasonably necessary requires consideration of the context in which, and the reasons for which, that detention has occurred. In the present case, the context relevantly includes:

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<sup>108</sup> *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [187], [748]–[784].

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- 109.1 a serious risk to public health identified by reference to a concentrated group of COVID-19 cases at the Flemington and North Melbourne public housing estates;
- 109.2 a large number of residents requiring review in circumstances where detention was imposed over a short period of time;
- 109.3 a time-critical and evolving situation, where decisions had been made in accordance with the precautionary principle, which requires that a lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control a public health risk, and the principle of the primacy of prevention, which requires that the prevention of disease be preferred to any remedial measures that might be available after that disease has been contracted.
110. The Department's method of review involved making a determination based on telephone conversations between authorised officers and affected residents, which involved:<sup>109</sup>
- 110.1 confirming whether the person was ordinarily resident at the premises at the time of the detention notice;
- 110.2 considering whether the person was still in the premises at the time of review;
- 110.3 considering information that had been identified during any spot or welfare checks; and
- 110.4 considering any other relevant information that could be shared with the authorised officer conducting the telephone call, including any symptoms displayed by the person, whether a medical record of previously being infected with COVID-19 existed and any other physical, mental or other special requirements known about the person.
111. That was sufficient information (combined with the authorised officers' knowledge of COVID-19 incubation periods and transmission methods) for each authorised officer to come to a conclusion about whether the continued detention of the resident was reasonably necessary to eliminate or reduce the

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<sup>109</sup> DHHS response dated 31 August 2020, page 3; DHHS response to item 4; Authorised Officer telephone conversation script.

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risk that the resident would infect others with COVID-19 or themselves become infected by neighbours. That is what s 200(6) requires.

112. The Department has produced to the Ombudsman:

112.1 documents, which demonstrate that the Department did develop a process for review in the period from 4 July to 8 July 2020; and

112.2 call records made by the Department's authorised officers, in line with the process that was developed by the Department for the purposes of that review.

113. The Ombudsman's provisional conclusion that:

... DHHS was unable to produce any records demonstrating the detention of residents at 33 Alfred Street was reviewed by an Authorised Officer each day or, for that matter, at all [which] appeared contrary to section 200(6) of the Public Health and Wellbeing Act ...

has ignored the evidence of the telephone calls made by authorised officers during that period and the script that was developed to ensure a consistent review of persons subject to detention.

114. Although it is unfortunate that there is no "daily record" of review by each authorised officer, it is both understandable and proper that the priority at the time was to ensure that the reviews were in fact conducted, while dealing with an unprecedented emergency situation, with many resources already deployed in other areas of the pandemic response. Notably, s 200(6) does not impose any requirement to record the relevant review and it was preferable that the Department's available resources were used to comply with the legislative requirements, because a resourcing choice had to be made.

#### **Response to Draft Opinion 4**

115. The Department submits that the Ombudsman's draft opinion, that the requirement for people at 33 Alfred Street to exercise in an area surrounded by temporary fencing was degrading and incompatible with the right to humane treatment when deprived of liberty and was contrary to s 38(1) of the Charter, is incorrect and has ignored important jurisprudence on the nature and content of the human rights protected by the Charter.

116. The Department observes that no decision was made to require residents to exercise within an area surrounded by temporary fencing, although residents

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did exercise within a fenced area for a very short period before the fence was dismantled and removed from the site.

117. It is unclear whether draft opinion 4 alleges a breach of the rights identified in s 10(b) of the Charter, or those identified in s 22(1) of the Charter, or both. As should be clear from a consideration of the jurisprudence on the nature and scope of those rights in paragraphs 40-50 above, there can be no question that, even if a requirement to exercise in a particular location had been imposed, that requirement would fall very far short of the kind of treatment that would engage the rights identified in either s 22(1) or s 10(b).

#### **Response to Draft Opinion 5**

118. The Department submits that the Ombudsman should not express the opinion that DHHS acted in a manner that was wrong in:

118.1 failing to document and adequately address the human rights implications of:

- (a) the decision to detain people at 33 Alfred Street without notice;
- (b) the manner in which detention was enforced;

118.2 failing to provide people at 33 Alfred Street with timely and accessible notice;

118.3 failing to notify people at 33 Alfred Street of their ability to complain under s 185(1) of the PHW Act;

118.4 failing to provide people at 33 Alfred Street with access to fresh air and exercise between 4 and 11 July 2020; and

118.5 failing to provide people at 33 Alfred Street with timely and reasonable access to required medication;

because it was not wrong for the Department to prioritise human life, which justified the above actions (to the extent that those actions are not disputed as a matter of fact).

#### *Documenting human rights implications ... Draft Opinion 5(a)*

119. The Department notes that s 38(1) of the Charter does not impose an obligation to document the “proper consideration” required by that subsection. Further,

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the Department submits that, in the circumstances facing the Department at the time, the Department did adequately address the decision to detain without notice and the manner of enforcement of that decision. The Department also submits that the Ombudsman's expectations of what was adequate are unduly high, considering that the Department was properly acting with immediate speed in order to save lives.

*The timely provision of notice ... Draft Opinion 5(b)*

120. The Department submits that it was right to prioritise the immediate protection of life and safety from serious threats to health over the communication of notice to residents. The Department notes that s 200(3) of the Act requires notice to be given "as soon as is practicable". There can be no dispute that, in the context of the PHW Act (as well as generally), life and protection against serious threats to health are more important than the provision of notice.

*Providing individualised notice of the complaints mechanism ... Draft Opinion 5(c)*

121. The Department was not required individually to notify people at 33 Alfred Street of the ability to complain under s 185(1) of the PHW Act; and, given the stretched resources at the time, the Department's omission to do so was not wrong.

121.1 Section 185 of the PHW Act allows for complaints to be made to the Secretary about the exercise of any power by an authorised officer under that Act. Given that s 185 applies generally to any authorised officer of the Department exercising powers under the PHW Act, there is an established complaints mechanism, under which complaints are received by the Department, including about authorised officers exercising their powers.

121.2 The established mechanism involves the complainant submitting a complaint in writing, or by accessing the DHHS website at [www.dhhs.vic.gov.au/making-complaint](http://www.dhhs.vic.gov.au/making-complaint).<sup>110</sup> During the period 4 July to 8 July 2020, complaints may also have been received by the Department through its assistance phone lines or other general contact points of entry, such as emailing the Department using the COVID email address. The compliance team worked with those areas to ensure that, if a complaint was received, the complaint was channelled appropriately.

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<sup>110</sup> DHHS response dated 31 August 2020, page 7.

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121.3 At the time of the lockdown of 33 Albert Street, the Department also had various community engagement mechanisms with residents of 33 Albert Street, which included:

- (a) Frequent meetings, including of the most senior Departmental executives, with community members, groups and leaders, during which community members were invited to provide feedback regarding issues they wished to have resolved;<sup>111</sup>
- (b) telephone calls to affected individuals;<sup>112</sup> and
- (c) Departmental contact information included on written materials that were provided to residents.<sup>113</sup>

122. Each of the above mechanisms, in addition to the established complaint mechanism, allowed practical avenues for residents of 33 Albert Street to make complaints directly to the Department, including about the exercise of any powers by an authorised officer. In circumstances where a statutory complaint mechanism exists, is publicly known and is supported by numerous practical alternative avenues by which residents may make complaints, the Department submits that any conclusion that the Department failed to notify residents of the ability to complain would not be supported by the evidence.

123. While the Department recognises that human rights remain an important consideration in emergency situations, the Department submits that the emergency situation is relevant to the obligations which apply. In this instance, as in many others, the Draft Report has judged the Department against the “gold standard”, at a time when a considerably lower standard was not only acceptable but essential. The Department maintains that it met its obligations under the Charter.

*Fresh air and exercise ... Draft Opinion 5(d)*

124. The provision of fresh air and exercise breaks was hampered by the spatially confined and numerically limited means of ingress and egress from the building at 33 Alfred Street. Providing all residents with regular fresh air and exercise

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<sup>111</sup> DHHS submission dated 31 August 2020, page 5, noting that community working group met regularly with residents.

<sup>112</sup> Email from [redacted] to [redacted], DHHS detention calls, between 6 July 2020 and 10 July 2020: 465 calls attempted with 41.3% success rate.

<sup>113</sup> Letter from DHHS to affected resident dated 7 July 2020.

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breaks outside their units would likely have resulted in transmission of COVID-19 to other residents and the Department's employees and contractors — to whom the Department owes stringent obligations under the *Occupational Health and Safety Act 2004* (Vic). Those obligations included providing and maintaining safe systems of work and providing a working environment that is safe and without risk to employees' health. It was not wrong of the Department to limit opportunities for fresh air and exercise to an extent that could be conducted safely within the exigencies of the emergency.

125. The practical barriers that existed to the provision of access to fresh air and exercise were that:

125.1 the building has only two small elevators and narrow corridors, which prevented proper physical distancing when people were moving in and out of the building;

125.2 for much of the day, there were many employees and contractors moving about inside this building, undertaking COVID-19 testing activities and providing essential services — such as food relief, healthcare, and laundry services; those activities significantly limited the times when residents could access the lifts and exit the building (without putting the lives of those employees and contractors at risk).

126. It took time to develop a fresh air and exercise policy because of the above limitations.

126.1 The process of developing a policy required guidelines for ensuring stringent safety requirements; establishing a scheduling and booking system to coordinate exercise requests with service providers' site access; and communicating to residents. Those requirements added logistical complexity to implementing the policy.<sup>114</sup>

126.2 The policy took a number of days to develop and the implementation of the initial lockdown could not have been deferred until the policy was developed, without incurring an inexcusable risk to life and health.<sup>115</sup>

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<sup>114</sup> *DHHS exercise guidelines*, draft as at 11 July 2020; *Fresh Air Program* summary, key events, 11 July 2020 program started total 161 residents assisted to access program; *Fresh air program guidelines Alfred Street Highrise*, dated 14 July 2020.

<sup>115</sup> Email from [redacted] to [redacted] and others dated 10 July 2020 at 10:39pm:

"commitments have been made to provide 'fresh air' breaks to tenants at Alfred St by today ... I received reinforced advice by [redacted] that this must be implemented for tenants tomorrow".

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127. The provision of fresh air and exercise on a daily basis is not mandated in the PHW Act, or by any human rights instrument. The Department notes that the *Close Contacts Directions* permitted a person to leave a premises:

... for the purposes of exercise, but only if:

- (A) the person takes reasonable steps to maintain a distance of 1.5m for any other person, unless the other person is required to self-isolate or self-quarantine at the same premises.<sup>116</sup>  
(emphasis added)

128. In circumstances where a person was unable to take reasonable steps to maintain a 1.5 metre distance from any other person, due to the practical barriers described in paragraph 125, there was no unqualified right to exercise under the *Close Contacts Directions*.

129. The absence of those amenities was both permissible under law and proportionate to the need to protect people from infection. The primary human rights guidance on exercise and fresh air has been developed in the context of imprisonment for criminal activity, not detention for infection control. Where providing fresh air and exercise would allow infection to escape and undermine the very purpose of detention, its absence will not breach s 22(1) because that absence is a necessary feature of the detention if the detention is to attain its purpose (the prevention of infection).

#### *Medications ... Draft Opinion 5(e)*

130. The Department did provide timely and reasonable access to medication, even if there were some delays in individual cases.

131. The Department subcontracted Cohealth to provide primary care services, and pharmacy and pharmacotherapy services. Residents were able to request healthcare services and assistance via the 1800 Housing Support Line, which was operational from 5 July 2020.<sup>117</sup> A dedicated healthcare phone line was established from 10 July 2020. Cohealth responded to requests made on that phone line by visiting residents in their homes to provide care and deliver medications.

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<sup>116</sup> *Close Contacts Directions* s 8(2)(b)(iii)(A).

<sup>117</sup> The 1800 Housing Support Line included integrated interpreting services for all calls.

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## Conclusions

132. Although s 23(1) of the Ombudsman Act simply specifies that the Ombudsman be “of the opinion” that administrative action “appears to have been taken contrary to law” or “was wrong”, the Ombudsman’s formation of those opinions must, as with all administrative action, be performed in a manner that is not irrational.<sup>118</sup> The Draft Report’s deliberative pathway for the draft opinions is opaque.<sup>119</sup> That feature of the Draft Report appears to breach the direction in s 23(2) of the Ombudsman Act to “report the Ombudsman’s opinion and the reasons for it” and imperils the validity of the Ombudsman’s administrative action on the basis of irrationality.
133. The Department was required to act in the context of an acute and unprecedented emergency. Given the exacting standards applied to the Department by the Ombudsman in its Draft Report, the Draft Report is insufficiently precise in its identification of how and why the Department or any other authority has taken administrative action in a manner that is “contrary to law” or is “wrong”.
134. Amongst other things, the Draft Report currently opines that the Department has breached the right to liberty and the right to protection from cruel, inhuman and degrading treatment, and failed to treat the residents at 33 Albert Street with humanity while they were deprived of liberty. Those would be grave conclusions.
135. The Draft Report also opines that the residents of 33 Alfred Street were detained unlawfully. That would be a conclusion with far reaching implications, not only with respect to this matter but with respect to the many thousands of people who have been required to isolate or quarantine under directions made by authorised officers since 16 March 2020. Before forming opinions of that nature, however, the Ombudsman must ensure that her opinions are well founded in fact and law.
136. The Department considers that the Draft Report’s conclusions on the law, and on many of the facts, are wrong. The Department asks that the Ombudsman reconsider her draft opinions, giving appropriate weight to the views of the

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<sup>118</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998 [38] (Gummow and Hayne JJ).

<sup>119</sup> As discussed in paragraphs 3.2–3.3.

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Supreme Court of Victoria and international courts, and to the evidence provided by the Department, as reiterated in this response.

# Appendix B

## Organisations that provided submissions to the investigation

	Organisation
1	Association for the Prevention of Torture
2	Australian Human Rights Commission
3	City of Melbourne
4	Cohealth
5	Disaster Legal Help Victoria
6	Ellen Sandell MP and Adam Bandt MP (Australian Greens)
7	Ethnic Communities' Council of Victoria
8	Flemington and Kensington Community Legal Centre
9	Inner Melbourne Community Legal
10	Liberty Victoria
11	Melbourne Activist Legal Support
12	North Melbourne Language and Learning
13	Police Association of Victoria
14	Save Public Housing Collective
15	The Shift
16	Translators and Interpreters Australia
17	Victorian Alcohol and Drug Association
18	Victorian Equal Opportunity and Human Rights Commission
19	Victorian Multicultural Commission
20	Victorian Public Tenants Association
21	Westjustice

# Appendix C

## Response to the Ombudsman's request for documents relating to the deliberations of the Crisis Council of Cabinet



Department of  
Premier and Cabinet

1 Treasury Place  
Melbourne, Victoria 3002 Australia  
Telephone: 03 9651 5111  
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Ms Deborah Glass OBE  
Ombudsman  
Victorian Ombudsman  
Level 2, 570 Bourke Street  
MELBOURNE VIC 3000

D20/150823

██████████@ombudsman.vic.gov.au

Dear Ms Glass

I refer to your letter to the Premier of 8 October 2020, in which you request Crisis Council of Cabinet (CCC) documents from a meeting of 4 July 2020 relating to the public housing lockdown at 33 Alfred Street, North Melbourne, which you are currently investigating. The Premier has asked me to respond on his behalf.

Your request has been carefully considered, however the State has decided to not produce the documents. As you indicate, s 19(1) of the *Ombudsman Act 1973* provides that the State cannot be compelled to produce such material. As is well recognised, there is a significant public interest in maintaining confidentiality in Cabinet deliberations.

The provision of Cabinet material to the COVID-19 Hotel Quarantine Inquiry occurred given the extraordinary nature of the matters being investigated. While I accept your own investigation is important and relates to a significant matter, it does not rise to the same level of the Hotel Quarantine Inquiry, and thus, with respect, your request for the CCC documents has been declined.

Yours sincerely

**Jeremi Moule**  
Secretary

22/10/2020

# Appendix D

## Detention Directions (33 Alfred Street, North Melbourne)

### Public Health and Wellbeing Act 2008

#### Section 200

#### DIRECTION FROM DEPUTY CHIEF HEALTH OFFICER (COMMUNICABLE DISEASE) IN ACCORDANCE WITH EMERGENCY POWERS ARISING FROM DECLARED STATE OF EMERGENCY

Detention Directions (33 Alfred Street, North Melbourne)

I, Dr Annaliese van Diemen, Deputy Chief Health Officer (Communicable Disease), consider it reasonably necessary to protect public health to give the following directions pursuant to section 200(1)(a), (b) and (d) of the **Public Health and Wellbeing Act 2008** (Vic.) (**the Act**):

#### PART 1 – PRELIMINARY

##### 1 Preamble

- (1) The purpose of these directions is to address the serious public health risk posed to Victoria by Novel Coronavirus 2019 (COVID-19).
- (2) These directions require everyone who ordinarily resides in a **Detention Location** to limit their interactions with others by restricting the circumstances in which they may leave the **premises** where they ordinarily reside.

##### 2 Citation

These directions may be referred to as the **Detention Directions**.

##### 3 Commencement

These directions apply beginning at 3:30:00 pm on 4 July 2020 and ending at 3:30:00 pm on 18 July 2020.

#### PART 2 – DETENTION

##### 4 Reason for this Notice

- (1) You ordinarily reside in a Detention Location.
- (2) A state of emergency exists in Victoria under section 198 of the Act because of the serious risk to public health posed by COVID-19.
- (3) In particular, there is a serious risk to public health as a result of the number of persons diagnosed with COVID-19 residing in the Detention Location, which presents a high risk of infection in the Detention Location and a potentially significant contribution to the spread of COVID-19 throughout Victoria.
- (4) You will be detained at the **premises** where you ordinarily reside in the Detention Location, for a period of 14 days (**Initial Detention Period**), because, having regard to the medical advice, that detention is reasonably necessary for the purpose of eliminating or reducing a serious risk to public health, in accordance with section 200(1)(a) of the Act.
- (5) **You will be detained for a further period of 10 days from the end of the Initial Detention Period** if you refuse to be tested for COVID-19 on the request of an **Authorised Officer**. This detention will be required because, having regard to the medical advice, this further detention is reasonably necessary for the purpose of eliminating or reducing a serious risk to public health, in accordance with section 200(1)(a) of the Act.
- (6) You must comply with the directions in clause 5 below because they are reasonably necessary to protect public health, in accordance with section 200(1)(d) of the Act.
- (7) The Chief Health Officer will be notified that you have been detained. The Chief Health Officer must advise the Minister for Health of your detention.

*Note: these steps are required by sections 200(7) and (9) of the Act.*

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## Detention Directions (33 Alfred Street, North Melbourne)

### 5 Conditions of your detention

- (1) **If you are not at the premises where you ordinarily reside, you must return there immediately.**
- (2) **You must not leave the premises in which you ordinarily reside in any circumstances, unless:**
  - (a) you have been granted permission to do so:
    - (i) for the purposes of attending a medical facility to receive medical care; or
    - (ii) where it is reasonably necessary for your physical or mental health; or
    - (iii) on compassionate grounds; or
  - (b) there is an emergency situation.
- (3) **You must not permit any other person to enter your premises, unless the person:**
  - (c) ordinarily resides at the premises as well and is being detained with you; or
  - (d) the person is authorised to be there for a specific purpose (for example, providing food or for medical reasons).
- (4) Except for authorised people, the only other people allowed in your premises are people who are being detained with you.
- (5) You are permitted to communicate with people who are not detained with you, either by phone or other electronic means.

*Note: an Authorised Officer must facilitate any reasonable request for communication made by you, in accordance with section 200(5) of the Act.*
- (6) If you are under 18 years of age your parent or guardian is permitted to stay with you, but only if they agree to submit to the same conditions of detention for the period that you are detained.

### 6 Review of your detention

Your detention will be reviewed at least once every 24 hours for the period that you are in detention, in order to determine whether your detention continues to be reasonably necessary to eliminate or reduce a serious risk to public health.

*Note: this review is required by section 200(6) of the Act.*

## PART 3 – OTHER PROVISIONS

### 7 Relationship with other Directions

- (1) If there is any inconsistency between these directions and a direction or other requirement contained in a **Direction and Detention Notice**, these directions are inoperative to the extent of the inconsistency.
- (2) If there is any inconsistency between these directions and any other **Directions currently in force** (other than the **Diagnosed Persons and Close Contacts Directions (No. 4)** and a **Direction and Detention Notice**), these directions prevail to the extent of the inconsistency.

### 8 Definitions

For the purposes of these directions:

- (1) **Authorised Officer** has the same meaning as in the Act;
- (2) **Detention Location** means 33 Alfred Street, North Melbourne, Victoria 3051;
- (3) **Direction and Detention Notice** means a notice given to a person under the Act requiring the person to be detained for a specified period;

# Appendix D – continued

## Detention Directions (33 Alfred Street, North Melbourne)

- (4) **Directions currently in force** means the **Restricted Activity Directions (No. 11)**, the **Restricted Activity Directions (Restricted Postcodes)**, the **Stay at Home Directions (Restricted Postcodes)**, the **Stay Safe Directions (No. 3)**, the **Areas Directions (No. 2)**, the **Diagnosed Persons and Close Contacts Directions (No. 4)**, the **Hospital Visitor Directions (No. 7)** and the **Care Facilities Directions (No. 6)**;
- (5) **Initial Detention Period** has the meaning in clause 4(4); and
- (6) **premises** means:
  - (a) a building, or part of a building; and
  - (b) any land on which the building is located, other than land that is available for communal use.

### 9 Penalties

Section 203 of the Act provides:

#### **Compliance with direction or other requirement**

- (1) A person must not refuse or fail to comply with a direction given to the person, or a requirement made of the person, in the exercise of a power under an authorisation given under section 199.  
Penalty: In the case of a natural person, 120 penalty units.  
In the case of a body corporate, 600 penalty units.
- (2) A person is not guilty of an offence against subsection (1) if the person had a reasonable excuse for refusing or failing to comply with the direction or requirement.

Dated 4 July 2020

DR ANNALIESE VAN DIEMEN  
Deputy Chief Health Officer (Communicable Disease),  
as authorised to exercise emergency powers by the Chief Health Officer  
under section 199(2)(a) of the Act

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# Appendix E

## Diagnosed Persons and Close Contacts Directions (No 4)

### Public Health and Wellbeing Act 2008

#### Section 200

#### DIRECTION FROM DEPUTY CHIEF HEALTH OFFICER (COMMUNICABLE DISEASE) IN ACCORDANCE WITH EMERGENCY POWERS ARISING FROM DECLARED STATE OF EMERGENCY

#### Diagnosed Persons and Close Contacts Directions (No. 4)

I, Dr Annaliese van Diemen, Deputy Chief Health Officer (Communicable Disease), consider it reasonably necessary to protect public health to give the following directions pursuant to section 200(1)(b) and (d) of the **Public Health and Wellbeing Act 2008** (Vic.) (**PHW Act**):

#### 1 Preamble

- (1) The purpose of these directions is to require persons:
  - (a) diagnosed with Novel Coronavirus 2019 (**2019-nCoV**) to self-isolate;
  - (b) who are living with a diagnosed person, or who have been in close contact with a diagnosed person, to self-quarantine;in order to limit the spread of 2019-nCoV.
- (2) These directions replace the **Diagnosed Persons and Close Contacts Directions (No. 3)** given on 21 June 2020.

#### 2 Citation

These directions may be referred to as the **Diagnosed Persons and Close Contacts Directions (No. 4)**.

#### 3 Commencement and revocation

- (1) These directions commence at 11:59:00 pm on 1 July 2020.
- (2) The **Diagnosed Persons and Close Contacts Directions (No. 3)** are revoked at 11:59:00 m on 1 July 2020.

#### 4 Self-isolation for diagnosed persons

*Who is a diagnosed person?*

- (1) A person is a **diagnosed person** if the person:
  - (a) at any time between midnight on 25 March 2020 and 11:59:00 pm on 19 July 2020 has been informed that they have been diagnosed with 2019-nCoV; and
  - (b) has not been given, or is not taken to have been given, **clearance from self-isolation** under clause 5.

*Requirement to self-isolate*

- (2) A diagnosed person must **self-isolate** under these directions:
  - (a) if the diagnosis is communicated to the person on or after the commencement of these directions; or
  - (b) if the diagnosis was communicated to the person before the commencement of these directions.

*Note: the requirements of self-isolation are specified in clause 8. A diagnosed person can still leave the premises at which they are self-isolating to obtain medical care.*

*Location of self-isolation*

- (3) A diagnosed person must self-isolate:
  - (a) if subclause (2)(a) applies, at the **premises** chosen by the person under subclause (4); or
  - (b) if subclause (2)(b) applies, at the premises at which the person was required to reside under a **Revoked Isolation Direction**.

# Appendix E – continued

## Diagnosed Persons and Close Contacts Directions (No 4)

- (4) For the purposes of subclause (3)(a), the diagnosed person may choose to self-isolate at:
- (a) a premises at which they ordinarily reside; or
  - (b) another premises that is suitable for the person to reside in for the purpose of self-isolation.

*Note 1: a person can decide to self-isolate at a hotel or other suitable location, instead of self-isolating at their ordinary place of residence.*

*Note 2: once a person has chosen the premises at which to self-isolate, the person must reside at that premises for the entirety of the period of self-isolation: see clause 8(2)(a).*

- (5) If a diagnosed person who has chosen a premises under subclause (4) is not at the premises at the time when the choice is made, the person must immediately and directly travel to that premises, unless the person is admitted to a **hospital** or other facility for the purposes of receiving medical care.

### *Self-isolation period*

- (6) For the purposes of subclause (2), the period of self-isolation begins:
- (a) if subclause (2)(a) applies, when the diagnosis is communicated to the person; or
  - (b) if subclause (2)(b) applies, upon the commencement of these directions.
- (7) For the purposes of subclause (2), the period of self-isolation ends when the person is given **clearance from self-isolation** under clause 5.

### *Notifications by the diagnosed person*

- (8) Immediately after choosing a premises under subclause (4), the diagnosed person must:
- (a) if any other person is residing at the premises chosen by the diagnosed person, notify the other person that:
    - (i) the diagnosed person has been diagnosed with 2019-nCoV; and
    - (ii) the diagnosed person has chosen to self-isolate at the premises; and
  - (b) notify the Department of:
    - (i) the address of the premises chosen by the diagnosed person; and
    - (ii) the name of any other person who is residing at the premises chosen by the diagnosed person.
- (9) If, during the period that a diagnosed person is self-isolating at a premises for the purposes of clause 4, another person informs the diagnosed person that they intend to commence residing at the premises chosen by the diagnosed person:
- (a) the diagnosed person must inform the other person of their diagnosis; and
  - (b) if the other person commences residing at the premises, the diagnosed person must notify the Department that a person has commenced residing with the diagnosed person and of the name of that person.

### **Clearance from self-isolation**

- (1) A diagnosed person is given **clearance from self-isolation** if:
- (a) an officer of the Department makes a determination under subclause (2) in relation to the person; and
  - (b) the person is given notice of the determination in accordance with subclause (3).
- (2) For the purposes of subclause (1)(a), an officer of the Department may make a determination in relation to a person if the officer is satisfied that the person meets the criteria for discharge from self-isolation under existing **Departmental Requirements**.

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## Diagnosed Persons and Close Contacts Directions (No 4)

- (3) For the purposes of subclause (1)(b), the notice must be in writing but is not required to be in a particular form.
- (4) A person who has been given clearance from self-isolation, however expressed, under a Revoked Isolation Direction is taken to have been given clearance from self-isolation under this clause.

### 6 Self-quarantine for close contacts

*Who is a close contact?*

- (1) For the purposes of this clause, a person is a **close contact** if:
  - (a) an officer of the Department has made a determination under subclause (2) in relation to the person; and
  - (b) between midnight on 11 May 2020 and 11:59:00 pm on 19 July 2020, the person has been given notice of the determination in accordance with subclause (3).
- (2) For the purposes of subclause (1)(a), an officer of the Department may make a determination in relation to a person if the officer is satisfied, having regard to Departmental Requirements, that the person has had close contact with another person who:
  - (a) since the time of last contact, has become a diagnosed person; or
  - (b) at the time of last contact, was a diagnosed person.

*Note: under the Departmental Requirements, a person is generally considered to have had close contact if, in the period extending from 48 hours before onset of symptoms in the diagnosed person:*

- they have had face-to-face contact in any setting with the diagnosed person for more than a total of 15 minutes over the course of a week; or
- they have shared a closed space with a diagnosed person for a prolonged period (for example, more than 2 hours).

- (3) For the purposes of subclause (1)(b), the notice:
  - (a) must specify the time (including by reference to an event) at which the person will no longer be required to self-quarantine, having regard to Departmental Requirements; and

*Example: the notice could specify that a person is no longer required to self-quarantine from 14 days after a diagnosed person who the person is living with receives clearance from self-isolation.*
  - (b) may be given orally or in writing, and, if given orally, must be confirmed in writing as soon as reasonably practicable; and
  - (c) is not required to be in a particular form.

*Requirement to self-quarantine*

- (4) A **close contact** must **self-quarantine** under these directions.

*Note: the requirements of self-quarantine are specified in clause 8.*

*Location of self-quarantine*

- (5) A close contact may choose to self-quarantine at:
  - (a) a premises at which they ordinarily reside; or
  - (b) another premises that is suitable for the person to reside in for the purpose of self-quarantine.

*Note 1: a person can decide to self-quarantine at a hotel or other suitable location, instead of self-quarantining at their ordinary place of residence.*

*Note 2: once a person has chosen the premises at which to self-quarantine, the person must reside at that premises for the entirety of the period of self-quarantine: see clause 8(2)(a).*

- (6) If, at the time a person is given a notice under subclause (1)(b), the person is not at the premises chosen by the person under subclause (5), the person must immediately and directly travel to that premises.

# Appendix E – continued

## Diagnosed Persons and Close Contacts Directions (No 4)

### *End of self-quarantine period*

- (7) For the purposes of this clause, the period of self-quarantine ends:
- (a) subject to paragraph (c), at the time specified in the notice given under subclause (1)(b) as given or as varied under subclause (9); or
  - (b) if the notice given to the person under subclause (1)(b) is revoked under subclause (9), at the time that revocation takes effect; or
  - (c) if the person becomes a diagnosed person following a test for 2019-nCoV – when the diagnosis is communicated to the person.

*Note: a close contact who becomes a diagnosed person will then be required to self-isolate under clause 4, for a period ending when the person is given clearance from self-isolation under clause 5.*

### *Exception – previous clearance*

- (8) A person is not required to self-quarantine under this clause if, before the time that notice is given under subclause (1)(b), the person has been given, or is taken to have been given, clearance from self-isolation under clause 5.

### *Review of determination and notice*

- (9) An **authorised officer**, who is authorised to exercise **emergency powers** by the Chief Health Officer under section 199(2)(a) of the PHW Act, may review a determination made under subclause (2) and, if satisfied that it is appropriate, having regard to Departmental Requirements, may vary or revoke the notice given to the person under subclause (1)(b), and must give the person notice of the authorised officer’s decision.

### *Transitional provision – close contacts under Revoked Isolation Directions*

- (10) If a person was a close contact under a Revoked Isolation Direction:
- (a) a determination made, or taken to have been made, under the Revoked Isolation Direction in relation to the person’s status as a close contact is taken to be a determination made under subclause (2); and
  - (b) a notice given, or taken to have been given, to the person under the Revoked Isolation Direction in relation to the determination referred to in paragraph (a) is taken to be a notice given under subclause (1)(b); and
  - (c) for the purposes of subclause (5), the person is taken to have chosen to self-quarantine at the premises at which the person was required to self-quarantine under the Revoked Isolation Direction.

*Note: a person who was required to self-quarantine under previous directions because they reside with a person who is, or was, a diagnosed person, are now treated as close contacts, and also continue to be required to self-quarantine for the period determined by the previous directions, unless that period is altered pursuant to subclause 9.*

## 7 Testing of persons in self-quarantine

- (1) If a person is required to self-quarantine under clause 6 and, during the period of self-quarantine, the person:
- (a) is tested for 2019-nCoV; and
  - (b) the period for which the person is required to self-quarantine under clause 6 expires during the period in which the person is awaiting the result of that test; the period of self-quarantine is extended until the person receives the result of the test.

*Note: persons who are in self-quarantine and experience a temperature higher than 37.5 degrees or symptoms of acute respiratory infection are encouraged to get tested. In certain circumstances, a person may be required to comply with an order that they undergo a medical test: PHW Act, section 113(3).*

- (2) If a person is required to self-quarantine under clause 6 and, during the period of self-quarantine, the person receives a test result stating that they have been diagnosed with 2019-nCoV, the person becomes a diagnosed person and must self-isolate under clause 4.

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## Diagnosed Persons and Close Contacts Directions (No 4)

- (3) If a person is required to self-quarantine under clause 6 and, during the period of self-quarantine, the person receives a test result stating that they have not been diagnosed with 2019-nCoV:
  - (a) if the period for which the person is required to self-quarantine under clause 6 has not expired – must continue to self-quarantine under that clause for the remainder of that period; or
  - (b) if the period of self-quarantine was extended under subclause (1) – may cease self-quarantining.

### 8 Requirements of self-isolation and self-quarantine

- (1) This clause applies to a person who is required to:
  - (a) **self-isolate** at a premises under clause 4; or
  - (b) **self-quarantine** at a premises under clause 6.
- (2) The person identified in subclause (1):
  - (a) must reside at that premises for the entirety of the period of self-isolation or self-quarantine, as the case requires, except for any period that the person is admitted to a hospital or other facility for the purposes of receiving medical care; and
  - (b) must not leave the premises, except:
    - (i) for the purposes of obtaining medical care or medical supplies; or
    - (ii) in any emergency situation; or
    - (iii) for the purposes of exercise, but only if the person:
      - (A) takes reasonable steps to maintain a distance of 1.5 metres from any other person, unless the other person is required to self-isolate or self-quarantine at the same premises; and
      - (B) does not enter any other building; or
    - (iv) if required to do so by law; or
    - (v) for the purposes of visiting a patient in hospital if permitted to do so under the **Hospital Visitor Directions (No. 7)**; and
  - (c) must not permit any other person to enter the premises unless:
    - (i) that other person:
      - (A) ordinarily resides at the premises; or
      - (B) is required to self-isolate or self-quarantine at the premises under these directions; or
    - (ii) it is necessary for the other person to enter for medical or emergency purposes; or
    - (iii) the other person is a **disability worker**, and it is necessary for the disability worker to enter for the purpose of providing a **disability service** to a person with a **disability**;
    - (iv) it is necessary for the other person to enter for the purpose of providing personal care or household assistance to the person as a result of that person's age, disability or chronic health condition; or  
*Example: personal care includes assistance with showering, toileting, eating; household assistance includes help with cooking, house cleaning, laundry and gardening.*
    - (v) the entry is otherwise required or authorised by law.
- (3) Subclause (2)(c) does not apply to a person who is a **resident** of a **care facility**.  
*Note: the Care Facilities Directions (No. 6) govern who can enter a care facility.*

# Appendix E – continued

## Diagnosed Persons and Close Contacts Directions (No 4)

### 9 Exemption power

- (1) A person is not required to comply with a requirement of these directions if the person is granted an exemption from that requirement under subclause (2).
- (2) The Chief Health Officer or Deputy Chief Health Officer may exempt a person from any or all requirements contained in these directions, if satisfied that an exemption is appropriate, having regard to the:
  - (a) need to protect public health; and
  - (b) principles in sections 5 to 10 of the PHW Act, as appropriate.
- (3) An exemption under subclause (2) must:
  - (a) be given, in writing, to the person the subject of the exemption; and
  - (b) specify the requirement or requirements that the person need not comply with.
- (4) An exemption granted to a person under this clause does not prevent an authorised officer from exercising an emergency power to give the person a different direction or impose a different requirement on the person.

### 10 Definitions

In these directions:

- (1) **authorised officer** has the same meaning as in the PHW Act;
- (2) **care facility** has the same meaning as in the **Care Facilities Directions (No. 6)**;
- (3) **Department** means the Victorian Department of Health and Human Services;
- (4) **Departmental Requirements** means the document titled ‘COVID-19 Pandemic Plan for the Victorian Health Sector’, as amended from time to time;  
*Note: the Departmental Requirements are available at:  
<https://www2.health.vic.gov.au/about/publications/ResearchAndReports/covid-19-pandemic-plan-for-vic>*
- (5) **emergency powers** has the same meaning as in the PHW Act;
- (6) **hospital** has the same meaning as in the **Hospital Visitors Directions (No. 7)**;
- (7) **premises** means:
  - (a) a building, or part of a building; and
  - (b) any land on which the building is located, other than land that is available for communal use;
- (8) **resident** of a care facility has the same meaning as in the **Care Facilities Directions (No. 6)**;
- (9) **Revoked Isolation Direction** means the following directions:
  - (a) **Isolation (Diagnosis) Direction**, given on 25 March 2020;
  - (b) **Isolation (Diagnosis) Direction (No. 2)**, given on 13 April 2020;
  - (c) **Diagnosed Persons and Close Contacts Directions**, given on 11 May 2020;
  - (d) **Diagnosed Persons and Close Contacts Directions (No. 2)**, given on 31 May 2020;
  - (e) **Diagnosed Persons and Close Contacts Directions (No. 3)**, given on 21 June 2020;
- (10) the following expressions have the same meaning that they have in the **Disability Service Safeguards Act 2018**:
  - (a) disability;
  - (b) disability service;
  - (c) disability worker.

---

## Diagnosed Persons and Close Contacts Directions (No 4)

### 10 Penalties

Section 203 of the PHW Act provides:

#### **Compliance with direction or other requirement**

- (1) A person must not refuse or fail to comply with a direction given to the person, or a requirement made of the person, in the exercise of a power under an authorisation given under section 199.

Penalty: In the case of a natural person, 120 penalty units;  
In the case of a body corporate, 600 penalty units.

- (2) A person is not guilty of an offence against subsection (1) if the person had a reasonable excuse for refusing or failing to comply with the direction or requirement.

Dated 1 July 2020

DR ANNALIESE VAN DIEMEN  
Deputy Chief Health Officer (Communicable Disease),  
as authorised to exercise emergency powers by the Chief Health Officer  
under section 199(2)(a) of the PHW Act.

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# Appendix F

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Notice of declared emergency area posted at 33 Alfred Street on 4 July 2020



VICTORIA POLICE

## DECLARED EMERGENCY AREA

This building and immediate surroundings are the subject of a Declared Emergency Area.

Victoria Police are satisfied that the building and surrounds are subject to an emergency due to the actual or imminent occurrence of an event endangering safety or health.

This declaration is made from authority under section 36A of the ***Emergency Management Act 1986***.

Victorian Police has power to use force under 36B(5) to remove people from the area, prevent people from entering it if they suspect an offence is being or about to be committed under the Act.

This declaration has been approved by [name and rank]

# Appendix G

## Contents of factsheet concerning continuation of lockdown

### For residents of 33 Alfred Street, North Melbourne

Due to the high number of cases at 33 Alfred Street, North Melbourne, all residents will be treated as close contacts and are required to isolate for a further nine days until 11:59pm, Saturday 18 July.

We will continue to provide residents with:

- Food deliveries
- A laundry service.
- The 1800 number to report requests.
- Ongoing welfare support such as check-ins, psychosocial supports, family violence and Aboriginal specific supports.

Residents of 33 Alfred Street will also be able exercise outside, under supervision.

*We thank all residents at the estates for their patience and support to help slow the spread and keep each other safe.*

**To find out more information about coronavirus and how to stay safe visit [DHHS.vic – Coronavirus \(COVID-19\)](https://www.dhhs.vic.gov.au/coronavirus)**  
**<[www.dhhs.vic.gov.au/coronavirus](https://www.dhhs.vic.gov.au/coronavirus)>**

If you need an interpreter, call TIS National on 131 450

For information in other languages, scan the QR code or visit

[DHHS.vic – Translated resources - coronavirus \(COVID-19\)](https://www.dhhs.vic.gov.au/translated-resources-coronavirus-covid-19)

<<https://www.dhhs.vic.gov.au/translated-resources-coronavirus-disease-covid-19>>



For any questions

**Coronavirus hotline 1800 675 398 (24 hours)**

Please keep Triple Zero (000) for emergencies only

To receive this document in another format phone 1300 651 160 using the National Relay Service 13 36 77 if required, or [email Emergency Management Communications](mailto:em.comms@dhhs.vic.gov.au)  
<em.comms@dhhs.vic.gov.au>.

# Appendix H

## Contents of letter to residents dated 7 July 2020

Dear [Name]

As you may be aware, there has been an outbreak of coronavirus (COVID-19) in Victoria. There is a serious risk to public health as a result of the number of persons diagnosed with COVID-19 residing at the housing estate at [Insert Detention Location e.g 120 Racecourse Road, Flemington], which presents a high risk of infection at [Insert Detention Location e.g 120 Racecourse Road, Flemington], and a potentially significant contribution to the spread of COVID-19 throughout Victoria.

As you ordinarily live at <Insert Detention Location e.g 120 Racecourse Road, Flemington>, you have been issued with a Detention Direction from the Deputy Chief Health Officer of Victoria.

This direction requires you to limit your interactions with others by limiting when you may leave your home for a period of up to 14 days. If you refuse to be tested for COVID-19, this period may be extended for a further period of 10 days.

Based on medical advice, this is necessary to reduce the serious risk to public health posed by COVID-19.

### **You must not leave home**

You must not leave your home in any circumstances, unless:

1. you have been granted permission to do so:
  - (a) for the purposes of attending a medical facility to receive medical care; or
  - (b) where it is reasonably necessary for your physical or mental health; or
  - (c) on compassionate grounds; or
2. there is an emergency situation.

### **You must not allow others to enter your home**

You must not permit any other person to enter your home, unless the person:

- (a) ordinarily lives at your home as well; or
- (b) the person is authorised to be there for a specific purpose (for example, providing food or for medical reasons).

Except for authorised people, the only other people allowed in your home are people who are required to stay at your home because of the Detention Direction.

You can communicate with any other people either by phone or other electronic means.

These arrangements will be reviewed at least once every 24 hours in order to determine whether they continue to be reasonably necessary to eliminate or reduce a serious risk to public health.

Please note that a refusal to comply with the Detention Direction, without reasonable excuse, is an offence. There are penalties for not complying.

A copy of the Detention Direction has or will be placed under your door. Please keep the Detention Direction with you at all times.

---

## Contents of letter to residents dated 7 July 2020

We understand these are very challenging and difficult times for your family and you. We greatly appreciate your co-operation and assistance. By complying with these arrangements, you are making an important contribution to keeping your family, your community and Victoria safe and health.

If you need further information or support, please call 1800 961 054. If you need an interpreter, call TIS National on 131 450.

Yours sincerely

**[Name]**

Authorised Officer under section 199(2)(a) of the Public Health and Wellbeing Act 2008

7/ 7 / 2020

# Appendix I

## Script observed by DHHS officers when notifying residents of Detention Directions

Hello,

My name is [Authorised Officer Name], I work for the Victorian Department of Health and Human Services and I am an Authorised Officer under the Public Health and Wellbeing Act. I am also authorised for the purposes of the emergency and public health risk powers in Victoria's current State of Emergency.

Can I confirm that I am speaking with [1. Insert name of tenant holder and 2. Insert names of other residents recorded at that tenancy and confirm that they are present]

*Where possible ask for each adult to listen into the phone call. Where this is not possible, each adult will need to be read the script individually.*

*If other persons are identified as being at the property who do not usually live there, a record of that persons' name and contact number should be taken and referred to the Authorised Officer on duty, who will then contact Public Health Command in order to make a close contact assessment.*

Because you usually live at [Insert Detention Location e.g 120 Racecourse Road, Flemington], you have been issued with a Direction and Detention Notice, which requires you to limit your interactions with others by restricting the circumstances in which you may leave the premises where you usually live.

I will now explain to you the conditions of your detention:

**(1) If you are not at the premises where you ordinarily reside, you must return there immediately.**

- (1) You must not leave the premises in which you ordinarily reside in any circumstances, unless:
  - (a) you have been granted permission to do so by an Authorised Officer:
    - (i) for the purposes of attending a medical facility to receive medical care; or
    - (ii) where it is reasonably necessary for your physical or mental health; or
    - (iii) on compassionate grounds; or
  - (b) there is an emergency situation.
- (2) **You must not permit any other person to enter your premises**, unless the person:
  - (a) ordinarily resides at the premises as well and is being detained with you; or
  - (b) the person is authorised to be there for a specific purpose (for example, providing food or for medical reasons).
- (3) Except for authorised people, the only other people allowed in your premises are people who are being detained with you.
- (4) You are permitted to communicate with people who are not detained with you, either by phone or other electronic means.

*Note: an Authorised Officer must facilitate any reasonable request for communication made by you, in accordance with section 200(5) of the Act.*

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## Script observed by DHHS officers when notifying residents of Detention Directions

There is a serious risk to public health as a result of the number of persons diagnosed with COVID-19 residing at [Insert Detention Location e.g 120 Racecourse Road, Flemington], which presents a high risk of infection in [Insert Detention Location e.g 120 Racecourse Road, Flemington], and a potentially significant contribution to the spread of COVID-19 throughout Victoria.

This action is necessary to ensure we reduce the serious risk to public health posed by COVID-19.

Refusal to comply without reasonable excuse is an offence. There are penalties for not complying with the notice.

A Direction and Detention notice has or will be placed inside or under your door. Please keep the Direction and Detention notice with you at all times.

### **Repeat**

We greatly appreciate your co-operation and assistance in these challenging times.  
Thank you again.

# Appendix J

## Random sample of telephone welfare checks made to residents (n= 50)

	Age	Call made (Y/N)				Total attempted	Total connected	Issue
		6 Jul	7 Jul	8 Jul	9 Jul			
Registered 1	43	N	Y	N	Y	2	0	No answer
Registered 2	37	Y	N	N	N	1	1	
Registered 3	65	Y	Y	Y	Y	4	1	
Registered 4	34	N	Y	Y	N	2	1	
Registered 5	49	Y	N	N	Y	2	1	
Registered 6	23	N	Y	N	Y	2	1	
Registered 7	24	Y	N	N	Y	2	2	
Registered 8	49	N	Y	N	N	1	1	
Registered 9	46	Y	N	N	N	1	1	
Registered 10	57	N	Y	Y	N	3	0	No answer
Registered 11	50	Y	N	Y	Y	4	0	Disconnected
Registered 12	55	Y	Y	Y	Y	4	1	
Registered 13	50	Y	N	Y	N	2	1	
Registered 14	46	Y	N	N	N	1	1	
Registered 15	55	Y	N	N	Y	2	1	
Registered 16	28	Y	N	Y	Y	3	3	
Registered 17	46	Y	N	Y	N	3	0	No answer
Registered 18	18	Y	Y	N	Y	3	3	
Registered 19	40	Y	N	N	N	1	1	
Registered 20	50	N	Y	Y	N	2	0	Disconnected
Registered 21	51	Y	N	N	Y	3	1	
Registered 22	20	N	Y	Y	N	2	0	Disconnected
Registered 23	18	Y	Y	Y	N	4	1	
Registered 24	37	Y	N	N	N	1	1	
Registered 25	48	N	Y	Y	Y	3	1	

	Age	Call made (Y/N)				Total attempted	Total connected	Issue
		6 Jul	7 Jul	8 Jul	9 Jul			
Tested 1	74	N	N	N	N	0	0	Housesitting for registered tenant
Tested 2	26	Y	N	N	Y	2	1	
Tested 3	25	N	N	N	N	0	0	Not identified in tenant data
Tested 4	54	Y	N	N	N	1	1	
Tested 5	35	Y	N	N	Y	2	1	
Tested 6	37	Y	Y	N	Y	3	2	
Tested 7	24	N	Y	Y	Y	3	1	
Tested 8	20	Y	N	N	Y	2	2	
Tested 9	31	Y	N	N	N	1	1	
Tested 10	47	N	Y	N	N	1	1	
Tested 11	65	N	Y	Y	Y	3	0	Disconnected
Tested 12	28	N	N	N	Y	1	1	
Tested 13	45	N	Y	N	Y	2	1	
Tested 14	23	Y	N	N	Y	2	1	
Tested 15	43	Y	N	N	N	1	1	
Tested 16	41	Y	N	N	Y	2	1	
Tested 17	46	Y	N	N	Y	2	1	
Tested 18	19	N	Y	Y	Y	3	0	Disconnected
Tested 19	20	Y	N	Y	Y	3	1	
Tested 20	31	Y	N	N	Y	2	1	
Tested 21	45	N	Y	Y	Y	4	0	Incoming call restrictions
Tested 22	25	Y	N	N	N	1	1	
Tested 23	51	N	N	N	Y	1	1	
Tested 24	34	N	Y	N	N	1	1	
Tested 25	39	Y	N	Y	Y	3	0	Disconnected

## Victorian Ombudsman's Parliamentary Reports tabled since April 2014

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### 2020

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Investigation into complaints about assaults of five children living in Child Protection residential care units

October 2020

Investigation into corporate credit card misuse at Warrnambool City Council

October 2020

Investigation into review of parking fines by the City of Melbourne.

September 2020

Investigation into the planning and delivery of the Western Highway duplication project

July 2020

Ombudsman's recommendations - third report

June 2020

Investigations into allegations of nepotism in government schools

May 2020

Investigation of alleged improper conduct by Executive Officers at Ballarat City Council

May 2020

Investigation into three councils' outsourcing of parking fine internal reviews

February 2020

### 2019

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Investigation of matters referred from the Legislative Assembly on 8 August 2018

December 2019

WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims

December 2019

Investigation into improper conduct by a Council employee at the Mildura Cemetery Trust

November 2019

Revisiting councils and complaints

October 2019

OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people

September 2019

Investigation into Wellington Shire Council's handling of Ninety Mile Beach subdivisions

August 2019

Investigation into State Trustees

June 2019

Investigation of a complaint about Ambulance Victoria

May 2019

Fines Victoria complaints

April 2019

VicRoads complaints

February 2019

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## 2018

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Investigation into the imprisonment of a woman found unfit to stand trial

October 2018

Investigation into allegations of improper conduct by officers at Goulburn Murray Water

October 2018

Investigation of three protected disclosure complaints regarding Bendigo South East College

September 2018

Investigation of allegations referred by Parliament's Legal and Social Issues Committee, arising from its inquiry into youth justice centres in Victoria

September 2018

Complaints to the Ombudsman: resolving them early

July 2018

Ombudsman's recommendations – second report

July 2018

Investigation into child sex offender Robert Whitehead's involvement with Puffing Billy and other railway bodies

June 2018

Investigation into the administration of the Fairness Fund for taxi and hire car licence holders

June 2018

Investigation into Maribyrnong City Council's internal review practices for disability parking infringements

April 2018

Investigation into Wodonga City Council's overcharging of a waste management levy

April 2018

Investigation of a matter referred from the Legislative Council on 25 November 2015

March 2018

## 2017

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Investigation into the financial support provided to kinship carers

December 2017

Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre

November 2017

Investigation into the management of maintenance claims against public housing tenants

October 2017

Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus

September 2017

Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system

September 2017

Investigation into Victorian government school expulsions

August 2017

Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board

June 2017

Apologies

April 2017

Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board

March 2017

Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville

February 2017

Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint

January 2017

## Victorian Ombudsman's Parliamentary Reports tabled since April 2014

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### 2016

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Investigation into the transparency of local government decision making

December 2016

Ombudsman enquiries: Resolving complaints informally

October 2016

Investigation into the management of complex workers compensation claims and WorkSafe oversight

September 2016

Report on recommendations

June 2016

Investigation into Casey City Council's Special Charge Scheme for Market Lane

June 2016

Investigation into the misuse of council resources

June 2016

Investigation into public transport fare evasion enforcement

May 2016

### 2015

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Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting

December 2015

Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations

November 2015

Investigation into the rehabilitation and reintegration of prisoners in Victoria

September 2015

Conflict of interest by an Executive Officer in the Department of Education and Training

September 2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight

June 2015

Investigation into allegations of improper conduct by officers of VicRoads

June 2015

Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service

April 2015

Councils and complaints – A report on current practice and issues

February 2015

Investigation into an incident of alleged excessive force used by authorised officers

February 2015

## 2014

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Investigation following concerns raised by  
Community Visitors about a mental health  
facility

October 2014

Investigation into allegations of improper  
conduct in the Office of Living Victoria

August 2014

Victorian Ombudsman  
Level 2, 570 Bourke Street  
Melbourne VIC 3000

Phone 03 9613 6222  
Email [complaints@ombudsman.vic.gov.au](mailto:complaints@ombudsman.vic.gov.au)  
[www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au)