THE CRIME OF CRIMINALISING EVERYDAY LIFE:

THE RULE OF LAW DISCARDED IN VICTORIA'S COVID-19 RESPONSE

September 2022

Professor Mirko Bagaric

Contents

Executive Summary 3

1. Overview 5

2. The Breadth and Extent of the Criminal Law COVID Response 8

3. Pragmatic Failures of the Pandemic Laws: Laws which Lack Legitimacy are Frequently Transgressed 9

4. Punitive Laws Damage Relationships Between the Community and Police and Police Morale 12

5. Lack of Adequate Oversight of Fines – Traffic Offence Criteria Applied for Reviewing COVID Fines 13

6. Jurisprudential Failures of the Pandemic Laws 14

7. Recommendation 15

Executive Summary

The criminal law was the main instrument employed by the Victorian government to force Victorians to comply with the strictest covid-19 lockdown in the world. More than 50,000 normally law-abiding Victorians were subjected to criminal sanctions for breaches of covid-19 restrictions.

The criminal law is society's harshest form of condemnation and strongest instrument of coercion. It must only be used as a last resort for serious wrongdoing. Imposing criminal sanctions on Victorians for engaging in banal, everyday activities which are permitted in even the most dictatorial of societies, such as sitting in public places; being out after dark, playing sport and congregating with more than two people is the greatest overuse of the criminal law in a democracy in recent history.

The criminalisation of everyday life was reflexive, unintelligent and damaging. It was ruthless. It traumatised everyday citizens, pitted police against the community and violated key rule of law virtues, including that laws must be knowable and transparent. The response was pragmatically unworkable – most fines remain unpaid. It was jurisprudentially flawed. Incredibly, in the midst of the lockdown, the human rights industry refused to criticise the criminal law overreach. This report demonstrates why the criminal law should never again be used as a blunt instrument of oppression to achieve health objectives.

1. Overview

From March 2020 to late 2021, governments throughout Australia implemented severe restrictions to limit the spread of covid-19. The restrictions effectively required people to stay at home unless they had a designated reason for leaving home: namely shopping for essentials; authorised work; exercise (for a limited time); caregiving and compassionate; or medical reasons. These restrictions involved the curtailment or negation of a number of fundamental rights, including the freedom of movement and expression and the rights to work, education and to participate in family relations.[1]

The extent to which the restrictions were implemented across Australia varied, with Victoria being subject to the longest lockdown and strictest enforcement regime. The restrictions in Melbourne were so severe that it is has the dubious title of the most locked-down city in the world.[2] This resulted in part from Victoria moving to a covid-19 elimination strategy from the "flattening the curve" which was adopted at the start of the pandemic.

It was clear from the start of the pandemic that covid-19 threatened the health and safety of the community and hence a governmental response was necessary to reduce transmission of the disease. There were a range of options that were available to governments to achieve this outcome.

The conventional response for dealing with threats to health is for governments to implement public education campaigns, as occurs with alcohol, tobacco, and obesity. This is a non-coercive (soft-power) approach which requires governments to inform, educate and persuade people. It was in the self-interest of people to avoid contracting covid-19 and the pandemic was receiving saturation coverage in the media at the time. Hence it would not have been difficult to influence people to change their behaviour. This is the response that was taken by the Swedish government in response to the pandemic.

Moreover, the Victorian government has previously influenced public behaviour and increased public awareness of important ideals through legislation that is not coercive. Thus, we see that the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which sets out a number of fundamental rights (including the right to life and liberty), is not enforceable but rather seeks to softly guide and inform behaviour.

The educational approach to influencing societal behaviour is effectively the current approach taken in Victoria to dealing with the pandemic, despite the fact more than three thousand covid-19 deaths were recorded in the first eight months of 2022 and thousands of new infections are occurring daily. At the time of writing this report, not even face masks are mandatory.

1 For an overview of the nature of the restrictions that were imposed, see Morgan Begg, States of Emergency: An Analysis of Covid-19 Petty Restrictions (Institute of Public Affairs, April 2020): https://ipa.org.au/wp-content/uploads/2020/04/IPA-Report-States-of-Emergency-An-analysis-of-COVID-19-petty-restrictions.pdf.

2 By 3 October 2021, Melbourne had spent a total of 245 days in lockdown, surpassing the 234-day lockdown in Buenos Aires: Judd Boaz, 'Melbourne passes Buenos Aires' world record for time spent in COVID-19 lockdown,' *ABC News* (3 October 2021): https://www.abc.net.au/news/2021-10-03/melbourne-longest-lockdown/100510710.

Instead of adopting a soft-power approach, the Victorian government utilised the most coercive process known to our system of law to shape community behaviour at the commencement of the pandemic. Criminal offences traditionally deal with the most harmful and immoral forms of conduct and can result in citizens being subjected to public opprobrium and the most oppressive sanctions available in our legal system, including a deprivation of liberty.

The Victorian government invoked the criminal law as the principal means through which the covid-19 restrictions were implemented and enforced from the commencement of the pandemic. This involved the creation of a large number of new criminal sanctions and enforcement mechanisms. Most breaches of the pandemic restrictions were criminal offences and the most common manner in which sanctions were imposed was by infringements notices for breaches of the Chief Health Officer's Directions under the section 200 of the *Public Health and Wellbeing Act 2008* (Vic).

Importantly, there was no parliamentary oversight of these laws. The offences and sanctions were created at the whim of the Chief Health Officer and hence circumvented the requirement for Victorian legislation to be screened for compatibility with the rights and freedoms enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), such as 'the freedom of movement'; 'the freedom of expression' and the protection of the family. Thus, it is not surprising that:

> Regrettably, human rights considerations have hardly surfaced in the political and public discourse about the usefulness and utility of employing criminal offences to combat COVID-19 in Australia.[3]

The number of new criminal laws which were created and the speed with which they were implemented is unprecedented in Australia. Certainly, it is not uncommon for governments to use the criminal law as a means to regulate human behaviour.[4] However, there are several important features relating to the pandemic control measures which are novel and violate a number of rule of law virtues, including the need for laws to be knowable and fair. The laws were so severe and crude that they lacked ethical legitimacy, thereby explaining the large degree of noncompliance with many of the measures and non-payment of tens of thousands of fines.[5]

3 Joseph Lelliott et al, 'Pandemics, Punishments and Public Health: COVID-19 and Criminal Law in Australia' (2021) 44 *UNSW Law Journal* 167, 169.

4 Mirko Bagaric, 'The Civil-isation of the Criminal Law' (2001) 25 *Criminal Law Journal* 197.

5 Incredibly, the Victorian government enacted even more draconian COVID laws. The Omnibus Bill of 2020 as presented effectively abolished Habeas Corpus; see https://ipa.org.au/wp-content/uploads/2020/10/IPA-Submission-to-Scrutiny-of-Acts-and-Regulations-Committee-COVID-Omnibus-Bill-1.pdf and the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021 ("the Bill"), which would allow the Victorian Government to Impose indefinite lockdowns even if there were no cases of the virus in the country (new sections 165AE & 165AI); Imprison people without trial (new section 165BA(1)(b) and arrest people because of their religion, political beliefs, or ethnic background (new section 165AK(4)); see https://ipa.org.au/publications-ipa/daniel-andrews-pandemic-bill-the-attack-on-our-democracy.

This report finds that there was no basis for utilising the criminal law as the primary vehicle to regulate human behaviour during the pandemic and the manner in which the laws were enacted violated key rule of law principles including that the law is knowable and transparent.[6] The Victorian government should cancel all outstanding COVID fines and refund fines which have been paid.

6 For an overview of the key rule of law virtues, see Rule of law Centre, 'What is the Rule of Law?' https://www.ruleoflaw.org.au/what-is-the-rule-of-law/.

2. The Breadth and Extent of the Criminal Law COVID Response

The first notable aspect of the pandemic criminal laws is their unprecedented breadth. They touched on nearly every aspect of human behaviour and relationships, from limiting the amount of time people could spend outside their front gate (at one point to one hour per day); the time of day they could leave their house (an 8 pm curfew was imposed) and locations they could visit (a total prohibition was imposed on visiting other households). Children were prevented from visiting frail parents. The effect of this was that nearly every human action, no matter how innocuous (from entering a playground to filling up petrol after 8 pm) was viewed through the lens of the criminal law.

Millions of people who had meticulously observed the criminal law all their lives, were suddenly under the active purview of police for engaging in what was previously routine and harmless conduct. This was graphically highlighted by footage of police sometimes questioning elderly citizens sitting on park benches – an activity that was prohibited as part of the lockdowns. Opposition to the laws resulted in protracted large-scale protests and hundreds of arrests. Police for the first time in Melbourne fired rubber bullets to control protester.[7]

Perhaps then, it is not surprising that by mid-2021 more than 25,000 of the nearly 38,000 covid-19 fines issued to Victorians were unpaid.[8] By mid-2022 more than 50,000 Victorians were issued with criminal fines for breaches of regulatory norms. A large amount of the fines, approximately half, remain unpaid.[9]

7 Caitlin Cassidy, 'Victoria Covid update: police arrest 44 people and fire rubber pellets during Melbourne construction protests', *The Guardian* (21 September 2021): https://www.theguardian.com/australia-news/2021/sep/21/victoria-covid-update-rubber-bullets-fired-on-second-day-of-construction-protests-which-block-freeway.

8 Jack Paynter, 'Victoria Police say 25,000 fines for breaches of virus restrictions unpaid', *News.com.au* (18 June 2021): https://www.news.com.au/finance/economy/victoria-police-say-25000-fines-for-breaches-of-virus-restrictions-unpaid/news-story/946a103ea1d69abc37a53aef8bfe0a48.

9 AAP, 'Inquiry reveals 50,000 Covid-related fines issued in Victoria', *The Guardian* (18 May 2022): https://www.theguardian.com/australia-news/2022/may/18/inquiry-reveals-50000-covid-related-fines-issued-in-victoria.

3. Pragmatic Failures of the Pandemic Laws: Laws which Lack Legitimacy are Frequently Transgressed

Research has previously demonstrated that there is a correlation between the perceived legitimacy of a law and the extent to which it is observed.[10] People are less reluctant to follow laws that they believe are unjust. To this end, unfairness comes in two forms. First, the rule itself is arbitrary or unjustified. Second, the punishment can be disproportionate to the seriousness of the conduct. On both these fronts, the response by the Victoria government failed.

An indispensable aspect of the rule of law is that laws must be publicized and knowable. A unique aspect of Victoria's pandemic laws is the rapidity with which they were enacted and enforced. Melbourne often went into lockdown with less than 24 hours' notice.[11] The legal instruments which imposed the lockdown restrictions were sometimes published after the lockdowns were imposed (ie after midnight on the day in which they took effect); meaning that it was literally not possible for individuals to understand the scope and nature of the restrictions which had been imposed.[12]

Even the Victorian Premier Daniel Andrews was issued with a covid-19 fine - for failing to wear a mask. In one respect this can be regarded as demonstrating the integrity of the covid-19 laws by showing that no person was above the law. But the more compelling message is that the laws were effectively impossible to habitually observe and a degree of judgment needed to be applied in enforcing the laws. No person in Victoria was more informed about the nature of covid-19 and its spread than the Premier. He repeatedly conveyed this message to all Victorians, and yet, even he slipped in complying with the laws. This highlights the immense difficulty that all Victorians faced in first understanding the laws and secondly in meticulously complying with them. In short, with only a hint of exaggeration, it was not humanly possible to always comply with every covid-19 law.

Moreover, there was no explanation for the sanctions that were imposed for breaching the restrictive directions. The main sanction that was utilised to deal with breaches of the restrictive directions was an infringement notice, which carries a fine with can be enforced through criminal law sanctions. The monetary sums were often considerable. Thus, the penalty for playing tennis or golf or fishing or mowing a neighbour's lawn or being 5.1 km from home during a Melbourne lockdown was $1,817 (and $5,452 for breaching gatherings restrictions in the home or outside) if dealt with by way of

10 Tom Tyler, *Why People Obey the Law* (Yale University Press, New Haven, 1990).

11 For example, Melbourne went into its sixth lockdown with less than 12 hours' notice: 'Victoria enters sixth lockdown in response to new mystery COVID-19 cases', *ABC News* (5 August 2021).

12 The Restricted Activity Directions for lockdown six in Melbourne were published after midnight on the day they commenced.

infringement notice or over $20,000 if the matter is dealt with by a court.[13] There was no attempt to match the seriousness of the crime to the harshness of the penalty. The Victorian Government seemed to be simply plucking sanctions from the air and hence violated the proportionality principle which the High Court of Australia has stated is the main consideration in setting penalty severity and requires a matching between the seriousness of the conduct and the harshness of the penalty. As the High Court of Australia stated in *Hoare v The Queen:*

> ... a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.[14]

The fines had a crippling impact of many Victorians and their families. The sum of $1,817 is more than many Victorians earn in a month. Often far higher fines were issued. For example, a small family-owned mobile repair shop was issued with a fine of $27,261 in November 2021 because a (covid-free and symptom-free) worker was not fully vaccinated. This would crush the business and imperils the financial stability of the family. It is draconian.

Children were fined over $1,000 for playing tennis.[15] A tennis court is 187.4 sqm and the players are separated by a physical net. The court was outdoors. The health recommendation is that to avoid the spread of covid-19 people should be separated by 1.5m. There is not a single case anywhere on earth of covid-19 transmission from playing tennis. Fining people for engaging in manifestly health promoting activities such as playing tennis is not a sign of a normal functioning society. It is the opposite of that.

If people cannot or do not pay the fines, severe enforcement processes can be activated. *Fines Victoria* can obtain an enforcement warrant allowing the sheriff or police to detain or sell the person's car. Also, the sheriff can enter the person's home and take items to sell to pay the fine and even sell a person's house. If the person has nothing which can be sold, the money can be taken from a person's wages or Centrelink payments. As a last resort, the Sheriff can arrest people for non-payment of fines and if they do not work the fines off through community work, a Magistrate can sentence the person to jail.

It is not in doubt that there is a need to have legal mechanisms in place to deal with the tiny fraction of people who callously disregard health protocols and wantonly put other people at risk of being infected with covid-19. However, there are already criminal law offences that prohibit this conduct in the form of offences that make it illegal to engage in conduct that places or may place another person in danger of death or serious injury.[16] There was no need to subject people for innocent oversights who had

13 120 penalty units, see *Restricted Activity Directions (Restricted Areas) (No 20)* issued pursuant to the *Public Health and Wellbeing Act 2008* (Vic), Section 200.

14 (1989) 167 CLR 348; 40 A Crim R 391; [1989] HCA 33. See also, *Veen (No2) v R* (1988) 164 CLR 465.

15 Lucy Mae Beers, 'Coronavirus: Police fine kids at Melbourne skate park and tennis players in Maribyrnong', *7NEWS.com.au* (15 April 2020): https://7news.com.au/news/victoria-police/coronavirus-police-fine-kids-at-melbourne-skate-park-and-tennis-players-in-maribyrnong--c-977158.

16 *Crimes Act 1958* (Vic), sections 22 and 23.

no desire to spread covid-19 to criminal penalties. “Legislators and other authorities ... must exercise restraint and caution when creating and employing criminal offences, not only in the context of covid-19. ...[T]he use of criminal law and punishment must be the very last – not first – resort”.[17] It should never be a first resort.

17 Joseph Lelliott et al, ‘Pandemics, Punishments and Public Health: COVID-19 and Criminal Law in Australia’ (2021) 44 *UNSW Law Journal* 167, 196.

4. Punitive Laws Damage Relationships Between the Community and Police and Police Morale

The over-punitive response to COVID restrictions also damaged the relationship between the Victorian Police and the community. A survey by Roy Morgan in late 2020 noted that confidence in Victorian Police by the community plummeted after police started enforcing covid-19 restrictions.[18] The survey found that only 42% of Victorians rate the Victorian Police high or very high for honesty or ethical standards; a stark drop from 76% three years earlier. The survey noted that police actions during the pandemic significantly contributed to this decline.[19] Comments by respondents included:

> "We've seen some disappointing incidents of police brutality recently", "Head stomping, pulling people from cars, raids on people's houses for Facebook posts", "Too heavy handed, I have lost trust", and "They behave like they are above the law. For the first time ever, I'm scared of the police" — the latter from a respondent aged 65+"

Many police members also become demoralised as a result of the enforcement of covid-19 restrictions. In October 2021, Acting Senior Sergeant Krystle Mitchell resigned after 18 years in the Victorian Police, stating that enforcing the covid-19 restrictions troubled her greatly and that she and most other believe police did not believe it was appropriate to enforce the restrictions.[20] She stated:

> There was a big thought process and battle of morals and integrity within me about what I wanted to do and how I see my organisation being used during this pandemic and it troubled me greatly. ... But behind that is all of my friends that are police officers that are working the front line and are suffering every day enforcing CHO directions, that certainly the great majority don't believe in and don't want to enforce. ... I'm choosing to quit because I can't remedy in my soul any more the way in which the organisation I love to work for is being used and the damage that it's causing to the reputation of Victoria Police and the damage it is causing the community.

The ongoing and continued enforcement and prosecution of covid-19 infringements will continue to damage the relationships between the police and the community and exacerbate the counter-productive impact of these laws.[21]

18 Roy Morgan, 'As Victorians' ratings for Police fall, two themes emerge: The 'Lawyer X' scandal and COVID enforcement' (29 September 2022): http://www.roymorgan.com/findings/8523-reasons-for-trust-distrust-of-police-vic-2020-202009280644.

19 The other matter that contributed to the decline was the 'Lawyer X' scandal, in which police used a lawyer as an informer in criminal cases.

20 Brianna McKee, 'Senior Victoria police officer Krystle Mitchell resigns, claims most cops 'don't believe' in COVID rules'" *SKY News*, 9 October 2022: https://www.skynews.com.au/australia-news/politics/senior-victoria-police-officer-krystle-mitchell-resigns-claims-most-cops-dont-believe-in-covid-rules/news-story/69cc750c6e64aa65d5044f38e62128b4.

21 See further, Joseph Lelliott et al, 'Pandemics, Punishments and Public Health: COVID-19 and Criminal Law in Australia' (2021) 44 *UNSW Law Journal* 167, 169.

5. Lack of Adequate Oversight of Fines – Traffic Offence Criteria Applied for Reviewing COVID Fines

The integrity of the criminal law response was further diminished by the fact that there was no method in place to properly review and cancel covid-19 fines in circumstances where the breach was trifling or inadvertent. A review by Fines Victoria, published in June 2022, stated the internal police process for reviewing covid-19 fines was inadequate because the criteria that was applied for reviewing these fines was not adapted to the subject matter. Incredibly, the review noted the criteria that was utilised to review covid-19 fines was cut and paste from traffic camera review guidelines. The Review noted:

> The Traffic Camera Office Guidelines appear to have been developed specifically for traffic offence reviews reflecting that fines for traffic offences are issued and reviewed within a clear legislative framework under the Road Safety Act 1986 and are generally 'strict liability' offences, with the physical elements of the offence generally established conclusively through the evidence obtained from road safety cameras'. COVID-19 fines are issued in a more complex legislative framework. The Review accepts that a COVID-19 offence involves a significant risk to public safety, however review officers should not be guided by guidelines that appear to have been developed for road safety offences as they are different to COVID-19 offences. For the avoidance of doubt, the guidelines for internal reviews of COVID-19 fines should direct review officers to have regard to the specific circumstances raised in the application.[22]

In reviewing the appropriateness of COVID fines, no account was taken of matters such as the nature and purpose of the conduct which resulted in the pandemic fine; whether the conduct was deliberate or accidental and the likelihood of the conduct endangering health.

22 Director Fines Victoria, *Report to Attorney-General under section 53D of the Infringements Act 2006 - Victoria Police processes for the internal review of COVID-19 fines* (June 2022): https://www.justice.vic.gov.au/justice-system/fines-and-penalties/review-into-victoria-polices-internal-review-processes-for-covid.

6. Jurisprudential Failures of the Pandemic Laws

In addition to the above pragmatic failures of the covid-19 laws, they also suffered from serious jurisprudential shortcomings. The criminal law is the strongest form of condemnation in our society. In order for an act to be deserving of blame and the deliberate infliction of punishment, it should breach some type of moral or cultural norm. It has been accepted for over a century that 'the absolute divorce of law from morality would be of fatal consequence'.[23] Lord Devlin has previously argued that one of the main objectives of the criminal law is to maintain and enforce public morality. Hence, it is inappropriate to criminalise behave and subject citizens to criminal punishment for conduct which is not morally flawed.

As been noted previously:

> Because of the severe implications for human rights and civil liberties, criminal law measures are the *ultima ratio* that can only be utilised in the most severe circumstances and only if other, less intrusive means are proven to be non-effective.[24]

It is for this reason that criminal guilt normally requires a guilty mind. This can be constituted by a number of different mental states, most typically an intention to break the law or a reckless disregard for the law in question. In rare instances, crimes can be committed through a high degree of negligence, for example inadvertent driving which results in the death of a person.

Accordingly, the criminal law has traditionally been reserved for dealing with the most damaging forms of human behaviour, such as violence, sexual assault, and theft. There is a need to maintain a connection between criminality and harm and subjective wrongdoing. A transient oversight which causes no tangible harm is not a basis for holding a person criminally responsible.

Yet, this is precisely what occurred with Victoria's covid-19 responses. Even the most trifling, unintentional breaches of health directions resulted in people committing criminal offences. As noted above, the unfairness of this was exacerbated by the fact that often the laws which imposed the restrictions were unknowable because they were released on the internet after midnight on the day they laws came into effect.

The severance between personal culpability and liability for pandemic breaches underlined the illegitimate nature of the pandemic laws.

---

23 *R v Dudley & Stephens* (1884) 14 QBD 287.

24 Joseph Lelliott et al, Pandemics, 'Punishments and Public Health: COVID-19 and Criminal Law in Australia' (2021) 44 *UNSW Law Journal* 167, 168.

7. Recommendation

Victoria's response to regulating the conduct of people during the first two years of the pandemic was reflexive and poorly constructed. It resulted in tens of thousands of Victorians coming into contact with the police for the first time in their lives; pitted police against ordinary Victorians and subjected thousands of Victorians to sanctions which were grossly disproportionate to their level of wrongdoing.

The alternative approach to reducing the incidence of a contagious disease is to adopt community education campaigns and persuade people by appealing to their sense of community and self-interest to follow public health recommendations. There is little question that this approach is far more desirable. It is precisely the setting where Victoria has pivoted to two and a half years into the pandemic despite recording many thousands of covid-19 infections daily.

One of the key lessons from covid-19 is that societies cannot criminalise their way to greatness and prosperity. This basic principle was violated by Victoria's response to covid-19. The only appropriate response is for all fines to cancelled and for paid fines to be reimbursed. In addition, it is necessary to repeal or amend *Public Health and Wellbeing Act 2008* (Vic) (Part 10, Div 3) in order that the Chief Health Officer can no longer unilaterally regulate most human activity under threat of criminal sanction in an attempt to achieve a health outcome. Any extreme response to a health crisis needs to have full parliamentary oversight. Most importantly, the criminal law should never again be used as a blunt instrument of oppression to achieve health objectives.

THE CRIME OF CRIMINALISING EVERYDAY LIFE: THE RULE OF LAW DISCARDED IN VICTORIA'S COVID-19 RESPONSE

About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape.

The IPA is funded by individual memberships, as well as individual and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

About the author

Dr Mirko Bagaric is the Dean of Law at Swinburne Law School at the Swinburne University of Technology, and an internationally renowned expert in legal rights, criminal justice, and punishment and sentencing reform. Dr Bagaric is the author or co-author of over 30 books and 150 articles in leading Australian and international journals, and engages extensively with the community on a range of socially relevant and important legal topics.

Institute of Public Affairs