IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2020 03608

MICHELLE LOIELO — Plaintiff

v

ASSOCIATE PROFESSOR MICHELLE GILES (in her capacity as Deputy Public Health Commander as authorised to exercise emergency powers by the Chief Health Officer under section 199(2)(a) of the Public Health and Wellbeing Act 2008 (Vic)) — Defendant

---

JUDGE:	Ginnane J
WHERE HELD:	Melbourne
DATE OF HEARING:	28-29 September, 1-2 October 2020
DATE OF JUDGMENT:	2 November 2020
CASE MAY BE CITED AS:	Loielo v Giles
MEDIUM NEUTRAL CITATION:	[2020] VSC 722

JUDICIAL REVIEW – COVID 19 Pandemic – State of emergency – Directions by authorised officer – Stay at Home Directions - Whether power to impose Curfew – Whether plaintiff had standing - Whether authorised officer acted at the direction or behest of the Premier – Whether Curfew decision unreasonable, irrational or illogical – *Public Health and Wellbeing Act 2008* ss 4, 5, 6, 7, 8, 9, 10, 11, 111, 197, 198, 199, 200.

HUMAN RIGHTS – COVID-19 Pandemic - Stay at Home Restrictions – Curfew – Right of freedom of movement – Right to liberty – Whether restrictions on rights proportionate – Whether less restrictive means reasonably available – Whether act of imposing Curfew incompatible with human rights – Whether proper consideration given to human rights in making Curfew decision – Plaintiff's standing to bring Charter claims – *Charter of Human Rights and Responsibilities Act 2006* ss 7(2), 12, 21, 38, 39.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Clarke QC with Ms V Plain and Dr J Harkess	NOH Legal
For the Defendant	Ms K Walker QC, Solicitor-General for the State of Victoria with Mr J Pizer QC, Mr E Nekvapil, Ms S Fitzgerald and Mr T Wood	Victorian Government Solicitor's Office

HIS HONOUR:

Summary

1 This proceeding concerns the legality of a 9:00pm to 5:00am curfew, binding all people living in 'greater Melbourne',[1] imposed by a Direction made to combat the COVID-19 pandemic. It was contained in the *Stay at Home Directions (Restricted Areas) (No 15)*, which was one of eleven Directions, signed by the defendant, Associate Professor Michelle Giles, an authorised officer and senior medical adviser in the Department of Health and Human Services ('the Department') on 13 September 2020. It was made under statutory powers exercisable only when a State of Emergency is in effect in Victoria. The effect of the Curfew was that residents of the Restricted Areas could not leave their home between those hours, except for specified purposes under penalty of a significant fine. I will call the Directions, the Curfew Direction, because, although the Directions contained a number of restrictions, the plaintiff, Ms Michelle Loielo only challenges the Curfew, which on her case, was 'a step too far'. An 8:00pm to 5:00am Curfew had been introduced on 5 August at the peak of the second wave of COVID-19 infections, so the Directions of 13 September contained a modification of that initial Curfew, as well as a lessening of other restrictions. It is necessary to keep in mind that the Curfew was only one part of the Stay at Home Directions and there were other restrictions, such as the four permitted reasons for leaving home and the 'ring of steel' between greater Melbourne and the rest of Victoria.

2 The Curfew was a major restriction of human rights and liberties of the free people of Victoria. No instance of a curfew being imposed in Victoria by the Executive exists in living memory. Curfews are normally imposed to control civil disturbances and widespread outbreaks of lawlessness.

3 This proceeding was given an urgent hearing and was listed to commence on Monday, 28 September. The day before, on the Sunday, at a media conference, the Premier of Victoria, Mr Daniel Andrews, announced the end or revocation of the Curfew with

---

1 'Greater Melbourne' included 28 Cities and three Shires, one of which was Mornington Peninsula Shire. See Court Book, *Loielo v Giles* (Supreme Court of Victoria, S ECI 2020 03608, 28-29 September, 1-2 October 2020) 544 ('CB').

effect from the following day, which was the first day of the court case, because the public health team considered that it was no longer a proportionate measure. In those circumstances, the case commenced on the Monday as a challenge to Associate Professor Giles' decision to direct or order the continuation of the modified Curfew on 13 September even through it had been revoked. I refused the defendant's application, made following the revocation of the Curfew, to have particular issues determined as preliminary issues, including the plaintiff's standing and the availability of declaratory remedies and Charter remedies to her.

4 The plaintiff, Ms Michelle Loielo, owns a restaurant in Rosebud West and says that her business income was drastically reduced following the Stay at Home Directions and since the introduction of the Curfew. I have decided that Ms Loielo had standing to bring the proceeding because of the effect of the Curfew on her business.

5 Ms Loielo's challenge to the Curfew Direction commences with the argument that Associate Professor Giles' decision was made at the direction or behest of the Premier, Mr Daniel Andrews, and was not an independent decision. Ms Loielo also contends that the decision was unreasonable, illogical and irrational in the legal sense. Finally, she contends that the decision unlawfully limited her human rights which are recognised by the *Victorian Charter of Human Rights and Responsibilities Act 2006* ('the Charter'),[2] especially her rights of freedom of movement and to liberty.

6 Although, Ms Loielo is the only plaintiff in the proceeding, the Curfew affected the human rights of all residents in the Restricted Areas.

7 Associate Professor Michelle Giles is an infectious diseases physician, whose work has included reviewing outbreaks of COVID-19 infections. The eleven Directions ('the Directions') had to be made by the end of Sunday 13 September, when existing Directions expired. Both parties argued the case on the basis that Giles had to make an independent decision exercising the powers and discretions conferred by the emergency powers. She signed the Directions on the Sunday evening. She had joined

[2] *Charter of Human Rights and Responsibilities Act 2006* ('The Charter').

the Department on 3 August and was only appointed an authorised officer, who could exercise emergency powers,[3] on the Friday of the week concerned, two days before she made the Directions. She was appointed to fill in for a another officer, who was going on leave. Giles had never made directions under the emergency powers before and has not since. She had not been part of the discussions in the Department's Public Health Unit, which apparently initiated directions. I say apparently, because the Department's organisational structure was unclear from the evidence and a chart could not be provided showing the departmental line of command of persons with responsibilities to make directions. Giles was appointed an authorised officer by Adjunct Clinical Professor Brett Sutton, who is the Chief Health Officer. It was unclear why Giles was chosen or why, for instance, Sutton did not make these Directions himself. There was evidence of uncertainty of who had decided to introduce the Curfew in the first instance in August and on what basis it had been decided to introduce it. This uncertainty was despite the empowering legislation requiring that regard be had in its administration to the principle of accountability and that persons engaged in the administration of the legislation should as far as was practicable ensure that decisions are transparent, systematic and appropriate.[4]

8 Earlier, on the morning of Sunday 13 September, at a media conference, Mr Andrews, announced that the Curfew would continue, but would be modified. Chief Health Officer Sutton took part in that media conference. Mr Andrews' announcement about the Curfew occurred hours before Giles made her decision on Sunday evening. In the particular circumstances of this case, that announcement could have resulted in Giles considering that she should just follow and adopt the announcement rather than making an independent decision. Under the law, Giles, as the authorised officer, had the power to make the decision and not anyone else. That is not to say that she could not discuss the decision she was to make with Department staff and medical and other relevant officers, but she had to make an independent decision, as both parties accepted.

---

3 *Public Health and Wellbeing Act 2008* Pt 10 ('*PHW Act*').

4 Ibid s 8.

9 Prior to the Sunday morning media conference, there had been media speculation about who had made the decision to introduce the Curfew and why. The Chief Health Officer and the Chief Commissioner of Police had apparently denied that it was their decision.

10 The importance of the person with legal authority not only making the decision, but being seen to make 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, in this case Giles, actually exercises it. When basic human rights such as freedom of movement are being restricted, it is particularly important that legal procedure is followed. Thus, in the case of the New Zealand lockdown restrictions, the New Zealand Prime Minister on 23 March 2020 announced extensive lockdown restrictions confining people to their homes from 25 March, when the Director-General of Health, who actually possessed the power to make such orders under the empowering legislation, only made such orders nine days later on 3 April. The New Zealand High Court accepted that 'there was for nine days an unlawful limitation of certain rights and freedoms, that must be seen in the context of the rapidly developing public health emergency that the nation was facing'[5] and granted declaratory orders to the plaintiff.[6]

11 The evidence suggests that in Victoria, directions are usually prepared by the Department's Public Health Unit and circulated to stakeholders such as the 'Crisis Council of Cabinet', the Premier's Office and the Minister's office and are approved or signed off by the Chief Health Officer, who may be present when the Premier announces the directions or their modification. So the Premier, or his office, may be aware of the proposed directions before they are signed. But the present case did not follow that path in important respects. It was not the Chief Health Officer, who had made, or was to make, the directions, or someone who had made them previously, but Associate Professor Giles, who the parties accepted had to make an independent

---

5 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [290] (Thomas, Venning and Ellis JJ) *('Borrowdale')*.

6 The Court dismissed challenges to the orders made on 3 April and later orders.

decision. The decision to make the directions had to be her independent decision, as she was the authorised officer and decision-maker given that power. The defendant's defence to Ms Loielo's case was that Associate Professor Giles was the decision-maker and made an independent decision although she had not been part of discussions that had led to the drafting of the Directions. Giles gave evidence that she had been told that if she did not approve the Directions they would be 'escalated' to a more senior person in the Department for their decision.

12 There was no evidence that Mr Andrews personally told Associate Professor Giles the Direction he wished her to make about the curfew, or that he knew that she was the officer to make the Directions on 13 September. On the evidence, the plaintiff's first ground depends on the argument that, in the circumstances of the case, Giles acted to give effect to Mr Andrews' announcement and that, her decision was, in reality, the Premier's decision. I should mention at this point, that Mr Andrews was not a party to, or a witness in, this proceeding and therefore has not given evidence of the procedures adopted in the approval of the Curfew Direction or why he announced the Curfew's continuation as modified before the Directions had been approved or signed by the authorised officer, Giles. So under legal procedure no finding adverse to him on the issue that he personally directed Giles in the making of her decision could be, or is, made. But, at the same time, because Ms Loielo's first ground of challenge is that Giles acted at the direction or behest of Mr Andrews, it is necessary to make findings on the evidence before the Court about whether she did so, in the sense that she sought to implement his announcements.

13 There can be legitimate debate about whether a public servant in Giles' position, who is not the Minister, the Department Secretary or the Chief Health Officer, should be exercising an emergency executive power that may close down much of the State. One argument would be that such a decision should be made by the Minister, who is responsible to Parliament and therefore to the public, acting on health and other relevant advice, including as to the effect of the Direction on the economic or social life of the State. That is not to suggest that Giles lacked experience or qualifications in

dealing with infectious diseases. But, these are not academic questions, they are relevant to the plaintiff's first ground, whether Giles acted at the direction or behest of Mr Andrews.

14 Apart from this first ground, the dispute between the parties is whether there was a justification for the Curfew and its limitation on human rights. It had already been in place as an 8:00pm to 5:00am curfew since 5 August and the plaintiff argued that there was no evidence that the Curfew stopped any case of COVID-19 infection. On the other hand, Giles said that the Curfew was part of a package of measures introduced at a time of high infection rates that, by 13 September, had reduced that rate, including by reducing the movement of people, which is an important way to reduce infection rates.

15 The Court's role in this proceeding is to exercise its judicial review powers to determine whether Associate Professor Giles, acting as a member of the Executive, exercised the emergency powers to order a curfew in accordance with law. Even in an emergency, Victoria is a society of laws and any executive decrees must be made in accordance with law.

16 The plaintiff contended that the powers on which Giles relied did not give her, or anyone else, power or authority to order a curfew across much of Victoria. I have ultimately accepted the defendant's submissions that such power did exist in a state of emergency. I was advised by the parties after judgment had been reserved that a number of the legislative provisions that provide safeguards in the use of the emergency powers had been suspended by Ministerial Declaration made under the *Emergency Management Act 1986* because the Minister[7] was satisfied that the provisions 'would inhibit response' to the Coronavirus (COVID-19) pandemic. They had been replaced by Ministerial Directives that appear to contain, at least, most of the requirements of the legislation. No submissions were made about whether this step was really envisaged by the legislation in the case of a widespread lockdown and Curfew. Because, the matter was only raised after the conclusion of argument, it is not

[7] Minister for Police and Emergency Services.

appropriate that I express any view on this important question. But, I do not consider that the Ministerial Directives affect the determination of the issue of whether the emergency powers gave Giles power to make directions for a Curfew.

17 Human rights are of importance even in urgent or emergency situations, if governments and executives can disregard them, they are not rights of any real value. Garde J said of a decision-maker's duty to consider human rights:

> [I]n an emergency or extreme circumstance, or where critical decisions have to be made with great haste, there are grave risks that human rights may be overlooked or broken, if no life or limb endangered. The existence of an emergency, extreme circumstances or haste confirms, not obviates, the need for proper consideration to be given to relevant human rights. In the absence of statutory provision to the contrary, s 38(1) of the Charter will operate to require proper consideration to be given by public authorities to relevant human rights in emergencies or extreme circumstances or where great expedition is required in decision-making. [8]

18 In the recent New Zealand case to which I have referred, the High Court stated:

> Even in times of emergency, however, and even when the merits of the Government response are not widely contested, the rule of law matters.
>
> …
>
> Although the state of crisis during those first nine days goes some way to explaining what happened, it is equally so that in times of emergency the courts' constitutional role in keeping a weather eye on the rule of law assumes particular importance. For these reasons we conclude that it would be appropriate to make a declaration.[9]

19 Ms Loielo's first ground, that Giles acted at Mr Andrews' direction or behest, ultimately involves a question of fact. As previously mentioned, deciding whether Giles actually made an independent decision was complicated by the fact that on 13 September, the day when she signed the Directions, Mr Andrews had already announced, in effect, that the Curfew, as modified, would continue. Ms Loielo contended that it was implausible that Giles could make an independent decision in view of Mr Andrews' announcement that Sunday morning. But, Giles gave detailed evidence that she did make an independent decision and explained her reasoning, I

---

8 *Certain Children (by their Litigation Guardian, Sister Marie Brigid Arthur) v Minister for Families and Children* (2016) 51 VR 473, 508 [188] (citations omitted) ('*Certain Children No 1*').

9 *Borrowdale* (n 5) [2], [291].

accept that she did so. Her evidence is supported by emails of the Sunday afternoon in which she discussed her consideration of the Curfew, in terms similar to her evidence given to the Court. The plaintiff's first ground therefore does not succeed.

20 Grounds two and three, the unreasonable, illogicality and irrationality grounds do not succeed, as Giles' decision to continue the modified Curfew was within the range of reasonable decisions that could have been made.

21 Ground four raised issues under the Charter about whether Ms Loielo's human rights to freedom of movement and to liberty had been unlawfully limited by the Curfew. The Curfew limited her rights to freedom of movement and those of about 5 million other people living in the Restricted Areas. The legality of the limitation and restriction then depends on whether Giles' evidence established that the restrictions or limitations were reasonably proportionate to the objective of protecting public health. Ultimately, I have decided that, taking into account the purpose of the emergency powers and the temporary duration of the Curfew, that Giles' evidence has established that the limitation of, and restrictions on, human rights caused by the Curfew were, at least in the case of the plaintiff, proportionate to the purpose of protecting public health. Giles' evidence established that in the emergency circumstances presented by the second wave of the pandemic, that there were no other reasonably available means to achieve that purpose. She was the only witness called and therefore there was no countervailing or conflicting medical evidence. I am also satisfied that Giles gave the relevant human rights real consideration in approving the Directions. Ground four is therefore not established.

22 Ms Loielo's proceeding therefore does not succeed and must be dismissed.

The plaintiff's case

23 The plaintiff seeks a declaration that the Curfew made pursuant to the *Public Health and Wellbeing Act 2008* ('*PHW Act*') was unlawful and invalid on judicial review grounds, being: that the Direction was made under the Premier's direction; that it was unreasonable, illogical or irrational; and, that it unlawfully limited the plaintiff's

human rights, to freedom of movement and of liberty, recognised by the Charter.

24 The Curfew Direction was made by the defendant, Associate Professor Michelle Giles ('Giles'). She was the only witness called to give evidence in the trial and was cross-examined on her affidavits. The plaintiff did not call any expert or medical evidence about the need for the Curfew.

25 Neither the Victorian Equal Opportunity and Human Rights Commission or the Victorian Attorney-General chose to exercise their statutory rights of intervention in given by the Charter.

26 In her first affidavit, made while the Curfew was in force, the plaintiff, Ms Loielo, owns a restaurant at Rosebud West on the Mornington Peninsula. She says that the Stage 4 restrictions put her business under significant pressure; she laid-off staff and wound back trading. She works every day for between 12 and 15 hours, part at home and part at the restaurant. During the Curfew her revenue and turnover dropped over 90 per cent from between $5,000 and $20,000 to just $400 in the week commencing 6 September 2020 and the restaurant is now running at a loss. The early closure of other shops in the area, including supermarkets, meant that she could not obtain food supplies required for some customers' orders.

27 Ms Loielo is a widow and the primary caregiver of her, and her late husband's, three school-aged daughters. She lives alone, but near to her parents. She has no other family in Australia. She fears that she may not be able to care for her children or lose her house if the situation continued.

28 She described the significant stress she was experiencing, when the Curfew was in force. She struggled to balance the management of the restaurant with home schooling and caring for her children's needs. Her observation of her children's stress and the toll on them adversely affected her. She has not been able to socialise or exercise, or see her parents and her health has declined. She describes her social isolation as 'unbearable' and she has been unable to see her parents, who used to help care for her children. She could no longer able to go for an evening walk after she finished work.

29 Upon the lifting of the Curfew, Ms Loielo made a second affidavit confirming that she was continuing with this proceeding. She said she felt a sense of relief, that a weight had been lifted and no longer 'felt trapped at home'. She said that she 'felt normal again, like a piece of [her] life had been given back to [her]'. She remained concerned that the Premier would reintroduce a curfew. She anticipated trade at her restaurant would pick up, including during the hours previously affected by the Curfew.

Legislation

30 The provisions of the *Public Health and Wellbeing Act 2008* of relevance are:

> **1—Purpose**
>
> The purpose of this Act is to enact a new legislative scheme which promotes and protects public health and wellbeing in Victoria.
>
> **4—Objective**
>
> (3) It is the intention of Parliament that in the administration of this Act and in seeking to achieve the objective of this Act, regard should be given to the guiding principles set out in sections 5 to 11A.
>
> **5—Principle of evidence based decision-making**
>
> Decisions as to—
>
> (a) the most effective use of resources to promote and protect public health and wellbeing; and
>
> (b) the most effective and efficient public health and wellbeing interventions—
>
> should be based on evidence available in the circumstances that is relevant and reliable.
>
> **6—Precautionary principle**
>
> If a public health risk poses a serious threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk.
>
> **7—Principle of primacy of prevention**
>
> (1) The prevention of disease, illness, injury, disability or premature death is preferable to remedial measures.
>
> (2) For that purpose, capacity building and other health-promotion activities are central to reducing differences in health status and promoting the health and wellbeing of the people of Victoria.
>
> **8—Principle of accountability**

(1) Persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate.

(2) Members of the public should therefore be given—

(a) access to reliable information in appropriate forms to facilitate a good understanding of public health issues; and

(b) opportunities to participate in policy and program development.

9—Principle of proportionality

Decisions made and actions taken in the administration of this Act—

(a) should be proportionate to the public health risk sought to be prevented, minimised or controlled; and

(b) should not be made or taken in an arbitrary manner.

10—Principle of collaboration

Public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.

11—Principles applying to Part 8

Section 111 specifies the principles that are to apply for the purposes of the application, operation and interpretation of Part 8.

111—Principles

The following principles apply to the management and control of infectious diseases—

(a) the spread of an infectious disease should be prevented or minimised with the minimum restriction on the rights of any person;

(b) a person at risk of contracting an infectious disease should take all reasonable precautions to avoid contracting the infectious disease;

(c) a person who has, or suspects that they may have, an infectious disease should—

(i) ascertain whether he or she has an infectious disease and what precautions he or she should take to prevent any other person from contracting the infectious disease; and

(ii) take all reasonable steps to eliminate or reduce the risk of any other person contracting the infectious disease;

(d) a person who is at risk of contracting, has or suspects he or she may have, an infectious disease is entitled—

(i) to receive information about the infectious disease and any appropriate available treatment;

(ii) to have access to any appropriate available treatment.

200 – Emergency powers

(1) The emergency powers are—

(a) subject to this section, detain any person or group of persons in the emergency area for the period reasonably necessary to eliminate or reduce a serious risk to public health;

(b) restrict the movement of any person or group of persons within the emergency area;

(c) prevent any person or group of persons from entering the emergency area;

(d) give any other direction that the authorised officer considers is reasonably necessary to protect public health.

(2) Unless subsection (3) applies, before any person is subject to detention under subsection (1)(a), an authorised officer must briefly explain the reason why it is necessary to detain the person.

(3) If in the particular circumstances in which the power to detain the person is to be exercised, it is not practicable to briefly explain the reason why it is necessary to detain the person before the power is exercised, the authorised officer must do so as soon as is practicable.

(4) Before exercising any emergency powers under this section, an authorised officer must, unless it is not practicable to do so, warn the person that a refusal or failure to comply without a reasonable excuse, is an offence.

(5) An authorised officer must facilitate any reasonable request for communication made by a person subject to detention under subsection (1)(a).

(6) An authorised officer must at least once every 24 hours during the period that a person is subject to detention under subsection (1)(a) review whether the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.

(7) An authorised officer must as soon as is reasonably practicable give written notice to the Chief Health Officer—

(a) that a person has been made subject to detention under subsection (1)(a);

(b) that following a review under subsection (6) a person is to

continue to be subject to detention under subsection (1)(a).

(8) A notice under subsection (7) must include—

(a) the name of the person being detained; and

(b) a brief statement as to the reason why the person is being, or continues to be, subject to detention under subsection (1)(a).

(9) The Chief Health Officer must as soon as is reasonably practicable advise the Minister of any notice received under subsection (7).

(10) Despite subsection (7), if the authorised officer is the Chief Health Officer, the Chief Health Officer must, as soon as is reasonably practicable—

(a) advise the Minister in writing that a person has been made subject to detention under subsection (1)(a) or that following a review under subsection (6) a person is to continue to be subject to detention under subsection (1)(a); and

(b) include in the advice the name of the person being detained and a brief statement as to the reason why the person is being, or continues to be, subject to detention under subsection (1)(a).

Background to the making of the Curfew Direction

31 On 15 March 2020, Adjunct Clinical Professor Brett Sutton ('Sutton'), the Chief Health Officer ('CHO') advised the Health Minister that COVID-19 posed a serious, and potentially catastrophic, threat to public health. The Minister for Health declared a state of emergency on 16 March 2020 under s 198 of the PHW Act.[10]

32 Section 198(1) of the PHW Act provides:

> **Declaration of a state of emergency**
>
> The Minister may, on the advice of the Chief Health Officer and after consultation with the Minister and the Emergency Management Commissioner under the **Emergency Management Act 2013**, declare a state of emergency arising out of any circumstances causing a serious risk to public health.

33 The state of emergency remains in force and, most recently, was extended to 8 November.[11] The declaration of emergency and subsequent authorisations have empowered some authorised officers to give directions under s 200 of the PHW Act directed at reducing or eliminating the risk to public health posed by COVID-19.

---

10 Victoria, *Victoria Government Gazette (Special)*, No S 129, 16 March 2020.

11 Ibid No S 515, 12 October 2020.

34 In July 2020, a significant increase in reported cases of COVID-19 occurred in Victoria, reaching a peak of 6,797 active cases on 7 August 2020. Stage 4 restrictions in public health directions were made in order to reduce the spread of COVID-19. This culminated in the issuing of the *Stay at Home Directions (Restricted Areas) (No 8)* under s 200(1)(b) and (d) of the PHW Act on 5 August 2020, which included a curfew between 8:00pm and 5:00am.

35 On 2 August 2020, the Premier declared a state of disaster under the *Emergency Management Act 1986*. That state of disaster remains in force and most recently was extended to 8 November 2020.[12]

36 The state of disaster declaration stated:

> **Emergency Management Act 1986**
>
> PREMIER'S DECLARATION OF A STATE OF DISASTER
>
> ((Section 23(1))
>
> I, Daniel Andrews, Premier, after considering the advice of the Minister for Police and Emergency Services, being the Minister responsible for the giving of advice under section 23 of the **Emergency Management Act 1986** ('the Act'), and the advice of the Emergency Management Commissioner, am satisfied that the emergency known as the coronavirus (COVID-19) pandemic constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria.
>
> Accordingly, I declare under section 23(1) of the Act that a state of disaster exists in relation to the whole of Victoria.
>
> This declaration remains in force from 6.00 pm on 2 August 2020 until 6.00 pm on 2 September 2020, unless revoked earlier.
>
> Dated 2 August 2020
>
> Time 1.43 pm[13]

37 After I had reserved judgment, the parties informed me by email that on 2 August, 2 September and 13 September 2020, the Minister for Police and Emergency Services made orders under s 24 of the *Emergency Management Act 1986* suspending the operation of s 200(2)-(9) of the PHW Act and that that Ministerial direction was in

---

12 Ibid No S 461, 13 September 2020, No S 512, 11 October 2020.

13 Ibid No. S 383, 2 August 2020 1.

force from the time the Stay at Home Directions were made until the time they were revoked. On 13 August, 2 September and 13 September 2020, the Minister for Police and Emergency Services pursuant to powers under s 24(2)(a) of the *Emergency Management Act*, directed authorised officers exercising powers under s 200(1))(a)-(d) of the PHW Act to warn persons before exercising powers that a refusal or failure to comply with a direction without reasonable excuse is an offence. These matters were identified in reports tabled in Parliament. These three reports were Report to Parliament on declaration of State of Disaster–Coronavirus (COVID-19) pandemic under s 23(7) of the *Emergency Management Act 1986* on 3 September, 17 September and 15 October.

38 The relevant provisions of ss 23 and 24 of the *Emergency Management Act 1986* state:

> **23 – Power of Premier to declare state of disaster**
>
> (1) If there is an emergency which the Premier of Victoria after considering the advice of the Minister and the Emergency Management Commissioner is satisfied constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria, the Premier may declare a state of disaster to exist in the whole or in any part or parts of Victoria.
>
> (1A) The Premier must not make a declaration under this section for the purpose of taking action against any person or body of persons in the circumstances to which section 4(1) of the Essential Services Act 1958 applies.
>
> (2) The Premier may at any time revoke or vary a declaration under this section.
>
> (3) Immediately upon the making, revocation or variation of a declaration under this section, a state of disaster exists, ceases to exist or exists as so varied (as the case requires) for the purposes of this Part.
>
> (4) As soon as practicable after the making, revocation or variation of a declaration under this section the Premier must cause notice of the making, revocation or variation of the declaration to be broadcast from a broadcasting station in Victoria and to be published (with, in the case of the making or variation of a declaration, a copy of the declaration) in the Government Gazette.
>
> (5) Production of a Government Gazette purporting to contain—
>
> (a) notice of the making, revocation or variation of a declaration under this section is evidence of that making, revocation or variation (as the case requires); and

(b) a copy of the declaration under this section is evidence of the terms of the declaration.

(6) A declaration under this section remains in force for not more than one month, but another declaration may be made before, at or after the end of that period.

(7) If a state of disaster has been declared under this section the Premier must report on the state of disaster and the powers exercised under section 24 to both Houses of Parliament as soon as practicable after the declaration if Parliament is then sitting and if Parliament is not then sitting as soon as practicable after the next meeting of Parliament.

24 – Powers and duties of Minister

(1) In a state of disaster, the Minister is responsible for directing and co-ordinating the activities of all government agencies, and the allocation of all available resources of the Government, which the Minister considers necessary or desirable for responding to the disaster.

(2) In addition to and without in any way limiting the generality of subsection (1), in a state of disaster the Minister may—

(a) direct any government agency to do or refrain from doing any act, or to exercise or perform or refrain from exercising or performing any function, power, duty or responsibility; and

(b) if it appears to the Minister that compliance by a government agency with an Act or subordinate instrument, which prescribes the functions powers duties and responsibilities of that agency, would inhibit response to or recovery from the disaster, declare that the operation of the whole or any part of that Act or subordinate instrument is suspended; and

(c) take possession and make use of any person's property as the Minister considers necessary or desirable for responding to the disaster; and

(d) control and restrict entry into, movement within and departure from the disaster area or any part of it; and

(e) compel the evacuation of any or all persons from the disaster area or any part of it.

(3) If a direction is given to a government agency under subsection (2)(a)—

(a) the government agency must comply with the direction; and

(b) the direction prevails over anything to the contrary in any Act or law.

…

39 Associate Professor Giles joined the Department of Health and Human Services on 3

August 2020 as a Senior Medical Adviser and has mostly worked in the Case, Contact and Outbreak Management Team ('CCOM') as an Outbreak manager, reporting to a Deputy Public Health Commander. She was a member of the Public Health Unit.

40 The CCOM team is responsible for the management of all COVID-19 cases, contacts and outbreaks, for example at hospitals.[14] Giles made recommendations about outbreak management, including self-isolation, quarantining and identifying contacts with infected people. To perform her role, Giles was required to understand, summarise and carefully consider detailed daily data about COVID-19 cases, contacts and outbreaks. This data was then used to inform the Government's response to the pandemic.[15] She saw a clear and direct correlation between the Stage 4 restrictions and a reduction in the number of reported COVID-19 cases.

41 Giles is an infectious disease physician and holds appointments to practise at four Melbourne hospitals and has a private practice in infectious diseases. She is an Adjunct Professor in the Obstetrics and Gynaecology Department at Monash University. She is not an epidemiologist,[16] but has extensive practical experience in public health and infectious diseases. She is a member of the Australian Technical Advisory Group on Immunisation COVID-19 Vaccine Working Group and Deputy Chair of the Cochrane National COVID-19 Clinical Evidence Taskforce–Pregnancy and Perinatal Care Panel and a member of the Cochrane National COVID-19 Clinical Evidence Taskforce – Disease Modifying Treatment and Chemoprophylaxis Panel.[17] This Taskforce meets every week to review the available scientific evidence specific to the management of people with COVID-19 infection, and make evidence-based, publicly available recommendations, written to inform the clinical management of patients. She has written over 100 peer reviewed journal articles and book chapters and several conference presentations.[18]

---

14 CB 176.
15 CB 175.
16 T 291.
17 CB 193-209.
18 CB 193-209.

42 Twice during her employment at the Department, Giles has been appointed as a Deputy Public Health Commander. She held that position on 13 September 2020, when she signed the Directions. The duties of that position or its position in the Department's organizational structure were not explained.

Mr Andrews' statements about the curfew

43 At a media conference on Sunday, 6 September, Mr Andrews, released a document titled 'Victoria's roadmap for re-opening – How we live in Metropolitan Melbourne' ('the Roadmap').[19] The document described a number of steps out of the Stage 4 restrictions. The First Step, commencing on 13 September, included the curfew being 'eased to 9pm-5am'.[20] Mr Andrews stated while releasing the Roadmap:

> Currently, Melbourne is in Stage 4 restrictions. From 11.59pm on 13 September, we'll take our first steps towards COVID Normal.
>
> …
>
> Finally, recognising we're slowly getting to warmer weather, [the] curfew will also move back an hour to 9pm.[21]

44 The plaintiff's solicitor made an affidavit setting out what he said were statements made by Mr Andrews at a media conference on 8 September. He viewed the conference live and had access to a copy of the video stored on a television news Channel via YouTube. His record of the conference was as follows. The Premier was asked by one of the journalists present at the conference "are you able to confirm today that it was in fact the police that asked you to impose the curfew?" to which he replied:

> No, I would not confirm that at all. I think there was a discussion, there was a discussion between different parts of government. We spoke with the Police, absolutely, Police I think.[22]

45 When asked 'where did the idea first come from', Mr Andrews replied:

> [O]h look, I am not wanting to be anything other than clear, but I can't pinpoint the individual and the day when they said oh let's do this, I think there has been an ongoing discussion, right, just to be as clear as I can be, there has been an ongoing discussion every time we make rules the Police will give us

19 CB 754-769.
20 CB 754-6.
21 CB 751-2.
22 CB 772.

> feedback on how hard or easy they will be to properly enforce and you would expect nothing less you would expect that we have that ongoing discussion. Once you limit, once you limit the number of purposes, the number of reasons that you are allowed to leave home, to a very small number, then the easiest thing to do to enforce that, not easy at a personal level, or you know I have never done it before, but the easiest thing just if be completely focused on the kind of operational side of it, the easiest thing to do is to say ok oh well if you do not have one of those reasons you are not allowed out, so at the moment if you wanted to go exercising you can't if you wanted to go shopping you can't, if you go to go to work you can, if you are permitted worker you can do that so this is about limiting movement, health advice says limit movement, the Police say they need clear rules, to be able to enforce, curfew delivers both.[23]

46 When asked: 'do you not think Victorians deserve to know where that idea originated from and what the process was … ' the Premier replied:

> [W]hat I am saying to you is that I can't give you the specific person and the exact moment that they said let's do this". Then asked "you do not know or you won't tell us", the Premier replied "no, no its because I can't tell you, I don't know exactly which person at what moment said that but there is ongoing discussions lots of different people talking both us as a government, officers, senior officials, members of the Victoria Police and it's no more or less complicated than that.[24]

47 When asked whether Brett Sutton advised him that he 'should do it' i.e. introduce a curfew, the Premier replied:

> It's not a matter for Brett Sutton, this is not it's not health advice, this is about achieving the health outcome, his advice is do whatever you can to limit movement, Police then say 'We need rules we can enforce, it needs to be as simple as possible, we can't stop every car, but if everyone is out who shouldn't be, um knows there is a chance they will get caught, and they got no lawful reason to be outside, that's what a curfew is about, then all of a sudden you will limit movement, so it's consistent with the health advice, and these are decisions ultimately made by me, so the answer to the question is, if anyone has got a problem with that, anyone who doesn't that that has limited movement and driven down cases well their argument is with me, because, I've made that decision because I think it's a challenging one to make but its effective and it works and what it means is …if you wanted to go exercising at midnight you can't, if you wanted to go shopping at midnight you can't, if you are a worker and you are permitted you can, if you need urgent care, you can get that care, beyond that what it means is no one is sneaking out going to their mates' place, no one is going doing things that they are by law not allowed to do, so it hasn't changed the rules, the rules that is the reasons you can leave they are all the same, it just makes the job of Police much much easier.[25]

---

23 CB 772.
24 CB 773.
25 CB 773.

Media Conference 10 September 2020

48 At a media conference on 10 September, Mr Andrews was asked, 'yesterday you said that the curfew made it easier for Police to enforce, today the Police Commissioner said that they weren't consulted'. Mr Andrews replied:

> Well the Police Commissioner and Police command have throughout all of our decisions have been really clear with us that they need rules that are as easily enforced as possible and the curfew together with the 5km rules together with there is a very long list of different decisions that we've made over these last few months and indeed since the beginning of the pandemic that's always been clear to us that we need to make the job of Police, the amazing work that they do as simple as possible.[26]

49 On the same day, in answer to a question about the Curfew, he said:

> Well decisions are made by group of people, and I can't necessarily pinpoint for you the exact individual and the exact moment that it was suggested that we put a curfew on. What I am saying to you is anyone who is displeased with that or doesn't think that that's a proportionate measure, well that's a decision that I've made.[27]

Associate Professor Giles appointed to consider Directions

50 The Directions in force were to expire on Sunday 13 September and on the previous Wednesday, Giles was asked if she would fill in for Dr F Romanes, who had made the August directions and was going on leave. She agreed to do so. Dr Romanes emphasised that she would have to carefully read documents and consider the Charter. He gave her a list of people in the Department to contact if she had queries or required assistance. The evidence did not disclose why Giles, who had worked for the Department for just a month and had not been involved with the making of previous directions, was appointed.

51 To make the Directions, Giles needed to be an authorised officer and she was so appointed by an instrument of appointment made 11 September 2020 by Sutton. Under the headings 'Public Health and Wellbeing Act 2008' and 'Instrument of Appointment', the document reads:

> I, **Adjunct Clinical Professor Brett Sutton, Chief Health Officer**, Delegate of

---

26 CB 779.
27 CB 780.

> the Secretary to the Department of Health & Human Services, appoint: Michelle Giles, as an authorised officer under section 30 of the *Public Health and Wellbeing Act 2008*.[28]

52 By an 'Instrument of authorisation under section 199' executed on the same day, Sutton authorised Giles to exercise the public health risk and emergency powers of the PHW Act.[29] The instrument reads:

> This authorisation is given under s 199 of the Act to authorise specified authorised officers to exercise public health risk powers and emergency powers for the purpose of eliminating or reducing the serious risk to public health during the state of emergency as extended.[30]

It goes on to state:

> I, Adjunct Clinical Professor Brett Sutton, Chief Health Officer of Department of Health and Human Services, authorise the officer in column 2 of the Schedule, being an authorised officer appointed by the Secretary of the Department of Health and Human Services (or her delegate) under s 30 of the Act, to exercise any of the **public health risk powers and emergency powers**.[31]

The schedule then reads:[32]

Source of power:	*Public Health and Wellbeing Act 2008*
Holder of power/function:	Chief Health Officer
Authority type:	Authorisation

Public Health risk powers and emergency powers

COLUMN 1 Statutory Provision	**COLUMN 2 Authorised officers**	**COLUMN 3 Limitations/ restrictions**
Section 199 of the Act	The following authorised officers that have been appointed by the Secretary (or her duly appointed delegate):	
	• **Michelle Giles, Authorised Officer**	N/A

Another Instrument of Authorisation was executed on 13 September at 2:06pm which appointed Giles,[33] along with another 381 of her colleagues as Authorised Officers.[34]

---

28 CB 515.
29 CB 517.
30 CB 514.
31 CB 515 (emphasis altered).
32 CB 517 (emphasis added).
33 CB 522.
34 CB 521-25.

53 Under s 30 of the PHW Act, the Secretary or her delegate, in this case the Chief Health Officer, must be satisfied that the person to be appointed and is suitably qualified or trained to be an authorised officer.

The Sunday 13 September media conference

54 At a media conference on Sunday morning, 13 September, Mr Andrews, accompanied by Chief Health Officer Sutton and two Ministers, announced that from 11.59pm Sunday night:

> Melbourne moves from Stage 4 restrictions to the first step of our roadmap. Which brings small – I fully acknowledge – small changes that allow for more social interaction and more time outside. Social bubbles for those living alone or single parents, they will be allowed to have one other person in their home.
>
> Exercise is extended for two hours, split over a maximum of two sessions. That goes obviously from one hour to two hours. And the notion of time outside, time outdoors, whilst at the moment it's just for exercise, it will also now be – from midnight tonight – for social interaction with one other person or members of your household. And of course as we move towards the warmer months, the curfew is extended from 8pm - from tomorrow night essentially, from midnight tonight so it'll apply from Monday night – from 8pm to 9pm. So an extra hour of that freedom of movement.
>
> Playground and outdoor fitness equipment will reopen, and libraries will be able to open for contactless click and collect. We'll put all this detail up on the website but, and we'd be grateful to you helping us to get the message out there.[35]

55 On the same day, a Media Release was published online at www.premier.vic.gov.au entitled 'On the Road to Covid Normal', which stated that as from 11:59pm 'the curfew will begin at 9pm as Melbourne moves into warmer months'.[36]

Associate Professor Giles decides whether to make the Curfew Direction

56 But Giles was still to decide whether the new Directions should be made and whether they should include a curfew. She commenced considering those questions from the time that she had been asked to fill in for Dr Romanes.

57 At about 11:00 pm on that same Sunday, Giles, at the Department's CBD office in

---

35 Premier Mr Daniel Andrews, 'Transcript of Press Conference' (Media Conference, transcribed by Legal Transcripts Pty Ltd, 13 September 2020) 5.

36 CB 84.

Lonsdale Street, signed the *Stay at Home Directions (Restricted Areas) (No 15)* and the other Directions. They contained the Curfew prohibiting persons leaving their homes between 9:00 pm and 5:00am save for certain specified reasons including: for work, to obtain necessary medical goods and services, for certain child-care responsibilities, to provide care and support for a relative or other person, to escape harm or a risk of harm and for emergency purposes.[37]

58 The *Stay at Home Directions (Restricted Areas) (No 15)* contained the introductory paragraphs:

> I, Associate Professor Michelle Giles, Deputy Health Commander, consider it necessary to eliminate or reduce the risk to public health – and reasonably necessary to protect public health – to give the following directions pursuant to s 200(1)(b) and (d) of the **Public Health and Wellbeing Act 2008** (Vic) **(PHW Act)**:
>
> **PART 1 –PRELIMINARY**
>
> **1—Preamble**
>
> (1) The purpose of these Directions is to address the serious public health risk posed to Victoria by Novel Coronavirus 2019 (2019nCoV).
>
> (2) These directions require everyone who ordinarily resides in the **Restricted Area** to limit their interactions with others by:
>
> (a) restricting the circumstances in which they may leave the premises where they ordinarily reside and the Restricted Area; and
>
> (b) placing restrictions on gatherings, including prohibiting private gatherings (no visitors to another person's home other than in very limited circumstances).
>
> (3) These directions must be read together with the **Directions currently in force.**
>
> (4) These directions replace the **Stay at Home Directions (Restricted Areas) (No 14)** and amend the start of the evening curfew, increase the time permitted for exercise and social interaction, and establish a social bubble system of **nominee persons and nominated persons**.[38]

59 Part 2 is headed 'Stay at Home'. Clause 5(1) contains the requirement to 'stay at home',

---

37 CB 58-59; *Stay at Home Directions (Restricted Areas) (No 15)* cl 5(1AF).

38 CB 420.

other than for one of the reasons specified in Part 3 ('Reasons to leave premises').

60 The Stay at Home Directions were one of a suite of eleven directions that Giles signed on Sunday evening 13 September. She signed ten other Directions the: Stay at Home Directions (Non-Melbourne); Area Directions (No 8); Restricted Activity Directions (Restricted Areas) (No 9); Restricted Activity Directions (Non-Melbourne) (No 4); Workplace Directions (No 4); Workplace (Additional Industry Obligations) Directions (No 5); Permitted Worker Permit Scheme and Access to Onsite Childcare/Kindergarten Permit Scheme Directions (No 5); Care Facilities Directions (No 11); Diagnosed Persons and Close Contacts Directions (No 11); and Hospital Visitor Directions (No 11) (collectively 'the Directions').

The plaintiff commences the proceeding and the curfew is revoked

61 The following day, the plaintiff commenced this proceeding seeking judicial review orders. This proceeding was given a priority hearing and was listed for a two days commencing on Monday, 28 September 2020.

62 However, at another media conference on Sunday, 27 September, Mr Andrews announced that the Curfew would be lifted from 5:00am on Monday, 28 September. At that same press conference, Sutton said that:

> We're at a point now where the epidemiology is different, where the demographics of the cases that we are seeing are different … Over the course of the last couple of weeks, we've talked about 21 mystery cases but really we are getting to one, two, three community cases per day and so in reflecting on the obligations of the Victorian Charter and the Public Health and Wellbeing Act and the issue of proportionality it's my view and the public health team's view that the curfew is not a proportionate measure to have in place going forward.[39]

Associate Professor Giles' evidence about how she made the Directions

63 Giles understood that the Directions were required to be signed by the end of 13 September, when the previous Directions would expire. She understood that the power to decide whether to sign the Directions was entrusted to her alone.[40] She commenced turning her mind to the making of the Directions on 9 September

39 CB 1691.
40 T 265, 10-4.

following her appointment as a Deputy Public Health Commander and confirmed 'most of [her] waking hours' on 12 and 13 September were spent considering information relevant to the making of the Directions and weighing up competing considerations after receiving the documents about the previous directions.[41]

64 Giles said that she had not previously been involved in drafting directions because, prior to filling in for Dr Romanes, she worked in the Case Contact and Outbreak Team.[42]

65 She said that the process of making directions usually involved discussions within the Department's Public Health Unit, although a decision-maker ultimately makes them after reviewing the information provided.[43] The Public Health Unit made recommendations about restrictions to control the pandemic. Those recommendations were endorsed by the Chief Health Officer and passed onto key stakeholders, such as the Crisis Council of Cabinet, the Premier's Officer and the Minister's Office.[44] Thus, the Premier's Office was likely to be aware of the proposed Directions that Giles reviewed and considered on the Sunday evening.[45] She said that she was unsure of the process for choosing the authorised officer who was to sign particular directions.

66 Giles said of the Roadmap document:

> I don't think the decision is the Premier's. This informed by the public health unit. And this is announced – so the plan is correct. The plan is being announce[d] prior to the signing of directions.
>
> …
>
> The roadmap is a plan. And it contains in it the proposed changes that, as I understand it, have been informed by the public health unit.[46]

67 The following passage in cross-examination is also instructive:

> Mr Clarke: That's just the Premier makes these decisions, doesn't he and gives documents or causes documents to be provided to whoever's

41 T 315.
42 T 360.
43 T 351.
44 T 352.
45 T 354.
46 T 274-75, 276.

appointed? ---

> Associate Professor Giles: No I don't agree with that. The Public Health Unit absolutely makes the decisions about what the restrictions are required to control the pandemic. Those recommendations are then endorsed by the Chief Health Officer and then those are shared with key stakeholders but that, the decision is actually, and the recommendations actually come from the Public Health Unit.[47]

68 However, on this occasion, it appears that the normal process of considering directions did not involve Giles and she was involved at a point when the proposed directions had already been drafted. She did not prepare the Directions, but was presented with pre-prepared documents to consider and decide whether to accept and sign.[48]

69 Giles received and considered the following documents and advices: a bundle of documents relating to the directions then in force, which Dr Romanes had made on 16 August; a bundle of documents comprising a draft covering brief and draft directions for making on 13 September; the covering brief from the Department titled 're-issue of amended public health directions to limit the spread of Novel Coronavirus 2019; a copy of an instrument of authorisation from the Chief Health Officer, 11 draft public health directions, 10[49] individual assessments by the Legal Services Branch that the Directions were likely to be compatible with the Charter and a policy paper prepared by the Department and information provided by the Chief Health Officer during two separate discussions, at Giles' request, about the proposed directions. She also received: legal advice by members of the Department's legal team about the requirements of the Charter; public health advice from an Executive Director, Strategy & Policy; and, information gained in teleconferences with a Deputy Public Health Commander. She also relied on the specific data and experience gathered in her Department role and her knowledge and experience gained throughout her career in infectious disease and public health.[50]

70 That daily data was first a 'Outbreak Summaries Report' of 20 to 40 pages, which recorded and reported details on COVID-19 outbreaks in real time. She also received

---

47 T 352.
48 T 265, 19-22.
49 Amended to read '10 individual assessments' in Second Affidavit. See CB 791.
50 CB 180-81.

a 'COVID-19 Intelligence Briefing' which was an email of 10 pages, prepared by the Public Health Intelligence team within the Department, including epidemiologists, who interpret and analyse data about COVID-19, including statistics on new cases, the source of cases, the number of outbreaks, and the demographic details of outbreaks. She said that she received over 1,000 pages of information between 3 August and 13 September, but she did not read all the emails every day. She was familiar with the epidemiology of COVID-19 in Victoria as a result of her work interpreting the data for the Department and she understood its implications, including the factors contributing to transmission of COVID-19.[51] She said that the most important matter when she made the Directions was the current epidemiology.[52]

71 She spoke with Sutton, who had been at the media conference that morning, in two telephone conversations on 13 September: the first in the afternoon and the second in the evening when she was reviewing the Directions. She took into account his view on the public health rationale of the Curfew. She also received legal advice from the Department's legal team in a telephone call.[53] Additionally, she received public health information from the Executive Director of Strategy and Policy, Ms Nicole Lynch, at the Department in emails.

The email chain between Lynch, Sutton and Giles

72 Associate Professor Giles was asked about her email chain with Ms Lynch,[54] who was 'on secondment from the Department of Premier and Cabinet to assist with the Victorian COVID-19 response'. Ms Lynch sent the following email to Sutton, Mr Allen Cheng and Giles on Sunday, 13 September at 1:10pm, after the Premier's media conference:

> Hi everyone
>
> As discussed, documenting the public health basis for the curfew for the final legal review for today's directions.

51 CB 176.
52 T 285.
53 T 297.
54 CB 1335-41.

Please let me know if any further comments on this framing.

Many thanks

Nicole

Public health rationale:

- The curfew is part of a range of restrictions that go to limiting movement in Metropolitan Melbourne to contribute to reducing the spread of COVID-19. While the curfew on its own may not achieve this aim, it is part of a package of restrictions that achieves this and to remove may have unintended impacts on transmission from both a direction impact and behaviour change mechanism.

- Having people at home for 8 or 9 hours out of 24 (9pm-5am) has the potential to reduce the aggregate risk of people from different households mixing. No single measure will be effective by itself, as interventions work in combination to reduce risk of transmission.

- Stage 4 restrictions are in place with significant volumes of community transmission, as well as substantial numbers of cases with an unknown source. In this environment, the overall aggregate purpose of the Directions taken together are to minimise movement and reduce aggregate risk of people from different households mixing.

- A curfew reduces mobility (particularly targeted at the age bracket of 20-39) – potentially reducing the geographic spread, distance travelled (e.g. people attending private residences at night)

- It supports further community understanding of the need for behaviour change, specifically that you should not leave home unless for the 4 reasons and also reduces the reasons people would not be at home during these hours.

- It also enhanced operational enforcement and compliance operations to maximise compliance with directions which increases the overall reduction of transmission risk as intended by the package of public health interventions included in the Directions.

<u>Epidemiology</u>

- 99 cases with an unknown source in the previous 14 days – indicating substantial transmission is still occurring in Metropolitan Melbourne outside the controls of the test, trace and isolate regime.

- The effective reproduction rate is currently at 0.77. Maintaining this level (rather than see it increase to close to 1) is critical to reduce case load and transmission fast enough to ensure that significant restrictions are not required for a longer duration and that rights and freedoms can be restored as soon as possible.[55]

[55] CB 1340-41.

73 Giles replied at 1:50pm stating:

> Thanks Nicole.
>
> One final additional comment- there has been much discussion about the paucity of evidence to support the curfew as a public health intervention. However, we do know from our recent experience that a significant fall in case numbers can be achieved when a curfew is included as part of a package of restrictions. Given we still have evidence of community transmission I propose that by completely removing one component we may expose the community to an unmeasured risk and the potential for an increase in cases.[56]

74 Sutton replied at 1:54pm stating:

> Thanks Nicole,
>
> I've discussed with Michelle and we also reflected on the more limited engagement of Charter issues given the existing SAH Directions and the fact that the curfew primarily targets non-permitted travel from home.[57]

Giles did not agree with suggestions put in cross-examination that Lynch's emails directed her attention to compliance issues and behavioural claims, rather than health advice, and that Giles had adopted these comments. She said that she did not adopt Lynch's comments, but that, in any event, Lynch outlined the public health rationale for the Curfew under the six dot points in her email.[58] Giles said that law enforcement was not the reason she signed off on the curfew.[59]

75 Giles received the draft directions via email after 3:00pm. She printed the final form of the Directions and Charter assessments and systematically went through every document and decided whether to sign them or not.[60] She had to tick an 'agreed' or 'not agreed' box for each of them on an accompanying form.[61] She commenced signing the Directions in the Department's office at 5:30pm and finished just after 11:00pm.

76 Associate Professor Giles said that her professional experience made her realise the difficulty in 'weighing the impacts of public health measure on specific individuals,

---

56 CB 1335; T 484.
57 CB 1337.
58 T 311; CB 1340-41.
59 T 311.
60 T 314.
61 CB 528-9.

businesses and communities against the impacts on the broader community of individuals if the measure is not taken'.[62] Her experience at the Department taught her about the weighing exercise in the context of COVID-19 outbreaks in Victoria during the 'second wave'.[63]

77 Associate Professor Giles said that she did not instruct anyone that she was going to sign the Directions prior to doing so on the Sunday night.[64] Thus, she gave evidence that the words '[y]ou have instructed us' in paragraphs [45] and [46] of the briefing attachment were incorrect.[65] She suggested that this wording related to the earlier briefing pages which she had to go through and the need to tick the box indicating whether she agreed or disagreed to sign the Directions and if she agreed, she was to sign them.[66] She signed them after considering them with the Charter assessments, but had not decided to do so before receiving the Directions.[67]

The amendments to the Directions

78 The plaintiff's counsel referred to emails between Giles and Department staff on the Sunday evening about the need to resign the Stay at Home Directions because of drafting issues raised by the Premier's office and suggested that they showed that she was acting at the direction of the Premier. These drafting issues did not concern the Curfew, but included a misalignment between clauses dealing with exercise and private gatherings and making restrictions compatible with safe campaigning in the upcoming local government elections. To understand this issue, it is necessary to set out some of the email chain.

79 The email chain in relevant parts states:

> Colleague A: The Premier's office has picked up an issue with the Stay at Home Directions x 2. We're just fixing it up now and will send through shortly for re-signing. I'm also looking at your query on the Stay at Home Directions regional.

---

62 CB 177.
63 CB 177.
64 T 317, 318.
65 T 318.
66 T 318.
67 T 318.

Assoc Prof Giles: I have finished all the others except the Stay at Home Regional (I will wait for the revised version). I will then re-sign the Stay at Home Metro. Can you advise what the issue was?

Colleague A: In relation to the Stay at Home Directions (Restricted Areas) – I understand there's a misalignment between the clauses dealing with exercise and private gatherings. In relation to the Stay at Home Directions (Non-Melbourne) – the issue is around high numbers of people (5) being able to catch up for social interactions that can catch up for exercise and possibly aligning the two limits to be the same.

Assoc Prof Giles: It would be important for me to know if there are likely to be any further corrections/changes as I am in 50 Lonsdale St so will wait here till I receive the updated versions. After I leave though it won't be easy for me to come back in and re-do any others.[68]

80 At this point, the email chain splits into two, the first reply reads:

Colleague A: As I understand there are no other changes expected, but I'll double check;

and the second reply reads:

Colleague A: FYI, attached are mark ups of the proposed changes that are just being checked with the premier's office. Will send through confirmation/execution versions once premier's office has confirmed.

81 Giles' colleague then sent a further email with the execution versions of the *Stay at Home Directions (Restricted Areas) (No 15)* attached:

Colleague A: The two Stay at Home Directions attached are now ready for signing. I note that the only other outstanding item for signing is the cover brief. Could you please scan these back once ready. Thank you so much for your patience and assistance today.

Colleague B: Michelle – apologies – but we've just been asked to HOLD for now. Will confirm shortly. Colleague B: Sorry for the delay. Please see attached final PDF's for your signing. A minor change has been made to Clause 10G (ii) to allow the employee or volunteer to travel within the local government ward in which they ordinarily reside or within 5 Kilometres from their ordinary place of residence. Please send these and the covering brief when ready. Thank you again for your patience.

[68] CB 211-224.

82 Associate Professor Giles disagreed that she would always have signed the amendments to the Directions that the Premier's office requested and said that she wanted to know what the issue was before signing it.[69] She also denied being part of the email conversations directly with the Premier's Office.[70] She denied that she was presented with the Directions in their completed form, as a *fait accompli*, and that she had no option but to make the Directions. She said that she considered the curfew in relation to public health and the reduction of the movement of people.[71]

83 At 11:24pm on 13 September 2020 Giles provided signed and emailed to the Department copies of the *Stay at Home Directions (Restricted Areas) (No 15)* and the *Stay at Home Directions (Non-Melbourne) (No 5)*.

Giles' knowledge of the Premier's statements

84 Although Sutton had been present at the Premier's media conference on the Sunday morning and took part in the email chain in the early afternoon and spoke to Giles about the utility of the curfew, she said that the Premier's announcement was not mentioned.[72] She said that she did not hear the Premier's announcement on Sunday morning 13 September and that she did not know if he announced the Directions at the media conference,[73] but she was aware that the proposed Directions and Road Map were part of the response. She also said she would have assumed that the Premier had announced his plan at the press conference on the Sunday morning.[74] She described the process of making Directions as including an announcement about what the Directions were going to contain or what was likely to be adopted. She agreed that even though she did not see any announcement by the Premier, it would have been reasonable to have expected an announcement would happen.[75]

85 Despite the Roadmap document stating that '[a]t 11:59 pm 13 September 2020

69 T 341.
70 T 342.
71 T 270, 25-31; 271, 1.
72 T 354.
73 T 262.
74 T 356.
75 T 356.

Metropolitan Melbourne will commence the first step of easing and Regional Victoria will commence the second step', she again denied that it was a 'foregone conclusion'[76] that she would sign the Directions.[77] She knew of the existence of the Roadmap and referred to statements by the Premier with which she disagreed, stating that signing or making the directions was her decision on the Sunday.[78] She said that the Premier's statements would have been informed by information about recommended directions from the Department's Public Health Unit.[79]

86 The briefing material included reference to law enforcement purposes for maintaining the Curfew.[80] Nonetheless, Giles said that this was not part of her consideration, nor was she influenced by comments made by the Premier in the media. She said that the decision was hers alone; her primary consideration was whether the Curfew was justified from a public health perspective, and she decided that it was.

87 She said that she had been told that if she had not signed the Directions, the matter 'would be escalated to the Secretary and discussed with Strategy and Policy'. She did not know what then 'would have happened, whether they might've got someone else to sign it'.[81] But she said that it was always an option, that she did not have to sign the Direction if she did not agree 'from a public health perspective, with what was contained in the directions'.[82]

88 She was asked in cross-examination how she could explain the fact she signed some Directions at 8:30pm and some not till 11:00pm when the Premier made a public announcement about the Curfew that morning before 11:30am.[83] She said that the Public Health Unit in the days and weeks leading up to the making of Directions would look at all the important data and make recommendations, which were 'pulled

76 T 320.
77 T 267, 27-31; 268, 1-5.
78 T 271.19-14.
79 T 274, 28-31.
80 CB 190.
81 T 355.3-5.
82 T 355.
83 T 355.

together' and endorsed by the Chief Health Officer. A summary of them was then shared with the key stake holders: including the Crisis Council of Cabinet; the Premier's Office and the Minister's office. They would have been aware of the recommendations before an independent decision-maker, such as Giles, considered and review them. Thus on the 13 September, the stakeholders would have been aware of the recommendations before she reviewed them on the Sunday evening.[84]

89 She said that she assumed that the Premier had announced the Directions on the Sunday morning, 13 September as this had happened with previous directions.[85] The significance of this assumption appears from the following passage in her cross-examination:

> Mr Clarke: And you were conscious of this roadmap, were you not, when you signed the directions on 13 September, were you not?
>
> Assoc Prof Giles: Yes. The roadmap is a plan. And it contains in it the proposed changes that, as I understand it, have been informed by the public health unit.
>
> …
>
> Mr Clarke: You accept, do you not, that the directive you signed accorded with what is set out, a document called the road map, released to the public on 9 September, that is the curfew will be eased to 9 pm to 5 pm?
>
> Assoc Prof Giles: Yes, the directions that I signed on the Sunday did have easing of the curfew to 9 pm, correct.
>
> Mr Clarke: And it wasn't your decision to ease the curfew from 8 pm to 9, 5 am, was it?
>
> Assoc Prof Giles: So it was my decision on the Sunday night before I signed the direction. The work and proposal was not mine leading up to the 13th but on the 13th it was my decision whether to sign that direction or not.
>
> …
>
> Mr Clarke: And, what, it was a coincidence that it accorded with the road map that the premier announced on the 9th?
>
> Assoc Prof Giles: No, I don't, I don't think it's a coincidence. The road map,

84 T 353.
85 T 355.

> as I've said, was informed by public health advice so I don't think it's coincidental when I was considering the public health rationale for those directions that there would be some alliance with that. The public health advice, the priority is to protect Victorians and reduce the risk of COVID. So I'm not surprised there's some alliance with that.[86]

Associate Professor Giles' reasons for signing the Curfew Direction

90 Associate Professor Giles accepted that there was no evidence that the Curfew, as a discrete action aimed at stopping the spread of COVID-19, had any greater impact than other restrictions.[87] But she said that the Curfew would reduce the movement and mobility of people and was part of the package or suite of restrictions that were aimed at reducing movement and interactions between people.[88] She said that 2019 novel coronavirus is very infectious and spread by close contact of, and interaction between, people. As case numbers increased, despite restrictions being in place, three things were really important to control the pandemic: adequate testing, contact tracing and reduction in movement and interaction of people.[89]

91 She agreed that she was not provided with scientific evidence in relation to the Curfew, as it was not considered in isolation from the package of directions.[90] She was asked about reference material, being research and scientific papers, listed at the end of Attachment D, which was a document provided to her titled 'COVID Additional Direction'.[91] She had read two in particular, namely, by Chang SL (number 28) and by Ferguson NM (number 27).[92] Neither of these references discussed the effectiveness of the curfew or the 5km radius.[93]

92 While she did not receive expert evidence or data about the impact that the Directions were having on anxiety, depression and loneliness in the community, she was aware

---

86 T 276.6-279.30.
87 T 267.
88 T 287-78.
89 T 291.
90 T 325.
91 T 325; CB 716.
92 T 326; CB 735-38.
93 T 326-27; CB 736.

of their psychological impact on people.[94]

93 Giles was asked about the 'Transmission Dynamics' details in Attachment D of the briefing papers sent to her[95] and whether she considered that the impact of making Directions for the whole of the Melbourne Metropolitan Area was arbitrary, as the outbreaks could be localised. She considered that the recent outbreaks referred to in the document under that heading were merely a 'snapshot' of the cases and did not reflect all the cases in Melbourne.[96] She also said that the attempts in June and July to lockdown hotspots were ineffective in reducing transmission.[97] She did not consider that localising the curfew would be effective, as there would still be significant movement of people.[98]

94 The Directions were published in the Victorian Government Gazette on 14 September 2020.[99]

95 Giles was asked about the Department's Charter compatibility advices provided to her and the parts that had originally been redacted because of a legal privilege claim when exhibited to her first affidavit.[100] The redacted part of the advice included that:

> It is the Department's view that these Directions are, on balance, likely to be compatible with human rights under the Charter, in light of the exceptional circumstances in which they are being issued and the public health advice they are based on. However, we note that this assessment is not without doubt; **in particular, there is some risk of incompatibility with respect to the evening curfew**.[101]

96 Giles denied that she redacted the last sentences and similar sentences because she did not want the Court to know that the advice given included a risk of incompatibility of the Curfew with the Charter.[102] She denied that she had no hesitation in imposing the

---

94 T 321.
95 CB 718-19; T 321-23.
96 T 323.
97 T 324.
98 T 325.
99 T 316.6-7.
100 See *Loeilo v Giles* [2020] VSC 619 ruling that legal privilege could not be claimed in respect of the Charter advices.
101 CB 1512 (emphasis added).
102 T 329.

Curfew despite the risk of Charter incompatibility and said that she spent a lot of time thinking about the impact of the Curfew.[103]

97 Giles said that her general experience in public health and infectious diseases taught her about the importance of weighing the impacts and benefits of public health measures. Before she signed the Directions, she had discussions with Chief Health Officer Sutton and the Department's policy team and lawyers about the human rights considerations and competing public health factors. She affirmed that these discussions greatly assisted her in making the Directions, but she used them to inform her own thinking and that she knew the ultimate decision was hers to make.[104]

98 On the matter of the Directions' compliance with the Charter, she considered that her role was to determine whether the restrictions were proportional to the risk of COVID-19. She said that she took a precautionary, or careful and considered approach.[105] She looked at what the Stage 4 restrictions had achieved and what would happen if they were eased too quickly.[106] Ultimately she was concerned that if she altered the Stage 4 restrictions, it would undo all of the progress made.[107]

99 She said that she considered the four steps that the Charter advice said she was required to consider. They were: (1) understanding the rights of the person affected by a decision; (2) turning one's mind to the impact on a person's human rights; (3) identifying countervailing interests; and (4) balancing private and public interests.[108]

100 Giles said that she gave particular consideration to the Curfew part of the Directions as it had been raised in the media[109] and that highlighted the need to carefully weigh its impacts when making her decision.

101 The legal briefing she received mentioned the Premier's comments that the Curfew

---

103 T 329.
104 T 277.
105 T 330.
106 T 331.
107 T 331.
108 T 332-3.
109 CB 187.

made law enforcement easier, but she had already read those comments on The Age website. However, she had not seen the Premier make comments about the curfew at a press conference, did not communicate with the Premier or the Premier's Office about the Directions or the Curfew specifically, and had no recollection of the Department telling her anything about the Premier's views on the Curfew.

102 Giles considered that continuing the Curfew was necessary because: the previous directions were working; removing the Curfew might increase cases; the Curfew was minimising contact between people; people could still leave home during the Curfew for permitted reasons; it was not an unreasonable burden in the context of other limitations; and many of the hardships Victorians had experienced were caused by restrictions other than the Curfew.[110] Having regard to the public health evidence that indicated that the restrictions were working to reduce infection numbers, Giles considered that any further changes to the Directions, including removing the Curfew, would risk uncontrolled transmission of the virus.[111]

103 Giles was aware of the issues of increases in domestic violence and delays in obtaining medical treatment as a result of the restrictions, although she did not seek specific advice or data about them.[112] She believed that the only way to allow Victorians to again have full access to healthcare services was to reduce the number of COVID-19 cases, and that removing the Curfew might jeopardise that occurring.[113] Similarly, she said that she had weighed the financial impact on individuals and businesses, although she agreed that she had not received data or reports about that consideration. She said that her job was to do what was necessary to protect people from COVID-19.[114] The two main impacts that she considered that the Curfew would have on people were that they would not be able to leave their home to exercise and obtain goods during the Curfew hours, but she said that there were still 16 hours in the day

110 CB 188.
111 CB 190.
112 T 334.
113 T 334.
114 T 337.

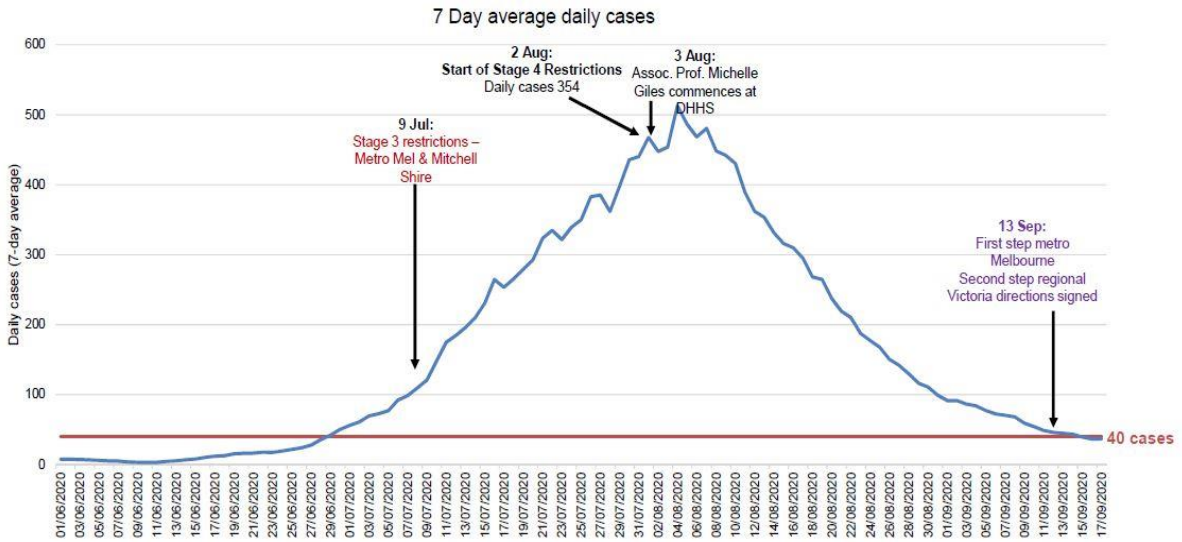
to do so.[115] She did not agree that that the Curfew would be counterproductive by increasing contact between people by compressing the window of time during which they could leave their homes.[116]

104 Giles said that she felt a heavy responsibility when considering whether to make the Directions, as she knew it would cause hardship for everyone and described it as one of the most important tasks that she had been given.[117] She said that did not just turn up on the Sunday to sign the Directions, but rather that she requested reading materials and draft directions so that she could properly understand the issues, and she tried to factor in all the things she had mentioned in her evidence.[118]

105 She had read Ms Loielo's principal affidavit and was not surprised that the Directions adversely affected her lifestyle.[119] She had, herself, experienced hardship personally as a result of the restrictions, as a mother of four children, three of whom were remote schooling from home whilst she was also working from home. Despite these hardships, her opinion remained that the measures contained in the Directions were necessary to reduce the infection rate. She knew if numbers increased there was a high risk that the cases would exceed the Department's ability to trace infections and the capacity of Victoria's hospital system to care for infected persons.[120]

106 To present the knowledge she had when she made the Directions, she provided a graph showing Victoria's infection numbers between 1 June and 17 July, which represents the time period of the 'second wave'. The graph was:[121]

115 T 339.
116 T 339.
117 T 358-59.
118 T 359.
119 CB 183.
120 CB 183-84; T 334.
121 CB 185, 741.



107 Marked on the graph are the dates on which Stage 3 restrictions were re-introduced, Stage 4 restrictions were introduced, Giles' commencement at the Department and when she made the Directions, as well as a red line representing a 7-day rolling average of 40 cases. Among other things, the graph demonstrated that: Stage 4 restrictions were effective in bringing the number of infections down; even with low daily numbers, infection numbers can rapidly increase. The graph also showed that Stage 4 restrictions were effective in bringing the rate and numbers of infections down; and from 29 June, when the seven day rolling average was at 40 cases, it took only five weeks for transmission rates to reach the peak seven day rolling average of over 500, on 3 August, even with Stage 3 restrictions in place.[122] Thus she was concerned that, without appropriate restrictions, there may be a rapid growth in cases as had been seen in the 'second wave'.[123] Using her experience and the evidence before her, she concluded that the restrictions, including the Curfew, had substantially reduced the effective reproduction rate of COVID-19 in Metropolitan Melbourne.

108 At the time of making her decision, Giles considered Victoria to be at a pivotal turning point in the trajectory of the virus.[124] As 154 cases with an unknown source had occurred, she concluded that a large number of people in the community had the virus but did not know it. Furthermore, the reproduction rate was at 0.77, and reducing that

122 CB 185.
123 CB 185.
124 CB 189.

level was paramount, so that freedoms could be restored as soon as possible. In an effort to improve the psychological hardships. The Directions that she made opened up playgrounds and introduced a 'bubble system, whereby a person who lives alone can nominate one other person to spend time with at their respective homes'.[125] Giles considered that a large number of Victorians would die if appropriate restrictions were not put in place. Thus she decided to prioritise human life, knowing that the restrictions imposed would only be temporary.[126] She also knew that the Directions could be reviewed at any point, even though she initially signed them to operate for one month.[127]

109 In cross-examination, Giles was asked about the Public Health Intelligence Data documents,[128] and it was suggested that the data about deaths it provided was not reliable, because it recorded as a death someone died with COVID but not of COVID.[129] She agreed, but said the that majority of deaths recorded were people who had died of COVID. She also agreed that majority of deaths were of older people, many of whom had died in aged care facilities. She also agreed that there was an uneven distribution of cases in areas of Melbourne.[130] She said that some people may not have symptoms, but still may be infectious.[131]

110 Giles said that sometimes during a pandemic, there is an absence of scientific evidence because there have not been years of accumulated experience and information. However decisions have to be made with the information available, and interventions could still be effective.[132]

Was there power to order a curfew?

111 Before dealing with the questions of the plaintiff's standing and the grounds of her case, I will consider the important issue of statutory interpretation was argued about

125 CB 186 [61].
126 CB 186.
127 T 349.
128 CB 1630-31.
129 T 344.
130 T 346.
131 T 347.
132 T 358.

whether the powers in s 200 of the PHW Act authorised the directing of the Curfew. This question was raised as part of submissions in respect of grounds two and three, but it is convenient to consider it at this point.

112 Section 200 of the PHW Act in Pt 10 provides for the emergency powers, which may be exercised during an emergency period and, to repeat, states:

> **200—Emergency powers**
>
> (1) The emergency powers are—
>
> (a) subject to this section, detain any person or group of persons in the emergency area for the period reasonably necessary to eliminate or reduce a serious risk to public health;
>
> (b) restrict the movement of any person or group of persons within the emergency area;
>
> (c) prevent any person or group of persons from entering the emergency area;
>
> (d) give any other direction that the authorised officer considers is reasonably necessary to protect public health.
>
> …
>
> (4) Before exercising any emergency powers under this section, an authorised officer must, unless it is not practicable to do so, warn the person that a refusal or failure to comply without a reasonable excuse, is an offence.

113 Serious risk to public health is defined in s 3(1) to mean:

> a material risk that substantial injury or prejudice to the health of human beings has or may occur having regard to—
>
> (a) the number of persons likely to be affected;
>
> (b) the location, immediacy and seriousness of the threat to the health of persons;
>
> (c) the nature, scale and effects of the harm, illness or injury that may develop;
>
> (d) the availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce the risk to the health of human beings;

114 I have previously mentioned the Minister's suspension of the operation of s 200(2)-(9)

of the PH W Act and their replacement by Directives to authorised officers to carry out steps required by those provisions. Neither party sought to make submissions about the significance of that suspension on the question of the interpretation of the emergency powers.

115 The plaintiff disputed that the Curfew had been ordered under the powers in s 200(1)(b) and (d) of the PHW Act, as the Direction stated, and argued that it was in fact made in reliance on the power in s 200(1)(a), which provides for the detention of any person or group of persons for the period reasonably necessary to eliminate a serious risk to public health. However, the defendant's case was that the Directions, as they stated, had been made under s 200(1)(b) and (d).

116 The plaintiff submitted that the Curfew Direction was not made 'under law' because:

(a) It was a detention of persons and within the s 200(1)(a) power which the defendant did not purport to exercise and was not authorised by s 200(1)(b) or (d) which the defendant did purport to exercise. Those powers did not permit the imposition of a curfew. The interpretation of s 200(1)(b) and (d), and the legal limits of the defendant's powers under those provisions were conditioned by ss 5, 6, 8, 9 and 111 of the PWA Act, and ss 7, 12, 21, 32 and 38 of the Charter.

(b) The Curfew Direction was not 'reasonably necessary' to justify the exercise of the s 200(1)(b) or (d) power;

(c) The powers could not be applied to 'person or group of persons', which terms could not include a whole city population and the defendant could not have made a proper assessment of the effect of the Curfew Direction on the individual rights and freedoms of everyone in that population.

117 The plaintiff submitted that the powers in s 200(1) fell into two groups: paragraph (a) the detention power, which was the most coercive power, and paragraphs (b)-(d) which were less coercive. The expression 'reasonably necessary to protect public health', in paragraph (d), should also be implied into, or read into, paragraphs (b) and

(c), so as to limit the exercise of those powers to the protection of public health.

118 In contrast, the defendant submitted that s 200 was sufficiently broad to extend to a very large group of persons, including those living within the Restricted Areas. First, there was no express limit on the size of the group of persons referred to in s 200. Secondly, as the purpose of the emergency power was to respond to widely present infectious diseases, a narrow interpretation of 'group of persons' would be inappropriate. Thirdly, utilising the ordinary meaning of the words in paragraph (b), people living in the restricted areas were a group of persons, albeit a large group.

119 In *Borrowdale v Director-General of Health,*[133] the New Zealand High Court considered the meaning of 'persons' within s 70(1)(f) of the *Health Act 1956 (NZ)*. The Court decided that this provision did authorise the imposition of the stay at home restrictions on the whole of New Zealand. Although that case concerned a country, and this proceeding concerns an area within Victoria, it was the defendant's submission that the language within s 200 was sufficiently broad to encompass a group of this kind. The High Court noted that s 70(1)(f) referred to 'persons' without any obvious restrictions in meaning,[134] and that other provisions in the legislation seemed specifically designed to apply to specific individuals.[135] Section 70(1)(f) stated:

> **Special powers of medical officers of health**
>
> (1) For the purpose of preventing the outbreak or spread of any infectious disease, the Medical Officer of Health may from time to time, if authorised to do so by the Minister or if a state of emergency has been declared under the Civil Defence Emergency Management Act 2002 or while an epidemic notice is in force,—
>
> …
>
> (f) require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit:

120 The High Court considered that a requirement under s 70(1)(f) to isolate might be

133 *Borrowdale* (n 5).
134 Ibid [120].
135 Ibid.

individually focused or might not be.[136] The Court stated:

> The signal point is that the exercise of any of the s 70(1) powers requires appropriate notification to those affected. Where the power is exercised on a national basis and directed at the population at large, a written order with at least a degree of formality is plainly apt. This is so irrespective of whether the power refers to an "order" or "requirement".
>
> …
>
> First, it is not difficult to interpret "quarantine", in particular, as incorporating the separation of seemingly healthy people from other seemingly healthy people. The term's traditional use involved separating those who *might* be infected from those who were (almost certainly) not, in order to prevent the possible spread of disease. And in a COVID-19 context, we accept that – as a matter of fact – the nature of the virus is such that it is not always possible to know who is infected and who is not. We accept that at Level 4 the medical assumption was, and had to be, that *anyone* might be infected.[68] It follows that in order to achieve the purpose of s 70(1) – to prevent the spread of COVID-19 – it was necessary to "quarantine" the entire country.
>
> Secondly, while we acknowledge that this use of s 70(1)(f) is extraordinary in its reach, the historical survey we have set out above indicates that it is not wholly unprecedented. The predecessors to s 70 were, in fact, used to similar effect over large portions of the country. In the influenza and polio epidemics during the first half of the 20th century, similar powers were used to isolate or quarantine not individuals, but entire populations of school children, limited only by district. Accordingly, in enacting the 1956 Act, Parliament can be taken to have understood and endorsed the potential use of the powers in such a widespread way, if necessary to prevent the outbreak or spread of infectious disease in New Zealand.
>
> We conclude that s 70(1)(f) can be used to quarantine or isolate the wider population.[137]

121 I note that although s 200 of the PHW Act does not require any written notice of directions to be given, the Directions have been issued in written form.

122 I also note that in *Dolan v Secretary of State for Health and Social Care*,[138] Lewis J held that the *Public Health (Control of Diseases) Act 1984* permitted COVID-19 regulations to be made in relation to the population of England as a whole. However, that Act provided that the powers might be exercised 'so as to make provisions of a general nature'.

123 These New Zealand and English decisions turn on the legislation that they considered.

---

136 Ibid [122].
137 Ibid [123], [128]-[130] (emphasis in original) (citations omitted).
138 [2020] EWHC 1786 (Admin).

But they do suggest that emergency powers are intended to confer power to deal with a range of emergencies some local, some national, some anticipated and some novel and not contemplated.

Consideration of submissions about s 200

124 Parliament would not have anticipated the features of the COVID-19 pandemic or the rapid spread of infections, but widespread and rapidly surging infections of the community are not new. Pt 10 of the PHW Act contains the powers that Parliament has given the Executive to deal with such infections when they have reached the point when a declaration of a state of emergency is made. The PHW Act is the successor to the *Health Acts* that have previously regulated the control of infectious diseases. The emergency powers in Pt 10 may need to be exercised in a part of, or throughout all of, Victoria. In this case, the emergency was declared for all of Victoria and was caused by the arrival of a global pandemic. The purpose and reach of the emergency powers are to be read in that context.

125 I consider that Parliament's intention in choosing the words 'person or group of persons within the emergency area' in s 200 of the PHW Act was to permit the implementation of emergency powers over a large group of people, including a group as large as the population of greater Melbourne. It included the power to impose a curfew if the authorised officer considered it reasonably necessary for the protection of public health.[139] The ordering of a curfew could only occur while the state of emergency existed.

126 So much is evident from the purpose of the PHW Act which is 'to enact a new legislative scheme which promotes and protects public health and wellbeing in Victoria',[140] and the objective of the Act, which recognises the need to protect 'persons in Victoria'.[141] It is also evident from the provisions in the PHW Act stating that: 'the State has a role in assisting in responses to public health concerns of national and

139 *PHW Act* s 200(1)(d).
140 *PHW Act* s 1.
141 *PHW Act* s 4(1)(a).

international significance';[142] that 'actions taken in the administration of [the] Act … should be proportionate to the public health risk sought to be prevented';[143] and that the Act seeks to achieve the promotion of 'collaboration between all levels of … communities and individuals'.[144]

127 In interpreting a statute, attention must be given to the words used but also their context, so far as it throws light on their purpose. The emergency powers in Pt 10 of the PHW Act can only be exercised where the Minister on the advice of the Chief Health Officer has declared 'a state of emergency arising out of any circumstances causing a serious risk to public health'.[145] A state of emergency can be declared to exist throughout the whole of Victoria as occurred in this instance.[146] The whole of the State then becomes the 'emergency area' in which the s 200 powers may be exercised by an authorised officer, including the power to give any direction 'that the authorised officer considers is necessary to protect public health'. Directions that are considered reasonably necessary can be made for the whole of the State or for different parts of the State. The PHW Act contemplates the need to act quickly to combat public health emergencies and an interpretation of the words 'group of persons' must be adopted that enables that purpose to be achieved. The rapid spread of the virus potentially affected all of greater Melbourne and therefore its population was the group of people to whom the emergency powers could be applied.

128 The term 'direction' in s 200 can include an order or command,[147] whether written or oral.[148] Similarly, directions under s 200 can be detailed and complex and run to many pages as is likely to be required in a large community like Victoria. The *Stay at Home Directions (Restricted Areas) (No 15)* made by Giles was 24 pages long and has eight clauses. Part 2 'Stay At Home' is seven pages long and includes the Curfew provision

142 *PHW Act* s 4(1)(b).
143 *PHW Act* s 9.
144 *PHW Act* s 10.
145 *PHW Act* s 198(1).
146 *PHW Act* s 199(7)(a).
147 *Macquarie Dictionary* (8th ed, 2020) 'direction' (def 7).
148 See the different uses of the word 'direction' in the *Building Act 1993* esp s 37D.

in cl 5(1AF), which occupies almost a page.

129 Some of the sub-sections of s 200, which have been suspended and replaced with a directive pursuant to the state of emergency declaration, appear to envisage communication between an authorised person and a person against whom the emergency powers are exercised, eg s 200(4). They could be read as not permitting directions that apply to millions of people. But s 200(1) permits the emergency powers to be exercised in respect of 'groups of persons within the emergency area' and those powers are to be exercised in a state of emergency throughout the all of the emergency area, the State of Victoria. Those factors suggest that s 200 permits the emergency powers to be exercised in relation to large population groups.

130 One matter that I have reflected on in interpreting the extent of the powers in Pt 10 of the PHW Act, although it has ultimately not been decisive in my decision, is that they can be exercised by an authorised officer. That could potentially result in a person not accountable to Parliament and, perhaps not even a senior administrative officer, exercising powers to close all of Victoria during a state of emergency and confine all the people of Victoria to their homes. While it might be said that good sense would ordinarily prevail as to who would be authorised to exercise the emergency powers, the Victorian legislation is in contrast to England's, where the Secretary of State makes regulations and New Zealand's where the Director-General of Health issues significant t orders. The PHW Act contains a principle of accountability, to which regard is to be had in the administration of the Act, and which provides that:

> (1) Persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate.
>
> (2) Members of the public should therefore be given—
>
> (a) access to reliable information in appropriate forms to facilitate a good understanding of public health issues; and
>
> (b) opportunities to participate in policy and program development.[149]

[149] *PHW Act* s 8.

131 This principle is more than ever important in an emergency, when decisions are made to restrict or remove basic liberties. It was unclear how decisions were made within the Department to choose the authorised officer to make directions. In this case Associate Professor Giles, who did have relevant qualifications, was appointed two days before she made the Directions. It was unclear why the Chief Health Officer did not make the Directions. The Department organizational structure concerned with exercising the emergency powers was unclear, no document could be produced explaining it and the role of officials such as Public Health Commander was not explained.

132 Parliament may wish to reconsider who should exercise these emergency powers and whether their exercise should be required to take into account matters such as the social and economic consequences of their exercise.

The plaintiff's standing

133 The defendant did not challenge the plaintiff's standing to bring the proceeding while the Curfew was operating, but did so after it was revoked on 28 September. The defendant then contended that the plaintiff no longer had a special interest giving her standing to bring the proceeding. She argued that the plaintiff was seeking a declaration in respect of an alleged violation of a public right and had not established a special interest in the subject matter of the action. The plaintiff's evidence about the effect of the Curfew on her personal life and her restaurant business was insufficient to establish that special interest. The Curfew imposed the same restrictions on everyone. As the plaintiff did not have standing to make the non-Charter claims, she could not bring Charter claims because of the requirements of s 39 of the Charter. The plaintiff lacked standing. Her claimed financial losses did not establish that special interest. While the nature and extent of the financial interest and extent of any impact may be important to the question of standing, the plaintiff's evidence did not distinguish between the effects on her of the Stage 4 restrictions generally and those imposed upon her by the Curfew. She had not demonstrated that the Curfew caused her business losses. It was not possible to tell whether the shorter Curfew commencing

at 9.00pm made on 13 September would have had the same effect, if any, on the plaintiff's business as the first curfew. In any event, because the Curfew was no longer in existence, the plaintiff could not establish any special interest to give her standing.

134 This was not a case where a person sought to challenge legislation when they had been charged with a criminal offence or admitted conduct that amounts to an offence under the legislation.[150]

135 The key authority relied on was the statement of Gibbs J in the *Australian Conservation Foundation v The Commonwealth*[151] who considered that if no private right is interfered with, a plaintiff has standing to sue only if she had a special interest in the subject matter of the litigation. His Honour stated:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.[152]

136 The recent Court of Appeal decision in *Maguire v Parks Victoria* summarises the relevant authorities on standing and states:[153]

> In *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*, the High Court observed that the special interest test was flexible and that its content in a given case will be dictated by the nature and subject matter of the litigation. That observation was further explained by Gaudron, Gummow and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* who said:
>
> > This emphasises the importance in applying the criteria as to sufficiency of interest to support equitable relief, with reference to the exigencies of modern life as occasion requires. It suggests the dangers involved in the adoption of any precise formula as to what suffices for a special interest in the subject-matter of the action, where the

150 *Kuczborki v Queensland* (2014) 254 CLR 51; *Smethurst v Commissioner of Police* (2020) 94 ALJR 502 ('*Smethurst*').
151 (1980) 146 CLR 493 ('*Australian Conservation Foundation*').
152 Ibid 530 (Gibbs J).
153 [2020] VSCA 172 (Ferguson CJ, Kyrou and Niall JJA).

> consequences of doing so may be unduly to constrict the availability of equitable remedies to support that public interest in due administration which enlivens equitable intervention in public law.[154]
>
> …
>
> Although the statutory context is important, it does not control standing. A plaintiff may have standing to challenge the exercise of power because of its practical or legal effect even though the interests of the plaintiff do not coincide with the purpose of the statutory scheme. For example, a person whose business or economic interests are threatened may challenge a decision that is made entirely for public health, safety or environmental reasons. As Doyle J observed in a statutory standing context:
>
> > In determining the nature of a plaintiff's interest in the relevant subject matter and decision, and the impact or effect of the decision upon the plaintiff, it will often be necessary to have regard to the legislation under which the impugned decision is made, and the legal effect and operation of the decision, in order to determine how the interests of the applicant for review may be affected or aggrieved. On the other hand, a majority of the High Court in *Argos Pty Ltd v Corbell* cautioned against going further and attempting to divine the breadth of interest that will suffice to establish standing from the purpose or objects of the relevant legislation. In other words, while the relevant legislation will inform, if not determine, the nature of the plaintiff's interest, it does not determine whether that interest is sufficient to establish standing. For example, in *Argos Pty Ltd v Corbell*, it was held that while the applicant supermarket operators' private interests in the relevant subject matter were not a matter that the legislation required (or permitted) to be taken into account in making the relevant decision, this did not mean that those persons were not sufficiently affected by the operation of the decision to give them standing to challenge the lawfulness of the decision on grounds that were relevant to its validity.[155]

137 The plaintiff submitted that the Curfew Directions operated to restrict her individual rights and freedoms recognised in the Charter and those of millions of other Victorian residents. Private rights can overlap with public rights and the plaintiff would not be the sole possessor of the private rights. The plaintiff had a real interest in having the Court adjudicate on events that have directly impacted on her in the past and is entitled to have the Court determine whether rights were infringed as a result of any illegality by the defendant as alleged in her grounds. She was able to demonstrate that because a public right was being violated, her private right to move freely throughout

---

154 Ibid [64].

155 Ibid [80] citing *McLeod v Legal Profession Conduct Commissioner* [2016] SASC 151, [60].

Victoria was also violated.[156]

138 The plaintiff, in submissions, did not appear to expressly rely on financial loss to establish standing, but it was raised in her evidence. The defendant argued the case on the basis that the plaintiff was relying on it and I propose to consider her standing claim on that basis.

139 The plaintiff relied on the statement of Buckley J in *Boyce v Paddington Borough Council* that:

> A plaintiff can sue without joining the Attorney-General in two cases, (a) where an interference with a public right involves interference with some private right of the plaintiff; and (b) where no private right of the plaintiff is interfered with, but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.[157]

140 Buckley J's words 'special damage peculiar to himself' are regarded in Australia as equivalent in meaning to 'having a special interest in the subject matter of the action'.[158]

Consideration of submissions about standing

141 Damage to a person's business is regarded as a special interest giving that person standing to challenge the violation of a public right. As Mason J said in *Australian Conservation v The Commonwealth*:

> Depending on the nature of the relief which he seeks, a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests (as to which see *New South Wales Fish Authority v Phillips*) and perhaps to his social or political interests.[159]

142 Possible commercial harm, even without precise evidence of financial loss, may provide standing.[160] Where the test is whether the plaintiff is a 'person aggrieved', it will be sufficient if the plaintiff establishes that they 'would suffer a not insignificant

156 T 417.
157 *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 110.
158 *Australian Conservation Foundation* (n 151) 527 (Gibbs J).
159 Ibid 547 (citations omitted).
160 *Assarapin v Australian Community Pharmacy Authority* (2016) 239 FCR 161 at 174.

loss of profitability in their businesses'.[161]

143 In my opinion, Ms Loielo does have standing to bring this proceeding. Her private right was to run her own restaurant business, which, her evidence established, had been substantially and adversely affected by the Curfew. While there were arguments that her losses may not have been attributable to the Curfew, in my opinion, her own uncontradicted evidence gives her standing. She said that 'since the curfew has been in effect, I have seen an approximate 99% drop in my turnover'. It is true that she did not distinguish between losses caused by the first Curfew and the second Curfew, but her evidence is sufficient to enable the conclusion that the Curfew did adversely affect her business.

144 Although that evidence was not precise, Ms Loielo was not cross-examined and I see no reason not to accept it, at least to the extent of establishing that she will suffer some financial loss because of the Curfew. It is not necessary for the plaintiff to establish her precise loss to show standing.

145 There is also the fact that while the Curfew was operating, the defendant did not dispute Ms Loielo's standing. As previously mentioned, she said that she suffered financial loss in the period that the Curfew was in force. In those circumstances, while the revocation of the Curfew might be relevant to the exercise of the discretion to grant a declaration, it does not remove her standing.

146 I will now consider the plaintiff's four grounds.

Ground 1 – Did Associate Professor Giles act under direction?

147 Ground one is that the defendant acted under the direction and at the behest of the Premier of Victoria, in making the Curfew Direction and failed to give any real independent consideration as to whether it was appropriate to make that Direction. Accordingly, she acted outside the limits of the functions and powers conferred on her, giving rise to jurisdictional error.

---

161 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 254 CLR 394, 408-9.

Legal principles

148 When a power or discretion is given by statute to a particular officer, that discretion must be exercised by that person and must be their own decision. The officer cannot act at the direction or behest of another.[162] The law is clear that 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.[163] That is not to say that they cannot take into account relevant matters and information received from others, including government policy in an appropriate case.[164] Ultimately, whether a person has acted at another's direction requires a consideration of the context of the decision, the evidence of the decision-maker and other relevant matters. It is a question of fact. The current legal view of the correct relationship between statutory discretions and government policies was stated in the *Bread Manufacturers of New South Wales v Evans* ('*Bread Manufacturers Case*')[165] as being found not in a priori values but by careful examination of the particular statutory or regulatory provision to see if it does confer an independent discretion.

149 The Full Federal Court stated the relevant principles in the following terms:

> There is a fine line between saying that a decision-maker has taken into account as evidence what is said by another person in arriving at his or her conclusion and saying that the decision was one made at the direction or behest of another. What is encompassed by the ground referred to in s 5(2)(e) of the ADJR Act is the case where the decision-maker gives no real independent attention to the discretion which is conferred upon him or her, so that the exercise of discretion is really the exercise of that discretion by some other person…
>
> The word 'behest' is defined in the Oxford English Dictionary (2nd ed), relevantly as 'a command, injunction, bidding', stemming from middle English where its meaning was 'to command'.
>
> This is consistent with its meaning as given in the Macquarie Dictionary (2nd Revised ed) of 'bidding or injunction; mandate or command'.
>
> In the context in which it appears in the ADJR Act, the word 'behest' cannot

---

162 The terms of the plaintiff's first ground of her Amended Originating Motion are the terms of s 5(2)(e) of the *Administrative Decisions (Judicial Review) Act 1977*.

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

164 Ibid; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177; *Ansett Transport (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

165 *Bread Manufacturers* (n 163).

> simply be a substitution for request. Both words are used against the background of the ordinary administrative law principle that, for a discretion to be valid it must be a real exercise of discretion by the decision-maker, not an acceptance by the decision-maker of a direction by some other person to whom the making of the decision has not been entrusted: cf *R v Anderson; Ex parte Ipec-Air Pty Ltd*.[166]

150 There are different and legitimate views about the extent to which, in responsible government, important discretion should be vested in officers of the executive rather than in ministers who are responsible to Parliament and thereby the public. It might be asked why a departmental medical officer should be able to give a direction that shuts down most of Victoria. It has been said that there is a practical reality that the government has coercive and persuasive means at its disposal to ensure its ultimate control about powers vested in departmental officials.[167]

151 Be that as it may, in this case it was accepted by both parties that the decision to make the Directions was a matter for the authorised officer who had been requested to make that decision, who in this case was Associate Professor Giles. Her evidence was that she made an independent decision.

The plaintiff's submissions about ground one

152 As previously mentioned, the plaintiff submitted that Giles acted under the direction and at the behest of the Premier in making the Curfew Direction and failed to give any real independent consideration as to whether it was appropriate to do so. She thereby acted outside the limits of her functions and powers and made a jurisdictional error. It is important to remember that breach of the Directions would constitute a crime for which there were significant financial penalties. Individuals could be fined as much as $19,826.40, being 120 penalty units, each of which equates to $165.22 each. Body corporates could be fines $99,132.00, which equates to 600 penalty units of $165.22.[168]

153 The plaintiff's many points in support of this submission relied on the events leading

---

166 *Telstra Corporation Ltd v Kendall* (1995) 55 FCR 221, 231-32 (Black CJ, Ryan and Hill JJ) (citation admitted).

167 Pamela O'Connor, 'Knowing When to Say 'Yes Minister': Ministerial Control of Discretions Vested in Officials' (1998) 5 *Australian Journal of Administrative Law* 168, 176.

168 *Public Health and Wellbeing Act 2008* s 203; *Monetary Units Act 2004* ss 5, 6; Tim Pallas, Treasurer, 'Notice under Section 6, Fixing the Value of a Fee and Penalty Unit' in Victoria, *Victorian Government Gazette*, No G 16, 23 April 2020, 776.

up to Giles signing the Directions, which I have set out previously, but which I will mention again to the extent necessary.

154 First, were the Premier's statements that the introduction of the Curfew was his decision and was to ensure compliance. The Premier also said that the Curfew made it 'much easier' for Victoria Police to assess whether someone should be out of their home.

155 The plaintiff argued that the Directions that Giles signed implemented the Premier's Roadmap released on 6 September, which stated that at 11.59pm on 13 September a Curfew would be eased to the hours between 9.00pm to 5.00am. Then there was Giles' agreement to make amendments to the Directions as requested by the Premier's Office. However, those amendments were not to the Curfew provisions. When Giles signed the Directions, they were sent to the Premier's Office.

156 The extension and modification of the Curfew were announced by Mr Andrews at a media conference on Sunday morning 13 September and Giles did not make her decision until that evening. I will again set out the terms of the Premier's announcement:

> Exercise is extended for two hours, split over a maximum of two sessions. That goes obviously from one hour to two hours. And the notion of time outside, time outdoors, whilst at the moment it's just for exercise, it will also now be – from midnight tonight – for social interaction with one other person or members of your household. And of course as we move towards the warmer months, the curfew is extended from 8pm - from tomorrow night essentially, from midnight tonight so it'll apply from Monday night – from 8pm to 9pm. So an extra hour of that freedom of movement.[169]

157 The plaintiff sought to rely on the 'plain common sense reality'[170] of the unlikelihood of a medical officer in Giles' position in the Department's administrative hierarchy making an independent decision in circumstances when Mr Andrews, holding the highest political office in the State, had said that the introduction of the Curfew was his decision. It was plain, so it was argued, that the Curfew Direction was signed

169 Transcript, Media Conference, Mr D Andrews, 13 September 2020, 5.
170 T 397.

under the direction of the Premier, or by the defendant considering herself duty bound to do so. Any other suggestion was implausible.

158 Then the plaintiff attacked the credibility of Giles' evidence, relying on the fact that she exhibited to her first affidavit redacted legal advice regarding the compatibility of the Curfew Direction with the human rights recognised by the Charter. She argued that that had produced a half truth, namely that the Directions were likely to be compatible with the Charter but not disclosing the significant qualification to that advice, that there was a risk that they could be held to be incompatible.

159 Then the plaintiff submitted that Giles' evidence conflicted with contemporaneous documents, that she was prone to long speeches and frequently evasive when purporting to give answers to direct questions during cross-examination.

160 Next, it was argued that Giles, on the afternoon of 13 September, was given more than 1,000 pages of documents with little time to properly consider them. The terms of the Directions were pre-determined and she had no involvement in their drafting. She knew that if she did not sign them, someone else would.[171] The language of the briefing papers sent to Giles was dictatorial or compulsive. She sought no advice or data or reports about other considerations such as the social and economic effects of the Directions and the Curfew. There was no scientific basis for the Curfew and the two research papers to which she referred did not support a broad brush state wide measure when the virus may not be present for hundreds of kilometres.

161 Finally, an inference could be drawn from Sutton's statement on 27 September, when the Curfew was lifted, that it was not proportionate at the time it was introduced.

Defendant's submissions on ground one

162 The defendant contended that she gave independent attention and consideration to whether she should sign the Directions. She had specialised knowledge in public health and infectious diseases and COVID-19, based on her training, study and her experience and work in the Department from 3 August. This provided her with

171 T 355.5.

specialised knowledge on which to form an opinion about the effectiveness of the Stage 4 directions in reducing the public health risk that would be caused by removing the Curfew. She formed this opinion herself; she did not act at the behest of the Premier, nor did she fail to give any independent consideration to whether this was the appropriate decision to make.[172]

163 Although the proposed directions were prepared by others and sent to Giles, she carefully considered them and decided whether they should be issued. She described it as one of the most important tasks she had ever been given. She gave particular attention to the Curfew and was aware that it had been raised in the media. She said:

> I did not say I had no hesitation in imposing the curfew. I actually – based on this charter advice, I actually thought very carefully about the curfew. I spent a lot of time thinking about the impact of the curfew. I spoke to the Chief Health Officer about that. So I reject that I had no hesitation. I thought very carefully about it.[173]

164 She also said:

> Put simply, the decision to make the Directions so as to include the curfew was mine and mine alone. No one forced me to make that decision. No one directed me to make that decision. I always felt completely free to make what I regarded to be the right decision from a public health perspective. And that is what I did.[174]

165 Her email to Ms Lynch on the Sunday afternoon also revealed her views that 'or recent experience [was] that a significant fall in case numbers can be achieved when a curfew is included as part of a package of restrictions'. In her discussions with the Chief Health Officer and the Department's Policy Team and its lawyers, she debated and weighed the public health and human rights considerations and discussed the competing factors. When she received the bundle of proposed directions, she matched each one to the relevant Charter assessment and then went systematically through them. She was principally concerned with the public health rationale for the Curfew.

166 The emails between Giles and officers of the Department on the evening of 13

---

172 T 268.1-14.
173 T 329.7-13.
174 CB 191.

September about amendments to Directions did not establish that she acted under the Premier's direction in signing the Stay at Home Directions. She did not speak to the Premier about the Directions or the Curfew.

Consideration of ground one

167 The evidence establishes that the Premier announced a decision about the Curfew at a media conference on Sunday morning 13 September.

168 The issue presented by the facts is that under the Act of Parliament, Associate Professor Giles, the authorised officer, had to make an independent decision about the Curfew. The decision was hers and not Mr Andrews' nor Chief Health Officer Sutton's. It may be that, as Giles said, directions being considered for adoption are usually considered and discussed with 'stakeholders' before they are announced. But in this case, as the Premier had already announced a decision, the question arises whether, in reality, Giles could really reach a decision independently.

169 The chronology of events does suggest that on 13 September, Giles was in an awkward position, in that she was being asked to make an independent decision after Mr Andrews had announced what, in effect, was a decision on the same issue.

170 The question is whether there could be a real exercise of a discretion, when a decision has been announced by the political leader of the State before the decision-maker, Giles, came to consider her decision. The question whether Giles did act independently is one of fact.

171 Having seen Giles give evidence and having considered the documents she was provided with and the Department discussions that she held, I am satisfied that she made the decision herself based principally on public health considerations. She explained her reasoning process clearly in her evidence.

172 In addition, I consider that her contemporaneous emails in the early afternoon with Lynch and Sutton revealed her thinking on why the modified Curfew should be made. That thinking was substantially similar to her evidence which I have described

previously.

173 I do not accept that Giles was evasive in answering questions in cross-examination. I considered that she attempted to answer the questions as best she could. She was somewhat vague, at least initially, on what she knew of the Premier's announcement, but when asked questions directly on that topic, she answered them clearly enough and, in my assessment, truthfully.

174 I do not draw any adverse conclusion from Giles exhibiting the redacted legal advice about the Charter. I decided in a pre-trial ruling that legal professional privilege was not available in respect of those documents. Giles is not a lawyer and she said she was informed that the advice given to her by the Department's legal team was confidential and covered by legal privilege. There was nothing out of the ordinary in legal privilege being claimed for the Charter advice, although I later decided that inconsistent behaviour had occurred removing the privilege under s 122 of the *Evidence Act 2008*.

175 Nor do I see anything out of the ordinary in the Directions being pre-prepared for Giles' consideration. That is common public sector practice and recognises that the decision-maker will not have time to draw up detailed documents.

176 I do not consider that the announcement of the Roadmap is a critical consideration, as that document appears to have been a plan or a proposal rather than a decision which might have removed Giles' independence as the decision-maker.

177 I have considered whether Giles had any real choice to sign the Directions when she was informed that, if she did not, the decision about them would be elevated to higher authority. The defendant said that this gave her a choice, but it might also be considered as not much of a choice for an officer of six weeks tenure. However, again I am persuaded that Giles took the need to make an independent decision seriously and did in fact make such a decision.

178 There is a separate issue that makes the plaintiff's first ground difficult to accept. The Curfew Direction was one part of many parts of the Stay at Home Directions that Giles

signed. Mr Andrews announced other modifications of the restrictions at his media conference on the Sunday morning, which were contained in the Directions that Giles' signed such as the introduction of the 'social bubble'. It was not suggested that Giles acted at the Premier's direction in signing or approving those parts of the Directions, although they too had been pre-prepared and announced at the Sunday morning media conference. While the Curfew had apparently proved controversial, Ms Loielo's case is more difficult to accept because it contends that Giles failed to form an independent decision in respect of only one of the many parts of the Directions. That is logically a difficult submission to accept.

179 Ground one is not established.

Ground 2 – Unreasonableness

180 The plaintiff contended that the defendant acted unreasonably in making the Curfew Direction in that:

(a) the Curfew Directive was not reasonably proportionate;

(b) the Curfew Directive operated arbitrarily or capriciously;

(c) the defendant failed to comply with s 9 of the Act which imposed an obligation to make decisions and take actions in the administration of the Act:

(i) that were proportionate to the public health risk sought to be prevented, minimised or controlled; and

(ii) not in an arbitrary manner;

(d) the defendant failed to comply with s 111(a) of the Act which imposed an obligation to manage the spread and control of infectious diseases with minimum restriction on the rights of any person;

(e) the defendant failed to take into account material considerations, namely the social and psychological impact upon the plaintiff arising from the Curfew Directive; and

(f) the defendant failed to take into account material considerations, namely the human rights of the plaintiff contained in the Charter, and accordingly the defendant acted outside the limits of the functions and powers conferred on her, giving rise to jurisdictional error.

181 The plaintiff submitted that the Curfew was disproportionate, arbitrary or capricious, as it had no scientific basis. There were already sufficient restrictions in place and the Curfew infringed fundamental rights and freedoms without demonstrable justification.

182 The defendant argued that Giles' decision was taken in an area of decisional freedom and her decision fell within the range of possible lawful outcomes. There was not just one right outcome. In determining whether her decision was reasonable, it was necessary to evaluate its nature and quality by reference to the subject matter, scope and purpose of the relevant statutory power. In addition, the evidence required careful attention. Giles was exercising a discretion concerning what directions were reasonably necessary to protect the public health of people health of people residing in Victoria. Her reasons were important, as they provided an evident and intelligent justification for her decision, which was made under the pressure of events.

183 The power in s 200(1)(d) turned on the formation of an opinion of what was reasonably necessary to protect public health and it was to be exercised by authorised officers in urgent circumstances. The precautionary principle indicated that a lack of scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk. Giles formed her opinion that the Curfew Direction was reasonably necessary to protect public health based on her specialised knowledge, the detailed information that she had seen over time and other evidence that was available to her. Giles did take into account the social and psychological wellbeing of the community.

Consideration of ground two

184 I accept the defendant's submissions in respect of this ground. A challenge to a

decision based on unreasonableness, whether framed as *Wednesbury* unreasonableness[175] or as legal unreasonableness,[176] must establish that the decision was outside the scope or purpose of the statute under which it was made. This is a very difficult task in the present circumstances, as the power exercised was an emergency power or discretion contained in public health legislation to be exercised for the protection of public health based on the authorised officer's decision of what was reasonably necessary.

185 By 13 September, the Curfew, as part of a package of restrictions, had been in place for six weeks during which time the number of COVID-19 cases had decreased. It was part of the package of measures that had assisted in reducing the number of COVID-19 cases and it reduced the movement of people, and on Giles' view, thereby contributed to a reduction in the spread of COVID-19. Giles was entitled to have regard to the precautionary principle in making her decision. She formed the opinion that the Curfew was reasonably necessary to protect public health. The plaintiff called no evidence to the contrary of that opinion. I consider in more detail in dealing with ground three the matters on which Giles relied to form the opinion that the Curfew Direction was reasonably necessary for the protection of public health. Those matters were relevant to the exercise of the s 200(1)(d) and therefore her decision cannot be said to be unreasonable.

186 The other arguments that were raised under ground two do not establish any error by Giles. They alleged that the Curfew did not comply with s 9 of the PHW Act in that the decision and action of introducing the Curfew Direction were not proportionate to the public health risk sought to be prevented, minimised or controlled and were taken in an arbitrary manner. Section 9 was one principle to which regard should be had; another was the precautionary principle. I decide below in considering ground four, the Charter ground, that the Curfew was proportionate to the purpose it sought to achieve. I do not consider that its introduction occurred in an arbitrary manner, but

---

175 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

176 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541.

rather in the exercise of the emergency powers contained in s 200.

187 Section 111 appears in Pt 8 of the PHW Act, which is headed 'Management and control of infectious diseases, Micro-organisms and medical conditions'. It provides that:

> [T]he spread of an infectious disease should be prevented or minimised with the minimum restrictions on the rights of anyone.

188 Section 11 provides that s 111 states the principles that are to apply for the purposes of the application, operation and implementation of Pt 8. I do not see how the PHW Act can be taken to intend that s 111 applies to the operation of the emergency powers contained in Pt 10. In any event, as the defendant submitted, s 11 contains principles to which regard should be given and I consider that by taking into account the Charter advices and her stated consideration of human rights, Giles did have regard to the principles in s 111.

189 Another allegation raised in ground 2 is that Giles did not take into account the social and economic effects of the Curfew. But I accept that her evidence established that she was aware of the impacts of the Curfew on people living in the Restricted Areas, but considered that her principal task was to protect public health. That was the express purpose of the discretion that s 200(1)(d) gave her.

Ground 3 – Irrationality / Illogicality

190 The plaintiff's case in support of this third ground was that the Curfew Direction was capricious, unjust and not based on relevant and reliable evidence as required by s 5 of the PHW Act, which provides:

> Decisions as to —
>
> (a) the most effective use of resources to promote and protect public health and wellbeing; and
>
> (b) the most effective and efficient public health and wellbeing interventions —
>
> should be based on evidence available in the circumstances that is relevant and reliable.

191 It was invalid on the grounds of irrationality and illogicality giving rise to

jurisdictional error.

192 The plaintiff submitted that the defendant could not have logically or rationally reach a state of satisfaction that the Curfew was reasonably necessary for the protection of public health having regard to the evidence and competing considerations contemplated by the PHW Act and the Charter. Giles had not established that the Curfew was reasonably necessary for the protection of public health and her basis for considering that a Curfew was needed was not founded on any objective evidence. She had failed to provide evidence to support her contention that she 'had seen from the data a clear and direct correlation between the effect of the Stage 4 restrictions and the reduction in case numbers.'[177] The 'data', reluctantly produced, did not support her conclusion. Furthermore, despite stating that she 'had evidence in the documents before her, from information received orally and from her own knowledge and experience that the existing restrictions including the curfew had substantially reduced the effective rate of COVID-19 in Metropolitan Melbourne,'[178] her own evidence was to the contrary. She said that, 'I believed that the curfew has contributed to that effectiveness, even though I was not able to separate out how much of the beneficial effect could be attributed to the curfew.'[179] She agreed in cross-examination that:

> [T]he curfew in isolation, there is not evidence to support that, but there is evidence to support the curfew as part of a package of restrictions to reduce – that has been shown to reduce infections in Victoria.[180]

193 The defendant failed to call any independent witness, with whom she consulted, about the Curfew Direction. She could have called Chief Health Officer Sutton or other Departmental officers and her failure to do so required the drawing of a *Jones v Dunkel*[181] inference that such evidence would not have assisted her case.

194 The defendant submitted that the question of whether it was reasonably necessary for

177 CB 176.
178 CB 186.
179 CB 409.
180 T 267.17-21.
181 (1959) 101 CLR 298.

the protection of public health to make the Curfew Direction involved matters of conclusion based on material which required an evaluative judgment. The decision about what was reasonably necessary for the protection of public health was a decision within a range which Parliament intended to be formed as a prerequisite to the exercise of power. No invalidity occurred if the state of mind that Giles reached could also have been reached by a logical or rational person on the same material.[182] The precautionary principle in s 6 permitted emergency action and Giles had to make a decision on 13 September. In addition, she had detailed knowledge, experience and data about the COVID-19 outbreaks from her work in the Department.

195 The defendant relied on Gleeson CJ's statement in *Thomas v Mowbray* that in applying the words 'reasonably necessary' which appear in s 200(1)(d):

> [t]he court has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires.[183]

196 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'.[184] 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'.[185]

197 On the material available to Giles at the time of making the Curfew Direction, a logical or rational person to have considered them to be reasonably necessary to protect public health. At that time, COVID-19 posed a serious risk to public health in Victoria. This was evident by: the extension of the State of Emergency on the advice of the Chief

---

182 *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409, 532-5 [84]; [86]–[90] ('*EHF17*') (Derrington J).

183 (2007) 233 CLR 307, 332 [22].

184 *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).

185 Ibid 649 [135].

Health Officer;[186] the declaration of a pandemic by the World Health Organisation;[187] and the virus' highly infectious nature.[188] There was strong evidence that restrictions on movement on Victorians had effectively mitigated the public risk posed by COVID-19.[189]

Consideration of ground three

198 Ms Loielo's third ground that Giles acted irrationally or illogically, as those terms are used in law, in making the Curfew Direction is not established.

199 Associate Professor Giles' decision was ultimately about the exercise of the discretion – was the curfew reasonably necessary to protect the public health of the public? That is a subjective jurisdictional fact. Her decision about what was reasonably necessary could also have been reached by a logical or rational person on the same material and that was sufficient to enliven the power.[190] Urgent action had to be taken. The package of restrictions, including the Curfew, introduced on 5 August, had been followed by a reduction in the number of new infections. While different persons might have reached different conclusions about the need for a Curfew, it could not be said to be irrational or illogical for Giles to decide to continue the Curfew in a shorter, modified form as part of the restrictions. Giles' evidence was that she based her decision on public health grounds, and for the purpose of protecting public health, which was the purpose of the statutory discretion contained in s 200(1)(d). Her experience as an infectious diseases physician and from working in connection with outbreaks of COVID-19 assisted her in forming her opinion.

200 I do not consider that a *Jones v Dunkel*[191] inference should be drawn by Giles not calling other witnesses. She said that she made an independent decision and thus her case was to be assessed by her evidence. The emails in which she discussed her decision was also relevant in establishing the purpose of her decision. I do not see why she

186 CB 117, 137.
187 CB 122.
188 CB 124, 530.
189 CB 152-155.
190 *EHF17* (n 182) 433 [84].
191 (1959) 101 CLR 298.

would be expected to call any other witnesses.

201 I also consider that Giles established that she had specialised knowledge about COVID-19 infections based on her training, study and experience so as to the satisfy the provisions of s 79(1) of the *Evidence Act 2008*.[192]

202 I consider that Giles' evidence establishes that there was a public health purpose for the Directions and that she considered it necessary to continue the Curfew as part of a package of restrictions in response to the COVID-19 pandemic to eliminate or reduce the risk to public health. Giles' evidence was the only medical evidence presented to the Court. Her conclusion that the restrictions, including the Curfew, were reasonably necessary to protect public health was not irrational or illogical or reveal any material misconception by her and could not be said to be an erroneous finding of jurisdictional fact. She also could exercise the s 200(1)(b) power to make directions to restrict the movement of persons, something that she considered contributed to the spread of the virus. When different opinions are reasonably open, a decision to adopt one of then cannot be described as irrational or illogical.

Ground 4 – Breach of Charter of Human Rights and Responsibilities

Section 39

203 Section 39 provides:

> Legal Proceedings
>
> (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

204 It follows from my earlier finding that Ms Loielo has standing to pursue her non-Charter judicial review grounds that she satisfies the requirements of s 39(1) in that she 'may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the decision was unlawful.'

---

192 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 585.

205 As Kyrou J stated in *DPP v Debono:*

> Accordingly, it appears that the mere exercise of an available right to seek relief or remedy in respect of an act or decision of a public authority on a ground that is independent of the Charter is sufficient to satisfy the condition in s 39 of the Charter; that is, s 39 does not depend upon a successful exercise of that right based on the non-Charter ground. However, if a right to seek relief or remedy in respect of an act or decision of a public authority is not available independently of the Charter, no relief or remedy can be granted where the act or decision is unlawful under s 38(1) of the Charter.[193]

206 The applicant need not succeed on a non-Charter ground in order for a court to be able to grant relief on a Charter ground of unlawfulness pursuant to s 39(1). As Bell J said:

> It follows that, in respect of an act or decision of a public authority, the tribunal has jurisdiction under s 39(1) of the Charter to grant such relief or remedy on a ground of Charter unlawfulness as maybe sort in the tribunal on a ground of non-Charter unlawfulness. The tribunal does not lose that jurisdiction because, when application is actually made seeking the relief or remedy on a ground of non-Charter unlawfulness, that ground is not determined or rejected.[194]

Relevant Charter provisions

207 The defendant accepted that s 38(1) of the Charter applied to her decision: that is, she accepted that she was a 'public authority' when she made the Stay at Home Directions and that the decision under s 200 to make those Directions with the Curfew was a decision that was subject to s 38(1).[195]

208 Section 38(1) applies to the exercise of discretions.[196]

209 Section 38 of the Charter states:

> **Conduct of public authorities**
>
> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

193 *R v Debono* [2013] VSC 407, [82].

194 *Goode v Common Equity Housing* [2014] VSC 585 [39] cited in *Certain Children* (No 2) [549].

195 I referred the parties to the decision in *Kerrison v Melbourne City Council* (2014) 228 FCR 87, but they did not make any submissions about its relevance to this case, but proceeded on the basis that s 38 of the Charter applied to the exercise of the emergency powers contained in the PHW Act.

196 *Slaveski v Smith* (2012) 34 VR 206.

210 Section 7(2) states:

> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. (201

Section 12 states:

> **Freedom of Movement**
>
> Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

Section 21 states in relevant parts:

> **Right to liberty and security of person**
>
> (1) Every person has the right to liberty and security.
>
> (2) A person must not be subjected to arbitrary arrest or detention.
>
> (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

Plaintiff's submissions

211 The plaintiff contends that her human rights engaged by the Curfew Direction were freedom of movement, liberty, security, the right not to be detained arbitrarily and the right not to be deprived of liberty.

212 The plaintiff contends that the Curfew Direction limited her Charter rights between the hours of 9:00pm to 5:00am each day from 13 until 28 September.

Defendant's submissions

213 The defendant submitted that the two Charter rights that were potentially limited by the Curfew were the right of freedom of movement in s 12 and the right of liberty in s

21. She referred to Bell J's statement in *Kracke v The Mental Health Review Board* that:

> The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed at all deprivations of liberty, but not mere restrictions on freedom of movement. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity, not one of nature and substance.[197]

214 The defendant submitted that restrictions that may provide remedies at common law for interference with personal liberty may not breach the Charter right to personal liberty in s 21. A person may have a claim in tort for false imprisonment without their Charter right of liberty being limited.[198] Decisions concerning the European Convention on Human Rights establish that not all measures confining a person to their home are deprivations of liberty.[199]

215 The Curfew did not limit the plaintiff's ability to leave home other than for eight hours overnight and even then there were exceptions. Nor did it affect her life within her home. It had beneficial and non-punitive purposes and in fact, in its 13 September version, only continued for two weeks.

The rights engaged

216 I consider that the human right of freedom of movement in s 12 was engaged by the Curfew Direction because it limited or restricted the right of every person lawfully within the Restricted Areas of Victoria to move freely within Victoria and to enter and leave it and to be free to choose where to live.

217 I do not consider that the human right of liberty recognised in s 21 was directly engaged, at least so far as the plaintiff is concerned. That right is to liberty and security and not to be subject to arbitrary arrest or detention. In common usage, the right to liberty may include being able to come and go from your home as you choose, but in

---

197 (2009) 29 VAR 1, 140 [664] ('*Kracke*').

198 R (*Jalloh) v The Secretary of State for the Home Department* [2020] 2 WLR 418.

199 See *Secretary of State for the Home Department v MB* [2008] 1 AC 440; *Secretary of State for the Home Department v E* [2008] 1 AC 499; *Secretary of State for the Home Department v JJ* [2008] 1 AC 385. See also *Dolan*'s *Case* [2020] EWHC 1786, [73]; *Vella v Commissioner of Police* (NSW) (2019) 93 ALJR 1, 16 [53] (Bell, Kean, Nettle and Edelman JJ).

human rights discourse that right is more likely to be characterised as the right to freedom of movement – the s 12 right. The cases that consider curfews or control orders are often in a context of controlling the movement of people suspected of criminal activity or people who have entered a country without lawful authority. By way of illustration, I will refer to three statements in the House of Lords decision in *Secretary of State for the Home Department v JJ.*[200] In that case, the plaintiffs were subject to control orders made under the *Prevention of Terrorism Act 2005 (UK),* which included a curfew of 18 hours a day and they 'were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time'[201]. The obligations imposed by those control orders were held to be a deprivation of the liberty of the persons subject to the orders Lord Bingham stated:

> Thus the task of a court is to assess the impact of the measures in question on a person in the situation subject to them.
>
> …
>
> In assessing the impact of the measures in question on a person in the situation of the person subject to them, the court has assessed the effect of the measures on the life the person would have been living otherwise.[202]

218 Lord Hoffmann stated:

> However, when neither physical restraint nor removal from one's home is present, the Court takes a broader view. It does not confine its attention only to those times at which the person's liberty is most restricted (for example, when he is subject to a curfew) but asks in more general terms, as in Guzzardi's case, whether his situation approximates sufficiently closely to being in prison.[203]

219 Baroness Hale stated:

> It is necessary to focus on the actual lives these people were required by law to

200 [2008] 1 AC 385.
201 Ibid [24].
202 Ibid [15], [18].
203 Ibid [43].

> lead, how far they were confined to one place, how much they were cut off from society, how closely their lives were controlled.[204]

220 As Bell J observed in *Re Kracke and Mental Health Review Board*:

> The difference between a deprivation of liberty and a restriction on freedom of movement is one of degree of intensity, not one of nature or substance.[205]

221 The Curfew applied to much of Victoria, whereas many cases, where the right to liberty has been engaged, concern curfews applying to particular persons. Although, Ms Loielo was restricted from leaving her home for all hours of the day and especially during the hours of the Curfew, although she was still able to conduct her restaurant business to a limited degree. Her complaint is about the particular restrictions imposed by the Curfew. The case law on the human right of liberty suggests that it does not apply to the Curfew's impact on her, but that the human right of freedom of movement does. That is not to say that there may have been particular people living in the Restricted Areas, whose right to liberty may have been limited by the Curfew because of their particular circumstances, but any such cases are not before the Court.

Which limbs of s 38(1) were engaged?

222 The defendant submitted that the substantive limb, the first limb of s 38(1) of the Charter, did not apply because it only applied to acts and not to decisions, but she recognised that there was authority to the contrary or authority that had assumed the contrary.[206]

223 In my opinion, both limbs of s 38(1) were engaged by the defendant's decision to make the Directions, the substantive limb and the procedural limb. In that regard I follow the approach of John Dixon J in *Certain Children v Minister for Families and Children (No 2)*[207] decision. Section 38 requires that the decision maker, the public authority, act in a way that is compatible with human rights or in making a decision give proper consideration to human rights. One limb relates to the act, which in this case was the actual decision made and steps taken to implement it and the other limb concerns the

---

204 Ibid [63].
205 *Kracke* (n 197) 140 [664].
206 See, eg, *Certain Children No 2* (n 194) 441, 498 [177]; 510–511 [225]–[226].
207 Ibid.

procedure adopted in making the decision, being the requirement that relevant human rights are properly considered. The decision and the subsequent act are connected. The implementation of the decision may often require an act or series of acts. Section 38(1) results in the Charter affecting the procedure leading to a decision and then provides a standard of compatibility against which the lawfulness of actions taken are to be assessed, both any decision made and its implementation.

Charter questions – The first limb of s 38(1)

224 The question under the first limb of s 38(1) of the Charter then is whether the defendant has established that the limitations or restrictions imposed on her Charter right to freedom of movement were proportionate and therefore reasonably limited in accordance with s 7(2).

225 It is convenient at this point of the judgment to set out the Charter advices. They contain a statement of relevant issues and of matters that were brought to Associate Professor Giles' attention.

Summary of Charter advice received by Associate Professor Giles

226 Associate Professor Giles received a memorandum from Mr Sean Morrison, Director, Legal Services and Acting General Counsel, concerning her obligations under s 38 of the Charter prior to issuing the directions. That advice contained the following summary:

> It is the Department's view that these Directions are, on balance, likely to be compatible with human rights under the Charter, in light of the exceptional circumstances in which they are being issued and the public health advice they are based on. However, we note that this assessment is not without doubt; in particular, there is some risk of incompatibility with respect to the evening curfew.[208]
>
> The Directions that are the subject of this Charter assessment restrict the movement of people living in Restricted Area, which is defined in the operative Area Directions to include the aggregate areas consisting of the municipal districts, suburbs, localities and addresses within greater Melbourne. The Restricted Area is considered to have a higher prevalence of, or risk of exposure to, 2019-nCoV.[209]

---

208 CB 1512.

209 CB 1513.

227 The advice stated that Stage 4 represents the highest level of personal restrictions that have been issued to date in Victoria. It imposed very significant restrictions on when people may leave the premises in which they ordinarily reside, the circumstances in which they may leave the Restricted Areas and enter the Relevant Area and the circumstances in which they may gather in public and in private. The directions significantly restrict movement outside the Restricted Areas except for one of the specified reasons and restrict public gatherings of more than two people and private gatherings, except in circumstances that fall within one of the limited exceptions. The directions provided that a person who lives in the Restricted Areas must abide by an evening curfew for the duration of these directions, save for limited circumstances.

228 The Directions signed on 13 September represented a slight easing of the restrictions. The advice stated that the Directions had limited and have continued to limit a number of human rights protected by the Charter. The advice expressed the view that on balance, the restrictions were likely to be compatible with those rights in light of the exceptional circumstances in which they were being issued. The advice stated:

> we note this assessment is not without doubt. In particular, there is some risk of incompatibility with respect to the evening curfew. We draw your attention to the fact that the more onerous the limits become, the more difficult it is to assess whether the balance they strike is proportionate with their objective in part because it is not possible to consider how those limits will impact each individual. However, a state of disaster was declared under the *Emergency Management Act 1986* on 2 August 2020, and will be remade on 13 September 2020, which is indicative of the current level of risk presented by 2019-nCoV. For the reasons discussed below we consider the limits on relevant rights to be reasonably justified on the basis of persuasive medical evidence, public health advice, and current data and trends concerning rates of infection and community transmission.[210]

229 The advice assumed that the limits imposed by the Directions were in fact empowered by s 200 and conformed to the PHW Act more generally. The advice referred to the current evidence on the spread of COVID-19 and that that the current modelling indicated that throughout Victoria, in the absence of stringent control measures, the following six months would see over 10,000 people in Victoria die from COVID-19. It also stated that if the current rate of community transmission in greater Melbourne

[210] CB 1241, 1256, 1272, 1292, 1304-5, 1314, 1516.

persisted without continued restrictions, there would not be enough contact tracing staff to cope with those demands and infections would spiral out of control. The advice made the following comments about the Curfew:

> The evening curfew has been demonstrated to significantly reduce the movement of people in the Restricted Area. Traffic modelling has demonstrated a dramatic reduction in the number of people moving around the Restricted Area. In this way, the curfew significantly contributes to the reduction in the spread of 2019-nCoV. There are also limited exceptions to the evening curfew, such as for the provision of care and support, including child-minding; for health or medical purposes; to escape the risk of harm; and for emergency purposes, so that people can still leave their premises during curfew hours for legitimate reasons.
>
> The Department notes that the evening curfew was first introduced on 2 August 2020 in directions signed by Dr Finn Romanes. Dr Romanes signed those directions on the basis of his view of the package of directions, and advice, that the curfew, as part of a package of measures, was reasonably necessary to protect public health; and on balance, that the limits on the relevant rights were reasonably justifiable on the basis of persuasive medical evidence, as well as current data and trends concerning the rates of infection and community transmission.
>
> The Department has been provided with advice that the continuation of the evening curfew remains reasonably necessary on public health grounds. This is primarily because it reduces movement, which in turn reduces the risk of community transmission. Further, it is one part of a suite of measures that have proven to be highly effective in reducing community transmission. There is a risk that removing the curfew component from this suite may undermine the effectiveness of the measures taken together; this risk is considered to be unacceptably high.
>
> The Department notes the comments by the Chief Health Officer, Professor Brett Sutton, in a media interview on 8 September 2020, where he said that while the curfew is not inconsistent with public health advice, it was not the subject of his advice prior to its implementation. Professor Sutton also stated in that interview that had he 'put [his] mind to it' that the evening curfew would 'probably' have been a measure he would have recommended.
>
> The Department also notes that Premier Daniel Andrews stated in a press conference on 12 September 2020 that the evening curfew is 'not a matter of public health advice. It's a law enforcement issue.' He said '[i]t's about giving police the easiest set of rules to enforce and not have to waste their precious time dealing with things that shouldn't be happening and can easily be prevented by putting a curfew in'.
>
> Despite these comments, it is the Department's view that there is a public health basis for the curfew.[211]

[211] CB 701-2, 1517-18.

230 The advice also noted that recent trends indicated that the previous Stage 3 restrictions were not sufficient to stem transmission. The advice said that there were no less restrictive means reasonably available to achieve the same purpose of stemming the spread and effect of COVID-19 and that the curfew remained reasonably necessary on public health grounds.

231 The advice stated:

> Therefore, on balance, the Directions are likely to be compatible with the rights in the Charter. **However, we note that this assessment is not without doubt; in particular, there is some risk of incompatibility with respect to the evening curfew.**
>
> The Department does consider all of the measures to be consistent with promoting the right to life, as protected by s 9 of the Charter as well as the right to health which is protected under art 12 of the International Covenant on Economic, Social and Cultural Rights, to which Australia is a signatory.[212]

232 The advice looked at the rights that were limited by the Directions. It expressed the view that the Direction interfered with the right to liberty in s 21 of the Charter by depriving the people residing in the Restricted Areas of their liberty. The Curfew was one feature of those restrictions. However, the advice continued that the authors did not consider that the Directions deprived people of their liberty in a manner that was unlawful or arbitrary. The exceptions to it addressed the central needs of affected individuals. To the extent that the Directions did limit the right to liberty, any limitation was likely to be reasonably justified. The Directions were temporary.

233 The advice also addressed the restrictions on freedom of movement and the right recognised by s 12 of the Charter. The Directions imposed the Curfew on those living in the Restricted Areas and limited the number of times a person may leave their home each day, the duration for which they may leave and the distance which they may travel from their home. In this way, the Directions directly and significantly impaired a person's ability to move freely. However that limitation was reasonably justified because:

> The Directions form part of a vital suite of measures to limit community

[212] CB 1591 (emphasis in original).

> interaction and thereby minimise community transmission of the virus, and go no further than necessary. Importantly, the limitation on rights is temporary as it results from the Directions. Although having been in force for over a month, the restrictions are currently intended only to operate for a further matter of weeks in their current form, albeit subject to further extension where they remain reasonably necessary to protect public health, at which time they will be reassessed. In the present exceptional circumstances, we consider the Directions are therefore likely to be compatible with the right to freedom of movement.[213]

234 The advice in a footnote referred to art 12(3) of the International Covenant on Civil and Political Rights[214] which provides for freedom of movement but provides an indication of the type of purposes for which that right may be restricted, including public health.

235 The advice proceeded to consider a number of other rights including freedom of religion and cultural rights under s 14, freedom of peaceful assembly and association and freedom of expression under s 16(1), the right to equality under s 8(3), the right to privacy, family and home, under s 13(a) and, the protection of families and children under s 17(1).

Plaintiff's submissions

236 The plaintiff submitted that the defendant had not satisfied the onus of establishing that the Curfew's limitation of the right of freedom of movement was demonstrably justified under s 7(2) of the Charter.[215] The Curfew was therefore a 'step too far'[216] given the other restrictions introduced to reduce COVID-19 infections. The defendant had adopted a broad brush disproportionate approach 'simply to clamp everything down and just see if that works'.[217]

237 The plaintiff contended that there was no evidence that the Curfew made no difference in reducing COVID-19 cases and had been introduced for law enforcement purposes. There was no need for it as an addition to the existing restrictions. The

---

213 CB 1231.

214 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

215 *Kracke* (n 197) 35 [108]; *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 448-9 [147]; *R v Momcilovic* (2010) 25 VR 436, 475-6 [143]-[146]; *Certain Children (No 2)* (n 207) 497-8 [175].

216 T 405.2.

217 T 409.28.

scientific and research literature did not support the need for a Curfew. The defendant had no data about the social and economic effects of the Curfew. By making the Curfew Direction, the defendant acted in a way that was incompatible with Ms Loielo's human rights.

Defendant's submissions

238 The defendant relied on the principle that rights recognised by the Charter are not absolute and may be limited according to the standard of demonstrable justification in s 7(2), which is an expression of the principle of proportionality.[218] In making the PHW Act, which was enacted after the commencement of the Charter. Parliament had received a statement of its compatibility with the Charter, Parliament had concluded that the PHW Act limited rights in a way that was demonstrably justified in a free and democratic society. Parliament recognised that a potential limitation on human rights could occur if the authorised officer formed the opinion that a direction under the emergency powers was reasonably necessary to protect public health. The principles contained in the PHW Act were Parliament's expression of a struck by reference to the matters contained in s 7(2) of the Charter. The proper consideration required by s 7(2)(e) of 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve' must therefore occur within the frame of what the authorised officer concluded was 'reasonably necessary to protect public health'.

239 The statement of compatibility of the PHW Act was tabled in Parliament which described the right to health as being ultimately concerned with the right to life which was the supreme right. Mr Andrews, as Health Minister, stated that the right to health was essential for the enjoyment of many other rights protected by the Charter, particularly the right to life.[219] The defendant contended that this was consistent with the UN Human Rights Committee's most recent General Comment which described the right to life as a pre-requisite for the enjoyment of all other human rights.[220] In a

---

218 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 72 [214] (Tate JA).

219 Statement of Compatibility, Public Health and Wellbeing Bill 2008 (Vic) 1709.

220 Human Rights Committee, *General Comment No 36: Article 6 (the right to life)*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [2].

similar vein, Blackstone listed the right to life as the primary natural right, followed by the right to liberty.[221]

240 The powers in s 200, which can only be exercised in times of emergency, are to be exercised to achieve the important purpose of protecting public health. The decision-maker did not have to adopt the least restrictive means available to protect public health, but her action in making the Curfew Direction had to fall within the range of reasonably available options to achieve that purpose.[222]

241 The defendant conceded that the judicial determination of unlawfulness under s 38(1) 'necessarily require[s] an assessment that is closer to merits review than is usual in judicial review'.[223] The objective test of proportionality under s 7(2) of the Charter involves a greater intensity of review than is traditionally undertaken by a court in judicial review proceedings. The court may give a degree of weight or latitude to an administrative decision-maker depending on their expertise, the information they acted on and their provision of a transparent process of reasoning,[224] particularly where scientific evidence and health issues are concerned.[225] In this instance, the decision-maker, Giles, had specialist expertise pursuant to a legislative scheme. The purpose of the limitation was an evidence-based precautionary public health purpose.

242 The compatibility question under the first limb of s 38(1) must be decided by reference to the scope and objects of the statute conferring the discretion under which the Curfew Direction was made. The discretion that Giles exercised under s 200 was informed by the subject matter, scope and objects of the PHW Act, including the principles; was conditioned on the formation of the opinion required by s 200(1)(d), and was made by a person authorised by the Chief Health Officer to exercise that power.

---

221 T 501.

222 *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414.

223 *Certain Children Number 2* (n 194) 506-7 [212] (Dixon J). See also, *PJB v Melbourne Health* (2011) 39 VR 373, 421–422 [223] (Bell J) ('*Patrick's Case*').

224 *Certain Children (No 2)* (n 194) 508 [217].

225 See *R v Secretary of State for Health ex parte Eastside Cheese Company* [1999] 3 CMLR 123, [43]–[47] (Lord Bingham CJ).

243 Associate Professor Giles had abundant evidence on which to reach a decision that the Curfew satisfied the proportionality test and that there were no less restrictive means reasonably available to achieve the purpose of reducing the spread of COVID-19. A more geographically targeted approach had not been successful when Stage 3 restrictions were introduced. Giles was under no obligation to produce written evidence about the facts and assumptions upon which her opinion was based under s 79(1) of the *Evidence Act 2008*. She had relied on the best possible available evidence, being her daily experience in working with COVID-19 outbreaks, data about infections in Victoria and knowledge of the public health measures that had worked or had not worked. She concluded that the Curfew had assisted in reducing case numbers, particularly by limiting the movement of the residents of Victoria. The plaintiff had called no evidence contrary to that of Giles. To the extent that Giles was criticised for only having regard to the issue of public health, that was a correct focus because that was the purpose of the emergency powers.

Consideration of the first limb – Acts incompatible with human rights

244 As I emphasised in the summary at the commencement of this judgment, the protection of human rights has, at least, the same importance in times of emergency as in normal times. Human rights are not suspended during states of emergency or disaster. As well as protecting individuals, the consideration of human rights assists in thoughtful decision-making. Although, this case has been brought by one Victorian, Giles was required to give consideration, so far as possible to the Curfew's possible effects on residents of Victoria. It is not necessary for an identifiable individual to be affected in order for a human right to be engaged and order for the obligations in s 38(1) to apply.[226]

245 The Charter recognises that human rights are not absolute and may be limited, according to the standard of demonstrable justification found in s 7(2). Any other limitation is not 'under law'. Whether an action was 'incompatible' with human rights under s 38(1) was assessed by reference to s 7(2) of the Charter and proportionality.

---

226 *Certain Children (No 2)* (n 194) [194(a)].

The burden is on the party seeking to show that the limitation is 'demonstrably justified' having regard to the specific matters identified in s 7(2) of the Charter. The standard of proof is high.[227]

246 Lord Steyn in *Regina (Daly) v Secretary of State for the Home Department*[228] stated that the intensity of the review is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

247 The determination and assessment of Charter unlawfulness is closer to merits review than is usual in judicial review and requires a greater intensity of review.[229] What that may require may depend on the experience and expertise of the primary decision-maker, the information that they act on and the extent to which the decision is supported and objectively justified by a transparent process of reasoning.[230]

248 In this instance, the human right of freedom of movement was being limited significantly for the purpose of protecting public health. There was an issue whether the Curfew would assist in achieving that purpose. Another important issue in applying the s 7(2) proportionality analysis was whether there was any less restrictive means reasonably available of achieving the public health objective. [231] Thus, it would be insufficient if Associate Professor Giles had decided to continue the Curfew merely because it was already in place.

249 Giles reasoning was that the package of restrictions, including the Curfew, had reduced the spread of COVID-19, including by limiting the movement of people in Victoria They had reduced from 7 day rolling average of over 500 to about 40. It is true that she could not point to evidence that the Curfew itself reduced COVID-19 cases, but in the urgency of the circumstances created by the escalating COVID pandemic,

---

227 *DAS v Victorian Human Rights and Equal Opportunity Commission* (2009) 24 VR 415, 448 [147].
228 [2001] 2 AC 532, 547-8 [27]-[28] cited in *Certain Children (No 2)* (n 194) [213].
229 *Patrick's Case* (n 223) 421 [223].
230 *Certain Children (No 2)* (n 194) [217].
231 Ibid [471].

Giles' decision was not based on conclusions in medical journal articles or from analysing significant scientific evidence, as they were limited. Rather she had made a judgment based on her experience as an infectious diseases physician with added experience of COVID-19 cases.

250 By 13 September, the Curfew had only been in place for six weeks. While an alternative to its continuation would have been to revoke it and approve the continuation of the other Stay at Home restrictions as modified, there was equally no evidence that such a course would have continued to achieve the purpose of reducing new case at the same rate. Another option would have been to limit the Curfew to high infection areas, but Giles considered that the experience of lockdowns in hot spot areas did not support the effectiveness of localised restrictions. Yet another option would have been to decide that the Curfew might not reduce the infection rates as people would have 15 or 16 hours, rather than 24, to shop or exercise, thereby increasing the possibility of infected people spreading the virus to others because they had less time to undertake these activities.

251 But, the existence of other options does not mean that they were 'less restrictive means reasonably available to achieve the purpose' of protecting public health. In determining what means were 'reasonably available', it was appropriate to consider what means had been tried, what had followed, the urgency of the situation and the risks if infection rates surged again.

252 Victoria was in a state of emergency and the Stay at Home Directions, including the Curfew, had been followed by a significant reduction in infections. It might have been reasonably considered that it was not the time to try alternative means of reducing infections as the Curfew did reduce the movement of people. Whether Giles should have considered that the restrictions imposed by a Curfew were no longer proportionate to their purpose was a matter of judgment, open to different assessments. A cautious or precautionary approach was to leave the Curfew as modified in place. That is what occurred until the morning this case commenced.

253 In the circumstances I have described and, keeping in mind that Victoria was in a state of emergency, I do not consider that there were other reasonably available means within the meaning of s 7(2)(e) to achieve the purpose of reducing infections. I consider that Associate Professor Giles' evidence establishes that the Curfew was reasonably necessary to protect public health. I do not consider that I can take the timing of the revocation of the Curfew as undermining Giles decision on 13 September as to the reasonable necessity of the Curfew.

The procedural or second limb of s 38(1)

Plaintiff's submissions

254 The plaintiff submitted that the defendant did not give proper consideration to the plaintiff's human rights before the Curfew Direction was made, which is the requirement of the second or procedural limb of s 38(1) of the Charter because, first she did not understand in general terms which of the plaintiff's rights were affected, and how they were affected by the Curfew Direction. Secondly, she did not seriously turn her mind to the possible impact of the decision on the plaintiff's and others' rights and the implications thereof for the plaintiff and others. Thirdly, she did not identify the countervailing interests or obligations; and fourthly she did not balance the competing private and public interests as part of the exercise of justification.[232]

Defendant's submissions

The defendant submitted that Giles did give proper consideration to human rights as required by the first limb of s 38(1) in the formation of her opinion of what was reasonably necessary to protect public health under s 200(1)(d) of the PHW Act. Giles had the expertise, integrity, diligence and qualifications to form that opinion in accordance with the statutory requirements. In doing so, she had given appropriate consideration to human rights. Her graph of infection rates reflected her experience of the COVID-19 data following the introduction of Stage 4 restrictions. She was an expert decision-maker informed by the principles in the PHW Act who formed the requisite opinion that the Curfew Direction was reasonably necessary to protect public

232 *Castles v Secretary of the Department of Justice* (2010) 28 VR 141 ('*Castles*').

health. The Court should recognise her institutional competence. Giles based her decision on the information and advice before her, on the Charter advices and a reading of the Charter.[233]

Consideration of second limb - Proper consideration of human rights

255 The procedural or second limb of s 38(1) requires a decision-maker to have seriously turned their mind to the possible impact of the decision on an affected person's human rights and the implications for that person and to identify the countervailing interests or obligations.

256 There is a question issue of whether a health expert, such as the defendant, is able to properly balance the social and economic consequences of a decision primarily based on health considerations However, Parliament has given the discretion to an authorised officer.

257 Proper consideration does not require over scrutiny, zealously by the courts, the obligation is not satisfied by merely invoking the Charter. The review that is necessitated by the obligation to give proper consideration is a review of the substance of the decision-maker's consideration rather than form.[234] Emerton J in *Castles v Secretary of the Department of Justice*[235] stated that the procedural ground of s 38(1) involves:

> [U]nderstanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing

233 T 330.2-3.
234 See *Certain Children No 2* (n 206) [187]-[191].
235 *Castles* (n 232).

interests or obligations were identified.[236]

258 The evidence discloses that the decision-maker, Giles, gave primary consideration to health issues, which was the express subject matter which enlivened the exercise of the s 200(1)(d) discretion. But, I accept her evidence she did refer to the human rights advices under the Charter and considered them.

259 There is a question whether she had sufficient time to consider the documents she received over the weekend of 12 and 13 September. But her decision was in part based on data she had received over the previous six weeks. She said, and I accept, that she considered the documents that she received and had been thinking about her decision since the previous Wednesday when she was asked to stand in for Dr Romanes. She said that it was the most important task that she had ever been asked to undertake.

260 Giles received legal advice that there was a risk that the Curfew was not compatible with the Charter, although on balance, no such incompatibility existed. I accept her evidence that she did consider the effects of the Curfew on human rights applying her four step analysis. Giles' four steps were to understand the rights of the person affected by the decision, to turn her mind to the impact of the decision on human rights, to identify countervailing interests and balance private and public rights. These steps include some of the s 7(2) factors. But she also considered the importance and purpose of the limitation, by giving primary attention to risks to public health from the spread of the virus. She adopted a public health perspective using a precautionary approach – it would have been surprising if she had done otherwise. I accept that she did consider the effect of the Curfew on human rights and the effects of it on people in Victoria – she had experienced the effects of Stage 4 restrictions, herself. Her approach was that the sooner that the spread of the virus was substantially reduced, the sooner people would be able to resume their normal lives and attend to important activities such as visiting doctors and hospitals to receive health care that they had postponed because of fear of being infected. In the context of the purpose of the power

---

236 Ibid [185]-[186]. See also *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129, 223 [288] (Tate JA).

and discretion that Giles was required to exercise, I consider that she did give proper consideration to relevant human rights as required by the second limb of s 38(1).

261 Ground four is not established.

Declaratory relief

262 The parties made extensive submission about whether the plaintiff should be awarded declaratory relief if she established one or more of her claims. The defendant contended that a declaration would no longer have foreseeable consequences and in the exercise of the Court's discretion should not be granted.[237]

263 Although this question does not now arise, in view of the extensive submissions, I will express my opinion about it.

264 In my opinion, this case is analogous to the New Zealand COVID-19 decision in *Borrowdale v Director-General of Health*[238] where the High Court granted a declaration about the announcement of a lockdown by the Prime Minister before it had been imposed lawfully by the Director-General of Health.

265 If I had found that the plaintiff had established a breach of her Charter rights, I would have granted her an appropriately worded declaration to reflect that finding even though the Curfew has been revoked. I would not readily regard such a declaration of unlawful limitation of human rights as having no foreseeable consequence.

Conclusion

266 The proceeding must be dismissed.

---

237 *Smethurst* (n 150).
238 *Borrowdale* (n 5).

CERTIFICATE

I certify that this and the 88 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Ginnane of the Supreme Court of Victoria delivered on 2 November 2020.

DATED this second day of November 2020.

.....
Associate