

Investigation into decision-making under the
Victorian Border Crossing Permit Directions

December 2021

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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

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 decision-making under the Victorian Border Crossing Permit Directions*.

A handwritten signature in black ink, appearing to read 'Deborah Glass', with a stylized flourish at the end.

Deborah Glass OBE
Ombudsman

7 December 2021

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By the numbers



315 complaints received by the Ombudsman

21 categories available for people to be classified as an 'excepted person'

\$5,452 fine for breaching border rules

14 September 2021
Ombudsman starts investigation

33,252 exemption applications received between 9 July and 14 September 2021

2,736 applications granted

Up to **1,000** applications were processed daily

Staff had approximately **30 seconds** to categorise and prioritise applications



Deputy CHOs **approved 77%** applications / **refused 23%**

Directors **approved 23%** applications / **refused 77%**

20 staff in early July to deal with applications – increased to **285 staff** by early September

2,649 exemption applications to attend funeral or end of life **877** granted

10,812 exemption applications to return home for health, wellbeing, care and compassionate reasons **895** granted

971 exemption applications to care for animals **35** granted

553 exemption applications for emergency relocation **414** granted

Photo credit: 9News

Foreword

“ I feel anxious, stressed and depressed every day at the thought of being stuck in NSW, away from my parents and family back home in Melbourne ... I am scared, alone and losing all motivation to live ... Please, Please, Please, allow me to come back home. ”

What does it feel like to be locked out, not merely locked down? Everyone in Victoria now knows about lockdowns; we have all had our freedoms limited since the start of the COVID-19 pandemic in March 2020, and the necessity of doing so in the face of a global public health emergency is widely accepted. We even got used to border controls: for almost two years, Australian states and territories have imposed them, often on a few hours' notice, in response to spikes in cases. Countless plans have been upended by lockdowns and closures, or the prospect of isolation and quarantine.

Since January 2021, Victoria has operated a traffic light system, where every person wishing to enter the State required a permit, based on the latest health advice. Travel was inconvenient, actively discouraged, but not impossible.

But the closure of Victoria's borders in July 2021 impacted thousands of Victorians in ways few, if any, could ever have contemplated. First, on 20 July 2021, Victorian residents in red zones were given 12 hours to cross the border – an impossibility for many, especially the elderly or those with young children in remote parts of NSW. Then on 23 July 2021 the lockout hit, retrospectively applied, so no-one could enter unless they were an 'excepted person' or had an exemption.

Overnight, thousands of Victorians were locked out of their own State. For the first time in over 100 years, our border on the Murray River was closed.

This was not wrong: we assessed the Border Directions and concluded they were lawful. They were updated and reissued each time following detailed advice justifying their necessity, including current information about community transmission of COVID-19 and consideration of the human rights implications. People could request an exemption for a number of specified reasons, including end of life events or returning home for health, wellbeing, care or compassionate reasons.

The Department had a tough job to do, quickly establishing systems and onboarding significant numbers of staff to handle exemption applications, all in the context of the constantly shifting sands of the pandemic.

So far, so reasonable.

It quickly became apparent the problem was in the execution. Thousands of people, many likely relying on the traffic light system, were stranded. People began to complain to my office, although anecdotally it seems few even knew they could complain.

Many of these complaints were heartbreaking. People who had travelled to visit ill or elderly relatives, or who needed to return to care for them. People unable to return to care for their animals. People who had moved for jobs or study whose circumstances had been upended by the pandemic, who were homeless because their homes were in Victoria. People paying double rent with no job. Pensioners paying out money they could not afford. People desperate to attend vital medical appointments, told no, they could see a doctor in NSW.

All these people found themselves ineligible for an exemption.

This was not merely a problem of the volume of requests. With almost 8,000 exemption applications open in early August, the Domestic Exemptions Team was scaled up from 20 staff in early July to 285 by early September. Decision-makers were given detailed guidance on when to approve.

The evidence required was extensive. It included statutory declarations, proof of residence or ownership of animals, letters from medical professionals, financial statements, and statements of relationship to people who were dying. The ability to respond was inherently problematic for people in caravans or temporary accommodation; or people unfamiliar with technology, the internet or without access to it.

One complainant told us: 'I had to constantly book online appointments with our doctors to get more and more paperwork vouching for the severity of our mental health. It was so dehumanising and humiliating ... I had to call and threaten self-harm to feel like I was being taken seriously'.

Another complainant needed to travel to help care for her sister with an intellectual disability and terminal cancer, who was living with their elderly mother. She was asked for evidence of her sister's cancer diagnosis, treatment and life expectancy; her birth, marriage, divorce certificates and driver's licence; and a statutory declaration from her 86-year-old mother explaining why it was difficult for her to continue looking after her daughter.

It was hard not to agree with the complainant that such requests were 'beyond unreasonable ... very intrusive and unkind, it's inhuman actually'.

Or the woman from regional Victoria who needed to care for her animals, who was worried about having her flock put down because the department had asked for further information it said she did not provide, who told us: 'I cannot fathom the cruelty of this process and their decision. Surrendering our animals has broken my heart, my spirit and my faith in our state government and the humanity of the people that make such decisions based on fear and not at all on human rights, compassion or justice'.

Other people felt caught up in a bureaucratic nightmare that bordered on inhumane: people whose applications were not processed because they had not submitted a COVID test in time, when they could not plan travel until the exemption was approved; people refused exemptions with no reasons or review process, being told simply to apply again. Applications were closed as 'expired' when they were not processed before the intended travel date had passed, leaving people with no choice but to start the process again.

Between 9 July and 14 September 2021, the Department received 33,252 exemption applications, of which only 8 per cent were granted. The overwhelming majority were not specifically rejected but 'closed for other reasons' – the impact was the same as a rejection. They could not cross the border.

While the actual decisions were not delegated below senior departmental officials, most applications did not get to a decision-maker at all – and although the Directions appeared to provide for broad discretion, in practice, it was exercised narrowly. A departmental entry suggesting that whether someone ‘crossed interstate against public advice’ would be relevant to a decision on their application simply looked punitive. People were not given reasons for the refusals or an avenue of appeal.

It appeared to us that the department put significant resources into keeping people out rather than helping them find safe ways to get home.

“ We just want an exemption to be with our dying daughter ... She is terminal, palliative and end of life. We are being treated inhumanly ... [by a person] making a decision taking weeks we don’t have ... ”

The whole scheme failed to comprehend the very real need for many people to come and go across the border for a whole range of reasons, even in the face of official warnings. Our state borders have been porous for over 100 years. Even in a global health emergency, some people need to cross them, and too many found themselves bereft.

Rather than fairly considering individual circumstances and the risks associated with them, the exemptions scheme was a blunt instrument that resulted in unjust outcomes, potentially for thousands of people.

I recognise that the Department of Health was focussed on the safety of people in Victoria, seeking to reduce the risks to public health by severely limiting cross-border contact. But the result was some of the most questionable decisions I have seen in my over seven years as Ombudsman.

Aside from the myriad of cases that should have been cause for compassion, it is difficult to understand how a fully vaccinated person, testing negative to COVID-19, willing to self-quarantine on arrival, and able to drive to their destination on one tank of fuel, could pose such a risk to public health to justify refusing an exemption.

Such a narrow exercise of discretion may have been justifiable while a COVID-19 elimination strategy was still being pursued, but it persisted well after this strategy was abandoned toward the end of August 2021. It is even harder to understand how fully vaccinated Victorian residents just trying to get home could still be subject to such an approach at that time.

At its core, this investigation is about the importance of good administrative decision-making. Failing to exercise discretion fairly, not giving reasons for decisions, failing to offer a right of review – these can all damage public trust in those who make decisions, and ultimately, in government.

Getting it wrong will not always result in the torrent of angst and grief we saw in this investigation, but how much could have been spared if more compassion had been shown. We know hardworking public health officials have a tough job, especially in a pandemic. But the effect of a complex and constrained bureaucracy meant some outcomes were downright unjust, even inhumane.

I welcome recent amendments to legislation which provide greater transparency and accountability during a pandemic, but more is needed. Changes to policy and guidance will help. I also encourage the government to publicly acknowledge the distress caused to so many people when discretion was exercised narrowly, or not at all.

If there is a next time – we cannot let this happen again.

Deborah Glass

Ombudsman

Glossary

Authorised Officer	Person appointed by the Secretary to the Department of Health 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
Border Directions	Victorian Border Crossing Permit Directions – public health directions issued under section 200(1) of the Public Health and Wellbeing Act to control movement into Victoria
Charter of Rights Act	<i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i> – legislation providing for the protection of fundamental human rights in Victoria; commonly referred to as ‘the Charter’
CHO	Chief Health Officer appointed under the Public Health and Wellbeing Act
COVID-19	Infectious disease caused by a new strain of coronavirus first identified in December 2019
Domestic Exemption Team	The team within the Department of Health responsible for managing requests for exemptions under the Border Directions
Exception	Under the Border Directions, if a ‘prohibited person’ met one of 21 conditions they could be considered an ‘excepted person’ and were not required to obtain a permit or exemption to enter Victoria
Exemption	A person could request an exemption from any or all requirements contained in the Border Directions The CHO, Deputy CHO and other senior departmental officials could grant an exemption on specific grounds or under a general discretion if satisfied it was appropriate, having regard to the need to protect public health and the principles in sections 5 to 10 of the Public Health and Wellbeing Act
Extreme Risk Zone	On 23 July 2021, a new ‘extreme risk zone’ category was added to the Border Directions under which no-one would be able to enter Victoria unless they were an ‘excepted person’ or had an exemption
Permit	In accordance with public health Directions to close Victoria’s borders, people generally had to get a permit to enter Victoria
Public Health and Wellbeing Act	<i>Public Health and Wellbeing Act 2008 (Vic)</i> – legislation providing for the protection of public health and management of public health emergencies in Victoria

State of emergency	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
Traffic light system	<p>Since January 2021, Victoria operated a traffic light system, where every person wishing to enter the State required a permit or exemption, or needed to be an 'excepted person'</p> <p>The type of permit (and its associated conditions regarding testing and quarantining) depended on the colour-coded zone of the area the person intended to travel from. All areas in Australia were designated green, orange or red zones based on the latest health advice from the CHO</p>
WHO	World Health Organisation - United Nations agency based in Geneva responsible for international public health

“

I am absolutely distraught at the idea of living in temporary accommodation when I own a home. I don't know where to live, I am retired from work. I cannot sleep, thinking about being homeless for the first time in my life, just because of rigid border controls, designed to keep people out.

”

“

I have had kidney infections and I am bleeding substantially and I can't see my doctors.

”

“

[The Department] has called me asking for supporting documents for my depression and heart disease, which I did. I'm an anxious wreck and cannot sleep well anymore. I believe I meet all the criteria for allowing people to come back home due to compassionate reasons, however, [the Department] has shown no compassion.

”

“

This situation is heartbreaking for us. We have an intellectually disabled son who needs our support at home and both my husband and myself need to attend medical appointments, myself for my ongoing breast cancer oncology appointments and my husband for his blood clotting disorder.

”

“

My furniture and belongings are in transit and I am living in an empty apartment with an inflatable mattress and what possessions I can fit in my car.

”

“

My partner has lost her job in Melbourne as we were supposed to be there already.

”

“
We are elderly people, 69 and 72. This situation is heartbreaking for us. We have an intellectually disabled son who needs our support at home and both my husband and myself need to attend medical appointments, myself for my ongoing breast cancer oncology appointments and my husband for his blood clotting disorder.
”

“
My application was denied without even being looked at, and my father in Victoria passed away the next day on the Sunday.
”

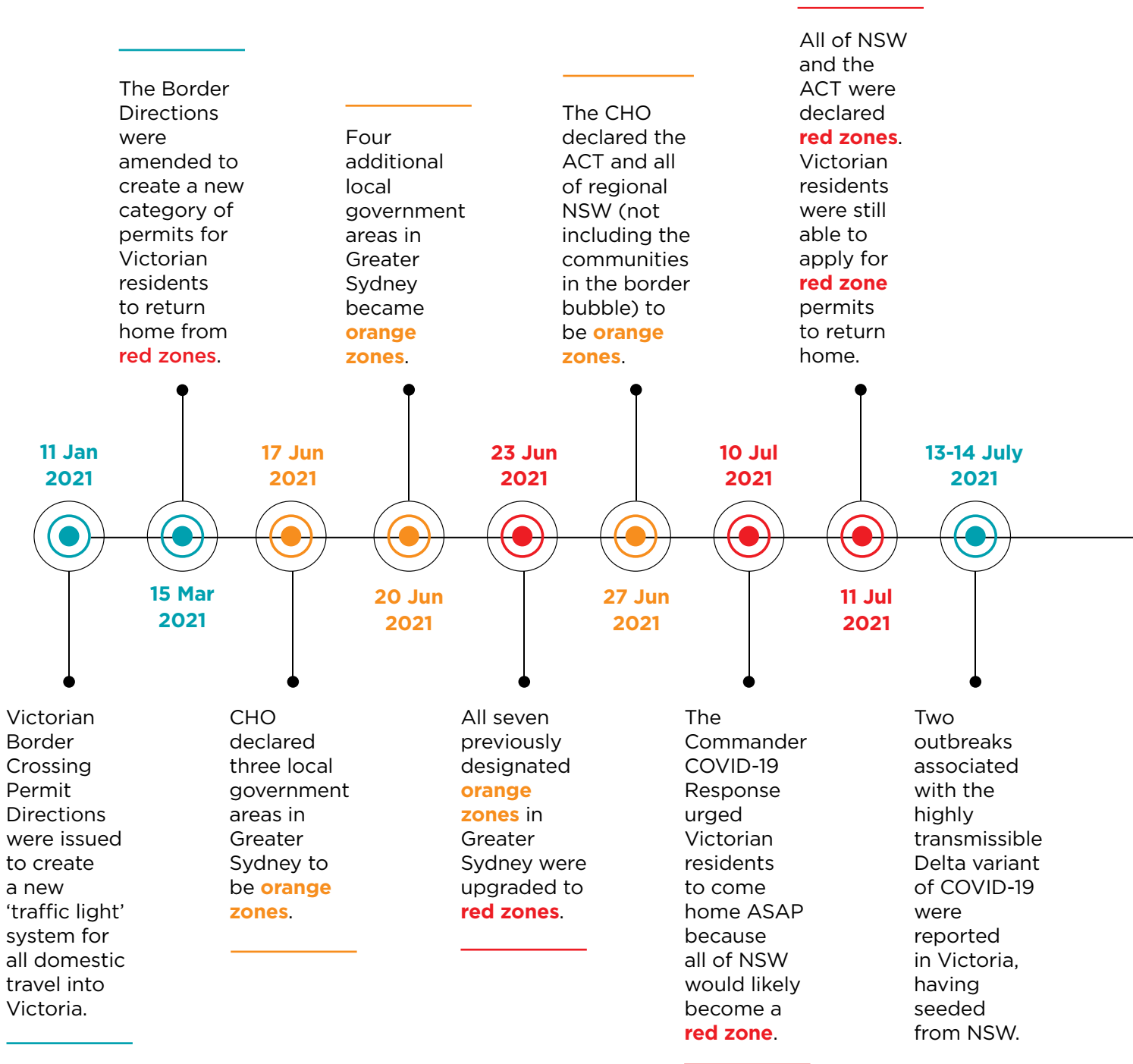
“
The Department of Health officer suggested we drive to NT, then SA to travel [into] Vic. This would be thousands of additional kms, additional costs and we are not equipped to undertake such travel.
”

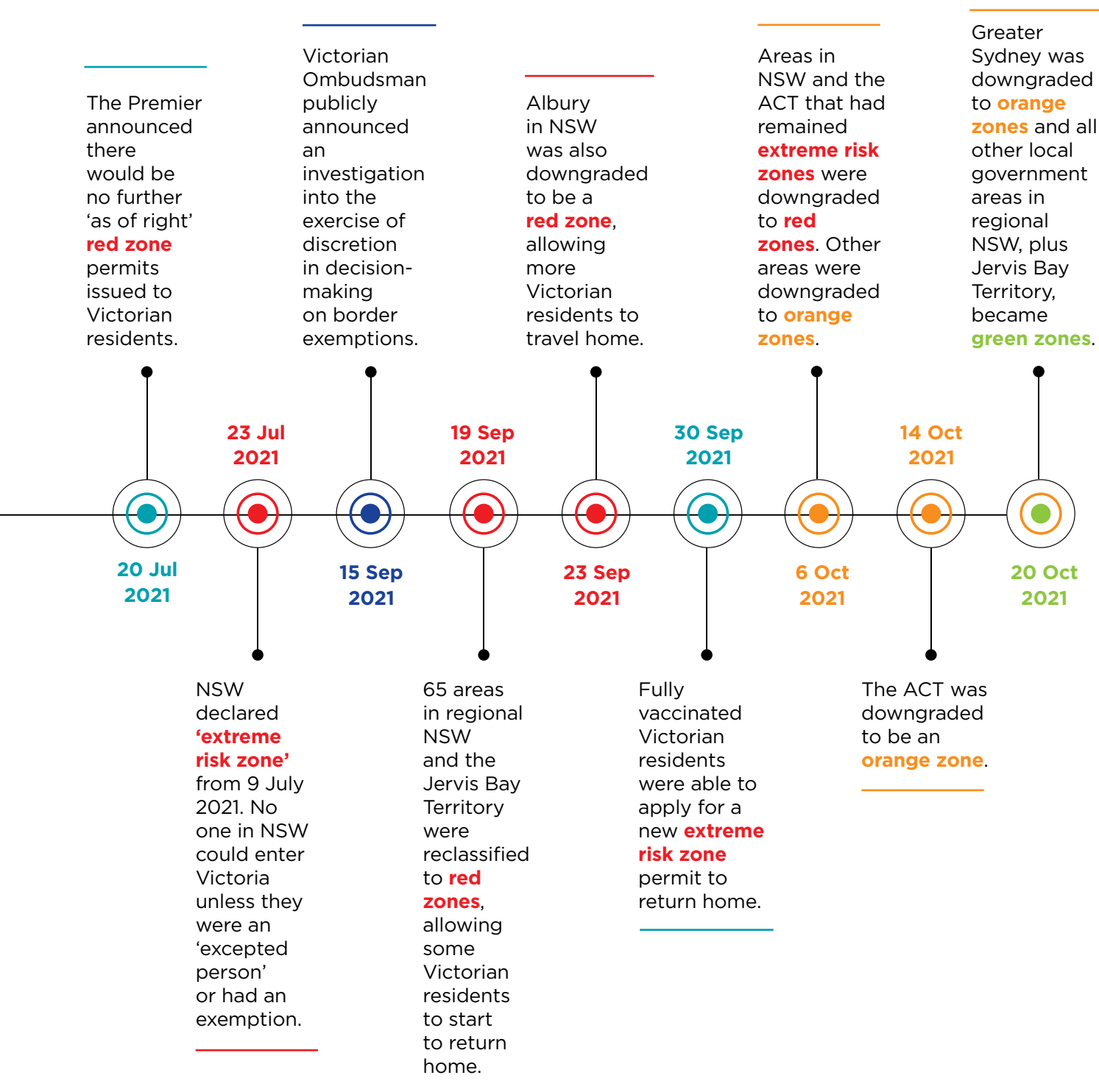
“
There is no help for those who are stranded. There seems to be little concern over situations like mine from those bureaucrats sitting comfortably in their own homes or offices. Surely this kind of makes a mockery of having a permit system at all.
”

“
Given our age [80 and 82 years old] and that we were travelling in a caravan, the requirement of documents has been onerous and difficult. We do not have access to the internet, a printer or a computer.
”

“
My sister ... has been dealt a devastating blow of being diagnosed with gallbladder cancer, that has also travelled to numerous other vital organs of her body. Ultimately this is a terminal diagnosis... we are unsure how long she may survive ... A clerk ... has informed us the diagnosis is not serious enough.
”

Timeline: Changes to Victoria's borders





Report summary

Background

1. From January 2021, Victoria operated a traffic light system, where every person wishing to enter the State had to obtain a permit or an exemption unless they were an 'excepted person'. The type of permit, and its associated conditions regarding testing and quarantining, depended on the colour-coded zone of the area the person intended to travel from as designated by the Chief Health Officer.
2. Victoria's Border Directions were updated multiple times between January and July 2021, and it is fair to suggest that people had generally come to rely on the traffic light system to understand the public health advice and plan their interstate travel.
3. In June and July 2021, when outbreaks of COVID-19 continued to escalate in NSW, and areas starting with Greater Sydney were declared to be orange and then red zones, Victorian residents would not have expected to be prevented from coming home. Despite explicit warnings against non-essential travel, Victorian residents were reasonably entitled to rely on the established traffic light system, which – even at its most severe – would have allowed them to return home subject to self-quarantining for 14 days and regular COVID-19 testing.
4. On 20 July 2021, changes were announced and Victorian residents in red zones with permits were given approximately 12 hours to make it across the border. For many, particularly those in regional and northern NSW, this was impossible.
5. Three days later, the Border Directions were changed again to reinstate 'red zone' permits and create a new 'extreme risk zone' category under which no-one would be able to enter Victoria unless they were an 'excepted person' or had an exemption. At the same time, all of NSW was designated an 'extreme risk zone'. The ACT was then declared an extreme risk zone on 16 August 2021.
6. As a result of these changes, thousands of Victorian residents and others wishing to enter the State from NSW and the ACT were effectively prevented from doing so.

Why we investigated

7. By September 2021, the Victorian Ombudsman had received more than 80 complaints from people who had been refused exemptions.
8. Concerned about how applications were being dealt with, on 14 September 2021, the Ombudsman decided to investigate the Department of Health's exercise of discretion involving decisions on interstate travel permits, exceptions and exemptions and relevant human rights considerations.
9. The investigation heard from 315 complainants.

Findings

10. On the facts available, it could not be said that the decisions to issue the Border Directions were unreasonable or that proper consideration was not given to human rights. Each time the Border Directions were updated, the CHO received detailed advice concerning community transmission of COVID-19 and current outbreaks, and consideration of the human rights implications.

11. However, the unexpected suspension of red zone permits and the subsequent addition of 'extreme risk zones' changed the traffic light system people had been accustomed to, and inadvertently caught many people off guard.
12. Under the Border Directions, people in extreme risk zones could request an exemption from any or all requirements contained in the Directions for a number of specified reasons and for any other reason under a general discretion. Almost 8,000 exemption applications were open in early August 2021, and the Department's team responsible for managing requests was scaled up from 20 staff in early July to 285 by early September.
13. Staff responsible for categorising and prioritising applications were expected to complete 50 per hour: an average of almost one every 30 seconds. Only Deputy CHOs and Directors could grant exemptions – as senior and busy officials, time dedicated to individual applications was limited.
14. The evidence required for exemptions was extensive and included statutory declarations, proof of residence, proof of ownership of animals, letters from medical professionals, bank or financial statements, and statements of relationship to people who were dying or funeral notices.
15. Between 9 July and 14 September 2021, the Department received 33,252 exemption applications, of which only 8 per cent were granted. The overwhelming majority were not specifically rejected but 'closed for other reasons'.
16. The Border Directions themselves appeared to provide for broad decision-making discretion, but in practice, it was exercised narrowly.
17. Decision-makers put too much emphasis on whether an applicant could prove they had 'compelling circumstances' for travel, and not enough on whether the public health risks of the applicant entering Victoria could be sufficiently mitigated.
18. The investigation considered the Department put significant resources towards keeping Victorian residents out rather than facilitating safe ways for them to return.
19. People were frustrated the Department did not provide reasons and that they could not seek a review of decisions to refuse to grant them exemptions.

Opinion

20. While acknowledging the challenging circumstances faced by the department, and that not all its decisions were unfair, the Ombudsman found the narrow exercise of discretion under the *Victorian Border Crossing Permit Directions* resulted in unjust outcomes.

Recommendations

21. As a result of the investigation, the Ombudsman recommended the Victorian Government publicly acknowledge that the narrow exercise of discretion resulted in unjust outcomes and consider measures to alleviate this.
22. Among other things, the Ombudsman also recommended a clarifying amendment to the right to freedom of movement under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and that policies be developed under the *Public Health and Wellbeing Act 2008* (Vic) to assist decision-makers in the future.

Introduction

Why we investigated

23. During the COVID-19 pandemic at a press conference on 20 July 2021, the Premier of Victoria together with the Chief Health Officer ('CHO') announced changes to Directions issued under the *Public Health and Wellbeing Act 2008* (Vic) concerning domestic travel into Victoria ('the Border Directions').
24. These changes meant that Victorian residents in interstate red zones would not be able to return home without an exemption:

'There will be no further, as of right, red zone travel for the next two weeks. What I cannot have happen is hundreds and hundreds who were warned weeks ago to get back here, who have not done that ... coming back to Victoria while the situation further deteriorates ... after 11:59pm tonight, you will need to apply for a new permit and you will not get an 'as of right' permit to come back to Victoria to isolate here. You will need to qualify for a compassionate exemption ...'

- Premier of Victoria, press conference, 20 July 2021

25. Three days later on 23 July 2021, the Border Directions were changed again to reinstate red zone permits and create a new 'extreme risk zone' category under which no-one would be able to enter Victoria without an exception or exemption. At the same time, all of New South Wales was designated an 'extreme risk zone'.
26. As a consequence, hundreds - if not thousands - of Victorian residents and others wishing to enter Victoria from NSW were effectively prevented from doing so.
27. During this initial period, the Ombudsman received more than 50 complaints about decisions made under the Border Directions, many of which came from Victorians trying to get home.
28. On 16 August 2021, the ACT was also declared an extreme risk zone.
29. On 27 August 2021, the Victorian Ombudsman wrote to the Secretary to the Department of Health about two particular cases. One involved Victorian children stuck at their agricultural school in rural NSW, and the other concerned an 82 year old woman who travelled to NSW to attend a funeral, but then could not get home again to care for her daughter who had stage four cancer and to attend her own medical appointments.
30. On 10 September 2021, the Secretary responded to the Ombudsman about these cases and explained the current circumstances and broader repatriation plans for Victorian residents.
31. By this time, the Ombudsman had received more than 80 complaints from people affected by the Border Directions and remained concerned about how applications for permits and exemptions were being dealt with.
32. On 14 September 2021, the Ombudsman notified the Minister for Health and the Secretary to the Department of her intention to conduct an 'own motion' investigation into the Department's exercise of discretion involving decisions on interstate travel permits, exceptions and exemptions and relevant human rights considerations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter of Rights Act').
33. By the time both NSW and the ACT had been downgraded to green and orange zones at 11:59pm on 19 October 2021, the Ombudsman had dealt with more than 300 complaints about the Border Directions.

Jurisdiction

34. Since machinery of government changes on 1 February 2021, the Department of Health has been responsible for leading the Victorian Government's response to the COVID-19 pandemic.
35. Under the Public Health and Wellbeing Act, the Secretary is responsible for appointing the CHO and may appoint other Authorised Officers for the purposes of that Act.
36. Throughout 2021, applications for exemptions under Border Directions have been processed by the Domestic Exemption Team ('DET') within the Department.
37. Section 16A of the *Ombudsman Act 1973* (Vic) provides that the Ombudsman may conduct an own motion investigation into actions or decisions taken by or in an 'authority'. The definition of 'authority' in the Ombudsman Act includes a department.

Terms of reference

38. The investigation's terms of reference focussed on the Department's exercise of discretion involving decisions on interstate travel permits, exceptions and exemptions and relevant human rights considerations. It considered in detail, the following complaints from the public concerning:
 - applications for children to return to Victoria from areas near Yanco Agricultural School in Leeton Shire, NSW
 - applications for 'Judy' and her brother 'Terry' to return to Victoria from the NSW Central Coast near Gosford
 - application for 'Henry' to travel to Victoria for his mental health and wellbeing
 - applications from 'Philippa' to return to Gippsland from Wagga Wagga, NSW to care for her livestock.
39. These cases are examined in this report, together with smaller case studies and quotes from the hundreds of people who complained to the Ombudsman about decisions made under the Border Directions.
40. Throughout the investigation, the Border Directions changed a number of times to the extent that by 20 October 2021, people were able to more freely travel into Victoria from interstate.

Methodology

41. The investigation focussed on the Department's decision-making processes and use of discretion under the *Victorian Border Crossing Permit Directions* ('Border Directions'). It was relevant to consider the timeline leading to the designation of NSW and the ACT as an 'extreme risk zone' and more broadly, the authority to close Victoria's border.
42. The investigation involved:
 - assessing information provided by the individuals who complained to the Ombudsman about the Border Directions
 - reviewing relevant legislation, including:
 - o *Public Health and Wellbeing Act 2008* (Vic)
 - o *Charter of Human Rights and Responsibilities Act 2006* (Vic)
 - o *Subordinate Legislation Act 1994* (Vic) and *Subordinate Legislation (Legislative Instruments) Regulations 2021* (Vic)

- considering best practice and administrative law principles concerning the exercise of discretion in decision-making, including relevant caselaw
- making enquiries with the Department and considering its responses dated 11 October 2021 and 8 November 2021
- researching the different versions of the public health directions restricting people's ability to travel into Victoria and considering the State's ability to close its borders to residents and others
- obtaining and reviewing records concerning the Border Directions, including the Department's:
 - o documents concerning four specific complaints
 - o policies, procedures and guidance material provided to decision-makers
 - o triage, assessment and decision-making processes, and data related to applications received, granted, refused and closed for other reasons
- providing a draft version of this report to the Department for fact checking and comment
- considering and addressing the response received from the Department on 25 November 2021.

43. The Department cooperated with the investigation and assisted Ombudsman investigators identify and retrieve relevant records.

44. The Ombudsman acknowledges the assistance provided by the people who complained to her office, many of whom were willing to share their experiences while still dealing with the impact of being refused entry into Victoria and stuck interstate.

Summoned materials

45. The Ombudsman issued two summons to the Department requiring:
- documents, including but not limited to applications, outcomes, internal emails, file notes or advice concerning the four specific cases referred to above
 - relevant instruments of authorisation / delegation of each decision-maker.
 - relevant policies, procedures, checklists and guidance material to assist decision-makers to exercise discretion and process travel permits, exceptions and exemptions in accordance with the Border Directions as in effect from time to time.
 - legal advice, including but not limited to any human rights assessments concerning specific versions of the Border Directions as in effect from time to time.

About this report

46. This report sets out the investigation's observations about the Border Directions in effect from 20 July 2021, including:
 - the timeline of events leading to NSW and the ACT being declared 'extreme risk zones'
 - the State's authority to close its border
 - complaints to the Ombudsman about people's applications to enter Victoria, including those that prompted this investigation
 - the Department's discretionary decision-making processes and human rights considerations.
47. The Ombudsman was guided by the civil standard of proof 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.
48. This report contains case studies describing individuals' experiences applying for permits and exemptions under the Border Directions. Names have been changed and other details have been removed to protect the privacy of the individuals concerned.
49. Noting that the Yanco students may be identifiable following reports in the media¹, the Ombudsman consulted the families' representative before publishing a final report.

Procedural fairness

50. This report contains adverse comments about the Department. In accordance with section 25A(2) of the Ombudsman Act, the Ombudsman gave the Department a reasonable opportunity to respond to a draft report and has fairly reflected the Department's response in this final report.
51. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable in this draft 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.

¹ Warwick Long, 'Victorian families plea for exemptions to bring their teenage boarding students home', *ABC* (online), 23 August 2021 <www.abc.net.au/news/rural/2021-08-23/ag-students-stuck-in-nsw-due-to-covid-lockdown/100399288>.

COVID-19 State of Emergency

COVID-19 pandemic

52. COVID-19 is an infectious disease caused by a new strain of coronavirus.
53. 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.
54. COVID-19 is primarily transmitted from person to person via airborne or aerosol particles exhaled from an infected person, and inhaled or introduced through contact with contaminated surfaces by a person who is susceptible to the disease.
55. On 11 March 2020, the WHO declared COVID-19 to be a pandemic; and on 20 March 2020, the Commonwealth Government closed Australia's international borders to all non-citizens and non-residents.
56. As of December 2021, more than five million people have died from COVID-19 worldwide, including more than 1,300 people in Victoria.
57. In January 2021, the Therapeutic Goods Administration – Australia's medical regulator - approved the Comirnaty (Pfizer) COVID-19 vaccine for use.
58. The first COVID-19 vaccine was administered in Australia on 22 February 2021, and vaccines including Vaxzevria (AstraZeneca) and Spikevax (Moderna) are now available for everyone in Australia aged 12 years and over.
59. By 30 October 2021, over 80% of the Victorian population aged over 16 years were fully vaccinated.

Public health emergencies

60. In response to the COVID-19 pandemic, many governments around the world and in Australia have exercised emergency powers to protect public health.
61. In Victoria, section 198 of the Public Health and Wellbeing Act provides that the Minister for Health may, on the advice of the 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'.

Public health emergency powers

62. During a state of emergency declared under the Public Health and Wellbeing Act, the CHO may authorise use of the following 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)).
63. These emergency powers are able to be exercised by 'Authorised Officers' appointed under the Public Health and Wellbeing Act.

64. 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.

65. 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.

Public health restrictions in Victoria

66. The first recorded case of COVID-19 in Australia was confirmed in Victoria in late January 2020.
67. 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.
68. The declaration of a state of emergency was subsequently extended into November 2021.

69. Throughout the pandemic, to eliminate or reduce the serious risk to public health and to protect public health, the CHO and other Authorised Officers have exercised emergency powers in the Public Health and Wellbeing Act:

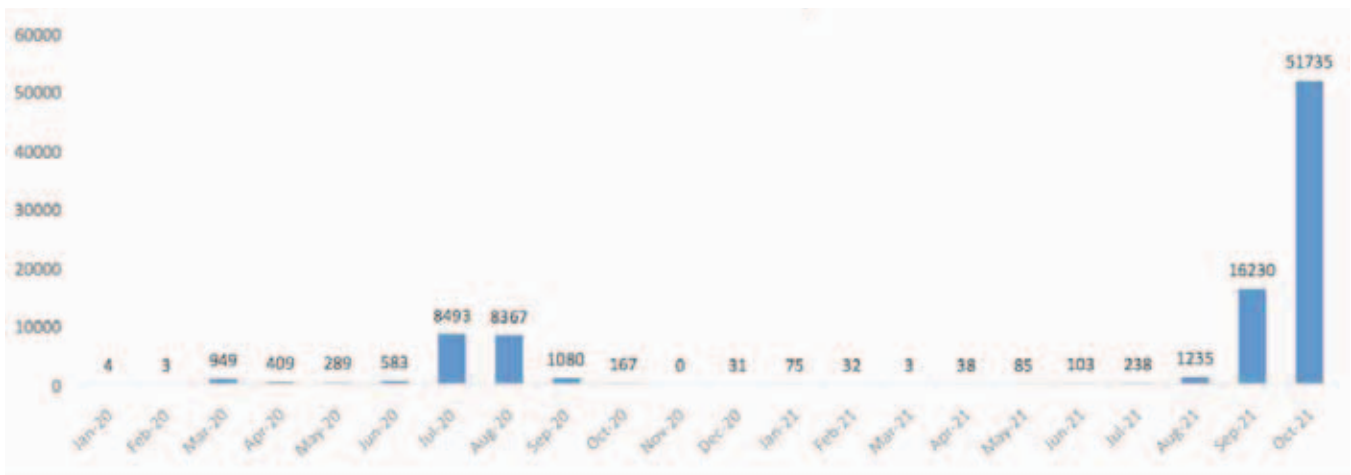
- restricting mass gatherings
- requiring persons diagnosed with COVID-19 to self-isolate
- prohibiting the operation of non-essential businesses
- otherwise preventing people from leaving their homes except in limited circumstances.

70. Generally, restrictions have been imposed and relaxed in response to the rise and fall in cases of COVID-19 infections. Broadly, Victoria has experienced three 'waves': in March 2020, across July and August 2020 and since July 2021.

71. Although a 'National Cabinet' comprising the Prime Minister and the leaders of the States / Territories was established in March 2020 'to ensure a coordinated response across the country to the many issues that relate to the management of the coronavirus'², each jurisdiction has largely been responsible for its own response to outbreaks of COVID-19 and implementation of public health interventions.

72. At different times throughout the pandemic, each State and Territory has at one time or another closed its borders.

Figure 1: Monthly new COVID-19 cases in Victoria, January 2020 – October 2021



Source: Victorian Ombudsman, data available from Department of Health online.

² Research Branch, 'COVID-19 Australian Government roles and responsibilities: an overview' (Research Paper, Parliamentary Library, Parliament of Australia, 19 May 2020).

Victoria's land border

- 73. Since becoming an independent colony on 1 July 1851, Victoria's land border has been defined as a 'straight line drawn from Cape How[e] to the nearest source of the River Murray and thence the course of that river to the eastern boundary of the province of South Australia' at the 141st meridian.
- 74. Along the Victorian border, the whole watercourse of the Murray River is within NSW.³
- 75. The border is the most porous in the country with 'more than 50 land crossings between NSW and Victoria, peppered between the coast and South Australia'.⁴

Figure 2: Bridges and major roads across the Victoria / NSW border



Source: ABC News (online), 6 July 2020

³ *Ward v The Queen* (1980) 142 CLR 308.

⁴ Andrew Burrige, 'Here's how the Victoria-NSW border closure will work - and how residents might be affected', *The Conversation* (online), 6 July 2021 <theconversation.com/heres-how-the-victoria-nsw-border-closure-will-work-and-how-residents-might-be-affected-142045>.

76. In January 1919, NSW unilaterally closed its borders with other States in response to an outbreak of pandemic influenza.



Interstate border closures in response to the 'Spanish flu' in 1919

Some six months before the end of the First World War, an influenza pandemic raged throughout Europe and eventually the world.

Referred to as the 'Spanish flu', the influenza pandemic killed more than 20 million people in 12 months.

For a while, Australia remained infection free. By the end of 1919, however, some 12,000 people had died.

To prepare the relatively young Federation for inevitable outbreaks, in November 1918 the State Ministers of Health met with the Commonwealth Minister for Trade and Customs and his Director of Quarantine to agree on an interstate Quarantine Plan.

Under the plan, the Commonwealth would proclaim a state to be 'infected' upon notification from its Chief Health Officer, and 'until any neighbouring State was similarly proclaimed their common land border would virtually be closed to travellers.'

Theoretically, the Commonwealth would then control an infected state's interstate traffic. The Quarantine Plan, however, fell apart over a disagreement between NSW and Victoria:

Victoria refused to acknowledge the presence of pneumonic influenza for a fortnight after its appearance and it was not until the day after NSW was proclaimed infected that Victorian authorities agreed to notify the Director of Quarantine...

Because the first diagnosed case in NSW was a soldier who had travelled by train from Melbourne, and because Victoria has postponed its official notification to the Commonwealth for more than a week, the NSW Government considered the November agreement revoked and, although both States were by now proclaimed, the border with Victoria was unilaterally closed. Thereafter it was every State for itself.

Without an effective national plan, most states imposed their own 'constantly amended interstate travel regulations' and the Commonwealth 'could do little more than threaten or cajole'.

In all the confusion, the then Prime Minister did, however, manage to negotiate a system of cash and travel vouchers for citizens stranded outside their home states.⁵

⁵ Humphrey McQueen, 'The Spanish Influenza Pandemic in Australia, 1912-19 in Jill Roe (ed), *Social Policy in Australia: Some Perspectives 1901-1975* (Cassell Australia Ltd 1976) 131. Available online at <honesthistory.net.au/wp/wp-content/uploads/SpanishFlu-1919.pdf>.

77. Unlike other Australian states, during the 1919 Spanish flu pandemic, Victoria did not impose interstate travel regulations - although with neighbouring States closing their borders, the effect might well have been the same.

Figure 3: Article from The Daily Examiner newspaper, 31 January 1919

VICTORIAN BORDER ABSOLUTELY CLOSED.

—

SYDNEY, Thursday.

Passengers from Victoria will be absolutely forbidden to cross the border into New South Wales. The border is being strongly patrolled.

At the Albury railway station the officials offer no objection to travellers travelling by train to Melbourne, but will not permit them to cross from Wodonga.

The police patrol at the Murray bridge refused intending visitors permission to cross from Victoria this morning, causing endless confusion. Many people booked to Melbourne from Albury this morning, and the chances are they will get an unpleasant surprise when they reach Melbourne.

Source: Trove, National Library of Australia

Figure 4: Article from The Age newspaper, 17 February 1919

BORDER QUARANTINE.

Consequent upon the reported intention of the New South Wales health authorities to provide belatedly a quarantine encampment of limited capacity in the show grounds at Albury, many inquiries are being made by New South Wales residents stranded in Melbourne as to future traffic arrangements. It is pointed out that there is a large number of people already in Wodonga waiting to cross into New South Wales, and they will be the first consideration of the authorities. To facilitate the transfer of stranded persons to their homes in New South Wales, those able to travel are requested to leave their names and addresses at the Tourist Bureau in Collins-street, Melbourne. Persons who, for financial reasons, are unable to take advantage of the opportunity are advised to communicate with Mr. Whitehead at the Immigration Offices, Spencer-street.

Source: Trove, National Library of Australia

Public health directions to close Victoria's borders

South Australia – November 2020

78. Victoria first closed its borders to another jurisdiction during the COVID-19 pandemic on 19 November 2020 when the Acting CHO issued the *Community Transmission Zone Directions* to prevent persons who had been in South Australia in the 14 days prior, from entering Victoria.
79. Two days later, on 21 November 2020, the Community Transmission Zone Directions were replaced with the *Border Crossing Permit Scheme Directions*, which created a permit system for people wishing to enter Victoria from South Australia.
80. Under the Border Crossing Permit Scheme Directions, people who had visited a 'red zone' or were otherwise required to self-quarantine in South Australia were prohibited from entering Victoria without a written exemption granted by the CHO or Deputy CHO. At the time, seven locations across metropolitan Adelaide were determined to be red zones during specific exposure periods.
81. All other areas of metropolitan Adelaide were designated 'orange zones' and the rest of South Australia was a 'green zone'.
82. People wishing to enter Victoria from green and orange zones required a permit that could be applied for online, unless they were entering Victoria:
 - to provide or receive emergency medical care or emergency services
 - to escape harm or the risk of harm, including harm relating to family violence or violence of another person
 - as a school student travelling on a bus
 - where they remained on the same premises and that premises crosses the border.

New South Wales – December 2020

83. On 18 December 2020, NSW recorded 30 new cases of COVID-19, representing the highest daily number of new infections of anywhere in Australia in over three months.
84. In response to this, the CHO issued new Directions. From 11:59pm on 18 December 2020, Sydney's Northern Beaches were designated red zones, and people who had visited or travelled through the area since 11 December 2020 were not permitted to enter Victoria without an exemption.
85. At the time, people in the Northern Beaches area were subject to NSW public health restrictions, including there being only four essential reasons to leave home: work, shopping, exercise, or compassionate visits.
86. Anyone wishing to enter Victoria from other areas of Greater Sydney or the rest of NSW required a permit unless they were entering Victoria for one of the four exceptions referred to above.
87. On 20 December 2020, the CHO updated the *New South Wales Border Crossing Permit Scheme Directions* to create a new category of 'very high risk' areas as 'hot zones' and provide a 24 hour window for Victorian residents to return home from red zones, which came to include Greater Sydney and the Central Coast:

Without mandatory mask rules and stay at home orders across Sydney, our Government and state's health authorities do not have confidence that the situation remains safe.

It's why from 11:59pm Sunday, 20 December 2020, the Greater Sydney area and the Central Coast will be designated as a 'red zone'. That means people who live in these communities, or have visited these communities since 11 December 2020, cannot enter Victoria. Anyone from this zone found trying to enter Victoria in breach of this order will be subject to 14-day mandatory hotel quarantine.

Victorians who have recently visited or are currently in Greater Sydney and the Central Coast, other than those in the Northern Beaches area, will be given until 11:59 Monday 21 December to return home.

Those returning must register for an exemption on the Service Victoria website and then get tested within 24 hours of returning to our state. They must then self-quarantine for 14 days at home. Follow up checks will be undertaken.

The Northern Beaches area will also be elevated to a 'hot zone'. Victorians in the Northern Beaches area remain subject to the NSW's Chief Health Officer's stay at home orders and will not be permitted to enter Victoria.

The rest of regional New South Wales remains a green zone, but residents in these areas will still need to apply for and receive a valid permit to enter Victoria.⁶

88. As the new measures were announced, up to 700 Victoria Police members were deployed to establish additional checkpoints along the Victorian and NSW border to ensure only people with permits, residents in border communities or those with eligible exemptions were able to cross. The Australian Defence Force also provided logistical support.

89. The *New South Wales Border Crossing Permit Scheme Directions* were revoked and reissued with changes six times in nine days in late December 2020 and early January 2021:

- From 30 December 2020:

- o people who had been in the Greater Sydney area, the Central Coast and the Northern Beaches since 11 December 2020 or in the last 14 days (whichever was later), were not permitted to enter Victoria without an exemption

- o people who had been in the Blue Mountains or Wollongong regions from 27 December 2020 had 24 hours to enter Victoria provided they had a border permit and complied with certain conditions or had an exemption.

- From 12:59am on 1 January 2021 all existing travel permits were revoked and people in NSW other than those in red zones or hot zones were given 23 hours to enter Victoria with a new permit and required to get tested for COVID-19 and self-quarantine for 14 days.
- From 11:59pm on 1 January 2021, no-one could enter Victoria from NSW unless they were an excepted person, held a permit, or had an exemption.
- From 11:59pm on 3 January 2021, people could only apply for a permit to enter Victoria from NSW if they were:
 - o transiting through NSW from another State or Territory
 - o only briefly passing through Victoria from another State or Territory
 - o a permitted worker – commercial freight worker, essential services worker, or agricultural worker travelling to Victoria for work.
- From 5 January 2021, people were able to apply online for an exemption to enter Victoria from NSW.
- From 7 January 2021, Victorian residents seeking to return to their ordinary place of residence could apply for a specific exemption providing they had not travelled through an area of NSW since that area was deemed a red zone or hot zone.

⁶ Department of Health and Human Services (Vic), *Victorian Border Crossing Permit* (Travel Update, 20 December 2020) <web.archive.org/web/20201220045315/www.coronavirus.vic.gov.au/victorian-border-crossing-permit>.

Victoria's traffic light system

90. Throughout the first week of January 2021, the media reported widely on the 'confusion' and 'chaos' caused by Victoria's border restrictions and inconsistent rules around Australia.

Border closure chaos as Victoria stops entry to those from NSW's 'red zone'

ABC, 22 December 2021

Border confusion as Victorians stuck in NSW plead for way home

The Age, 2 January 2021

Australia's mishmash of COVID border closure is confusing, inconsistent and counterproductive

The Conversation, 6 January 2021

Echuca-Moama border confusion continues for residents

Bendigo Advertiser, 7 January 2021

91. By 11 January 2021, new public health directions called the *Victorian Border Crossing Permit Directions* ('the Border Directions') were issued to simplify the traffic light zone system and provide people with greater certainty.

Victoria will establish a new permit system for all domestic travel into the state, helping to support Victoria's rapid contact tracing efforts and giving Victorians greater certainty when they travel.

It will be based on a traffic light system that allows Victoria to designate regions in other parts of Australia as green, orange or red, depending on the coronavirus risk in a particular area.

Zones will be declared by the Chief Health Officer, based on the public health risk for coronavirus transmission and mean that certain restrictions will apply for travellers from that area. The new permit system will go live from 5.59pm on Monday, 11 January. Current permits – including transit and worker permits – will remain valid, so long as they are consistent with public health's advice on zones.

Under the new system, you will need to apply for a permit to enter Victoria from anywhere in Australia, except border communities in NSW where locals will require proof of their home address.⁷

'With an easy to understand traffic light system, Victorians and Australians will understand exactly what the latest public health advice means for them, and their travel plans.'

- Premier of Victoria, press statement, 11 January 2021

⁷ Premier of Victoria, 'Permit System To Keep Victoria COVIDSafe' (Media Release, 11 January 2021) <www.premier.vic.gov.au/permit-system-keep-victoria-covidsafe>.

92. Under the new traffic light system people travelling from:

- a **red zone** were unable to enter Victoria without a red zone permit, Specified Worker Permit, transit permit or exemption. Non-residents were not eligible for red zone permits.
- an **orange zone** were required to get a COVID-19 test within 72 hours of arrival and remain isolated until receiving a negative result
- a **green zone** were required to apply for a permit, monitor for symptoms and get tested immediately if any presented.

93. On 15 March 2021, a new category of permit was added to the Border Directions for Victorian residents in red zones to return home providing they:

- had not been at a very high-risk exposure site during the very high-risk period
- were not a diagnosed person or a close contact of a diagnosed person
- would get tested for COVID-19 within 72 hours of entering Victoria
- would self-quarantine for 14 days
- would get tested for COVID-19 on or about day 13 of the self-quarantine period.

94. According to records provided by the Department, the addition of the red zone permit for Victorian residents sought to find an appropriate balance between limiting the movement of people into Victoria from areas where there was a known risk of exposure to COVID-19 and permitting residents to return to their ordinary place of residence for economic, mental health and safety reasons where this could be done safely, without putting the broader community at risk.


95. While the Border Directions were updated multiple times between March and July 2021, it is fair to say that people had generally come to rely on the traffic light system to understand the public health advice and plan their interstate travel.

96. At the time of this report, Victorian Border Crossing Permit Directions (No. 42) were in effect.

Figure 5: Victorian Travel Permit System Overview dated 29 March 2021

STAY SAFE
STAY OPEN

Victorian Travel Permit System






All travellers entering Victoria now require a permit.

The type of permit (and its associated conditions e.g. testing, quarantine etc) depends on the current colour-coded zone where a person is travelling from, as well as anywhere they might have recently been. Areas across Australia are designated as **red**, **orange** or **green** zones based on the latest coronavirus (COVID-19) advice from Victoria’s Chief Health Officer.


The Traffic Light Entry System applies to all arrivals (Victorian residents and non-residents) into Victoria from around Australia.

The colour classification from where a person is travelling from, or where they have been, will determine the conditions under which a permit to enter Victoria is granted.

Go to www.coronavirus.vic.gov.au/travelpermits for the latest information and advice.

Designation	Permit Conditions
 Red ('red zones')	<ul style="list-style-type: none"> Residents of Victoria who are in, or who have been to a red zone can apply for a 'red zone' permit to return home. You must return straight home (or to your accommodation), and self-quarantine for 14 days from the day you enter Victoria Non-residents not entitled to a permit or to travel to Victoria (unless covered by an exception, exemption or permitted worker permit) Non-residents who present at a land border without an exception, exemption or permitted worker permit will be turned around Non-residents who present at a Melbourne airport/seaport without an exception, exemption or permitted worker permit will be fined (\$4957) Non-residents are returned to their originating port at the next available opportunity at their own cost.
 Orange ('orange zones')	<ul style="list-style-type: none"> Permit required to enter Victoria Person must attest they have not been in a currently listed red zone within the past 14 days, have not been in close contact with a coronavirus (COVID-19) case and do not have any coronavirus (COVID-19) symptoms Person must self-isolate, get a coronavirus (COVID-19) test (within 72 hours) and continue to self-isolate until they get a negative test.
 Green ('green zones')	<ul style="list-style-type: none"> Permit required to enter Victoria Person must attest they have not been in a currently listed red zone, or orange zone within the past 14 days, have not been in close contact with a coronavirus (COVID-19) case and do not have any coronavirus (COVID-19) symptoms No further conditions on entry other than to monitor for symptoms and abide by existing directions.

**Latest details on the designated zones across Australia at www.coronavirus.vic.gov.au/travelpermits.
Apply for permits at www.service.vic.gov.au or by calling the Coronavirus hotline on 1800 675 398.**



OFFICIAL

Source: www.coronavirus.vic.gov.au

Timeline of key events: 17 June – 23 July 2021

97. Throughout April and May 2021, Victorian officials launched a number of ‘preliminary and precautionary public health actions’ in relation to a COVID-19 case in Sydney announced on 5 April 2021. During this time, all locations in NSW remained green zones under Victoria’s travel permit system.

98. On 17 June 2021, the CHO declared three local government areas in Greater Sydney to be orange zones and strongly advised people planning to travel from Victoria to the City of Sydney, Waverley and Woollahra to reconsider.

99. An additional four local government areas in Greater Sydney became orange zones on 20 June 2021:

Out of an abundance of caution, the Chief Health Officer advises against non-essential travel to Victoria from these areas.⁸

100. On 22 June 2021, the Department warned:

The Chief Health Officer continues to closely monitor the situation in NSW and is currently actively considering updates to travel permit zones based on an assessment of public health risks.⁹

101. The next day, on 23 June 2021, all seven previously designated orange zones were upgraded to red zones, meaning that Victorian residents in those areas would need a red zone permit to return home. Non-residents would need to be an ‘excepted person’ or get an exemption to travel into Victoria.

102. In the days that followed, there were further warnings about travel to red zones:

As the school holidays begin, we are asking all individuals to do the right thing and follow the rules that are in place.

You should not be travelling to a red zone in New South Wales, and if you do travel, note that the zones can change at short notice.¹⁰

103. In late June 2021, as the daily number of infected people in NSW continued to steadily increase, the CHO upgraded regional NSW and the ACT to orange zones:

Travel updates

Greater Sydney, including Central Coast, Shellharbour, Blue Mountains and Wollongong, are red zones under Victoria’s Travel Permit System effective from 1:00am on Friday 25 June.

ACT and all of regional NSW (not including the communities in the border bubble) are orange zones effective from 1:00am on Sunday 27 June.

104. During the first week of July 2021, there were further warnings about non-essential travel to red or orange zones. On 7 July 2021, the Acting Chief Health Officer said:

... we’re continuing to review our travel permit settings daily based on changing epidemiology. Where there are updates we are going to provide them with as much lead time as possible so that Victorians will know what to expect and in the meantime, we still continue to advise Victorians not to travel to orange or red zones.¹¹

105. On 9 July 2021, the Department warned:

Victorian public health authorities continue to review our travel permit settings on a daily basis and the Acting Chief Health Officer advises strongly against non-essential travel to red or orange zones.¹²

8 Department of Health (Vic), *Travel updates* (20 June 2021). <web.archive.org/web/20210620100329/https://www.coronavirus.vic.gov.au/travel-updates>.

9 Department of Health (Vic), ‘Coronavirus update for Victoria – 22 June 2021’ (Media Release, 22 June 2021) <www.dhhs.vic.gov.au/coronavirus-update-victoria-22-june-2021>.

10 Department of Health (Vic), ‘Coronavirus update for Victoria – 26 June 2021’ (Media Release, 26 June 2021) <www.dhhs.vic.gov.au/coronavirus-update-victoria-26-june-2021>.

11 Department of Health, Press conference, 7 July 2021 <www.facebook.com/7NEWSMelbourne/videos/victoria-covid-19-update-7-july-2021/520779695790024/> at 10:20-10:40.

12 Department of Health (Vic), ‘Coronavirus update for Victoria – 9 July 2021’ (Media Release, 9 July 2021) <www.dhhs.vic.gov.au/coronavirus-update-victoria-9-july-2021>.

106. As the situation in NSW continued to escalate, on 10 July 2021 both the Department and Victoria's Commander COVID-19 Response urged Victorian residents in NSW to come home to Victoria as soon as possible.¹³ The Commander COVID-19 Response described the situation as being on a 'razor edge' and suggested that all of NSW becoming a red zone was imminent:

'All I can say is to repeat the warning, if you're a Victorian in NSW you should have left already, you need to come home now. The chances are that at some point in the coming hours or days we will be forced to close, to upgrade NSW to red, to close the border. That is a significant likelihood at this point in time – that may not happen, but I can only give people the best possible advice about the level of concern we have.'

This thing is on a razor edge, we don't want to do it – if we don't have to do it we won't – but if there's any indication that it goes worse, there's no other warning point we're going to provide.'

We're not going to issue further running commentary every 12 hours and say we're going to give you two days' notice, if the situation gets to a point where it's beyond critical, we will make it red and we will enforce those border requirements.'

– Jeroen Weimar, Commander COVID-19 Response, press conference 10 July 2021

107. When asked at the press conference on 10 July 2021 whether the borders would 'suddenly shut' or whether NSW would be declared a red zone, the Commander COVID-19 Response answered:

'One scenario is we take an immediate decision to turn the rest of NSW as red, it's currently an orange zone. If we were to do that, and I stress, if we were to do that, well that would mean for Victorians, you can still come back home, but you'll be doing 14 days of isolation and home quarantine. There will not be any exemptions to that process if that's the decision we have to take.'

– Jeroen Weimar, Commander COVID-19 Response, press conference 10 July 2021

108. When asked whether red zone permit holders were complying with the conditions of their permits, the Commander COVID-19 Response said he had 'seen really high levels of compliance'.

'With the scale of numbers we're talking about and what we're asking people to do, we're very confident that people understand the message and are doing the right thing.'

– Jeroen Weimar, Commander COVID-19 Response, press conference 10 July 2021

¹³ Department of Health and Human Services (Vic), *Coronavirus update for Victoria* – 10 July 2021 (10 July 2021) <www.dhhs.vic.gov.au/coronavirus-update-victoria-10-july-2021>.

Figure 6: Twitter post from Department of Health on 10 July 2021



Source: Twitter

- 109. On 11 July 2021, all of NSW and the ACT was declared a red zone under Victoria's travel permit system.
- 110. On 13 and 14 July 2021, two outbreaks associated with the highly transmissible Delta variant of COVID-19 were reported in Victoria, referred to as the 'Coolaroo Community Outbreak' and the 'Maribyrnong Community Outbreak'.

'We have been saying consistently since the middle of June come home ... we've been saying since the middle of June don't go to NSW. It's a high risk ... so please, if you're a Victorian and you are still in NSW, time is ticking ... you have to get home.'

- Jeroen Weimar, Commander COVID-19 Response, press conference 15 July 2021

- 111. The first cases in the Coolaroo Community Outbreak were reported among a family of four who had returned from Greater Sydney on a red zone permit. The Maribyrnong Community Outbreak was linked to removalists from Greater Sydney.

- 112. On 15 July 2021, Stay at Home orders were reimposed in Victoria, under which people could only leave home for essential shopping, exercise, care or caregiving, authorised work or education, or to get vaccinated.
- 113. In a statement announcing the lockdown, the Premier commented on the quarantine requirements for people returning to Victoria on red zone permits:

We know this outbreak didn't start here in Victoria. We know that wearing face masks can keep us safe and stop the spread.

So please, follow the rules and wear a face mask at all times.

For those that have returned from a red zone on a permit – you must follow the requirements of your permit.

That means going straight home to quarantine for 14 days and only leaving to get tested.

And we must be clear. Quarantining means staying at home.¹⁴

¹⁴ Premier of Victoria, 'Statement from the Premier' (Media Release, 15 July 2021) <www.premier.vic.gov.au/statement-premier-92>.

114. The Premier made further statements about the evolving situation in NSW in the following days:

‘My advice to people from Victoria who are in NSW is for three plus weeks now we have been respectfully advising you to get home or run the risk that the rules change ... we have said please come home because the rules can change. The rules have now changed.’

– Premier of Victoria, press conference, 16 July 2021

‘I can’t rule out certainly further changes and further limiting movement from NSW to Victoria ... we are going to have an ongoing challenge in terms of defending that border to the north and making sure that nobody who has this virus is coming to our state. .. We will be calling on the community to play their part in that for a lengthy period of time.’

– Premier of Victoria, press conference, 16 July 2021

115. On 20 July 2021, the Border Directions changed most significantly when the ability for Victorian residents to apply for red zone permits was removed.

‘There will be no further, as of right, red zone travel for the next two weeks. What I cannot have happen is hundreds and hundreds who were warned weeks ago to get back here, who have not done that ... coming back to Victoria while the situation further deteriorates.’

– Premier of Victoria, press conference, 20 July 2021

116. The Premier explained that although people would not have the ability to apply for a red zone permit ‘as of right’, compassionate exemptions would be available. He noted, however, that it may not be a quick process to take individual circumstances into account:

‘There will be exemptions on compassionate grounds if you had a loved one that was unwell, if you yourself needed medical care, if you needed to attend Victoria and spend time in Victoria for one of those sorts of reasons, we will boost the number of people who are dealing with those exemptions, but I’d ask in advance, be patient, that’s not a quick process and that’s by virtue of the fact that it takes into account every individual circumstances which is what I would think anyone seeking an exemption would want. That does mean it takes time.’

– Premier of Victoria, press conference, 20 July 2021

117. When asked how many Victorians remained in NSW, the CHO said he did not know, and suggested there may not be any urgency for those who had not come home yet.

'It's really hard to know obviously. If they're not applying for a permit, we don't know they're there. We've had hundreds of new permit applications on a daily basis but it was thousands initially. We've had over 10 thousand permit applications altogether. There may well be hundreds if not thousands remaining. Some of those will want to see it out and are happy that they're remaining in Greater Sydney.

Obviously they've been given weeks and weeks of notice about the opportunity to return to Victoria so I imagine there isn't a great urgency for them. Circumstances change for people, that's what the exemptions process is for.'

- Professor Brett Sutton, Chief Health Officer, press conference, 20 July 2021

118. While the many warnings were explicit – 'if you're a Victorian in NSW ... you need to come home now' – in accordance with the established traffic light system and public statements, it is fair to suggest that many Victorian residents did not expect to be prevented from coming home, even if NSW was upgraded to a red zone. One person told the Ombudsman:

'We did not rush back on announcement of the border [closing] as we assumed we could rely on the ... process ... The anguish of being away from our own home for 10 weeks and living on the edge waiting for the time we can cross the border is taking a significant toll.'

119. Responding to the Ombudsman's draft report, the Department said:

the suggestion that the 'traffic light system' for interstate travel was static and that it was fair for the public to assume that it would remain in place without change for the purpose of planning interstate travel is inconsistent with the clear contemporaneous public statements to the contrary.

120. Many people who complained to the Ombudsman who were denied exemptions were stuck as they had been unable to return before the rules changed:

'My husband was made redundant in Sydney in May and received a new job offer for a job in Melbourne to commence on 12th July and relocated to our only permanent home in ... Victoria at the beginning of July while I remained in Sydney to pack up our belongings and move them out of our rental. I have therefore been caught up in the ... border closure even though you are allowed to move house in NSW and Victoria during a lockdown.'

'I am a Victorian resident stuck in NSW ... I came here on July 4, 2021 to help my sister-in-law as she [had a] baby with c-section ... My husband [has] depression due to lockdown and loneliness. I want to join him to give him psychological support.'

NSW and the ACT declared an 'extreme risk zone'

121. On 23 July 2021, the Border Directions were changed again to reinstate red zone permits and create a new 'extreme risk zone' category under which no-one would be able to enter Victoria unless they were an 'excepted person' or were eligible for an exemption. At the same time, all of NSW was designated an extreme risk zone.
122. The declaration on 23 July 2021 was retrospective from 9 July 2021. This meant anyone who had been in NSW since 9 July 2021 was considered to have been in an extreme risk zone. The decision to make the declaration apply retrospectively had regard to the virus's 14-day incubation period, being the period of time between contracting the virus and showing symptoms.
123. As a consequence, hundreds – if not thousands – of Victorian residents and others wishing to enter Victoria from NSW were effectively prevented from doing so.
124. According to the Department, at the time the CHO designated NSW an extreme risk zone, there were 158 active cases of COVID-19 and 31 active outbreaks in Victoria associated with the Delta variant. All were reportedly 'seeded from NSW cases travelling to Victoria, principally due to inadequate restrictive controls in NSW'.

The risk of further incursions due to persons returning from interstate areas with increased incidence of COVID-19 infections using the travel zone permit system remained, and further safeguards were required to mitigate against the risk of another seeding event. This was the context for the introduction of extreme risk zones and the designation of NSW as an extreme risk zone.¹⁵

The Victorian Border Crossing Permit Directions

125. The Border Directions were updated 34 times in 40 weeks between 11 January 2021 when they were first issued and 20 October 2021 when people from Greater Sydney were able to travel into Victoria again. Some changes were minor, or were made as a result of the extended state of emergency, while others:
 - clarified key definitions
 - imposed new conditions for categories of people seeking to enter Victoria (e.g. cross-border community members)
 - introduced or rescinded different permits to enter Victoria.
126. Generally, under each version of the Border Directions, people who had resided in, visited, been in or travelled through an extreme risk zone in the 14 days prior to their entry to Victoria were deemed to be 'prohibited persons'.
127. A 'prohibited person' was not permitted to enter Victoria unless they:
 - were a permitted cross-border community member or a cross-border community member who had a valid cross-border extreme risk zone permit or were a cross-border community member under the age of 18 who did not require a cross-border extreme risk zone permit

¹⁵ Department of Health, *Letter to the Victorian Ombudsman* (11 October 2021).

- had a valid Departing Hotel Quarantine Permit (and provided they had only been in an orange, red or extreme risk zone for the purposes of direct and short-term transit to Victoria)
- were an aircrew services worker permitted to enter Victoria under the current Directions
- had a valid transit permit
- had a valid specified worker (single entry) or specified worker (multiple entry) permit
- were an 'excepted person'
- had a valid exemption.

Exceptions under the Border Directions

128. To be an 'excepted person' people had to fall into one of 21 categories, including:

- people receiving emergency medical care
- emergency or essential service workers
- people escaping harm including family violence
- school students whose bus route travels through Victoria or on public transport services which leave and re-enter Victoria without stopping
- people whose residences straddle Victoria and NSW or South Australia
- child protection workers providing services
- people authorised or required by law to enter Victoria
- people travelling for national security purposes.

129. Eligibility to enter Victoria was assessed by an Authorised Officer or Victoria Police Officer at the border. In practice, this meant the Department did not determine whether someone was an 'excepted person' in advance, and the decision was made at the border. People risked being fined more than \$5,000 and being denied entry if they were deemed not to be an 'excepted person' when they crossed the border.

130. 'Excepted persons' were subject to restrictions upon entry, including self-quarantine and testing requirements as well as other directions given by an Authorised Officer.

Exemptions under the Border Directions

131. A person could request an exemption from any or all requirements contained in the Border Directions:

- to attend a funeral or end of life event
- if a person owned or had responsibilities in relation to an animal, to meet obligations to sustain the life and wellbeing of that animal
- to return to the person's ordinary place of residence for health, wellbeing, care or compassionate reasons
- to return to the person's ordinary place of residence in Victoria from a cross-border community area
- to effect an emergency relocation.

132. From 11:59pm on 29 September 2021, people could also apply for an exemption to receive or accompany a dependant who attends boarding school.

133. The CHO or Deputy CHO (or the Secretary or a Deputy Secretary to the Department or an Executive Director or Director in the COVID-19 Response Division of the Department) had the authority to exempt a person from any or all requirements contained in the Border Directions, if satisfied that an exemption was appropriate, having regard to the need to protect public health and the principles in sections 5 to 10 of the Public Health and Wellbeing Act.
134. In addition to the specific grounds for exemption outlined above, the Border Directions also provided for a general discretion to grant exemptions.
135. People could request an exemption by using a digital system provided by Service Victoria (a digital platform) or by contacting the Department by phone.
136. Under the Border Directions, a request for exemption had to 'contain all information reasonably required by the Department from time to time, for the purpose of protecting public health'.
137. Most complaints to the Ombudsman concerned the Department's assessment of applications for exemption.

Lawful authority to close Victoria's border

138. While many complaints to the Ombudsman concerned people's individual circumstances and decisions on their exemption applications, others raised broader concerns about the Border Directions not being:
 - lawfully issued under the Public Health and Wellbeing Act
 - proportionate and reasonably necessary
 - constitutionally valid
 - fair, having been issued with retrospective effect
 - compatible with human rights.
139. This section briefly examines the CHO's authority to close Victoria's border.
140. The use of emergency powers under the Public Health and Wellbeing Act has been available to the CHO and other Authorised Officers since 16 March 2020 when the Minister for Health first declared a state of emergency throughout the State of Victoria arising out of the serious risk to public health caused by COVID-19.¹⁶
141. In each version of the Border Directions, the CHO (or Acting CHO) has exercised emergency powers under section 200(1)(b) to restrict movement within an emergency area, and section 200(1)(d) to give any other direction considered reasonably necessary to protect public health.
142. Although provided for under section 200(1)(c), the Border Directions do not rely on the specific power to 'prevent any person or group of persons from entering the emergency area'.

¹⁶ *Public Health and Wellbeing Act 2008 (Vic) s 198(1).*

143. In accordance with the principles set out in Part 2 of the Public Health and Wellbeing Act, the CHO's decision to issue the Border Directions should be evidence-based, focussed on preventing disease, illness, injury, disability or premature death and proportionate to the public health risk. Lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk.
144. The investigation summonsed copies of the legal advice, including human rights assessments underpinning key versions of the Border Directions in effect from time to time. Having reviewed the advices, which included epidemiological data demonstrating the public health risk, it appears the CHO acted within his authority in issuing the Border Directions.
145. In each version of the Border Directions, the relevant decision-maker (being either the CHO, Acting CHO or Deputy CHO) attest to the fact that they consider it reasonably necessary to eliminate or reduce the serious risk to public health – and reasonably necessary to protect public health – to issue the Directions.

Directions that are considered 'reasonably necessary'

146. In considering the words 'reasonably necessary' in the context of public health Directions that imposed a 9pm to 5am curfew on all people in greater Melbourne in August 2020, Justice Ginnane found:

The words 'reasonably necessary' contained a subjective jurisdictional fact. The defendant's decision whether a curfew was 'reasonably necessary for the protection of public health' could only be challenged if it was proved to be 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.

The formation of the relevant state of mind 'will not be illogical or irrational if there is room for a logical or rational person to reach the same [state of mind] on the material before the decision maker'.¹⁷

147. Following this decision and on the available facts, it could not be said the decisions to issue the Border Directions were 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.¹⁸

Section 92 of the Australian Constitution - free 'intercourse among the States'

148. In February 2021, the High Court of Australia published a unanimous decision about the constitutional validity of Western Australia closing its borders with the *Quarantine (Closing the Border) Directions (WA), issued under the Emergency Management Act 2005 (WA)*.
149. Under the *Quarantine (Closing the Border) Directions (WA)*, Western Australia closed its borders to all persons from any place, subject to certain limited exemptions.
150. When Clive Palmer applied for and was refused an exemption to travel into Western Australia, he argued his rights under section 92 of the *Commonwealth of Australia Constitution Act 1901 (Cth)* had been infringed. Section 92 states:

92 Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

¹⁷ *Loiello v Gillies* [2020] VSC 722, [196].

¹⁸ *Loiello v Gillies* [2020] VSC 722, [196], referencing *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, 998 [38] (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 648 [131] (Crennan and Bell JJ).

151. The High Court held section 92 was concerned with freedom from unjustified burdens of a discriminatory kind. In separate judgements, the Court found that although Western Australia's border closure created a 'differential burden' between intrastate and interstate trade, commerce and intercourse, it was justified in the circumstances of the COVID-19 pandemic.
152. The *Emergency Management Act 2005* (WA) is similar to the Public Health and Wellbeing Act in terms of the effect of a declared state of emergency and making directions. But it is worth noting that the High Court's decision was based on the relevant facts at the time where there was no known vaccine.
153. Months before Victoria declared NSW and the ACT to be 'extreme risk zones' and closed its borders even to Victorian residents, people aged 40 years and above had been eligible to get vaccinated against COVID-19. According to the Department, vaccine levels at that time, however, were so low that they had a 'negligible impact on the public health rationale'.¹⁹

'Extreme risk zone' declared with retrospective effect

154. For over four months between March and July 2021, Victorian residents operated on the understanding that should they find themselves in an area determined to be a red zone they would be able to return home subject to receiving negative test results and quarantining for 14-days.
155. All of NSW and the ACT were determined to be red zones on 11 July 2021.
156. In a press conference just before midday on 20 July 2021, the Premier announced that red zone permits would be removed from the Border Directions for two weeks, effective from 11:59pm that day. After that time, all red zone permits that had already been issued would be revoked, and no others would be issued.
157. In light of these changes, between 11 and 20 July 2021, Victorian residents made travel plans on the understanding that they would be able to return home.

Figure 7: Tweet announcing changes to the Border Directions



Source: Twitter

¹⁹ Department of Health, Letter to the Victorian Ombudsman (25 November 2021).

158. Three days later, on 23 July 2021, red zone permits were reinstated together with the creation of extreme risk zones for which there were no permits. At the same time, all of NSW was determined to be an extreme risk zone retrospectively from 9 July 2021.

'I can [sic] to NSW on the 5th of July, to visit my elderly grandfather with dementia as he had been unwell. I stayed as he became increasingly ill, and then sadly passed away ... I am just a Victorian trying to return home.'

'I left Melbourne on 15 July for an end of life event [for my father in NSW] ... I had a Jetstar return ticket for 19 July ... Jetstar then scrubbed my flight.'

[The government] then created a new more restrictive Zone on the 23 July called an EXTREME Zone [and I was stuck].'

'I am a Victorian resident ... I accepted a short term employment contract in Sydney for 8 weeks commencing on June 14th and ending on Aug 10th. Due to the state border restrictions between NSW and Victoria across these dates, this work commitment ultimately resulted in a period of an additional 6 weeks ... during which time I was essentially rendered homeless.'

159. Some people told the Ombudsman they had travelled to red zones to attend funerals or end of life events, or for caregiving or compassionate reasons, understanding they would have to quarantine when they came home. When the rules suddenly changed on 20 July 2021, these people were locked out.

'We had everything set up to go and then the borders closed ... We had already been approved for a pass and were supposed to leave on the 27/07/21 ...'

We're losing all our money, we are living in a house with no possessions, furniture or means of food ... My partner has lost her job in Melbourne as we were supposed to be there already.'

'We first arrived in NSW on the 30th of June to take care of our grandchildren, one of whom has autism, so we could give our daughter a much-needed break as she continues to suffer symptoms post heart surgery late last year ...'

We have now been residing in temporary accommodation for 52 days which has cost us a significant amount of money that we cannot afford, being both retired and senior citizens.'

160. Others told the Ombudsman there wasn't enough time between the Premier's announcement that red zone permits would cease and the borders closing.

'I left Melbourne on the 19th of June for a 8 week holiday to Northern NSW ... The location was Kingscliff it is 1300km from the Victorian border I was informed you have 12 hours to get to the border before it shuts it was impossible to do that.'

'We are currently spending \$540 a week for accommodation which we cannot afford as we are both 70 year old pensioners ...

When the borders were going to be closed we were 12 hours away and would not have made it in time ... [accommodation] is costing us dearly as nearly half our fortnightly pension.'

161. As a consequence of the extreme risk zone applying retrospectively, from 23 July 2021 anyone who had been in NSW from 9 July 2021 was considered a 'prohibited person' and was unable to enter Victoria without an exception or exemption.

162. Responding to the draft report, the Department told the investigation:

the CHO determined that the border restrictions limiting travel into Victoria from ERZs – including the retrospective effect of zone declarations – was reasonably and proportionately necessary to manage and reduce the serious risk to public health that COVID-19 presented to the broader Victorian community.

This was based on the epidemiological situation at the time, considered public health advice, the principles under the PHW Act and the rights under the Charter. Accordingly, the retrospective effect of the declaration of NSW and ACT as ERZs to protect public health was appropriate in the circumstances.²⁰

Retrospective laws

163. Under the rule of law, retrospective laws should be avoided:

One element of the rule of law is that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. It follows that laws should not retrospectively change legal rights and obligations, or create offences with retrospective application.²¹

164. In Victoria, the Scrutiny of Acts and Regulations Committee ('SARC'), plays an important oversight role and accountability measure for 'legislative instruments'. Pursuant to section 25A of the Subordinate Legislation Act 1994 (Vic), the SARC may report to each House of the Parliament if it considers that any legislative instrument:

- does not appear to be within the powers conferred by the authorising Act
- has a retrospective effect (without clear and express authority)
- is incompatible with the human rights set out in the Charter of Rights Act.

²⁰ Department of Health, Letter to the Victorian Ombudsman (25 November 2021).

²¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report 127, August 2015), Chapter 9 – Retrospective Laws.

165. The SARC may make any recommendations it considers appropriate, including that a legislative instrument should be disallowed in whole or in part, or amended.
166. The Subordinate Legislation Act broadly defines 'legislative instrument' as 'an instrument made under an Act or statutory rule that is of a legislative character'.
167. According to the *Guidelines to the Subordinate Legislation Act 1994*²² an instrument will generally be considered to have 'legislative character' if it contains mandatory requirements with general application to undertake certain action(s), often accompanied by penalties or sanctions for non-compliance. Instruments of a purely administrative character, such as instruments of delegation, are not legislative instruments.
168. On 1 January 2021, regulation 26 of the *Subordinate Legislation (Legislative Instruments) Amendment Regulations 2020* (Vic) came into effect, which added Directions issued under section 200(1) of the Public Health and Wellbeing Act to the list of instruments prescribed not to be legislative instruments.²³
169. In effect, this change meant the SARC was unable to oversee Directions and report to Parliament.
170. While not applicable to the Border Directions, at the Commonwealth level,²⁴ 'unless the enabling Act specifies to the contrary, a legislative instrument has no effect if it has retrospective operation and, as a result, disadvantages or imposes liabilities on a person.'²⁵
171. Retrospective civil laws, however, are not uncommon, and 'may serve other policy objectives such as ensuring fairness, protecting the public, or addressing the consequences of a court decision that unsettled previous understandings of the law'.²⁶ Responding to the Ombudsman's draft report, the Department argued that in this context, 'the retrospective effect of the declaration of NSW and ACT as ERZs to protect public health was appropriate in the circumstances'.²⁷
172. While not unlawful, the retrospective declaration of NSW and the ACT as extreme risk zones had the potential to unfairly disadvantage Victorian residents trying to get home.

22 *Guidelines to the Subordinate Legislation Act 1994* issued under section 26 of the *Subordinate Legislation Act 1994* (Vic). Available online at <www.vic.gov.au/sites/default/files/2020-01/Subordinate-Legislation-Act-1994-Guidelines-2020.pdf>.

23 See *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic), Schedule 1, 46.1B

24 See *Legislative Instruments Act 2003* (Cth), s 12.

25 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report 127, August 2015), Chapter 9 – Retrospective Laws.

26 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Final Report 129, December 2015) at 1.54.

27 Department of Health, Letter to the Victorian Ombudsman (25 November 2021).

Governing for and on behalf of the people of Victoria

173. Many Victorian residents who were prevented from coming home when NSW and the ACT were declared to be extreme risk zones told the Ombudsman they felt locked out and let down by their government.

'I did not expect to spend my declining years locked out of my own home and not trusted by my Government.'

'I don't know where to live, I am retired from work. I cannot sleep, thinking about being homeless for the first time in my life, just because of rigid border controls, designed to keep people out.'

'This situation has had a huge effect on my emotional wellbeing and mental health as it is an end of life situation for my sister and me. It has magnified issues of mistrust, arrogance and lack of basic human rights in the role of government.'

'I feel abandoned by my home state after I defended them against the hordes of NSW residents arguing against the constant lockdowns.'

'I'm extremely frustrated and feel that I'm not being looked at as a person but rather a possible vector to spread the virus. What about my human rights? ... Honestly I'm left speechless at the level of disregard for people. Are we all in this together?'

'Effectively our lives are in limbo - our jobs, housing, and family future are all stuck. Yet, AFL players and staff can come and go as they like ... This double standard is unfair.'

'We are 74 and 70 years old ... This stress and anxiety is exacerbating existing health conditions. My husband has cardiac issues ... Our mental health is deteriorating and we feel helpless and abandoned by the Victorian Government.'

'All through the lockdowns, we were asked to follow the health guidelines, I did this to the letter, when it was the department's turn to trust me they didn't!'

174. Although the Public Health and Wellbeing Act seeks to promote and protect public health and wellbeing ‘in Victoria’, when the Bill was second read, then Health Minister Daniel Andrews MP described it in terms of the Government’s commitment to ‘all Victorians’:

The introduction of this bill is part of the Victorian government’s commitment to promoting and protecting the health and wellbeing of all Victorians.²⁸

175. The State’s responsibility to its residents is further articulated in the context of the Victorian Government’s general mandate to ‘govern for and on behalf of the people of Victoria’, as set out in the Victorian Constitution.²⁹

176. The decision to revoke red zone permits on 20 July 2021 and effectively prevent Victorian residents from returning home undoubtedly impacted those people’s health and wellbeing.

177. Fundamentally, the decision left Victorian residents stuck in areas that the Government considered presented a sustained and elevated risk for COVID-19 transmission.

178. If a Victorian resident had become infected with COVID-19 while in an extreme risk zone, they would have had to rely on the health care system in that area, instead of the publicly funded health care system designed ‘to keep Victorians safe’.

‘The pandemic has asked all of us to focus on the things that matter most – government is no different. We’ve invested in our health system to keep Victorians safe ...’

– Victorian Treasurer, Statement on the Victorian Budget 2021-22, 15 May 2021

179. Some with medical issues were left stranded across the border.

‘I am 73 with ... health issues, the Victorian Health advice was to seek medical assistance where you are, NSW was stretched, I should have been attended to by my local health professionals.’

‘We didn’t get a call, just another email saying we were rejected and that whilst they understood this might cause distress that their obligation was to protect Victorians (WE ARE VICTORIAN) from Covid and that we should call Lifeline because they could council [sic] us.’

²⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 8 May 2008, 1731 (Daniel Andrews MP, Minister for Health).

²⁹ *Constitution Act 1975* (Vic), s 16A(1)(b).

Proper consideration of human rights: issuing the Border Directions

180. Victoria is one of only three jurisdictions in Australia with dedicated human rights legislation. The Charter of Rights Act protects 20 basic rights and freedoms. It promotes a culture where people working in state and local government protect and consider everyone’s human rights in service delivery, policy, decisions and legislation.
181. Under the Charter of Rights Act, it is generally unlawful for public authorities, including Victorian Government departments such as the Department of Health and other public officials such as the CHO, to:
- act in a way that is incompatible with a human right; or
 - fail to give proper consideration to a relevant human right when making a decision.
182. Public authorities must comply with both of these requirements for a decision to be lawful.
183. 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’.
184. 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.³⁰
185. Each time the Border Directions were updated and reissued, the CHO (or Acting CHO) received detailed advice justifying their necessity, including information about community transmission of COVID-19 and current outbreaks, and consideration of the human rights implications.
186. The Department consistently identified the following rights as being engaged by the Border Directions as shown in the table below.

Table 1: Rights the Department identified as engaged by the Border Directions

section 8	recognition and equality before the law
section 10(c)	protection from medical treatment without full, free and informed consent
section 12	freedom of movement
section 13	right to privacy, family and home
section 14	freedom of religion
section 17	protection of families and children
section 19	cultural rights
section 21	right to liberty
section 22	right to humane treatment when deprived of liberty.

³⁰ *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, [190].

187. In the context of deciding to issue the Border Directions, to give proper consideration to human rights, the CHO had to:

- understand the rights referred to above
- give serious consideration to the impact of the decision to issue the Proposed Border Directions on the human rights of persons in Victoria
- identify countervailing interests or obligations in a practical and common-sense way, and
- balance the competing private and public interests (including the public health risk interests).

188. The Department's human rights advice provided detailed analysis for the CHO to understand how the Border Directions may limit human rights and reasons why such limitations would on balance likely be 'demonstrably justified' in the circumstances of the pandemic and the relevant risks to public health at the time.

189. The fact that the Border Directions included both specific and general exemption powers to take individual circumstances into account was referenced as a measure to strengthen human rights safeguards.

190. The human rights advice noted that it remains an objective for the Border Directions to continue to facilitate the return home of Victorians where it can be achieved safely, without imposing excessive risk on the wider community. However, with reference to the Coolaroo Community Outbreak, the advice acknowledged:

the importance of monitoring compliance of returnees from red zones with the conditions of entry such as self-quarantine, and testing at specified intervals. This is essential if the conditions are to be effective to prevent returnees seeding further outbreaks.

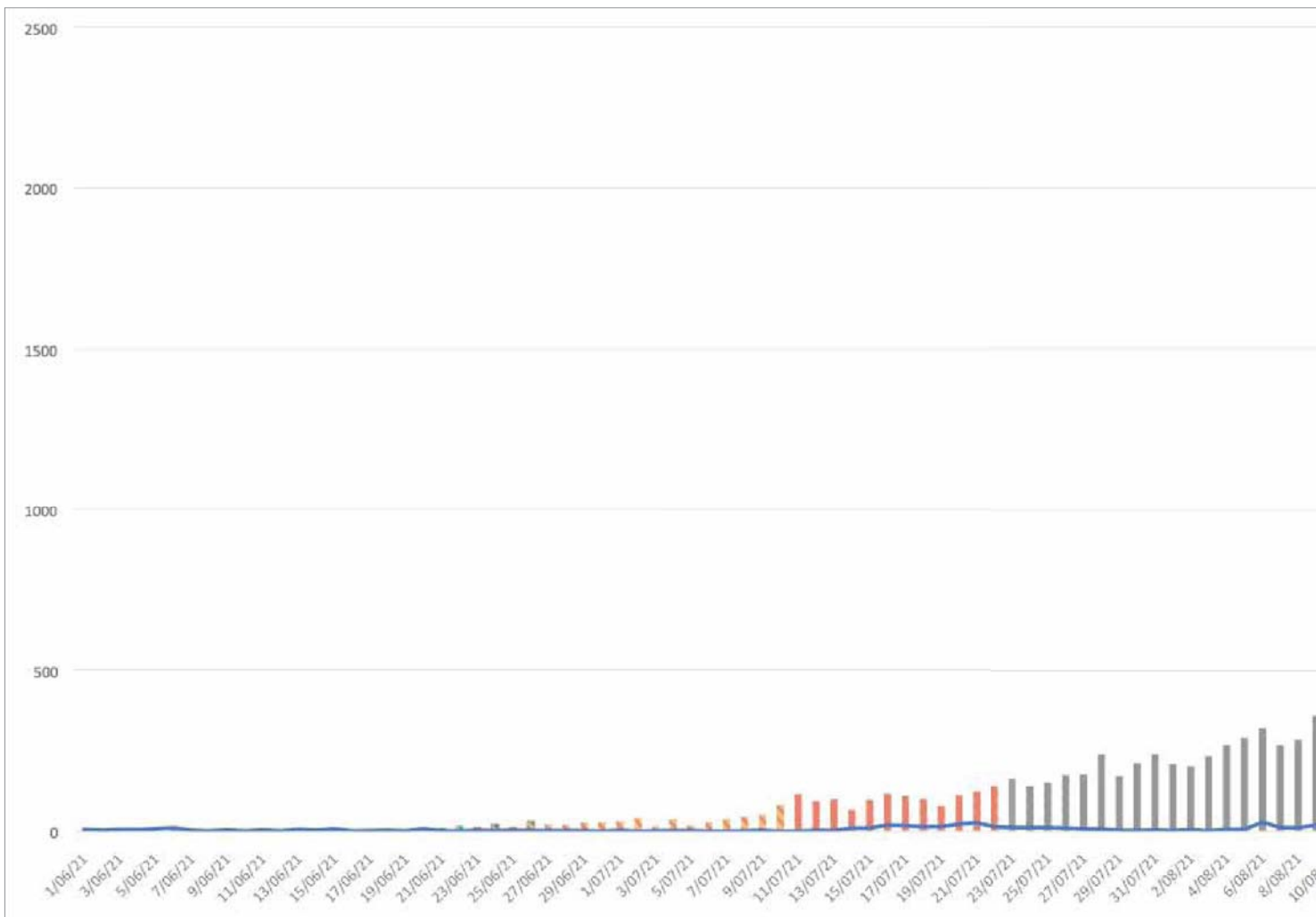
... Entry by Victorians seeking an exemption happens more slowly due to the time taken to consider exemption applications. This enables the resources for compliance monitoring to be available to meet the need. It will be important for those resources to remain available given the risk posed by those returning from red zones and any extreme risk zones.

191. Overall, the investigation did not receive any evidence to suggest the CHO (or Acting CHO) failed to properly consider human rights in deciding to issue the Border Directions or deciding to update or revise the Directions from time to time.

192. The investigation considered the Department's detailed human rights advice was appropriate, noting the significant restrictions imposed by the Border Directions.

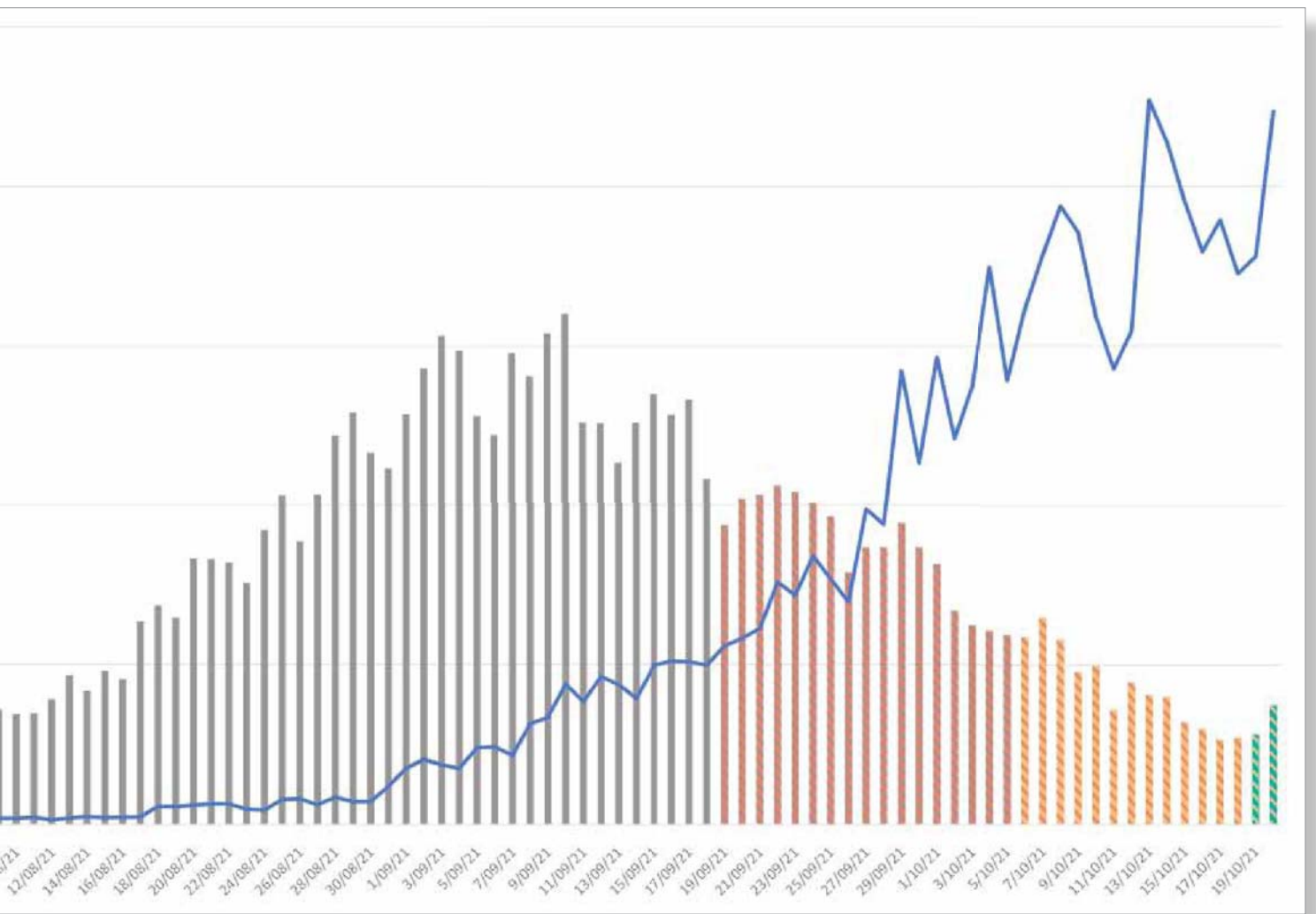
193. Finally, the human rights advice also noted that any decision – whether to grant an exemption or not – would also be required to be compatible with and properly consider human rights.

Figure 8: Comparison of NSW and Victoria daily COVID-19 case numbers and 'zone' categorisation under Victoria's travel permit system



Source: data compiled from <coronavirus.vic.gov.au> and <data.nsw.gov.au>

- Daily Covid-19 case numbers in Victoria are represented by the line graph.
- Daily Covid-19 case numbers in NSW are represented by the coloured bar graph.
- The colour of the bar graph indicated whether any or all of NSW was declared to be a green, orange, red or extreme zone under the Border Directions. On some days, different areas within NSW were different zones.



The epidemiological situation in NSW and Victoria

194. On 17 June 2021, NSW recorded three new locally acquired cases. This escalated to 1,648 locally acquired cases by 23 July 2021 as part of the outbreak of the Delta variant. There were a high number of cases not in full isolation while infectious, and the 'public health advice [in NSW at that time] was that the situation was like the scenario faced in Victoria's second wave of transmission in July 2020'.³¹
195. Because of the high case numbers, including unlinked cases and cases in the community while infectious, the Department considered there was an 'ongoing significant risk of incursion from NSW into Victoria' which was 'compounded by reports of non-compliance with restrictions ... in NSW'.³²
196. At 23 July 2021, there were 158 active cases and 31 active outbreaks in Victoria. These outbreaks were seeded from NSW cases travelling to Victoria and were all associated with the Delta variant. The locally acquired cases in Victoria were linked to the Maribyrnong Community Outbreak, which started with a removalist from NSW, and the Coolaroo Community Outbreak, which started with a red zone permit holder returning from NSW. The Department told the investigation:
- This makes plain that every exemption granted to allow a person to enter Victoria presented a public health risk because any traveller was at risk of carrying the virus into Victoria that could seed an outbreak.³³
197. The Department told the investigation that these incursions, and the risk of further incursions meant 'further safeguards were required to mitigate against the risk of another seeding event.' Accordingly, the declaration of an 'extreme risk zone' created a presumption that people were not able to enter Victoria from that area due to the significant public health risk.
198. By the end of August 2021, Victoria was no longer working to an elimination or 'COVID-zero strategy' but remained focussed on keeping daily COVID-19 case numbers low.³⁴
199. On 31 August 2021, for the first time all year, Victoria recorded over 100 new daily COVID-19 cases.
200. By this time, nearly 60 per cent of the Victorian population aged 16 and over had received at least one vaccination dose and over 50 per cent of population aged 50 and over were fully vaccinated.
201. Responding to the Ombudsman's draft report, the Department noted that at 29 September 2021, less than 50 per cent of Victorians aged 16 and over were fully vaccinated. As vaccinated people are still able to transmit COVID-19, there was a risk that fully vaccinated Victorians could seed the virus in the community. The Department noted that:
- the low levels of vaccination meant that there was a material risk that even fully vaccinated Victorians could acquire and transmit COVID-19 in the community. This was the context for the introduction of ERZs and the designation of NSW as an ERZ.³⁵

31 Department of Health, Letter to the Victorian Ombudsman (25 November 2021).

32 Department of Health, Letter to the Victorian Ombudsman (25 November 2021).

33 Department of Health, Letter to the Victorian Ombudsman (25 November 2021).

34 Patrick Durkin and Tom Burton, 'Victoria abandons COVID zero but national plan in doubt', *Australian Financial Review* (online), 31 August 2021 <www.afr.com/policy/health-and-education/victoria-abandons-covid-zero-but-national-plan-in-doubt-20210831-p58ngs>.

35 Department of Health, Letter to the Victorian Ombudsman (25 November 2021).

Complaints to the Ombudsman

202. Between 9 July 2021 and 14 September 2021 (the date this investigation commenced) the Ombudsman received 81 complaints from people seeking to enter Victoria under the Border Directions. The vast majority were from Victorian residents trying to come home, including many older people and others with a legitimate need to travel across the border for a range of reasons.

203. On 10 September 2021, Victorian residents who had been residing in a NSW border area for at least the past 14 days were able to apply for a new permit exemption category to come home. This specific category of exemption was available for seven days.

204. Throughout September, both the daily number of COVID-19 infections and vaccination rates in Victoria climbed quickly. This left many who remained stuck in NSW and the ACT unsure why they couldn't come home in light of the changing risk profile.

205. The Ombudsman sought to resolve complaints quickly and informally where possible with the Department. Although the Ombudsman could not require the Department to change decisions or grant exemptions, a number of fairer decisions on individual cases were made after enquiries with the Department.

206. During this initial period, four complaints stood out to the Ombudsman as raising potentially systemic issues about the exercise of discretion and decision-making processes under the Border Directions.

'I am very worried about my wife's health, now exacerbated by our combined mental health and stress ...

I'm 70 & my wife is 69, we are mature responsible citizens. What more do we have to do? Can you please help us?'

'I honestly cannot understand how the Victorian government can continue declining individuals who reside in towns such as Port Macquarie where I live.

There has been no Covid-19 cases in the LGA for almost 18 months.'

'The impact of this decision has left my 88 year old father and myself devastated ...

Every day he asks me 'can we go home today?' ... He's lost the love of his life, sold his home because we can't maintain two homes in different states ... and found out his daughter has cancer...

I'm physically, emotionally, and mentally exhausted. I'm covered in a rash from stress.'

'My removalists are delivering my furniture and belongings [to my home in Beechworth] 17 September, and I won't be there.

I am homeless at the age of 68, no job and no place to live because of Border Control personnel.'

Case in focus: Students from Yanco Agricultural School

On 19 August 2021, Katrina, the mother of a student at Yanco Agricultural School in rural NSW, complained to the Ombudsman on behalf of ten students aged between 14 and 18. The students wished to return to their families in Victoria after their school closed. When Katrina contacted the Ombudsman, the children were staying in temporary accommodation with other families from the school.

The Department had rejected six of the student's applications but after considerable pressure from the families' local Members of Parliament and coverage in the media, reconsidered these applications and offered the children permission to enter Victoria subject to a 14 day stay in hotel quarantine in Melbourne with an accompanying parent or guardian. The children's families were concerned the Department's proposal to require the children and their guardians to travel to Melbourne and stay in hotel quarantine would increase the risk of them contracting and spreading COVID-19:

No one has any idea what the long term impact will be on our younger generation of this pandemic but as a parent and a health professional, it is up to us to advocate on their behalf, and we beseech you to investigate our children's plight.

In a letter to the Department, Katrina highlighted that the South Australian Health Department was enabling children at boarding school in rural NSW to return home to quarantine with their families. In response to the Ombudsman's enquiries the Department maintained the 'most appropriate option was to offer hotel quarantine to the families in order to allow them to be reunited in a manner that also [seeks] to mitigate the high public health risk of doing so.' Yanco Agricultural School is in Leeton, a small and remote town in the Riverina region of NSW. At the time, the local government area had not had any previous or confirmed cases of COVID-19 throughout the course of the pandemic. Katrina asked the Department to consider the children's individual circumstances:

We have the greatest respect for the urgency to curtail this disease's spread, but we desperately implore you to review the uniqueness of the children's school, the location of their homes and the commitment offered by their families.

On 27 August 2021, the Ombudsman wrote to the Secretary to the Department, noting:

I can understand the families' dismay at a decision that would effectively result in their children coming from a part of rural NSW where there are no cases, into the hotel quarantine system where there are cases of COVID-19, when there are no cases in their own communities. It is difficult to see how this is the least restrictive decision consistent with public health risks.

The Secretary responded that 'permits to enter Victoria from such high-risk zones are only available in specified circumstances – none which are applicable to the Yanco students'. The Secretary said the fact there were no confirmed cases in Leeton shire was not directly relevant:

The designation of all of NSW as an ERZ was a necessary and appropriate emergency risk management measure based on a science-based risk assessment. ... [R]isk is posed by entry into Victoria by persons from anywhere in an extreme risk zone, and the VPBCD apply to each of those persons.

Ultimately, two of the children entered hotel quarantine. Katrina said this was distressing as her child had to travel from Leeton where there was no COVID-19 to Sydney, where COVID-19 was circulating. She said 'the stress that it put on my child was immense, it was like being detained like criminals'. After their applications were rejected, two other children decided to stay in NSW at family friends' farms and five children travelled to the border bubble and stayed with family friends there for two weeks before returning to Victoria once Local Government Areas in the cross-border community were downgraded from 'extreme risk zones' to 'red zones' on 19 September 2021. The remaining child was able to enter Victoria as an 'excepted person' after he sustained a leg injury that required urgent medical attention.

Case in focus: Phillipa

Phillipa travelled to Wagga Wagga in NSW in April to support her daughter after she gave birth to premature twins. Phillipa's son-in-law was deployed overseas with the Australian Army at the time and was unable to provide immediate support.

After Phillipa's daughter no longer needed her assistance, she applied for an exemption to return home to Gippsland on 18 August 2021. Initially, Phillipa applied for health, wellbeing, care and compassion reasons as she needed to attend medical appointments and have tests done for a pre-existing condition. In a second application submitted four days later, Phillipa added information about needing to return home to care for her livestock, which her husband was unable to attend to as he was required to leave their farm for work.

Phillipa provided supporting evidence with her application including a letter from the (then) Department of Environment and Primary Industries confirming her Property Identification Code for her livestock, a statutory declaration explaining the circumstances, identity documents and negative COVID-19 test results.

Phillipa then sent several emails to the Department in the days after she applied as she was increasingly concerned for her livestock's wellbeing. One of Phillipa's ewe's had already died and the situation was becoming increasingly urgent. In an email to the Department on 31 August 2021, Phillipa said:

Our paddock has no grazing feed left so without hand feeding, and an urgent worm treatment, the rest of the flock will quickly succumb to malnourishment and starvation. It is also lambing season so I URGENTLY need to attend to the sick ewe and be there for lambing ewes needing assistance and their feeding for lambs to survive.

I am greatly distressed and heartbroken by the loss of our ewe ... And now I am stressed and concerned at the risk to the rest of the flock and am panicking and in anguish over the pain and suffering I am causing to my animals by not attending to their care and urgent needs ... PLEASE can you help me.

When the Department failed to respond to her emails, Phillipa complained to the Ombudsman:

This seems inhumanely cruel to leave me unable to return home, to leave our animals to suffer and die and not respond with any details ... The pain and anguish this is causing myself, my husband and our animals is beyond bearable, cruel on every level and wrong.

The Department told the Ombudsman it asked Phillipa for additional information but that she did not provide it:

[Phillipa] failed to provide any sufficient evidence to support her travel circumstances and the case was rejected ... if an applicant's circumstances change or they can provide new evidence - they are encouraged to lodge a new application with the Department.

On 9 September 2021, Phillipa told the Ombudsman she had taken the difficult decision to move or destroy her animals as there was nobody to care for them. Phillipa said:

I am beyond devastated and have sought medical help and counselling as I am not coping well. I cannot fathom the cruelty of this process and their decision. Surrendering our animals has broken my heart, my spirit and my faith in our state government and the humanity of the people that make such decisions based on fear and not at all on human rights, compassion or justice.

The Department told the Ombudsman:

While it is understandable that people wish to enter Victoria to care for animals, in most cases, arrangements can be made for others to care adequately for animals. The threshold for exemptions in order to care for animals is therefore quite high, in the face of the significant risk to public health posed by entry into Victoria from high risk zones.

Case in focus: Judy and Terry

Terry and his sister Judy obtained a permit to leave Victoria and travel to NSW on 15 July 2021 to attend Judy's sister-in-law's funeral. They applied for an exemption to return home to Victoria on 1 August 2021 but their application was rejected because it expired – the Department did not assess and make a decision on the application before their proposed travel date.

A second application submitted on 10 August 2021 was rejected for the same reason, then a third application was rejected because the Department decided insufficient medical evidence was supplied. Terry and Judy lodged two further applications, but these were rejected as duplicates.

Judy is 82 years old and has significant heart issues. She is also a carer for her adult daughter who suffers from stage four cancer. Terry first complained to the Ombudsman on 11 August 2021, raising concerns about procedural fairness:

The published material does not disclose the criteria used by the department to assess applications seeking [exemptions] and no indication that the assessment of health or wellbeing status of applicants is processed by suitably qualified personnel. In addition the published material does not include any clear pathway by which decisions can be challenged nor does it include any means by which an applicant can track progress of applications nor is there a case manager for an application when lodged.

After contacting the Department again, Terry said:

This response, or lack of response, goes to the heart of my complaint. The travel permit system is not transparent, it is unfair, under resourced and it is on the surface disorganised.

After the Ombudsman made enquiries, the Department established that the application it closed as a duplicate should not have been rejected. It then requested further information from Terry and Judy on 1 September 2021 to prove that they had attended a funeral in NSW.

Terry raised concerns about the Department's communication:

If the only reason to grant a travel permit is for urgent or emergency purposes then why is that not clearly stated in the material published by the Department and why does the published material include health and wellbeing exceptions and why do refusal notification[s] invite further applications?

Terry said he spoke with a member of the Domestic Exemptions Team and that it was agreed his and Judy's travel date would be 9 September 2021. This was because there were limited flights out of Newcastle and they did not want to risk going to Sydney airport where there was a greater risk of contracting COVID-19.

Despite this agreement, the Department then emailed Terry an approval to travel on 4 September 2021 or up to 72 hours after that date. After Terry contacted the Department again it told him that letter was sent to him in error and that he and Judy should still seek approval to enter Victoria on 9 September 2021. The permit was then issued on 8 September 2021 and Terry and Judy flew to Melbourne the following day.

After he had returned to Melbourne, Terry told the Ombudsman:

I am still seeking a response from Department of Health regarding my complaint. If anything the fact that I got an [exemption] highlights for me that the system being followed by the department is highly prone to inconsistency and is causing unreasonable distress and hardship to many individuals. I note that the letter of approval we got does not state the reasons or category under which approval was granted.

I've checked the application website and it does not appear to have amended to include any new categories and it still does not disclose what criteria will be used in determining applications nor does not indicate a pathway to approval for applicants.

Case in focus: Henry

Henry moved from Melbourne to Sydney at the beginning of 2021 to study. Initially, his classes were conducted in person but when his university moved to delivering classes online only during NSW's lockdown, Henry was stuck in a small studio apartment and his mental health quickly deteriorated. Henry said:

I feel anxious, stressed and depressed every day at the thought of being stuck in NSW, away from my parents and family back home in Melbourne ... I am scared, alone and losing all motivation to live and look after myself. I'm losing sleep, not eating properly and cannot focus in any of my lectures ... If my exemption is declined then I do not know how I will be able to sustain living in NSW by myself for any longer ... Please, Please, Please, allow me to come back home.

Henry's mother contacted the Ombudsman after the Department rejected his application to return to Victoria. The Department had rejected Henry's application because it considered he was not a 'returning Victorian resident' due to him being a resident of NSW at the time the border closed. It told the investigation that 'while [Henry's] view of himself as a Victorian is understandable, [it] is separate from a factual determination of his ordinary place of residency.'

Henry submitted supporting evidence with his application including a statutory declaration, identity documents, a questionnaire, a negative COVID-19 test result and a letter from a doctor stating he was experiencing depression and anxiety. He also explained that he would be able to effectively isolate for 14 days in a standalone granny flat on his parents' property in Melbourne.

The Department told the investigation that many applicants provided letters from doctors and that more compelling evidence was required. It indicated that a letter from a psychiatrist stating that treatment was not available in NSW or that 'immediate, compelling and urgent' support was needed in Victoria would have been more persuasive.

Ultimately, however, the Department said Henry's application would not have been granted as the Department had determined he was not a Victorian resident and the evidence supplied did not meet the threshold at the time, as articulated in the CHO guidance material and Deputy CHO decision diary.

Commencing the investigation

207. As complaints continued to come in, the Ombudsman decided it was in the public interest to examine the exercise of discretion under the Border Directions, and commenced a formal investigation on 14 September 2021.
208. On 15 September 2021, when this investigation was publicly announced, the Ombudsman immediately received 85 new complaints from people stuck in NSW and the ACT.
209. Four days later at 11:59pm on 19 September 2021, 65 local government areas in regional NSW and the Jervis Bay Territory were reclassified to red zones, meaning for the first time in two months, Victorian residents in those areas could apply for a permit to come home, effectively resolving their complaints. The ACT and other areas in NSW, including Greater Sydney, remained extreme risk zones.
210. On 23 September 2021, the border town of Albury in NSW was also downgraded to a red zone, allowing more Victorians to return home via the busy Albury / Wodonga route.



Paul's bad luck getting home from Northern NSW via Albury

On 19 June 2021, Paul and his family left Melbourne for an eight-week holiday in Northern NSW. The family was in Kingscliff, nearly 1,500 km from the Victorian Border when they heard that 'red zone' permits would be revoked within 12 hours.

It was not possible for the family to have made it home in that time.

For the next eight weeks, Paul and his family (including their two dogs) spend an additional \$1,000 per week on accommodation. They applied for exemptions to return home twice and were rejected both times. Everyone in Paul's family was fully vaccinated.

We have sent 2 applications in - both have been refused and on the bottom of the letter [they say] 'ring Lifeline' or 'ring Beyond Blue' ... you are kidding me.

The whole 4 of us are fully vaccinated and it's still a no go - what is the use of being fully vaccinated?

When a local lockdown was lifted in Northern NSW, Paul drove his family to Albury in the hope that being closer to the border might make it easier to come home.

By the time Paul got to Albury, Kingscliff had been downgraded to a 'red zone', but Albury remained an 'extreme risk zone' because of a local outbreak. Had Paul stayed in Kingscliff, he would have been able to get a 'red zone' permit on 19 September 2021.

Paul and his family received their 'red zone' permits on 23 September 2021 after Albury was also downgraded and were able to return home to quarantine.

211. On 30 September 2021, fully vaccinated Victorian residents were able to apply for a new extreme risk zone permit to return home:
- With Victoria moving towards its vaccination targets at a rapid pace, parts of the state's domestic travel permit system will be modified to allow Victorians in Greater Sydney and the ACT to come back home.
- Under current rules, Victorians in Extreme Risk Zones can't return home unless they obtain an exemption, have another valid permit (such as for specified workers) or are exempted for limited reasons.
- As part of the changes advised by the Chief Health Officer, which will come into place from 30 September, Victorians in an Extreme Risk Zone will be eligible to return home to Victoria if they are fully vaccinated.³⁶
212. At 11:59pm on 6 October 2021, areas in NSW and the ACT that had remained extreme risk zones were downgraded to red zones, and those that had been red zones were downgraded further to orange zones. The ACT was then also downgraded to orange on 14 October 2021.
213. Finally, from 11:59pm on 19 October 2021, all local government areas in Greater Sydney (including Blue Mountains, Central Coast, Shellharbour and Wollongong) became orange zones and all other local government areas in regional NSW, plus Jervis Bay Territory, became green zones.
214. By 20 October 2021, for the first time in three months, all non-residents (including people seeking to move to Victoria) were able to apply for a permit to enter the State from NSW and the ACT.
215. Since 9 July 2021, the Ombudsman received 315 complaints about the Border Directions, the vast majority of which continued to resolve as areas were downgraded to orange and green throughout September and October 2021.
216. At the time of this report, Victoria's borders are largely open, and domestic travel permits are no longer required to enter the State. At its core, however, this investigation is about the Department's discretionary decision-making, and the conclusions may be relevant to future processes.
217. When 'as of right' red zone permits were taken away from Victorian residents on 20 July 2021, the Premier said that when applying for exemptions, individual circumstances would be taken into account 'which is what I would think anyone seeking an exemption would want'.
218. The following section examines the Department's discretionary decision-making to consider whether people's individual circumstances were reasonably taken into account.

³⁶ Premier of Victoria 'Pathway For Vaccinated Victorians To Come Back Home' (Media Release, 23 September 2021) <www.premier.vic.gov.au/pathway-vaccinated-victorians-come-back-home>.

Decisions on exemption applications under the Border Directions

219. As discussed above, people could apply for an exemption from the Border Directions either on specific grounds, such as to attend a funeral or to return home for compassionate reasons, or under a general discretion.

220. Either way, an exemption could be granted if the decision-maker had regard to the need to protect public health and the principles in sections 5 to 10 of the Public Health and Wellbeing Act. These recognise 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 prevention of disease, illness, injury, disability or premature death is preferable to remedial measures
- people engaged in the administration of the Act should as far as practicable ensure that decisions are transparent, systematic and appropriate
- decisions and actions should be proportionate to the public health risk sought to be addressed and not made or taken in an arbitrary manner.

221. Before granting an exemption, decision-makers were required to consider:

- whether the person was a diagnosed person or close contact of a diagnosed person; and
- documentary evidence provided by the person applying, including:
 - o information about their circumstances and grounds for seeking an exemption
 - o test results or other medical information
 - o information from other states or territories about the person's need not to self-quarantine
 - o any further documents requested by the decision-maker.

222. Even if a person was granted an exemption, Authorised Officers were not prevented from exercising an emergency power to give the person a different direction or impose a different requirement or condition of exemption.

How the Department dealt with exemption applications

223. The Department's Domestic Exemptions Team ('DET') was responsible for managing requests for exemptions under the Border Directions. When an application was received, it progressed through triage and allocation to assessment then onto a decision.

225. Staffing levels fluctuated throughout the second half of 2021, depending on operational demand. In early July, the DET had just 20 staff but this increased to 285 by early September. At 11 October 2021, the DET consisted of 13 VPS6 staff, 37 VPS5 staff and 144 VPS4 staff.³⁷

224. The DET was staffed by public sector employees including:

- Case Officers (VPS4)
- Team Leaders (VPS5)
- Business Managers (VPS6)
- Directors (Executive).

Figure 9: Summary of steps taken by the Domestic Exemptions Team to process exemption applications



Source: Department of Health

³⁷ Department of Health, Letter to the Victorian Ombudsman (11 October 2021).

Triage and allocation

226. Exemption applications were received via Service Victoria, an administrative office within the Department of Premier and Cabinet via a digital platform.
227. As part of their application, people were required to fill out a questionnaire explaining their circumstances as well as provide their supporting evidence, including in many cases, proof of a recent (with 72 hours) negative COVID-19 test result. They were also required to nominate a date they intended to travel to Victoria.
228. Once an application was received, an automated email response was generated advising that exemptions would not be prioritised unless they related to end-of-life events or funerals. The response also provided information about the types of evidence required for each category of exemption.
229. The automated email response changed from 4 August 2021 to provide more detail about the type of information the Department required and included a table with the criteria and supporting evidence for each category of exemption.
230. Once received, a Team Leader categorised the application in accordance with the specific circumstances outlined in the Border Directions. If further information was required, the application was allocated to a 'waiting for information' queue. After supporting information was received, the application would be allocated to a Case Officer.

Figure 10: Example of a template response to application for exemption, before 4 August 2021

Dear [REDACTED]

Case Reference: [REDACTED]

We write in relation to your Victorian Border Permit Exemption Application. Please carefully read the following information.

The Department has been responding to an unprecedented volume of exemption applications due to the current public health situation happening across parts of Australia.

Exemptions applications are assessed on a case-by-case basis and are only granted in extremely limited circumstances. Unless your situation is urgent, we strongly advise that you reconsider your need to travel.

Please also consider whether you are currently permitted to travel to Victoria under the Stay at Home orders that may be in place in your state or territory.

If your exemption is approved, please note you will be entering Victoria under strict conditions, which may include a 14 day self-quarantine requirement, and the requirement to self-quarantine away from any others with whom you may be residing, and strict testing requirements.

If you still wish to progress with your exemption application, we require additional information and documentation to progress your application further.

Lists of interstate COVID-19 exposure sites have been published on the [Coronavirus Website](#). Please advise in the below questionnaire whether you have attended any of these exposure sites during the times listed.

In order to continue to progress your application, please use [this link](#) to:

- provide additional information by completing the online questionnaire (please ensure that you provide detailed information regarding your circumstances); and
- provide all relevant documentary evidence as stated below.

Supporting evidence is to include:

- A negative COVID-19 test result
- Death notice, or obituary
- Letter from the funeral home, or a public announcement of the funeral, or a statement by the applicant that includes:
 - identity of the deceased
 - time and location of the funeral service
- Statement as to the applicant's relationship with the deceased
- Statutory declaration as to the location the applicant intends to reside in Victoria, any other persons residing at the same address and ability of the applicant to self-isolate until a negative COVID-19 test has been received
- Any other relevant supporting documentation

We require you to get tested for COVID-19 within 48 hours prior to your intended date of travel to Victoria. You should provide us with evidence of the result once received, as this would support your exemption application.

Once the information and documentation you have provided has been assessed, we will contact you to advise you of the outcome of your application.

For queries regarding your application, please email DomesticExemptions@health.vic.gov.au including your Case Reference Number and Full Name in the subject line.

For the latest information on travel into Victoria, please see [here](#).

For general queries relating to coronavirus health concerns or for the latest information on current restrictions, please call the Coronavirus Hotline on 1800 675 398. Interstate or international callers call (+613) 9096 9000.

Kind Regards,

Domestic Exemptions Team
Compliance and Enforcement | Engagement and Delivery
COVID-19 Response | Department of Health
DomesticExemptions@health.vic.gov.au
www.health.vic.gov.au

Source: Complaint to the Victorian Ombudsman

Assessment

231. Case Officers assessed applications against guidance material issued by the CHO. This guidance material, discussed in more detail below, set out evidence the Department required for applications to be approved, and the criteria against which applications should be assessed.
232. If a person had not provided sufficient evidence (as required by the CHO guidance material), Case Officers attempted to contact them to obtain it.
233. If that evidence was not obtained, the Case Officer would recommend the application be rejected and progress it to a Team Leader for review. If sufficient evidence was provided, Case Officers documented the reasons they thought the evidence was sufficient before progressing the application. In this case, Case Officers also drafted an exemption letter.
234. A Team Leader then reviewed the Case Officer's reasons and draft letter. If they were not satisfied that the application met the CHO guidance, they would take action or send it back to the Case Officer. If the Team Leader was satisfied, it would be sent to a Business Manager for further review. After the Business Manager had reviewed the application it was sent to the decision-maker.
235. Some people told the Ombudsman they felt frustrated by the bureaucracy involved in processing applications and at not being able to speak directly to a decision-maker.

'You only get to talk to the 'fact collectors' who have a list of criteria to request with no specialty in the area.

'They send it 'up the line' and the people who have that specialist knowledge do not feedback in any way so it becomes a bureaucratic process.'

'Each time someone calls it is a different person who asks me to do something that I have already addressed and evidenced in my application.'

'There is no help for those who are stranded. There seems to be little concern over situations like mine from those bureaucrats sitting comfortably in their own homes or offices.

'Surely this kind of makes a mockery of having a permit system at all.'

236. Many people applying for exemptions were seeking to return to Victoria for medical reasons - to attend surgery or other appointments, or to care for sick relatives.

237. To deal with these applications, the Department assessed the seriousness of the medical issues faced by the people involved. For example, if a person applied for an exemption to return home to attend a medical appointment, the Department would consider whether travel was critical, could not be delayed, and whether the person could not have their medical needs met within the extreme risk zone.

238. Before September 2021, when members of the DET needed to seek medical advice about an application, they were required to consult the Deputy CHO. From early September 2021, the Department engaged a medical advisor to provide such advice.

'We are elderly people, 69 and 72. This situation is heartbreaking for us ...

We have had 3 exemptions rejected, even though we have an intellectually disabled son who needs our support at home and both my husband and myself need to attend medical appointments.'

'The battery in [my husband's] defibrillator is nearing the end of its efficacy and needs surgery to replace it ... If the defibrillator sets off a charge between now and having it replaced ... it could result in death or a stroke ... My husband is a Vietnam Veteran and has Post Traumatic Stress Disorder and high anxiety ... The Department of Health officer suggested we drive to NT, then SA to travel [into] Vic.'

'I have had kidney infections and I am bleeding substantially and I can't see my doctors.'

'I have had to cancel various medical appointments, including an appointment for a Covid-19 vaccination.'

Decision

239. Under the Border Directions, decisions about exemptions could only be made by the CHO or Deputy CHO (or the Secretary or a Deputy Secretary to the Department or an Executive Director or Director in the COVID-19 Response Division of the Department).
240. The Department, however, limited the number of decision-makers for exemption applications, requiring them to be either a Director or a Deputy CHO.
241. Where a Director was satisfied that an application was consistent with criteria in the Border Directions and the CHO guidance material, they approved it. Applications received that were outside the parameters of the CHO guidance material were escalated to a Deputy CHO for decision.

Applications escalated to a Deputy CHO

242. Applications that fell outside the categories in the CHO guidance material were categorised as 'other' and were escalated to a Deputy CHO for decision. Applications that involved a health issue, or where a medical advisor had advised escalation was appropriate, were also escalated.
243. Business Managers would attend twice-daily meetings to put these applications to a Deputy CHO for decision. Information from these meetings was recorded in the Deputy CHO decision diary.

How the Department decided exemption applications

244. In the month before extreme risk zones were introduced to the Border Directions, on average the Department processed over 15,000 border permits every 24 hours, and more than ten travel permits were issued per minute.³⁸
245. By 23 July 2021 when NSW was declared an extreme risk zone the daily number of travel permit applications processed reduced to less than 6,500, presumably reflecting the fact that most people wanting to enter Victoria from NSW would now need to be an 'excepted person' or require an exemption.
246. According to the Department, almost 8,000 exemption applications were open in early August 2021, and the DET was scaled up from 20 staff in early July to 285 by early September. Over 100 staff were onboarded in the space of nine days from mid-July and a further 164 by early September.³⁹
247. The DET received an average of 420 exemption applications each day between 23 July 2021 and 6 September 2021. According to the DET's Operations Guide, staff responsible for categorising and prioritising applications were expected to complete 50 per hour: an average of almost one every 30 seconds.
248. In the same period, an average of 500 applications were dealt with each day, and on some days, over 1,000.⁴⁰

38 Data collated from daily coronavirus updates for Victoria (23 June - 21 October 2021), available online at <www.dhhs.vic.gov.au/coronavirus-update-victoria/>.

39 Department of Health, Letter to the Victorian Ombudsman (11 October 2021).

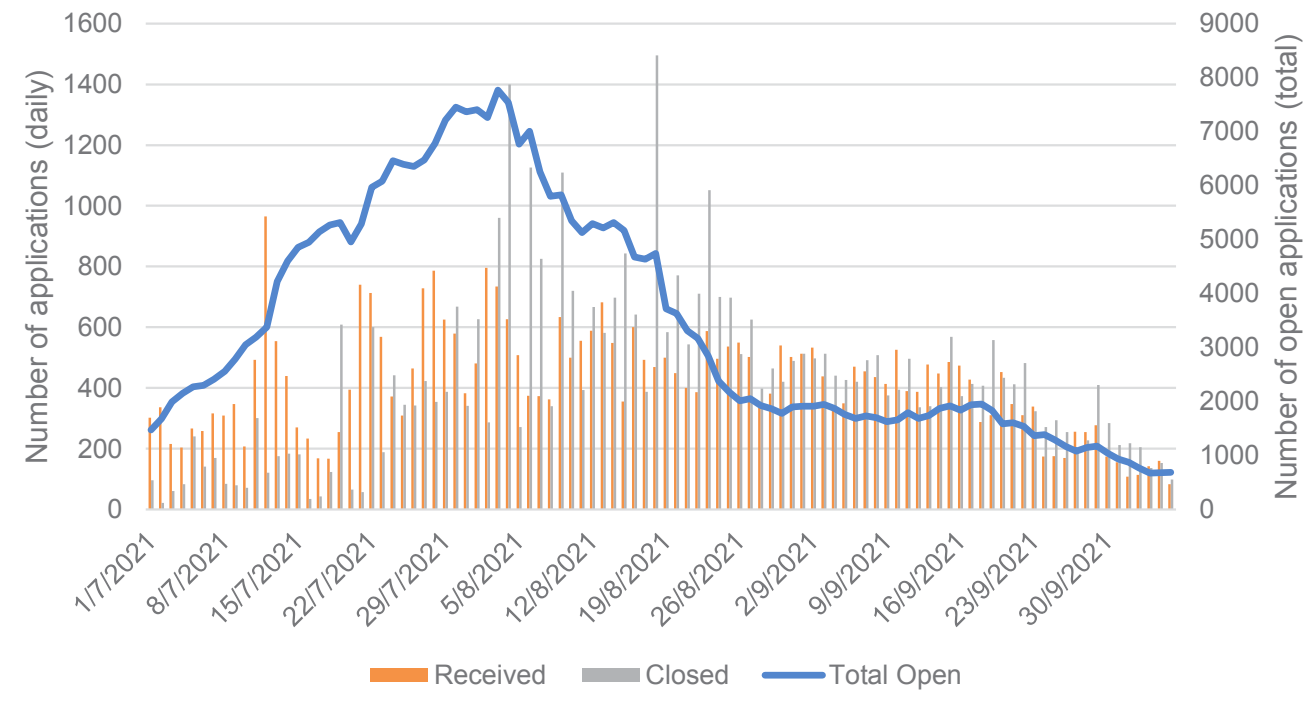
40 Department of Health, Letter to the Victorian Ombudsman (11 October 2021).

Figure 11: Domestic Exemptions Team structure and decision-making hierarchy



Source: Department of Health

Figure 12: Number of exemption applications received, closed and open



Source: Department of Health

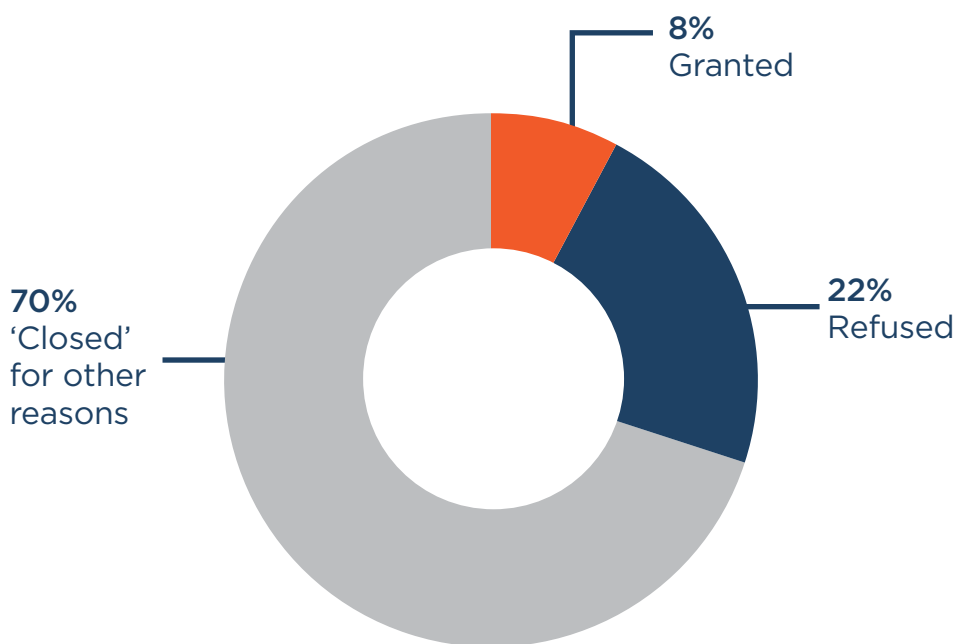
249. Between 9 July 2021 and 14 September 2021, the Department received 33,252 exemption applications, of which:

- 2,736 were granted (8 per cent)
- 7,327 were rejected (22 per cent)
- 23,189 were 'closed for other reasons' (70 per cent).

250. According to the Department, applications that were 'closed for other reasons' included:

applications that are duplicates, where applicants travelled on a permit, applicants that qualified for an exception, where an applicant could not be contacted, where insufficient evidence was provided and where the applicant decided against proceeding with their travel plans.⁴¹

Figure 13: How exemption applications were decided - 9 July to 14 September 2021



Source: Victorian Ombudsman, data from Department of Health

⁴¹ Department of Health, Letter to the Victorian Ombudsman (11 October 2021).

Making decisions to grant or refuse exemption applications

251. The Border Directions provided decision-makers, most relevantly Deputy CHOs and Directors, with broad discretion to grant exemptions to people wishing to enter Victoria.

252. In accordance with administrative law principles, in deciding exemption applications and accounting for individual circumstances, Deputy CHOs and Directors must have:

- taken into account relevant considerations and ignored irrelevant considerations
- exercised genuine discretion, unfettered by any fixed policy inconsistent with the Border Directions
- not made unreasonable decisions
- acted in good faith
- given proper consideration to relevant human rights.

The CHO's Guidance

253. To assist the DET and decision-makers, the CHO provided a guidance document setting out:

- criteria by which decision-makers assess requests for exemption
- supporting evidence required for each request
- specific exemption conditions that apply to each granted request.

254. The criteria by which decision-makers would assess requests for exemption varied depending on the specific category of exemption. There were two common criteria across all categories, namely:

- an applicant's ability to effectively isolate upon arrival in Victoria, and
- evidence in support of the application.

255. According to the Department:

The CHO Guidance is a static document endorsed by the CHO to capture the public health risks [in Victoria at the time]. This ensures consistency in decision making for the granting or refusal of exemptions by Directors within CHO-approved categories. Applications that do not fall within these categories are referred to DCHOs for decision making.

The decision maker must be satisfied that the reason for travel has been sufficiently substantiated and the CHO Guidance describes the supporting evidence required.

256. For each specific category of exemption described in the Border Directions, the CHO Guidance listed the supporting evidence that must be provided. In terms of discretion, a note at the top of the CHO Guidance stated:

The decision maker must be satisfied that the reason for travel has been sufficiently substantiated.

The extent to which the applicant must satisfy the Supporting Evidence requirements is within the discretion of the decision maker and may depend on the urgency and reason for travel.

257. Depending on the category of exemption, required evidence included: statutory declarations; proof of residence; proof of ownership of animals; letters from medical professionals; bank or financial statements confirming that a person could not continue to support themselves away from home; and statements of relationship to people who were dying or funeral notices.

Deputy CHO 'decision diary'

258. In addition to the CHO Guidance, members of the DET referred to the Deputy CHO 'decision diary' when assessing applications. The 'decision diary' contained broad advice based on the applications that had been put to a Deputy CHO for decision.

259. Overall, the investigation considered the 'decision diary' showed discretion to approve exemption applications was only exercised in very limited circumstances.

260. Deputy CHO advice on 20 August 2021 stated that Victorian residents wanting to return home in the following circumstances should all have their applications rejected:

- Those applying for health, wellbeing, care or compassionate reasons 'unless there is a significantly compelling, essential, 'no-other-solution-is-possible', substantiated and evidenced health, wellbeing, care or compassionate reason'.
- 'If services are available in NSW to support the applicant and there are no urgent/critical medical needs'.
- Someone who required medication or to attend an appointment with their GP.
- Someone who was stranded with no official place of residence, no family/friends to help with accommodation 'unless they can substantiate a claim for emergency relocation (financial distress, homelessness etc)'.

261. The advice also provided a high threshold for people to travel to return home for their mental health and wellbeing:

[m]ental health threshold [is] incredibly high; there has to be a sense of urgency for someone to return home, evidenced by medical/third party letters, for example a letter from a psychiatrist/psychologist advising that it is critical for the individual to return to VIC.

Figure 14: Extracts from the Deputy CHO 'decision diary'

27 August 2021

Funeral Attendees: Case for NSW applicant to attend Funeral in Victoria – suggested that the applicant should provide the list of names of attendees at the funeral. Given limit of 10 persons attending, it was noted that they should be able to provide this to us BEFORE attending the funeral.

27 August 2021

Medical Grounds: Cases where medical tests or procedures are required have been consistently REJECTED over the last week. Very high threshold: unless there are compelling urgent reasons, with no other option possible except Victoria –even considering Doctor's recommendation. (e.g. Doctor advised that the same Scanning machine used previously in Vic was required. DCHO advised that the scans were non-urgent and could be done in NSW.)

28 August 2021

Care and compassion –mental health: At least one rejection, despite "very strong" evidence for compassion grounds. Based on 2-3 cases presented over the last 24 hours, they are looking for clear information from doctors that require people to travel to support people with medical needs. Letters of support from doctors haven't been deemed sufficient. Requiring a documented treatment plan to ensure the person gets support they require, and that the applicant is the right and only person who can support them. There needs to be "immediate, compelling, necessary and urgent support" required.

28 August 2021

Primary carers: Self identifying as a "Primary Carer" is not sufficient. Doctors' letters referring to an applicant as "a primary carer" have also been read as dubious. The role as primary carer needs strong supporting evidence that the support person is the only available person, that the care is urgent, compelling and strong medical or EOL grounds.

3 September 2021

Family reunification: 2-3 cases approved for family reunification upon relocation of one partner to Victoria. Strong evidence of reasons for relocation and associated medical and mental health issues, young children/babies; families entering self-isolation in stand-alone accommodation or HQ together. One partner joined their family already in Quarantine in Victoria.

NB: Review meetings have been short this week –under 15 minutes with small numbers of cases presented.

ACTION: Do please let me know ahead of meetings if you have cases to present in case there are none and we can cancel meetings if ZERO cases.

4 September 2021

End of Life:

- Cases involving someone "imminently dying" (preferred term, effectively within 5-7 days) are a "no-brainer" for approval (subject to risk mitigation)
- "If not imminent but up to 28 days, it needs risk mitigation and strong grounds for care and compassion" E.g. Case where someone at EOL (but not imminent) wanted a weekend at the beach with very low risk) was approved on **Care & Compassion grounds**
- In between those examples (5-28 days), there is "wiggle room" depending on risk mitigation and **grounds for care and compassion**.

8 September 2021

Family reunification / Care & Compassion

- The general sense is that family reunions are important. It depends a lot of why and when they were separated / travelled and other issues.
- If there is evidence from medical or psych services that someone is not coping or has health issues and/or young children, that seems to help.
- number and ages of children seems to matter, especially in relation to any health issues
- Good evidence from employers regarding work travel is significant, but work contract changes alone is usually NOT enough
- If they crossed interstate against public advice, that's a wee problem, but not definitive (*its IMPORTANT that the distinction is NOT communicated to applicants as a factor).
- They need evidence that their inter-state address was not their permanent address, and that Victoria is.

25 September 2021

Risk zones are relevant: Applicants travelling from **higher risk zones** to lower risk zones (such as regional areas with no current cases) is a **significant factor** influencing decisions, but not always determinative.

25 September 2021

Relocation Guidance: Reiterated by [Officer] that relocations to Victoria would be considered, subject to it being organised BEFORE closure of borders ("Early Interest") and /or if the applicant is critical to the essential function of critical infrastructure (e.g. some emergency or medical personnel). This was confirmed today by [Deputy CHO].

Source: Department of Health

262. The investigation was particularly concerned by the entry on 8 September 2021, suggesting that whether a person ‘crossed interstate against public advice’ would be relevant to a decision for them to travel to Victoria for the purposes of family reunification or on care or compassionate grounds.

263. Under administrative law principles, a decision-maker must not take irrelevant factors into account. To give excessive weight to an irrelevant factor may result in the decision being ‘manifestly unreasonable’.⁴²

264. Before making a decision about an exemption for one of the specified reasons, the Border Directions required decision-makers to consider:

- whether the person is a diagnosed person or a close contact of a diagnosed person and whether they are seeking to enter Victoria for one of the specified reasons
- documentary evidence provided by the person of:
 - o the circumstances of their specified reason, or
 - o test results or other medical information, or
 - o directions or permissions from a state, territory or other country not to self-isolate or quarantine
- any further documentation requested by a decision-maker.

265. Many people told the Ombudsman how difficult they found it to comply with the strict evidentiary requirements imposed by the Department (via the CHO Guidance and Deputy CHO decision diary).

‘When the Department requested information it raises expectation and I began to feel really hopeful.

There was a flurry of activity because I expected to be on the move and then I received no response from the Department.’

‘I had to constantly book online appointments with our doctors to get more and more paperwork vouching for the severity of our mental health.

It was so dehumanising and humiliating. We had to continuously pour our hearts out to strangers in documents, over the phone, just to feel like we were being seen as people and not as numbers.’

‘There’s a list of arbitrary and irrational requirements:

refusing to process my application because I didn’t submit a covid test ([in time], when I don’t know if and when I will be able to travel until they process my application)

demanding a statutory declaration (I have no idea what it’s supposed to say), even though it’s illegal for me to travel to have it sworn.’

⁴² *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] 162 CLR 24, [15] (Mason J).



Fiona's experience trying to travel to Victoria to care for her sister

Fiona needed to travel to Victoria from Canberra to help care for her 49-year-old sister who has an intellectual disability and terminal stage four cancer.

Fiona's 86-year-old mother was her sister's carer and was struggling to provide the care her sister needed, including help with physically lifting her and helping her to use the toilet. Fiona's sister was living with their mother in residential aged care.

After she applied, supplying a statutory declaration as required, the Department also asked Fiona for evidence of her sister's cancer diagnosis, current treatment and life expectancy.

As Fiona's medical power of attorney for her sister was in her married name, the Department also asked her to provide her birth certificate, marriage certificate, divorce certificate and driving licence. The Department also asked for a statutory declaration from her 86-year-old mother explaining why it was difficult for her to continue looking after her daughter.

Fiona contacted the Ombudsman as she was dissatisfied that the Department had asked for such detailed medical evidence to support her application, saying it was 'beyond unreasonable and is very intrusive and unkind, it's inhuman actually'.

She said '[the Department] obviously don't believe me'. It was also difficult for her to supply the evidence the Department asked for as her sister's oncologist was treating many other patients and was only available for very limited periods.

Fiona said the Department asked why her sister couldn't go into aged care, which Fiona said was an inappropriate question.

Fiona highlighted to the Ombudsman that one of the recommendations of the Royal Commission into Aged Care Quality and Safety was that younger people should not be looked after in aged care homes and that this was not appropriate for her sister.



Jackie's experience trying to come home to attend medical appointments

Jackie is an elderly Victorian resident who travelled to NSW at the end of June to meet her new grandchild. Jackie has ongoing medical issues which require her to see her Cardiologist and Gastro-Hepatologist every three months in Victoria. She was involved in a potential clinical trial that was running in Victoria to determine her eligibility for an alternative treatment to surgery.

Jackie was very distressed when she called the Ombudsman. She said that her being in NSW with her son and his family was putting a lot of pressure on them:

[My medical appointments] are in Victoria, I live in Victoria. I came here for the birth of my grandchild then got stuck in lockdown.

I've been here for two months. It's putting a strain on my own health but also my son's marriage. I don't want to be the cause of a divorce.

After Jackie submitted an application on 13 September 2021 to return to Victoria for her medical appointments, she was told if she did not submit all her supporting documents within four days, her application would be rejected.

The Department also asked her if she could instead seek her specialist medical treatment in NSW. Jackie was unable to provide the medical evidence the Department requested in that time because her specialist was not available. Her application was rejected.

266. Many people applying for exemptions were elderly and had limited computer or internet access and found it difficult to provide such extensive evidence, often using only their mobile phones.
267. The evidence required for each category of exemption is considered further below.

'Given our age [80 and 82 years old] and that we were travelling in a caravan, the requirement of documents has been onerous and difficult.

We do not have access to the internet, a printer or a computer.'

Assessment Guidance

268. In addition to the CHO Guidance and Deputy CHO decision diary, the Department provided the investigation with copies of other materials used to assist the DET process exemption applications.

269. One particular document titled (*Dep Commander Approved*) *Assessment Guidance – Border Travel Exemption Applications – 24 August 2021* (‘the Assessment Guidance’) sought to assist ‘individuals reviewing and making recommendations on border travel exemption applications’ by providing a list of factors that may impact the public health risk and other examples of compelling reasons for travel.

270. In terms of exercising discretion, the Assessment Guidance noted:

None of the below factors solely support either a recommendation for approval, or a recommendation for rejection, the intention of this guidance is to communicate a general indication of how particular factors may impact the exercise of the discretion of the decision maker, taking into account the relevant assessment criteria contained in the *Victorian Border Crossing Permit Directions*.

The Public Health Risk Factors should always be prioritised given the overarching obligation to protect public health. If the totality of the Public Health Risk Factors weigh in support of rejecting an application, then this should be the favoured outcome. Compelling circumstances for travel will generally not take precedence in such circumstances.

271. In summarising the public health risk from NSW and the ACT, the Assessment Guidance stated:

Public Health Risk – NSW and ACT

There is currently a substantial public health risk emanating from New South Wales (NSW) and the Australian Capital Territory (ACT), as well as contemporaneous public health risks arising across the country.

NSW and the ACT are currently designated as extreme risk zones. There continues to be high COVID-19 case numbers within NSW including unlinked cases, cases out in the community during their infectious period, and large ongoing transmission in Greater Sydney and increasing transmission in regional NSW. The ACT is similarly seeing relatively high COVID-19 case numbers, and the extent of broader transmission within the community is currently unclear, thus the risk is deemed to be high.

Given this, there is a significant ongoing risk of incursion from NSW and the ACT, including regional New South Wales, into Victoria. **The impact of this extreme risk is that there is a residual risk associated with permitting any persons who has been in these regions from entering Victoria. Where there are no compelling reasons for travel, the residual risk is likely to be too significant to validly justify granting an exemption in such circumstances. Accordingly, an exemption should generally not be granted in the absence of compelling reasons for travel** [emphasis added].

272. The Assessment Guidance identified the following factors as non-determinative to mitigating the public health risk.

Testing	Applicant is able to provide evidence of a negative result from a test conducted within 48 hours prior to proposed entry to Victoria.
Self-quarantine	Applicant is able to safely self-quarantine at a premises away from others (standalone premises)
Vaccination status	Applicant is fully or partially vaccinated.
Time spent in red zone or extreme risk zone	Applicant does not reside in a red zone or extreme risk zone, but merely transited through.
Symptoms/Close Contact/Exposure Sites	Applicant <ul style="list-style-type: none"> • is not experiencing COVID-19 symptoms • is not a close contact • has not attended a known exposure site.

273. From this document, it appears that despite there being any number of factors to mitigate the risk to public health, the advice from at least the 'Dep Commander' (who was also a Director within the DET) was that an exemption 'should generally not be granted in the absence of compelling reasons for travel.'

Specific evidence required

Exemptions to attend a funeral or end of life event

274. In accordance with the CHO Guidance, people applying for an exemption to attend a funeral were required to provide:
- a negative COVID test result less than 48 hrs before planned entry to Victoria
 - death notice, or obituary
 - letter from the funeral home, or a public announcement of the funeral, or a statement by the applicant that includes:
 - o identity of the deceased
 - o time and location of the funeral service
 - statement as to the applicant's relationship with the deceased
 - statutory declaration as to the location the applicant intends to reside in Victoria, any other persons residing at the same address and ability of the applicant to self-isolate until a negative COVID-19 test has been received
 - any other relevant supporting documentation.
275. People wishing to attend an 'end of life event' were also required to provide a letter from a medical institution or medical professional, including among other things, a 'description of the patient's condition and prognosis'.
276. One person missed their father's funeral because the Department failed to assess their application in time.
277. Another person was denied the opportunity to see their father before they died.

'We just want an exemption to be with our dying daughter in Pakenham. She is terminal, palliative and end of life.'

'We are being treated inhumanly ... dealing with a sub contractor who sits at home reading from a computer screen without any medical knowledge making a decision taking weeks we don't have ...'

'This is life threatening and urgent we don't have time to waste.'

'My Father passed away suddenly on July 17th. My wife and I immediately obtained a Covid Test and once we had the results applied for an exemption to travel to Melbourne ...'

'We are the only Family that would / could attend. Nothing was heard back despite several calls to the Hotline ...'

'This caused us both enormous stress and ultimately meant that no family members were present to farewell our Father.'

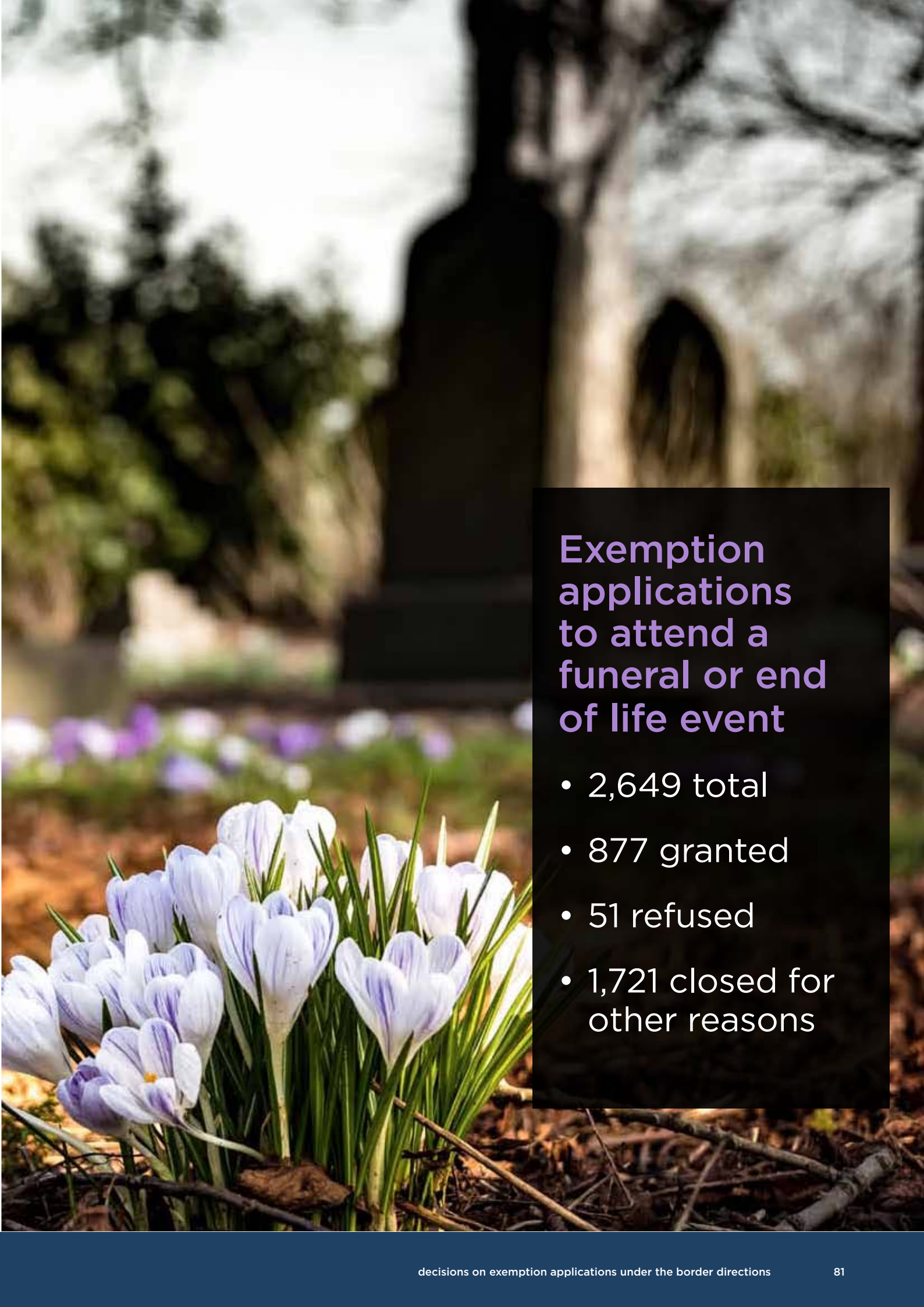
'My application was denied without even being looked at, and my father in Victoria passed away the next day on the Sunday.'

'I did not get to see him in the past 3-4 months before this since I kept getting denied and I will never see him again now due to these Vic health worker being completely supercilious and condescending with my applications.'

278. Between 9 July and 14 September, the Department dealt with 2,649 exemption applications to attend a funeral or end of life event, of which 877 were granted, 51 were refused and 1,721 were 'closed for other reasons'.

279. According to data provided by the Department, of the 1,721 funeral / end of life applications 'closed for other reasons', 1,077 (63 per cent) were closed because the applicant indicated they no longer needed the exemption, often because they decided not to travel. Of the other applications:

- 23 (1 per cent) were closed because the applicant considered they might be eligible for an exception and decided to travel on that basis
- 129 (8 per cent) were closed because the applicant received another permit
- 195 (11 per cent) were closed by the Department as they were considered to be duplicates or created in error
- 139 (8 per cent) were closed because the applicant could not be contacted
- 117 (7 per cent) were closed because the 'application expired'
- 41 (2 per cent) were closed by the Department because the applicant did not provide the requested documents.



Exemption applications to attend a funeral or end of life event

- 2,649 total
- 877 granted
- 51 refused
- 1,721 closed for other reasons

Exemptions to effect an emergency relocation

280. As noted in the 'Deputy CHO's decision diary' above, people seeking exemptions to relocate to Victoria 'would be considered, subject to it being organised BEFORE closure of borders'.

281. Under the CHO Guidance, those applicants seeking an 'emergency relocation' were required to provide:

- a negative COVID test result less than 48 hrs before planned entry to Victoria
- a statutory declaration including details of the circumstances for requiring an exemption, reasons why travel is critical and cannot be delayed and reasons why the person cannot reside elsewhere that is not in Victoria.
- The following information if relevant:
 - o bank or financial statements confirming the person cannot continue to support themselves in their current location
 - o a signed letter from the person's real estate agent/landlord confirming their lease cannot be extended
 - o a contract of sale for the person's current property showing the handover date
 - o Police statements or court documents confirming an urgent need to vacate their current premises.

282. Complaints to the Ombudsman from non-residents seeking to relocate to Victoria were the last group to resolve, and only did so after the borders were effectively reopened.

283. The Ombudsman heard from people who had already sent their possessions to Victoria and were squatting in empty apartments.

'My partner and I are NSW residents who have signed a lease in Berwick, VIC prior to the border closures. We are currently still in NSW as we had our border passes approved but then had to reapply once the borders closed.

All of our possessions ... had already been sent to the new house in Berwick, so we have been living in an empty house with no utensils, no way to cook food.

We are paying for two houses totalling about \$900/week in rent alone, and are unable to work.'



Bianca's experience living in an empty apartment

Bianca owned a house in Victoria but had been living and working in the ACT when the borders closed. When she decided to move back to Victoria, she sold her Canberra apartment and had all her belongings moved to her Melbourne home.

My furniture and belongings are in transit and I am living in an empty apartment with an inflatable mattress and what possessions I can fit in my car (which includes a cat).

After Bianca's exemption applications were rejected, she became increasingly worried about where she would live when her apartment settled in September.

I have nowhere to live. Accommodation in the ACT is incredibly expensive and it is difficult to get temporary accommodation here when you don't have employment. I am also continuing to pay the mortgage on a house that I can't have a tenant in or live in myself.

In support of her exemption application, Bianca provided negative COVID test results, a statutory declaration and a letter from her doctor detailing the impacts of the situation on her health and wellbeing. Bianca lived alone and was able to quarantine for 14 days as required.

'I want to add my name to the list of Victorian citizens stuck and abandoned outside of Victoria. ... I'm being thrown out if [sic] my temporary accommodation in 2 weeks time. I don't know where I will go.

I can't afford to run my Victorian home and pay rent here. I am fully vaccinated ... I'm doing my bit for the community. Why is the Victorian government not helping me get back to the State I have helped pay for over many years.

Why do I have to be homeless at my age?'

'[My] house in NSW has sold and new owners are moving in... and we have suitable accommodation in Victoria where we can quarantine for 14 days.


I have escalated this matter 5 times via the hotline, sent numerous emails and sent a formal complaint. This as far as I am aware is the only way I can contact the department.

No-one has contacted me other than an operator who obviously has not read through my submitted evidence ... [and then] 2 emails were received stating our applications have now been declined even though we were verbally advised they had been approved.'

284. Between 9 July and 14 September, the Department dealt with 3,553 exemption applications to effect emergency relocation, of which 414 were granted, 1,350 were refused and 1,789 were 'closed for other reasons'.

285. According to the Department, of the 1,789 emergency relocation applications 'closed for other reasons':

- 617 (35 per cent) were closed because the applicant indicated they no longer needed the exemption
- 114 (6 per cent) were closed because the applicant considered they might be eligible for an exception and decided to travel on that basis
- 181 (10 per cent) were closed because the applicant received another permit
- 408 (23 per cent) were closed by the Department as they were considered to be duplicates or created in error
- 142 (8 per cent) were closed because the applicant could not be contacted
- 268 (15 per cent) were closed because the 'application expired'
- 59 (3 per cent) were closed by the Department because the applicant did not provide the requested documents.



Exemption applications to effect emergency relocation

- 3,553 total
- 414 granted
- 1,350 refused
- 1,789 closed for other reasons

Exemptions for people to return home for health, wellbeing, care and compassionate reasons

286. Of the specific exemption categories, applications from Victorian residents to return home for their health, wellbeing, care or on compassionate grounds were the most common.

287. Under the CHO Guidance, people seeking an exemption on these grounds were required to provide:

- evidence of their primary residence in Victoria
- a negative COVID test result less than 48 hrs before planned entry
- a statutory declaration including details of the circumstances that require an exemption, reasons why travel is critical and cannot be delayed, and if relevant why any present care arrangements cannot continue and an impact statement if the exemption application were to be denied
- if relevant, a letter from a medical institution or medical professional including:
 - o the name of the medical professional
 - o the name of the hospital/clinic/institution represented
 - o confirmation of the appointment date and time
 - o a statement as to why this care cannot be provided from your current location
- if supporting another person attending a medical appointment, a statutory declaration stating:
 - o the relationship between the applicant and the person with the medical appointment

- o the impact of the applicant being unable to accompany the non-dependent to the medical appointment
- o confirming that there is no other person that could reasonably provide this assistance in your absence such as a friend or family member.

288. According to the Department, compassionate reasons were not formally defined as they may involve a range of circumstances and the DET had a specific 'sub-team' to consider applications involving care and compassion, and another to consider applications for end-of-life reasons and health and wellbeing reasons. Some people who were denied exemptions for compassionate reasons told the Ombudsman:

'My [35 year old sister has been] diagnosed with gallbladder cancer, that has also travelled to numerous other vital organs of her body. Ultimately this is a terminal diagnosis ... This may be our last and only opportunity to spend with our beloved sister ...

[The Department] has informed us the diagnosis is not serious enough.'

'It is incredibly urgent that I move back to Melbourne immediately. My grandfather's condition is deteriorating rapidly.

My mother is financially and medically unable to care for my grandfather and the strain and stress of my mother being the only family member in Melbourne, and bearing the sole responsibility for his care, is having significant repercussions on the mental and physical health of all members of the family.'

'Since June I have had over 6 cancelled flights and I have applied 4 times for a border permit so I can drive back home but all my applications have been denied ... I have no family here ... I'm an anxious wreck and cannot sleep well anymore.

[The Department] has shown no compassion when reviewing these applications.'

'I applied initially 12 weeks ago to assist my daughter ... She delivered via caesarean and also had another medical procedure. ... She also has a 20 month at home and a 14 year old who has autism.

She has no family around her ... She is having to pick up her 20 month son, which she shouldn't be doing ... I could have helped so much. She still needs care.

My heart has broken. I feel so helpless. ... I feel abandoned by my home state.'

'[I am stuck in NSW, trying to get back to Victoria to undergo IVF cycles with my wife and] continued denial has led to myself seriously contemplating is it worth living and doesn't matter that they suggest you try lifeline after your [sic] denied. Lifeline can not get me back to my life, family and wife ...

I'm actually at a lost [sic] to what else to do. I can't get home to her, I can't have a family and I guess therefore really wonder what's the point of living anymore.'

289. Between 9 July and 14 September, the Department dealt with 10,812 exemption applications to return home for health, wellbeing, care and compassionate reasons, of which 895 were granted, 2,369 were refused and 7,548 were 'closed for other reasons'.

290. Of the 7,548 emergency relocation applications 'closed for other reasons':

- 2,639 (35 per cent) were closed because the applicant indicated they no longer needed the exemption
- 372 (5 per cent) were closed because the applicant considered they might be eligible for an exception and decided to travel on that basis
- 1,187 (16 per cent) were closed because the applicant received another permit
- 1,103 (15 per cent) were closed by the Department as they were considered to be duplicates or created in error
- 320 (4 per cent) were closed because the applicant could not be contacted
- 1,744 (23 per cent) were closed because the 'application expired'
- 183 (2 per cent) were closed by the Department because the applicant did not provide the requested documents.



Exemption applications for health, wellbeing, care and compassionate reasons

- 10,812 total
- 895 granted
- 2,369 refused
- 7,548 closed for other reasons

Exemptions for people to care for animals

291. Under the Border Directions if a person owned or had responsibilities in relation to an animal, they could apply for an exemption to travel to Victoria to sustain the life and wellbeing of that animal.
292. Under the CHO Guidance, people seeking an exemption on these grounds were required to provide:
- a negative COVID test result less than 48 hrs before planned entry
 - a statutory declaration including details of where the animals are located, how the animals have been cared for until the application for exemption, and why the present care arrangement cannot continue
 - proof of ownership / obligation, such as pet registration, or a farming property registration
 - a statutory declaration as to the location the applicant intends to reside in Victoria, any other persons residing at the same address and ability of the applicant to self-quarantine until a negative COVID-19 test has been received
 - any other relevant supporting documentation.
293. People whose applications for exemption under this category were rejected told the Ombudsman:

‘Our applications are based on the need to attend to our livestock, one reason for granting exemptions.

There does not appear to be any regard to the fact that we left Victoria to attend my father-in-law’s funeral, a very distressing time for my wife and while NSW was an orange zone.’

‘Our live in house/animal sitter left on 1st September and I have had to rely on family to throw some lucerne to the sheep. This is not the answer, the sheep need drenching, shearing, feet done and proper pellet feeding to reduce scouring, which they have ...

The only response from [the Department] was a rejection with NO explanation.’

294. Between 9 July and 14 September, the Department dealt with 971 exemption applications for people seeking to travel to Victoria to care for animals, of which 35 were granted, 212 were refused and 724 were ‘closed for other reasons’.
295. Of the 724 applications ‘closed for other reasons’:
- 325 (45 per cent) were closed because the applicant indicated they no longer needed the exemption
 - 12 (2 per cent) were closed because the applicant considered they might be eligible for an exception and decided to travel on that basis
 - 161 (22 per cent) were closed because the applicant received another permit
 - 108 (15 per cent) were closed by the Department as they were considered to be duplicates or created in error
 - 51 (7 per cent) were closed because the applicant could not be contacted
 - 53 (7 per cent) were closed because the ‘application expired’
 - 14 (2 per cent) were closed by the Department because the applicant did not provide the requested documents.

Exemption applications to care for animals

- 971 total
- 212 refused
- 35 granted
- 724 closed for other reasons



General discretion to grant exemptions

296. In addition to the specific categories of exemptions outlined above, the Border Directions also provided for a general discretion to grant exemptions if the decision-maker was satisfied an exemption is appropriate, having regard to the need to protect public health and the principles in sections 5 to 10 of the Public Health and Wellbeing Act.

297. Between 9 July and 14 September, the Department dealt with 14,847 exemption applications categorised as ‘other’, of which 411 were granted, 3,300 were refused and 11,136 (over 75 per cent) were ‘closed for other reasons’.

298. According to the Department, a sub-team within the DET were responsible for processing exemption applications categorised as ‘other’ (being those that fell under the general exemption discretion).

Applications categorised as ‘other’ typically involve non-Victorian applicants seeking to enter Victoria for reasons associated with health, wellbeing, care and compassion. This requires consideration of broader care and compassion reasons, typically from applicants who are NSW residents seeking to come to Victoria, and if health decisions are involved will be escalated to a DCHO for decision making.⁴³

Table 2: Exemptions categorised as ‘other’: breakdown of applications ‘closed for other reasons’

Category	Number	Per cent
Closed because the applicant indicated they no longer needed the exemption	3,180	29%
Closed because the applicant considered they might be eligible for an exception and decided to travel on that basis	497	4%
Closed because the applicant received another permit	1,557	14%
Closed by the Department as they were considered to be duplicates or created in error	1,138	10%
Closed because the applicant could not be contacted	271	2.5%
Closed because the ‘application expired’	4,318	39%
Closed by the Department because the applicant did not provide the requested documents.	175	1.5%
TOTAL	11,136	100%

Source: Victorian Ombudsman, data provided by Department of Health

⁴³ Department of Health, *Letter to the Victorian Ombudsman* (11 October 2021).

Time given to decision-makers to consider individual circumstances

299. According to the Department, between 23 July and 30 September, the DET processed an average of 500 exemption applications each day. On some days, the DET dealt with over 1,000 exemption applications.
300. In practice, the decision-makers relied on the advice of their staff who had assessed applications and collected relevant information.
301. While this is pragmatic and necessary, it is important that decision-makers make their decision independently. While they can consider relevant information from others, they must make the decision themselves. When considering the exercise of emergency powers under the Public Health and Wellbeing Act, Justice Ginnane J commented:
- ... [it] is not just a point of procedure. Far more importantly, it is about the legal principle that the person who has the legal authority to exercise extraordinary statutory power in times of emergency ... actually exercises it. When basic human rights such as freedom of movement are being restricted, it is particularly important that legal procedure is followed.⁴⁴
302. Although this decision relates to the exercise of a statutory power, the principles of proper administrative decision-making would apply equally to a discretionary decision under the Directions issued by the CHO, particularly as they equally restrict human rights.
303. Where a power is given to a particular person or office, that power cannot be exercised at the direction of someone else, whatever position they may occupy.⁴⁵
304. On the evidence provided by the Department, 92 per cent of decisions under the Border Directions were made at the Director level.
305. There were two Directors within the DET working different shifts, meaning one was available on any given day. On Wednesdays, when the shifts crossed over, there were two Directors working.
306. Between 9 July 2021 and 14 September 2021, the Directors decided over 9,000 applications. Making decisions on exemptions, however, was not the Directors' and Deputy CHOs' only responsibility and the time they dedicated to deciding each individual application was limited.
307. Responding to the Ombudsman's draft report, the Department said that 'decision-makers took into account the advice of staff but did not 'rely' on it. Decision-makers formed their own view on each application'.

⁴⁴ *Loiolo v Giles* [2020] VSC 722, [10].

⁴⁵ *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404, [418] (Gibbs CJ).

Applications ‘closed for other reasons’

308. As detailed above, 70 per cent of exemption applications were ‘closed for other reasons’, as opposed to being either granted or refused.

309. While the Border Directions only allow for the CHO, Deputy CHO and specific senior officials, including the Director in the COVID-19 Response Division to grant exemptions, according to the Department, applications could be closed by Business Managers without Director consultation in the following four circumstances:

No evidence:

At the initial triage stage, if no evidence is uploaded within 5 days, an automated email is sent notifying the applicant that the case will be closed but, if the applicant still wishes to travel, they can create another application and upload supporting evidence.

No contact:

Multiple attempts are made to contact an applicant by both phone and email, including attempting to make contact at different times of day. DET will attempt to contact applicants over 3 to 4 days (does not need to be consecutive) and, if no contact is made, the case is closed.

Exemption no longer required:

If an applicant indicates that an exemption is no longer required for travel their application will be closed.

Duplicates:

Duplicate applications will be closed and a single application preserved.

Expired applications

310. Of the applications ‘closed for other reasons’, nearly 30 per cent were closed because the application had expired.

311. As noted above, to apply for an exemption, people had to nominate an intended travel date, and in many cases, provide proof of a negative COVID-19 test result received no more than 48 hours prior to their proposed or actual entry to Victoria.

312. Applications that weren’t able to be processed before the intended travel date had passed were closed as having expired without an actual determination. The Department said applications were only closed on this basis ‘at an early point in the process’ and that people were sent an email advising them of their right to reapply. Responding to the Ombudsman’s draft report, the Department said it:

acknowledges that this approach caused distress, anger and frustration to applicants. Improvements were made over time including contacting applicants and inviting them to update their travel details if they still intended to travel.⁴⁶

313. Many people who contacted the Ombudsman after their application was deemed to have expired were understandably frustrated by the process:

⁴⁶ Department of Health, *Letter to the Victorian Ombudsman* (25 November 2021).

‘My father died soon after the govt shut the border. Once the funeral was completed, I applied to return home to Vic. My application with my preferred date to return came and went. I didn’t care what date but the form required a date.

2 weeks with zero feedback went by and then close to midnight on the Friday past my requested travel date, I received an email stating as my travel date had now passed my application was closed and if I still wanted to travel I was to reapply’

314. Others who complained to the Ombudsman said obtaining a COVID-19 test in time proved difficult, and at times, expensive.
315. In total, of the exemption applications dealt with between 9 July and 14 September 2021, 6,500 or nearly 20 per cent were closed on the basis they had expired, leaving these people with no choice but to start the process again.
-

‘The impact of the uncertainty and bumbling of the Department of Health has caused me personally significant stress in an already horrible situation.’

‘This past Friday, we spent almost \$600 on Covid tests at [the Department’s] request.

We have bought a house which has settled. Our employers have approved our transfers. We will be working from home and pose no risk – we are responsible citizens who weighed up the policy and legal implications before we even made an application for an exemption.’

‘The Department want a covid test that is no older than 48hrs which is not always possible as we are restricted by the process which can take up to 56 hrs for a result.

Therefore I have been taking virtually daily tests as I do not know when they are going to look at and process my application.

Due to the lack of response and the opportunity to ask questions this means you are left in limbo which adds to the stress.’

Duplicate applications

316. An additional 13 per cent of exemption applications closed for other reasons were considered to be duplicates or otherwise created in error.
317. While it is of course reasonable to close duplicate applications created in error, a member of the DET who wished to remain anonymous told the investigation that for a period of time staff were told to close cases as duplicates if the applicant had previously applied, even if exemption reason and circumstances had changed. The DET member said this was why some applicants who made multiple applications were often only contacted by the Department once.
318. Responding to the Ombudsman's draft report, the Department submitted that 'cases could only be closed as duplicates if no new reasons / circumstances were raised in the new application'.
319. In total, of the exemption applications dealt with between 9 July and 14 September 2021, 3,010 or 9 per cent were closed as duplicates.

Exercise of discretion

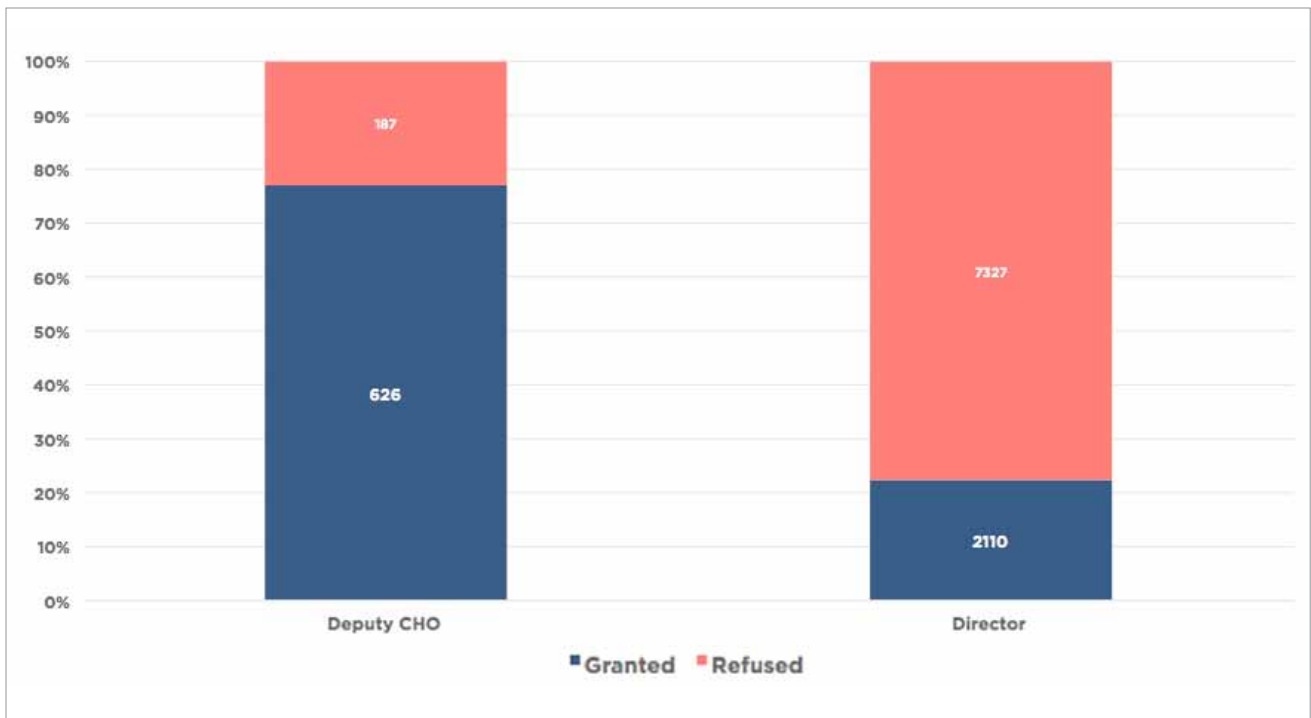
320. Only 8 per cent of exemption applications were granted between 9 July and 14 September 2021; the overwhelming majority were either refused or closed for other reasons.
321. When comparing decisions made by Deputy CHOs and those made by Directors, the data strongly suggests that decision-makers with medical expertise including in public health and infectious diseases, were significantly more likely to grant exemptions.
322. Of the cases determined by a Deputy CHO, 77 per cent were granted and 23 per cent were refused. Conversely, of the cases determined by a Director, only 23 per cent were granted and 77 per cent were refused.
323. Responding to the Ombudsman's draft report, the Department highlighted that Directors considered a significantly higher number of applications and that the applications presented to Deputy CHOs were of a fundamentally different character, being those that required consideration of medical or otherwise complex circumstances.
324. The Department also noted that under the Border Directions a Deputy CHO could impose additional or different conditions when granting an exemption.

Table 3: How exemption applications were dealt with between 9 July and 14 September 2021

Category	Per cent
Determined and granted	8%
Determined and refused	22%
Closed as exemption no longer required	24%
Closed as applicant may qualify for an exemption	3%
Closed as applicant travelled on permit	10%
Closed as duplicate/made in error	9%
Closed as applicant unable to contact	3%
Closed as applicant expired	20%
Closed as documents not received	1%
TOTAL	100%

Source: Victorian Ombudsman, data provided by Department of Health

Figure 15: Number of exemption applications granted and refused by a Deputy CHO compared to the number of exemption applications granted and refused by a Director



Source: Victorian Ombudsman, data provided by Department of Health

325. The investigation considered the ability of a Deputy CHO to impose additional or different conditions may have allowed for fairer decision-making because of their expertise and knowledge about what factors might mitigate risks to public health.

326. Overall, the data reviewed by the investigation demonstrated that although the Border Directions themselves appeared to provide for broad decision-making discretion, in practice, it was exercised narrowly.

327. This is consistent with advice from the Secretary to the Ombudsman in September 2021 noting the Department's assessment of the risk presented by cases of COVID-19 in NSW:

I note the current epidemiological situation regarding SAR-Cov2 virus in New South Wales (NSW) and Victoria. There are currently significant outbreaks of COVID-19 in NSW. Transmission of the SAR-Cov2 virus can occur rapidly, with very minimal exposure and from asymptomatic patients. We have seen it spread rapidly from the initial outbreak areas in NSW to neighbouring LGAs and beyond. As you know, the NSW outbreak seeded into Victoria and led directly to our current outbreak and the need for prolonged hard lockdown.

Our Chief Health Officer, Professor Sutton (the CHO), has determined that NSW is an extreme risk zone (ERZ) and has also determined that border restrictions limiting travel into Victoria from ERZs or high-risk zones (with limited exemptions) are reasonably and proportionately necessary to manage and reduce the serious risk to public health that SARs-CoV-2 presents to the Victorian community.

... Again, due to the high degree of risk travel to Victoria from ERZs presents, limited exemptions, exceptions and permits apply.

Our Domestic Exemptions team has received thousands of exemption applications. As Minister Foley has emphasized in the media, time-critical urgent applications, such as those to attend end-of-life events and funerals, have been prioritised for consideration.

328. It is also consistent with the advice in the Assessment Guidance discussed above.

329. Aligned with the Border Directions, decision-makers were required to have regard to the need to protect public health and the principles in sections 5 to 10 of the Public Health and Wellbeing Act.

330. Accordingly, decisions to grant or refuse exemption applications should have been proportionate to the public health risk sought to be prevented, minimised or controlled and not made or taken in an arbitrary manner.

331. Some people told the Ombudsman they were double vaccinated, had consistently tested negative to COVID-19, were willing to self-quarantine for 14 days on arrival and could comfortably drive to their destination from the NSW border on one tank of fuel, so as not to interact with anyone else. While appreciating the original decision to determine NSW and the ACT to be extreme risk zones, it is difficult to understand how a person in these circumstances would present such a significant public health risk to justify the narrow exercise of discretion.

332. The investigation considered decision-makers put too great an emphasis on the subjective assessment of whether an applicant could prove they had 'compelling circumstances' for travel, and not enough on the objective assessment of whether the public health risks associated with the applicant entering Victoria could be sufficiently mitigated.

333. Specifically in relation to Victorian residents, the investigation considered the Department put significant resources towards keeping people out instead of facilitating safe ways for them to return home.

‘Exceptions’ under the Border Directions

334. Under the Border Directions, if a ‘prohibited person’ met one of 21 conditions they could be considered an ‘excepted person’ and were not required to obtain a permit or exemption to enter Victoria.
335. The DET provided information to people who enquired about their eligibility as an excepted person, but the onus was on the individual to decide if their circumstances fit into one of the categories in the Directions. The Department’s process states:
- When discussing the provision for entering Victoria as an excepted person, Advisors can be reactive to an applicant’s confidence. We can encourage applicants by giving them some background as to why these excepted person categories exist (e.g., to facilitate entry into Victoria for time-sensitive matters), but we must avoid making a decision on their behalf.⁴⁷
336. The decision about whether a person qualified as an ‘excepted person’ was made at the border by an Authorised Officer or Victoria Police Officer. The consequences of an adverse decision were severe – people faced the possibility of a \$5,452 fine and could either be sent back across the border or have to enter hotel quarantine for 14 days at their own expense.
337. The Department’s process made it clear that staff were not to use language that gave people the impression they would be guaranteed entry to Victoria. This left many people uncertain whether they were eligible to enter Victoria as an excepted person or whether they needed to apply for an exemption.
338. In one case the Ombudsman reviewed, a Director of Nursing for Mental Health was unsure if she qualified as an excepted person and was unable to get clear advice from the Department, so applied for an exemption. When she arrived at the airport wearing her hospital scrubs, she was told she did not need an exemption and was allowed to enter Victoria as an excepted person.

⁴⁷ Department of Health, *Possible Exceptions Process* (2021) 3.



Georgia's experience travelling home with an exemption or as an excepted person

After her 93-year-old mother had a fall, Georgia feared her mother was close to dying so she travelled to Port Stephens to be with and support her. Her mother was alive when she arrived, but the hospital told her to expect the worst. Thankfully, Georgia's mother stabilised, so she applied to return to Victoria.

Georgia is the Director of Nursing, Mental Health at a large hospital in Melbourne and needed to return to work. Georgia told the Ombudsman she had been isolating alone in NSW and that she would be able to isolate at home in Melbourne as she lived alone.

When she contacted the Department, Georgia was not given clear advice about whether she was eligible as an 'excepted person' so applied for an exemption to enter Victoria, which was rejected. Over the weeks and months Georgia was in NSW, she continued to apply for exemptions but they continued to be rejected.

She told the Ombudsman:

My continued absence from my employment is impacting on me as well as the team. My team are under constant stress providing care for mental health consumers during this time and my guilt at feeling I am letting them down weighs heavily on me.

Georgia was eventually stood down from her position as she could not fulfil her role's responsibilities working remotely.

She told the Ombudsman:

[T]hat disconnection from a 44 year role as a nurse that contributes to my sense of identity is one of the hardest things to bear.

I already felt guilty for letting the team down and now with the delta impact in Victoria I have to live with not being able to do my bit.

Georgia's application for exemption was eventually approved on 30 September 2021 and she flew to Melbourne the following day.

At the airport, Georgia was advised she did not need an exemption as she was eligible to enter Victoria as an 'excepted person':

At the airport the DHHS (I assume) rep recognised that I was a nurse ... and asked if I had evidence of my nursing profile and so I showed him an email signature which he took a photo of and moved me to a worker category - who knew it could be that simple - it makes me even more cross with the process that took place over the last 3 months.

Responding to the Ombudsman's draft report, the Department said Georgia was not an excepted person and that the compliance officer at the airport was incorrect. It said, 'regular training is provided to compliance officers to ensure that they can make the best and most accurate decisions possible in a highly challenging, and constantly changing environment'.

339. Other people told the Ombudsman they were dissatisfied with the way the Department handled the exceptions process.

'[T]he hotline refused to give any advice about the scope of the exception and suggested I get legal advice. To make matters even more uncertain, authorized officers and Victoria Police assessing the permits do not always act in compliance with [the Department's] advice

In effect, the result is that you cannot rely on any advice you have received from [the Department] and it appears you will just be at the mercy of the discretion of the officer at the border.'

'[The Department] stated if we believe we met the criteria of the reasons of [exception] in the website she was giving me, you could return home.

I said that's putting the onus back on me to make that decision [then the Department said] if you have a doctors appointment on your phone you just show that to the police and they will let you proceed home.'

340. Other people said they were fined at the border and turned back, despite presenting their Specified Worker Permit and other supporting evidence.

'The letter was not read by [the] policeman. [My responses to the policeman's] questions were then relayed to a Senior Member ... of the Victorian Department of Health ... [who] decided [!] probably do not meet the thresholds to enter Victoria ...

[The policeman] then issued an Infringement Notice.'

'I managed to negotiate a Melbourne based work opportunity, listed as 'essential work' on all Federal, State and Territory lists ... I followed all directions relating to arranging a 'Specified Workers permit' and was assured before I made travel arrangements that this opportunity was an acceptable reason for travel.

Upon arrival in Victoria I was met by officers who translated my eligibility quite differently and I was ultimately forced into 2 weeks hotel quarantine [and] I may now face a penalty of more than \$4,000 for 'breaching' restrictions.'

Proper consideration of human rights: deciding exemption applications

341. The Department provided the investigation with a copy of a 'Charter Flow Chart' that was used to assist decision-makers ensure that when deciding whether to grant or refuse exemption applications they acted compatibly with and gave proper consideration to human rights.

342. In accordance with section 7(2) of the Charter of Rights Act, a human right may only be subject to 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. In considering whether a limit is reasonable and demonstrably justified, all relevant factors must be taken into account, including but not limited to:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and the purpose
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

343. The investigation considered the Charter Flow Chart was generally useful, however, was not necessarily satisfied that a decision to refuse an exemption application in circumstances where the applicant:

- was fully vaccinated
- consistently tested negative to COVID-19
- was willing and able to self-quarantine for 14 days on arrival, and
- could reach their destination without interacting with any other person

would be a reasonable limitation on the right to freedom of movement, when considering the relationship between the limitation and the purpose sought to be achieved, namely protecting public health.

Communicating decisions

344. Best practice in public administration requires decision-makers to provide reasons for their decisions, particularly where a person's rights are adversely affected:

[Reasons] encourage good administration generally by ensuring that a decision is properly considered by the repository power ... They promote real consideration of the issues and discourage the decision maker from merely going through the motions.⁴⁸

345. Many complaints to the Ombudsman about the Border Directions concerned the way the Department communicated the outcome of people's exemption applications and the fact that no reasons were provided.

'Is there no cross referencing going on? Does anyone in the department acknowledge the potential mental health implications arising from repeated but unexplained refusals for people in stressful situations?'

'We want the Department of Health to provide a Statement of Reasons for the decisions they have made to date and for them to review these decisions on their merits ... We would also seek an explanation as to why the Department of Health believes it can operate with a blanket exception to all administrative law principles generally?'

'[T]hey do not give any reason other than a pre programmed answer. I feel deeply let down by my home state government.'

'I rang COVID hotline almost everyday, when an application was rejected I was not given a reason and was told we don't have to give you a reason.'

'I received no help from hotline. I told them I was worried my wife was going to have a mental breakdown and was told to ring lifeline. I know a number of people who were told the same thing.'

'We have been denied procedural fairness, and this is entirely separate to any possible merits related to the decision-making process as we have requested reasons and not been provided them.'

'They have been rejecting my entry permit applications and ignoring my requests for reasons.'

'When I tried calling the hotline, I was only read out information already available online and encouraged to reapply because I couldn't appeal the decision to reject my application.'

'The [Department] has not responded to my request for which specific legislation ... the director considered in [refusing] my exemption application [or] to name the director or deputy and also to sign the letter of my refused exemption application.'

⁴⁸ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA, [105] 56 (Kirby J).

346. Generally, when the Department decided to refuse an application, a template email was sent to the applicant stating that facts and circumstances of the application had been considered and that the person had not been granted an exemption to enter Victoria.

347. The email was signed from the 'Domestic Exemptions Team' rather than the person who had made the decision to reject the application.

348. People told the Ombudsman they were frustrated and confused by the generic emails and left unsure how to proceed. When they contacted the Department to seek more information, they were told to reapply but were not advised what their application was missing or why it was refused in the first place.

Figure 16: Example exemption application outcome email

From: "Domestic Exemptions Team (HEALTH)" <domesticexemptions@health.vic.gov.au>
Date: [REDACTED] September 2021 at 4:48:17 pm AEST
To: [REDACTED]
Subject: Victorian Border Travel Exemption Application – Notice of Decision

Dear [REDACTED]

Victorian Border Travel Exemption Application – Notice of Decision – Case Reference : [REDACTED]

The facts and circumstances outlined in your application have been considered, and you **have not been granted an exemption** from the [Victorian Border Crossing Permit Directions](#) to enter Victoria.

This decision has been made after considering the need to protect the public health and the principles set out in sections 5 to 10 of the *Public Health and Wellbeing Act 2008*. Consideration has been given to the relevant human rights contained in the *Charter of Human Rights and Responsibilities Act 2006*.

Victoria remains in a State of Emergency due to COVID-19, and we appreciate your willingness to comply with the restrictions that are currently in force. Strict measures are required to limit the spread of COVID-19 in the Victorian community.

We acknowledge that this decision may be a source of significant distress for you. We encourage you to seek additional support during this time if you feel it is needed. Lifeline, for example, offers 24-hour counselling and support: call 13 11 14 or you can access online support [here](#). Additional material and support can also be found [here](#).

If you require any further information on the travel restrictions for Victoria, please visit the Victorian Coronavirus website [here](#).

Yours sincerely,

Domestic Exemptions Team
Compliance and Enforcement | Engagement and Delivery
COVID-19 Response | Department of Health
DomesticExemptions@health.vic.gov.au
www.health.vic.gov.au

Source: Complaint to the Victorian Ombudsman

349. Other people said they were offended when the Department referred them to Lifeline.

'It was a traumatic experience and the final slap in the face was the link to lifeline in the decision letter which provided no reasons.'

'There was no other avenue to complain. The only recourse was to contact Lifeline and I find this absolutely appalling.'

'It reminds me so much of the complaints we get in mental health ... about people being communicated with humanely and compassionately and with clear outcome information from the people making the decisions and my learning is that I will use my poor experience when working with new workforces to illustrate the power of the human interaction.'

Reviewing decisions

350. According to records reviewed by the investigation, the Department intended to create an internal review system for exemption applications; however, this was ultimately not done.

351. In a document dated 26 May 2021 – *Guidelines for the consideration of applications for exemptions under the Victorian Border Crossing Permit Directions for Domestic Exemptions Team under the Public Health and Wellbeing Act 2008* (Vic) – the Department proposed an internal review system:

[i]n order to accord with principles of best practice administrative decision making, procedural fairness, and to ensure proportionality where a decision restricts a person's human rights.

352. The intention was to 'create a system of merits review' that would 'withstand scrutiny' and manifest some key features of a review system.

353. People complained to the Ombudsman about their inability to seek a review, and instead being advised to submit another application. Without reasons for the rejection being given, many were unsure what they needed to change.

354. While the investigation appreciates the challenges and complexity of the Department's role to manage border permits and exemptions, having a proper review system may have resulted in fairer decisions and greater community confidence in the system.

355. Responding to the Ombudsman's draft report, the Department highlighted several improvement initiatives it had implemented, including:

- Introduction of a 'medical advisor' to consider cases and provide greater access to medical advice regarding urgency and need.
- Implementation of a process whereby an automated response is generated and sent by email to each applicant on receipt of an application. That email describes more information to the public with targeted information to make an exemption application and reflects the information relied on by decision-makers.
- Introduction of a specific category of exemption for boarding school students. This is relevant to the Yanco Agricultural School case study.
- Improved ability to review DET's performance. For example, an ability to review the number of cases closed each day versus the number of cases received to provide an indication of how quickly cases were being processed and whether staffing levels were appropriate.
- Stronger training and guidance for triage staff to identify applicants that may be able to travel on a permit or as an excepted person to improve the prospect of these applicants travelling as quickly as possible.
- Development of extensive process documents for staff to ensure better consistency in approach to applications for all case officers.

356. The Department also said it:

... agrees with the Ombudsman that any future travel permit system operating in the context of a public health emergency should include a process for the decision to be reviewed having regard to the relevant public health directions, epidemiological circumstances and public health advice at the time of review; and upon request from an applicant, the provision of key reasons for any decision not to grant an application.

Conclusions

Public Health Directions and Victoria's border

357. Throughout the pandemic, Australian States and Territories have implemented border controls to eliminate or reduce the serious risk to public health. For almost two years, Victorians have necessarily become accustomed to public health restrictions on movement, with spikes in cases inevitably prompting swift responses in the form of border closures and lockdowns. People have adapted, but have had to make difficult choices in their personal and working lives.
358. The legislation provides authorities with substantial powers to restrict movement and impose other limitations on people's rights during declared public health emergencies.
359. Although extraordinary in nature, exercise of these powers remains subject to the specific principles identified in the Public Health and Wellbeing Act. Equally, decisions and actions must be compatible with, and give proper consideration to, human rights.
360. The guiding principles underpinning the Public Health and Wellbeing Act include 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.
361. These must be balanced with the principle of proportionality, which cautions against implementing arbitrary measures disproportionate to the public health risks sought to be addressed.
362. From January 2021, Victoria operated a traffic light system, where every person wishing to enter the State could not enter unless they obtained a permit (or if they had an exemption or were an 'excepted person'). The type of permit (and its associated conditions regarding testing and quarantining) depended on the colour-coded zone of the area the person intended to travel from. All areas in Australia were designated green, orange or red zones based on the latest health advice from the Chief Health Officer ('CHO').
363. Victoria's Border Directions were updated multiple times between January and July 2021, and it is fair to suggest that people had generally come to rely on the traffic light system to understand the public health advice and plan their interstate travel.
364. When outbreaks of COVID-19 continued to escalate in NSW, and areas starting with Greater Sydney were declared to be orange and then red zones, Victorian residents would not have expected to be prevented from coming home. Despite the explicit warnings – 'if you're a Victorian in NSW ... you need to come home now' – people were reasonably entitled to rely on the established traffic light system, which – even at its most severe – would have allowed them to return home subject to self-quarantining for 14 days and regular COVID-19 testing.
365. Even on 10 July 2021, the warning of the Commander COVID-19 Response expressly made clear that Victorians would still be able to come home: 'if the situation gets to a point where it's beyond critical, we will make it red ... you can still come back home, but you'll be doing 14 days of isolation and home quarantine.'

366. On 20 July 2021, when Victorian residents in red zones with permits were given approximately 12 hours to make it across the border, for many, particularly those in regional and northern NSW, this was impossible.
367. On 23 July 2021, the entire state of NSW was declared an 'extreme risk zone' after the Border Directions were changed again to create a new category which applied retrospectively from 9 July 2021. People who were in an extreme risk zone were deemed to be 'prohibited persons' and were unable to enter Victoria unless they had an exemption or were an 'excepted person'. The ACT was later also declared to be an extreme risk zone on 16 August 2021. As a result, thousands of Victorian residents and others wishing to enter the State from NSW and the ACT were effectively prevented from doing so.
368. Each time the Border Directions were updated and reissued, the CHO (or Acting CHO) received detailed advice justifying their necessity, including information about community transmission of COVID-19 and current outbreaks, and consideration of the human rights implications.
369. On the facts available, it could not be said that the decisions to issue the Border Directions were 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds'⁴⁹ or that proper consideration was not given to human rights.
370. However, the unexpected suspension of red zone permits and the subsequent addition of extreme risk zones to the Border Directions fundamentally changed the system Victorians had come to reasonably rely on. It caught many people off guard.
371. Given the exigencies of the public health emergency, the Border Directions were not unreasonable. But the fact they were retrospective, and that Victorians stranded in NSW and the ACT had relied on a traffic light system under which they expected to be able to re-enter the State under strict conditions, should have been taken into account when exemption applications were considered.

Exemption applications under the Border Directions

372. Under the Border Directions, people in extreme risk zones could request an exemption from any or all requirements contained in the Directions for a number of specified reasons. This included attending a funeral or end of life event or returning home for health, wellbeing, care or compassionate reasons or for any other reason under a general discretion.
373. Only specific senior departmental staff had the authority to exempt a person from requirements in the Directions. In practice, the Department's Domestic Exemptions Team ('DET') was responsible for managing requests for exemptions, receiving an average of 420 applications each day between 23 July 2021 and 6 September 2021.
374. According to the Department, almost 8,000 exemption applications were open in early August, and the DET was scaled up from 20 staff in early July to 285 by early September.
375. Staff responsible for categorising and prioritising applications were expected to complete 50 per hour: an average of almost one every 30 seconds.

⁴⁹ *Loiolo v Gilies* [2020] VSC 722, [196], referencing *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, 998 [38] (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 648 [131] (Crennan and Bell JJ).

376. In the same period, an average of 500 applications were dealt with each day. According to the Department, on some days, the DET handled over 1,000 exemption applications.⁵⁰ The Department's policy was that only Directors or Deputy CHOs were able to decide applications for exemptions. As very senior Departmental staff, Directors and Deputy CHOs had a wide range of responsibilities, so time dedicated to each individual exemption application was limited.
377. The difference in approval rates between the Directors and the Deputy CHO was striking. The ability of a Deputy CHO to impose additional or different conditions may have allowed for fairer decision-making because of their expertise and knowledge about what factors might mitigate risks to public health.

Excepted persons

378. The Border Directions did not provide for the Department to decide whether a person qualified as an 'excepted person', so the decision was made at the border by an Authorised Officer or Victoria Police Officer. The consequences of an adverse decision were severe – people faced the possibility of a \$5,452 fine and could either be sent back across the border or have to enter hotel quarantine for 14 days at their own expense.
379. People who called the Department for advice were given general information only and were left unsure whether they could travel as an excepted person. Some of these people held an honest belief they were an excepted person but were then fined and turned back at the border.

Discretionary decision-making under the Border Directions

380. The CHO's guidance material for decision-makers set out the criteria by which applications could be assessed, the supporting evidence required, and specific conditions that would apply to each request granted.
381. The evidence required was extensive. Depending on the category of exemption being applied for, it included statutory declarations, proof of residence, proof of ownership of animals, letters from medical professionals, bank or financial statements, and statements of relationship to people who were dying or funeral notices.
382. Many people found it difficult to comply with the Department's requirements. It is not clear what thought, if any, the Department gave to the likely difficulties facing people away from home; those unfamiliar with technology, the internet or without access to it; or other practicalities to obtain the required documentation.
383. In addition to the CHO guidance material, members of the DET referred to the Deputy CHO 'decision diary' when assessing applications. One particularly concerning entry in this diary suggested that whether a person 'crossed interstate against public advice' would be relevant to deciding their application to travel to Victoria for the purposes of family reunification or on care or compassionate grounds. On the face of it, such a consideration is punitive – it is difficult to see how the fact that someone travelled when they were advised not to, but were not prohibited, could be relevant on public health grounds when they sought to return.

⁵⁰ Department of Health, *Letter to the Victorian Ombudsman* (11 October 2021).

384. In addition to the CHO guidance material and Deputy CHO decision diary, the Department's 'Assessment Guidance' provided a list of factors that may impact the public health risk and examples of compelling reasons for travel. Although vaccination status was identified as a factor 'mitigating the public health risk', it was not determinative. In practice, little or no weight appears to have been placed on it until the Border Directions changed on 30 September 2021 to allow fully vaccinated Victorian residents to return home.
385. Between 9 July and 14 September 2021, the Department received 33,252 exemption applications, of which only 8 per cent were granted. The overwhelming majority were not specifically rejected but 'closed for other reasons'.
386. These included numerous examples of people caught up in a bureaucratic merry-go-round where applications were closed as 'expired' when the Department was not able to process them before the intended travel date had passed, leaving them with no choice but to start the process again.
387. When comparing decisions made by Deputy CHOs and those made by Directors, the data strongly suggests that decision-makers with public health expertise were significantly more likely to grant exemptions. But the vast majority of applications did not get to a decision-maker at all.
388. Overall, the data reviewed by the investigation demonstrated that although the Border Directions themselves appeared to provide for broad decision-making discretion, in practice, it was exercised narrowly.
389. In accordance with the Border Directions, decision-makers were required to have regard to the need to protect public health and the principles in the Public Health and Wellbeing Act. Accordingly, decisions to grant or refuse exemption applications should have been proportionate to the public health risk sought to be prevented, minimised or controlled and not made in an arbitrary manner.
390. Yet based on the guidance material supporting the exercise of discretion, the Department's decision data and the complaints to the Ombudsman, it appears that decision-makers put too great an emphasis on the subjective assessment of whether an applicant could prove they had 'compelling circumstances' for travel, and not enough on the objective assessment of whether the public health risks of the applicant entering Victoria could be sufficiently mitigated.
391. It is difficult to understand how a double-vaccinated person who consistently tested negative to COVID-19, was willing to self-quarantine for 14 days on arrival and could comfortably drive to their destination from the NSW border on one tank of fuel (to minimise interactions) could pose such a risk to public health to justify refusing an exemption.
392. Such a narrow exercise of discretion may have been justifiable while a COVID-19 elimination strategy was being pursued, when the risk in NSW and the ACT was growing and there were few cases in Victoria. But it persisted well after the elimination strategy was abandoned. By the end of August 2021, it is even harder to understand how fully vaccinated Victorian residents just trying to get home could still be subject to such an approach.

393. Specifically in relation to Victorian residents, it appeared the Department put significant resources towards keeping people out instead of providing safe ways for them to return home.

Reviewing decisions

394. Although contemplated by the Department, a review process was not established for decisions under the Border Directions to refuse to grant exemptions.

395. People told the Ombudsman of their frustration at instead having to submit another application. Without knowing why their application was rejected, many people simply did not know how to proceed.

396. While appreciating the scale and complexity of the Department's role to manage border permits and exemptions, having a proper review system may well have resulted in fairer decisions and greater community confidence in the system.

Opinion

397. The investigation did not review all decisions and does not suggest that all were unfair. It is evident for at least those decisions made by Deputy CHOs, considerable thought was given to the circumstances and the public health implications. It is also acknowledged the Department was under enormous pressure dealing with the exigencies of the public health emergency and that the intentions of the scheme were to protect people in Victoria from a dangerous virus that had already seeded through cross border incursion. But as noted above, the overwhelming majority of applications did not get to a decision-maker at all, and the guidance did not change even as case numbers in Victoria grew and the risks evolved. The consequences of that were vast, and unfair, for many thousands of people stuck across the border.
398. In light of the above and the data and complaints reviewed by the investigation, the narrow exercise of the Department's decision-making discretion under the *Victorian Border Crossing Permit Directions* resulted in unjust outcomes pursuant to section 23(1)(b) of the Ombudsman Act.

Recommendations

The Ombudsman welcomes amendments to the *Public Health and Wellbeing Act 2008* (Vic) to provide greater transparency of public health advice and human rights assessments underpinning decisions to issue public health orders. As such, the Ombudsman does not need to recommend similar measures.

Further changes, some of which can be reflected in guidance under the Act, are, however, still needed to address the issues identified in this report.

Recommendations to the Victorian Government

Recommendation 1

Publicly acknowledge that the narrow exercise of discretion under the Border Directions while NSW and the ACT were 'extreme risk zones' resulted in unjust outcomes, and consider measures to alleviate this, such as ex gratia payments on application to help cover the financial cost of not being able to travel home.

Recommendation 2

To provide greater clarity, consider amending section 12 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to reflect the equivalent provision in the *Human Rights Act 2004* (ACT) as follows.

12 Freedom of movement

Every person has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

Recommendations to the Secretary to the Department of Health

Recommendation 3

As a matter of priority, develop and implement policy under the amended *Public Health and Wellbeing Act 2008* (Vic) to:

- a. assure Victorians that their ability to return home safely will be a key component of future public health directions or pandemic orders that require the closure of Victoria's interstate borders
- b. ensure that if, as a result of interstate border closures, a Victorian resident is unable to return home safely, appropriate financial assistance will be provided so the person is not unfairly disadvantaged
- c. provide guidance for the implementation of future public health directions or pandemic orders that allow people to apply to be exempt from any or all requirements, to ensure discretionary decision-makers:
 - i. consider each applicant's individual circumstances
 - ii. take reasonable steps to engage directly with the applicant
 - iii. prioritise factors that mitigate risk to public health
 - iv. consider whether additional conditions may be reasonably imposed on the applicant to mitigate risk to public health and allow the exemption to be granted
 - v. provide reasons for any adverse decision
 - vi. provide details of internal and external review rights, including the Ombudsman.

Recommendation 4

Noting the Department could not provide certainty to people on their status as an 'excepted person' under the Border Directions, invite those who received an infringement for entering or attempting to enter Victoria as an 'excepted person' to have their infringement reviewed and withdrawn where they believed on reasonable grounds they were an 'excepted person'.

Recommendation 5

Report publicly on steps taken to implement recommendations 1-4 above, on or before 31 March 2022.

Appendix 1

Department of Health 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

25 November 2021

A INTRODUCTION

- 1 This document provides the response of the Department of Health (the **Department**) to the Draft Report prepared by the Victorian Ombudsman on her investigation into travel permits, exceptions and exemptions under the *Victorian Border Crossing Permit Directions* (the **Investigation**).
- 2 The Investigation is being conducted pursuant to the Ombudsman's own motion powers in section 16A of the *Ombudsman Act 1973 (Vic)* (the **Ombudsman Act**). Section 23(1) of the Ombudsman Act outlines opinions that the Ombudsman may consider forming about the administrative action to which an investigation relates.
- 3 The introduction of border restrictions in Victoria presented a number of challenges for travellers and was understandably the source of frustration and distress for many individuals. The cases identified in the Draft Report profile some of the difficulties faced by applicants seeking to enter Victoria, including Victorians attempting to come home, during a period when the risks presented to the public health of Victorians by COVID-19 was constantly evolving. The exemption process was established to address the most compelling of those cases in the context of the public health risks at the time, which included an elevated risk to the public health of Victorians from interstate travellers.
- 4 At the time of writing, all Local Government Areas in all States and Territories across Australia are green zones for the purposes of entering Victoria. Explicitly, apart from applying for a permit, there are no domestic travel restrictions for travel into Victoria. All interstate travellers may apply for a permit to enter Victoria and do not need to apply for an exemption. Further, Victoria has recently entered Phase D of the Roadmap to Deliver the National Plan with around 90% of Victoria's population (aged 12 years and older) fully vaccinated against COVID-19.¹ In accord with Phase D settings, the permit system to manage domestic interstate travel permits, exceptions and exemptions is scheduled to be revoked entirely on 25 November 2021.
- 5 The Department acknowledges that the border restrictions were a source of distress and disruption to individuals. However, as described below the public health risk at the relevant time was significant and the Chief Health Officer (**CHO**) determined that the restrictions were necessary to protect Victorians, particularly at a time when the majority of Victorians were not vaccinated.
- 6 The Department agrees with the Ombudsman that any future travel permit system operating in the context of a public health emergency should include:

¹ <https://www.coronavirus.vic.gov.au/victorias-roadmap>.

- a. a process for the decision to be reviewed having regard to the relevant public health directions, epidemiological circumstances and public health advice at the time of review;² and
- b. upon request from an applicant, the provision of key reasons for any decision not to grant an application.³

B PUBLIC HEALTH RATIONALE

- 7 The Draft Report will benefit from including more complete information on the nature of the COVID-19 Delta variant and the increased transmission risk.⁴ The Delta variant demanded a significantly different public health response to that used at the early stages of the pandemic in Victoria. That requirement, and the underlying public health rationale, directly informed the Department's approach to border restrictions.
- 8 The description of COVID-19 being primarily spread through saliva droplets or nasal discharge is outdated and inaccurate. Current evidence is that it is mostly transmitted from person to person via airborne or aerosol particles exhaled from an infected person, and inhaled or introduced through contact with contaminated surfaces by a person who is susceptible to the disease. This is directly relevant to the risks of at scale transmission from an infected individual.
- 9 Under the *Victorian Border Crossing Permit Directions (VBCPD)*, Victoria has a permit system in place for all domestic travel into Victoria. Under these directions, all domestic travellers (including residents of Victoria returning home from interstate travel) require a permit to enter Victoria from anywhere in Australia, unless they are eligible for an exemption or meet the criteria to travel as an 'excepted person' (as defined in the VBCPD).
- 10 The Domestic Exemptions Team (**DET**) is responsible for managing requests for *exemptions* under the VBCPD. They do not have oversight of the permit system. The VBCPD are reviewed regularly by the CHO and adjusted as the epidemiological situation evolves, taking into account the relevant principles under the *Public Health and Wellbeing Act 2008 (Vic)* (**PHW Act**) and rights under the *Charter of Human Rights and Responsibilities 2006 (Vic)* (**Charter**) engaged by those directions.
- 11 The Draft Report in part mischaracterises the process for travel into Victoria on a travel permit versus an exemption. The permit system is the default process and is automatic in that applicants need only meet the relevant criteria and apply online. There is no discretionary component. In contrast, exemptions, by design, are limited and are only granted by decision-makers in special circumstances in accordance with the specific and general exemption powers under the VBCPD. Indeed, all applicants for an exemption must provide compelling reasons and satisfy the decision maker that the public health risk for their travel can be

² Draft Report at [357] to [359].

³ Draft Report at [310].

⁴ Draft Report at [29] - [33].

mitigated. The declaration of an 'extreme risk zone' (**ERZ**) creates a presumption that persons are not able to enter Victoria from that area due to the significant public health risk. An applicant must accordingly provide compelling reasons why they need to enter Victoria and satisfy the decision-maker that they can self-quarantine on arrival having regard to those significant public health risks for all Victorians.

- 12 From early August 2021, in response to a significantly increased caseload, DET implemented a process whereby an automated response was generated and sent by email to each applicant on receipt of an application. The email extracted in the Draft Report is historic.⁵ The updated email, a product of the continuous system improvement processes that are in place to better meet the demand for exemptions, describes the types of evidence that may be required to support each category of exemption and reflects the information contained in the CHO Guidance.
- 13 As described below, the public health risk at the relevant time was significant and it was this epidemiological situation that directly informed the changes to the VBCPD. That Victoria's ongoing third wave, a wave that has been associated with over 95,000 cases and 480 deaths to date, was seeded by infected persons from an ERZ is evidence that the public health risks are real and material, not theoretical.

Extreme risk zones and predictability of interstate travel

- 14 On 23 July 2021, the CHO made changes to the VBCPD, introducing the category of ERZ as an additional risk designation. The CHO also determined New South Wales (**NSW**) to be an ERZ.
- 15 The introduction of ERZs was designed for locations that present a sustained, elevated risk for COVID-19 transmission, over and above the identified risk of transmission from a red zone. Unlike Victorians in red zones, because of the elevated health risk, Victorians in ERZs could not return home unless they obtained an exemption, had another valid permit (such as for specified workers) or were excepted for limited reasons. In these locations, there may be evidence of high case numbers, a high number of exposure sites, transmission through brief periods of contact and super spreading events.
- 16 The designation enables the CHO to apply additional controls and restrictions on the movement from persons entering Victoria from these areas, to manage the risk of incursion into Victoria from ERZs, whilst continuing to allow for a graded approach to managing travel permit arrivals from other designated zones.
- 17 The timeline diagram on page 5 of the Draft Report and the public statements referred to at [79] – [81] are incorrect and incomplete. In fact, Victorian residents were strongly and repeatedly encouraged to return to Victoria as soon as possible (or to seriously reconsider travelling out of Victoria) in, at least, the following communications not included in the Draft Report:

⁵ Draft Report at [194] and Figure 10.

- On 17 June 2021: *“The Chief Health Officer strongly advises those planning to travel from Victoria to the City of Sydney, Waverley and Woollahra LGAs to reconsider”*
- On 22 June 2021: *“The Chief Health Officer continues to closely monitor the situation in NSW and is currently actively considering updates to travel permit zones based on an assessment of public health risks.”*
- On 25 June 2021: *“As the school holidays begin, we are asking all individuals to do the right thing and follow the rules that are in place. You should not be travelling to a red zone in New South Wales.”*
- On 25 June 2021: *“Don’t travel to a red zone in NSW. You may not be able to return home”*
- On 27 June 2021: *“You should not be travelling to a red zone in New South Wales, and if you do travel, note that the zones can change at short notice.”*
- On 28 June 2021: *“You should not be travelling to a red zone in NSW or the Northern Territory. If you do travel anywhere, note that the zones can change at short notice”*
- On 5 July 2021: *“The Acting Chief Health Officer advises strongly against non-essential travel to red or orange zones”*
- On 6 July 2021: *“The Acting Chief Health Officer advises strongly against non-essential travel to red or orange zones”*
- On 7 July 2021: *“...we’re continuing to review our travel permit settings daily based on changing epidemiology. Where there are updates we are going to provide them with as much lead time as possible so that Victorians will know what to expect and in the meantime, we still continue to advise Victorians not to travel to orange or red zones”*
- On 8 July 2021: *“The Acting Chief Health Officer advises strongly against non-essential travel to red or orange zones”*
- On 9 July 2021: *“Victorian public health authorities continue to review our travel permit settings on a daily basis and the Acting Chief Health Officer advises strongly against non-essential travel to red or orange zones. Given the escalating situation, if you are a Victorian resident current in NSW, you should come home to Victoria as soon as you can”*
- On 10 July 2021: *“Victorian public health authorities continue to review our travel permit settings on a daily basis and the Acting Chief Health Officer advises strongly against non-essential travel to red or orange zones. Given the escalating situation, if you are a Victorian resident current in NSW, you should come home to Victoria as soon as you can”*
- On 15 July 2021: *“We have been saying consistently since the middle of June come home...we’ve been saying since the middle of June don’t go to NSW. It’s a high risk...so please, if you’re a Victorian and you are still in NSW, time is ticking...you have to get home”*
- On 16 July 2021: *“My advice to people from Victoria who are in NSW is for three plus weeks now we have been respectfully advising you to get home or run the risk that the rules change...we have said please come home because the rules can change. The rules have now changed*
- On 19 July 2021: *“...I can’t rule out certainly further changes and further limiting movement from NSW to Victoria...we are going to have an ongoing challenge*

in terms of defending that border to the north and making sure that nobody who has this virus is coming to our state...We will be calling on the community to play their part in that for a lengthy period of time”

- On 20 July 2021: *“For four weeks, we have been saying to people from Victoria who are in Sydney and now in broader NSW, not the bubble, but I mean beyond that border bubble, we have been saying come home, come home because the rules may change. Well the rules are changing today”*

- 18 Accordingly, the suggestion that the ‘traffic light system’ for interstate travel was static and that it was fair for the public to assume that it would remain in place without change for the purpose of planning interstate travel is inconsistent with the clear contemporaneous public statements to the contrary.⁶ It is also inconsistent with the previous closure of borders. For example, in closing the border to NSW in January 2021 in response to an outbreak in the northern beaches, or in closing the border to South Australia (**SA**) in November 2020 in response to the outbreak in Adelaide.
- 19 Indeed, the above strong, repeated and consistent messaging from the Premier, the Minister for Health, and the Department advising against travel and emphasising the seriousness of the situation in NSW, supports the very opposite conclusion that (i) Victorians were given a reasonable opportunity to get home, and (ii) Victorians were advised against travelling for non-essential reasons given the likelihood of border closures and the significant and changing risk posed to Victoria by the Delta variant from interstate travellers.

Retrospective effect of border restrictions

- 20 The Draft Report accepts that the retrospective declaration of NSW and ACT as ERZs was not unlawful. However, it contends that the retrospective effect from 14 days prior had the potential to unfairly disadvantage Victorian residents trying to get home.⁷ That contention is put without:
- a. regard to the incubation period of 14 days, being the period of time between contracting COVID-19 and showing any symptoms, informing the public health rationale that warranted the retrospective effect; and
 - b. consideration of the complete set of public statements addressing the worsening epidemiological situation and the impact on incoming travel to Victoria (see paragraph 17) to inform the public and allow them to exercise choice and organise themselves accordingly.
- 21 Indeed, the retrospective effect of those designations is not unusual in the context of the significantly changed public health risk from interstate travellers. The Draft Report quotes from an Interim Report of the Australian Law Reform Commission (at [134]) but fails to consider the published Final Report that finds:⁸

⁶ See also Draft Report at [27], [80], [128], [129] and [328].

⁷ Draft Report at [143].

⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report 129, December 2015) at 1.54.

Retrospective civil laws, that is, laws that retrospectively change legal rights and obligations, are reasonably common. Retrospective laws are not an effective way of deterring behaviour, but may serve other policy objectives such as ensuring fairness, protecting the public, or addressing the consequences of a court decision that unsettled previous understandings of the law.

- 22 Indeed, the CHO determined that the border restrictions limiting travel into Victoria from ERZs – including the retrospective effect of zone declarations – was reasonably and proportionately necessary to manage and reduce the serious risk to public health that COVID-19 presented to the broader Victorian community. This was based on the epidemiological situation at the time, considered public health advice, the principles under the PHW Act and the rights under the Charter. Accordingly, the retrospective effect of the declaration of NSW and ACT as ERZs to protect public health was appropriate in the circumstances.

Epidemiological situation in New South Wales

- 23 At the onset of a new outbreak on 17 June 2021, NSW recorded 3 new local cases. By 23 July 2021, a total of 1,648 locally acquired cases were recorded as part of the outbreak. Genomic sequencing of the first case confirmed this outbreak as the highly transmissible Delta variant of COVID-19. At this time, NSW had identified 395 unique exposure sites and an additional 45 public transport routes. As at 23 July 2021, 39% of the total cases recorded in the previous 24 hours were not in full isolation whilst infectious.
- 24 Despite a range of restrictions across Greater Sydney and additional controls in particular local government areas and regional communities, the daily cases and new exposure sites were continuing to increase. There was also a delay in test turnaround times, impacting on contact tracing efforts. The public health advice was that the situation was like the scenario faced in Victoria's second wave of transmission in July 2020.
- 25 There continued to be high case numbers including unlinked cases, cases out in the community during their infectious period and ongoing transmission in Greater Sydney and surrounding areas as well as exposure events in parts of regional NSW. There was an ongoing significant risk of incursion from NSW into Victoria. This was compounded by reports of non-compliance with restrictions in place by individuals and groups in NSW, including individuals who were known cases travelling from Greater Sydney to regional NSW while infectious in breach of public health orders.

Epidemiological situation in Victoria

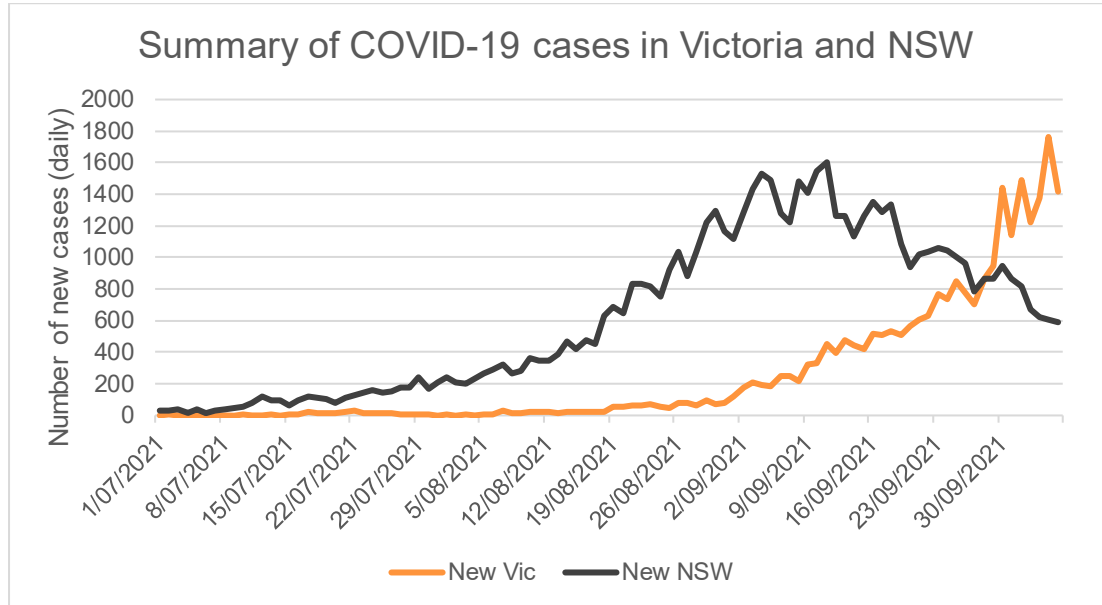


Figure 1: Summary of COVID-19 cases in Victoria and NSW

- 26 As of 23 July 2021, there were 158 active cases of COVID-19 (146 locally acquired and 12 overseas acquired cases). There were 31 active outbreaks comprising 131 linked cases. These outbreaks were associated with the Delta variant and all seeded from NSW cases travelling to Victoria, principally due to inadequate restrictive controls in NSW.
- 27 At this time, Victoria had ‘circuit-breaker’ restrictions in place, which had commenced on 15 July 2021. These restrictions were based on strong public health advice to gain rapid control of the outbreak in Victoria. The vaccine roll-out was continuing, with the total number of doses received by Victorians at 2,982,502.
- 28 As mentioned above, all of the locally acquired cases in Victoria were linked to one of two separate incursions of the Delta variant from the Greater Sydney outbreak: the Maribyrnong Community Outbreak was seeded by a removalist from NSW who worked in Victoria on 8 July 2021 and tested positive on 11 July 2021 after returning to NSW; and the Coolaroo Community Outbreak was seeded by a red permit holder, returning from NSW. This makes plain that every exemption granted to allow a person to enter Victoria presented a public health risk because any traveller was at risk of carrying the virus into Victoria that could seed an outbreak.
- 29 These incursions generated a large number of exposure sites and close contacts in Victoria. The risk of further incursions due to persons returning from interstate areas with increased incidence of COVID-19 infections using the travel zone permit system remained, and further safeguards were required to mitigate against the risk of another seeding event. As described in paragraph 34 below, the low levels of vaccination meant that there was a material risk that even fully vaccinated Victorians could acquire and transmit COVID-19 in the community. This was the context for the introduction of ERZs and the designation of NSW as an ERZ.

C EXERCISE OF DISCRETION

Appropriate consideration of applicants' circumstances

- 30 The Draft Report concludes that it is difficult to understand how due attention was given to each person's individual circumstances before a decision was reached.⁹ This conclusion should be revisited and the underlying assumptions considered with the benefit of the following information.
- 31 The number of applications processed on any given day were not exclusively done by decision-makers. Indeed, the Draft Report states that only 29% of applications between 9 July and 14 September 2021 were determined and granted or refused by both Directors and Deputy CHOs.¹⁰ The remaining 71% of applications were closed for other reasons and did not require determination by a Director. In that context, the Draft Report identifies the four circumstances where an application may be closed for other reasons and those applications may be reopened if an applicant later makes contact, provides further supporting evidence or adjusts their intended travel date to allow for the application to be processed.¹¹
- 32 Further, Directors worked longer 9.5-hour shifts (not an 8-hour shift as assumed) and these would be even longer on busy days. Two Directors would work across two four-day shifts (Wednesday to Saturday and Sunday to Wednesday). It was not a five-day-work week precisely because of the longer shifts. Two Directors worked on Wednesdays which typically had the most number of applications determined.
- 33 Similarly misconceived, the Draft Report suggest that decision makers granted, refused, or determined over 1,000 applications on some days.¹² This misrepresents the process for considering applications, whereby many cases were processed or closed without the need for a determination to be made. For example, in the case of duplicate applications, or circumstances where the applicant has advised that they no longer wish to travel.
- 34 Accordingly, the contention that Directors may have had insufficient time to properly consider applicants' individual circumstances is incorrect.
- 35 For completeness, there was also no 'expectation' that one staff member would process all applications received each day.¹³ The calculations in the Draft Report are inaccurate because they incorrectly assume that only one person deals with applications whereas in reality a number of staff members on each shift processed applications.

Decisions of Directors and Deputy CHOs

⁹ Draft Report at [276] and [339].

¹⁰ Draft Report at [288].

¹¹ Draft Report at [278].

¹² Draft Report at [275] and [339].

¹³ Draft Report at [212].

- 36 The Draft Report states that Deputy CHOs were ‘significantly more likely to grant exemptions’ than Directors.¹⁴ That conclusion does not bear scrutiny in circumstances where, by design, applications considered by Directors and Deputy CHOs were of a fundamentally different character. Deputy CHOs would only be presented with applications that required consideration of medical or otherwise complex circumstances and, unlike Directors, Deputy CHOs could impose other conditions if granting an exemption.
- 37 In contrast, Directors determined all other applications and were presented with a significantly higher number of cases. Directors’ consideration of cases was consistent with the criteria in the VBCPD and CHO Guidance. Indeed, Figure 21 of the Draft Report discloses that Deputy CHOs determined 813 applications whereas Directors determined 9,437. Accordingly, the comparison between determinations made by Directors and Deputy CHOs is not meaningful.

Fully-vaccinated returning Victorians

- 38 The Draft Report suggests that in exercising discretion for determining applications for exemptions, decision-makers should have been more permissive in granting applications for fully vaccinated persons.¹⁵ That suggestion belies a misunderstanding of the effect of vaccinations and the public health risk **at the relevant time**.
- 39 In July – September 2021, the vaccination rates in Victoria slowly improved. Nonetheless, as at 29 September 2021 less than 50% of Victorians aged 16 and over were fully vaccinated.¹⁶ While the vaccine rollout was underway, there remained at that time insufficient coverage of the population to protect against outbreaks and resultant community transmission. Indeed, while the range of COVID-19 vaccines reduce symptom severity, vaccinated people are still able to be infected with and transmit COVID-19. Accordingly, there was a material risk that fully vaccinated Victorians could still transmit COVID-19 to others in the community, and that this could have risked severe consequences for the large proportion of the Victorians that were yet to be vaccinated at the time.
- 40 Decision-makers followed this public health guidance and, on that basis, in exercising discretion to grant exemptions for applicants that met the exemption criteria set out in the VBCPD and CHO Guidance, gave consideration to but did not rely on vaccination status as a key integer in exercising their discretion in accordance with the principles under the PHW Act and Charter. Doing so would prioritise an individual’s circumstances over the countervailing and significant risk posed to the public health of all Victorians.
- 41 From 10 to 17 September 2021, partially vaccinated Victorians residing in border communities were allowed to apply for an exemption to return home, subject to full

¹⁴ Draft Report at [289], [348] and Figure 21.

¹⁵ See, eg, Draft Report at [124], [125], [297], [309], [345] and [353].

¹⁶ Australian Government: Operation COVID Shield, *COVID-19 Vaccine Rollout Jurisdiction Breakdowns* (30 September 2021) <<https://www.health.gov.au/sites/default/files/documents/2021/09/covid-19-vaccine-rollout-update-jurisdictional-breakdown-30-september-2021.pdf>>.

quarantine requirements and a testing regime.¹⁷ From 30 September 2021, fully vaccinated Victorian residents were able to apply for a new ERZ permit to return to Victoria, also subject to full quarantine requirements and a testing regime.¹⁸ Given the diminishing differential transmission risk between NSW and Victoria, the risk posed by entry of fully vaccinated persons was balanced with the need to repatriate Victorians to support the health and wellbeing of residents to be able to return home.

D CONTINUOUS IMPROVEMENT

42 The Department made several improvements to its processes since the introduction of border restrictions. These included:

- Introduction of a 'medical advisor' to consider cases and provide greater access to medical advice regarding urgency and need.
- Implementation of a process whereby an automated response is generated and sent by email to each applicant on receipt of an application. That email describes more information to the public with targeted information to make an exemption application and reflects the information relied on by decision-makers.
- Introduction of a specific category of exemption for boarding school students. This is relevant to the Yanco Agricultural School case study.¹⁹
- Improved ability to review DET's performance. For example, an ability to review the number of cases closed each day versus the number of cases received to provide an indication of how quickly cases were being processed and whether staffing levels were appropriate.
- Stronger training and guidance for triage staff to identify applicants that may be able to travel on a permit or as an excepted person to improve the prospect of these applicants travelling as quickly as possible.
- Development of extensive process documents for staff to ensure better consistency in approach to applications for all case officers.

43 The Department agrees with the Ombudsman that any future travel permit system operating in the context of a public health emergency should include:

- a. a process for the decision to be reviewed having regard to the relevant public health directions, epidemiological circumstances and public health advice at the time of review;²⁰ and upon request from an applicant, the provision of key reasons for any decision not to grant an application.²¹

¹⁷ <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-10-september-2021>.

¹⁸ Premier of Victoria 'Pathway For Vaccinated Victorians To Come Back Home' (Media Release, 23 September 2021) <<https://www.premier.vic.gov.au/pathway-vaccinated-victorians-come-back-home>>.

¹⁹ Draft Report on page 48.

²⁰ Draft Report at [357] to [359].

²¹ Draft Report at [310].

Victorian Ombudsman's Parliamentary Reports tabled since April 2014

2021

Investigation into allegations of collusion with property developers at Kingston City Council
October 2021

The Ombudsman for Human Rights: A Casebook
August 2021

Councils and complaints – A good practice guide 2nd edition
July 2021

Investigation into good practice when conducting prison disciplinary hearing
July 2021

Investigation into Melton City Council's engagement of IT company, MK Datanet Pty Ltd
June 2021

Investigation into how local councils respond to ratepayers in financial hardship
May 2021

Investigation into the Department of Jobs, Precincts and Regions' administration of the Business Support Fund
April 2021

Outsourcing of parking fine internal reviews – a follow-up report
March 2021

Investigation of protected disclosure complaints regarding the former Principal of a Victorian public school
February 2021

2020

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

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

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

2018

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

Victorian Ombudsman's Parliamentary Reports tabled since April 2014

2017

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

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Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system

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Investigation into Victorian government school expulsions

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Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board

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Apologies

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Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board

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Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville

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Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint

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Investigation into the transparency of local government decision making

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Ombudsman enquiries: Resolving complaints informally

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Investigation into the management of complex workers compensation claims and WorkSafe oversight

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Report on recommendations

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Investigation into Casey City Council's Special Charge Scheme for Market Lane

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Investigation into the misuse of council resources

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Investigation into public transport fare evasion enforcement

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2015

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

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Conflict of interest by an Executive Officer in the Department of Education and Training

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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

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 1800 806 314
Email complaints@ombudsman.vic.gov.au
www.ombudsman.vic.gov.au