

# JUDICIAL OFFICERS' BULLETIN

Published by the Judicial Commission of NSW

May 2020 | Volume 32 | No 4

## Law enforcement and police powers in NSW during COVID-19



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With the onset of the COVID-19 pandemic in March, the Commonwealth and NSW Parliaments have introduced temporary laws<sup>1</sup> to enable the management of public health and safety and prevent the spread of the novel coronavirus. This article provides an overview of these laws with a focus on the exercise of discretion under novel or temporary police powers.

### A human biosecurity emergency

On 18 March 2020, the Governor-General declared a “human biosecurity emergency” under the *Biosecurity Act* 2015 (Cth). This is the first time the special measures for managing biosecurity risks under the *Biosecurity Act* have been invoked. The vice-regal declaration enlivened the federal Health Minister’s powers to determine emergency requirements or give directions that are necessary to prevent the spread of COVID-19.<sup>2</sup> The Act also includes a number of key safeguards. To exercise these powers, the Health Minister must be satisfied that the direction or requirement is:

- likely to be effective in, or contribute to, achieving the purpose for which it is to be given
- no more restrictive or intrusive than is required in the circumstances (including the manner in which the requirement is applied), and
- only applied for as long as is necessary.<sup>3</sup>

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1 Most new provisions will be repealed 12 months after their date of assent.

2 Sections 477 and 478 *Biosecurity Act* 2015 (Cth).

3 Section 478(3) *Biosecurity Act*.

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A number of legislative determinations have already been made, including the prohibition on overseas travel,<sup>4</sup> a ban on cruise ships,<sup>5</sup> and requirements for entering remote communities.<sup>6</sup> Under existing powers, the Minister can also make a “human biosecurity control order” against an individual, directing them to comply with certain conditions such as to stay home, remain at a particular place, refrain from visiting certain people, undergo decontamination or receive medical treatment.<sup>7</sup>

### Overview of COVID-19 laws in NSW

In NSW, legislative amendments to the *Public Health Act 2010* (NSW) (PHA) include new restrictions and offences in relation to gathering, movement, self-isolation and public premises. These laws grant police officers limited new powers to enforce “public health orders” or Ministerial directions by imposing a fine or arresting a person in certain circumstances.

The PHA empowers the Minister for Health and Medical Research to take such action or give directions necessary to deal with any risk to public health and its possible consequences.<sup>8</sup> The government need not declare a state of emergency to use these powers.<sup>9</sup> The risk to public health posed by COVID-19 therefore prompted the Minister to exercise power under s 7 of the PHA to make a series of “directions” — known as Public Health Orders (PHOs) — which deal most notably with social restrictions, quarantine measures and self-isolation. Such PHOs apply to the whole of NSW. Under s 7(5), each PHO expires 90 days after commencement unless it is revoked earlier.<sup>10</sup>

Like the federal law, the PHA also allows an “authorised medical practitioner”<sup>11</sup> to make a written “public health order” against a specific individual in certain circumstances,<sup>12</sup> which may require an individual to refrain from specified conduct or undergo specified treatment.<sup>13</sup>

To date there have been multiple PHOs (some already revoked) which have imposed, amongst others, the following community restrictions:

1. people arriving in NSW and who have been in a country other than Australia within 14 days before that arrival must, after that arrival, isolate themselves for a quarantine period of 14 days<sup>14</sup>

2. prohibition on mass gatherings of 500 or more people in outdoor spaces and 100 people or more in indoor spaces<sup>15</sup>
3. prohibition on access to and from Lord Howe Island<sup>16</sup>
4. prohibition on leaving one’s place of residence without a reasonable excuse or participating in a gathering in a public place<sup>17</sup>
5. prohibition on coughing or spitting on a designated worker.<sup>18</sup>

### Restrictions on gathering and movement

Due to initially burgeoning infection rates, the Minister implemented progressively restrictive PHOs to attempt to slow community transmissions. Between 18 and 27 March, there were four consecutive PHOs dealing with mass and social gatherings, all now revoked. This series of Orders has garnered public attention because of their significant impact on fundamental freedoms as well as public concern about how police are enforcing restrictions in such a rapid-fire legal terrain.

The Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (the “First Order”) was made on 30 March and amended for a fourth time on 9 May. It was subsequently revoked and remade (the “Second Order”) and commenced on 15 May.<sup>19</sup> Over time, each iteration has regulated, inter alia, the reasons people could leave their place of residence, where they could lawfully go and with how many people.

Under the First Order, Sch 1 specified 16 reasonable excuses to leave home, including to:

- go to work (where you can’t work remotely)
- attend school or an educational facility
- pick up or drop off children at childcare
- shop for food or other goods or services for the household
- move to or inspect a new house or business premises, or attend an auction
- access public services (eg employment, social or victims’ services)
- obtain medical care or supplies or fulfill carer’s responsibilities
- provide care to a vulnerable person
- donate blood

4 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020, dated 25 March 2020.

5 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020, amended and registered 2 April 2020.

6 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020, amended and registered 5 May 2020.

7 Chapter 2, Pt 3, Div 3, Subdiv B *Biosecurity Act*. At the time of publication, the authors are not aware of any control orders being issued to any individuals.

8 See Pt 2 *Public Health Act 2010* (NSW) (PHA), in particular ss 7 and 8.

9 NSW has not declared a state of emergency unlike Vic, Qld, WA, SA, Tas, the NT and the ACT which have all declared either a state of emergency or a Public Health Emergency under their respective statutes.

10 Revocation and replacement by a fresh PHO also resets the 90 day period. Note that PHOs are likely to be further amended after this article is published.

11 Defined as the Chief Health Officer and registered medical practitioners authorised by the chief health officer’s secretary: s 60 *Public Health Act*.

12 Section 62 PHA.

13 Section 62(3) PHA.

14 Public Health (COVID-19 Quarantine) Order 2020 (commenced 17 March).

15 Public Health (COVID-19 Gatherings) Order 2020 (commenced 21 March).

16 Public Health (COVID-19 Lord Howe Island) Order 2020 (commenced 22 March).

17 Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (amended 4 & 30 April, 1 & 9 May 2020; revoked 15 May 2020).

18 Public Health (COVID-19 Spitting and Coughing) Order 2020 (commenced 9 April, amended 20 April to include other specified workers).

19 Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020.

- attend a place of worship or provide pastoral care but only as a priest, minister of religion or member of a religious order
- attend a wedding or funeral (in limited circumstances)
- exercise
- respond to emergencies or for compassionate reasons
- avoid injury or illness or escape a risk of harm
- attend court or fulfill any legal obligations
- continue access arrangements between parents and children or siblings.

Importantly, the Second Order removes the restriction on leaving one's place of residence without a "reasonable excuse".<sup>20</sup> However, cl 8(2) of the Second Order creates new obligations on each adult in a household to prevent more than five visitors from entering or staying, or to "take reasonable steps" to ensure that no more than five visitors are present in the household at any one time.

Clause 6 prohibits gatherings in a public place of more than 10 people (previously 2), with exceptions for:

- gatherings of members of the same household
- gatherings for work
- a wedding of 10 people or less
- an indoor funeral service of 20 people or less, or outdoor service of 30 or less, excluding those preparing or conducting the service
- a religious service of 10 people or less, excluding those conducting the service
- moving to a new place of residence
- providing care to a vulnerable person
- helping someone in an emergency
- fulfilling legal obligations
- viewing/inspecting real estate or attending an auction.

Clause 7 provides for the closure of specified premises with exceptions for food and drink premises (such as cafes, restaurants, pubs and registered clubs) to sell food and drinks, for not more than 10 persons at any time, to consume on the premises. Schedule 1 of the Second Order also contains a list of exempt places for gatherings such as custodial facilities, hospitals, educational institutions, disability and aged care facilities, courts and tribunals, supermarkets, offices, factories and accommodation and transport locations. While this raft of changes is significant for both private and public life, at this early stage it is hard to predict how the new laws will be monitored. For example, it is unclear how police will enforce the "5 person rule" in households under cl 8(2) in the absence of a clear power to enter premises to check compliance with Ministerial directions.<sup>21</sup> The remainder of this article therefore examines police powers primarily in the context of the more restrictive First Order.

### New offences and police powers

In NSW, police powers under the PHA have been expanded in order to enforce the restrictions designed to manage the spread of COVID-19. This includes new powers to arrest, question and issue penalty notices in relation to:

1. breaches of "public health orders" which can only be imposed on individuals in writing (as specified under s 62 of the PHA) or
2. breaches of PHOs (also known as Ministerial directions) which create new offences for breaching restrictions on behaviour during the pandemic (pursuant to s 10 of the PHA).

Following the commencement of the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* on 25 March 2020, several amendments to the PHA give the NSW Police new emergency powers to enforce both individual "public health orders" and Ministerial directions. See the table below:

Amendments to <i>Public Health Act 2010 (NSW)</i> <sup>22</sup>	Summary of new police power
Addition of subs 112(2) and (3)	A police officer may require a person suspected of having contravened a "public health order", Ministerial direction, or any other provision of the PHA to provide their name and address.
New subs 118(6)	A police officer may issue a penalty notice to a person if it appears to the officer that the person has committed a "penalty notice offence": s 118(2) PHA. This includes by contravening: <ul style="list-style-type: none"> <li>• an individual "public health order": s 70(1) PHA or</li> <li>• a Ministerial direction: s 10 PHA.<sup>23</sup></li> </ul>
New s 71A	"A police officer may arrest a person if the police officer suspects on reasonable grounds" that the person is contravening their individual public health order, then return them to: <ul style="list-style-type: none"> <li>• their usual place of residence,</li> <li>• the place specified in the "public health order" at which the person has been ordered to reside, or</li> <li>• if the person is a public health detainee, the person's place of detention.</li> </ul>
Amendment to <i>Public Health Regulation 2012 (NSW)</i> <sup>24</sup>	Summary of new police power
Addition of penalty notice offences to Sch 4	The police may impose a penalty notice (on-the-spot fine) of: <ul style="list-style-type: none"> <li>• \$1000 if a person contravenes a Ministerial direction or PHO, and \$5000 for a corporation</li> <li>• \$5000 if a person contravenes cl 5 Public Health (COVID-19 Spitting and Coughing) Order 2020 which prohibits intentionally coughing or spitting on public officials and other specified workers.</li> </ul>

20 As previously stipulated by cl 5 of the First Order, now revoked.

21 Police may only enter premises either by consent, pursuant to a warrant, in an emergency or in accordance with s 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

22 All amendments to the PHA noted in this table are to be repealed 12 months after the date of assent.

23 For the full list of penalty notice offences, see Sch 4, *Public Health Regulation 2012*.

24 By the *Public Health Amendment (Penalty Notices) Regulation 2020*, commenced 25/3/2020, and the *Public Health (COVID-19 Spitting and Coughing) Regulation 2020*, commenced 9/4/2020.

The existing punishment for a person found guilty of breaching the PHA, including one of the new offences, is also serious. A breach of Ministerial directions or individual “public health orders” attracts a maximum penalty of 6 months imprisonment and/or \$11,000.<sup>25</sup>

### Police power under Commonwealth biosecurity law

Police in NSW possess a notional power to enforce existing offences under the federal *Biosecurity Act* but only if the exercise of power is in accordance with an agreement between the Commonwealth and NSW.<sup>26</sup> For example, a NSW police officer may detain a person for failing to comply with a requirement to remain at a place or to comply with isolation measures.<sup>27</sup> If exercising their detention power, an officer must not use more force or subject an individual to more indignity than is necessary and reasonable to detain or prevent escape.<sup>28</sup>

A person may be charged for breaching a determination made by the federal Health Minister, attracting a maximum penalty of 5 years imprisonment and/or \$63,000.<sup>29</sup>

### Police discretion when exercising the power to arrest

Keeping pace with the rate of legislative change during the pandemic continues to be a major challenge for both the public and members of the legal profession. Even after restrictions are relaxed or lifted, courts are likely to encounter cases in relation to charges and fines which raise issues about the exercise of police discretion, including under PHOs which were only in place for a short time before being amended or revoked.

The new powers to arrest, direct and fine persons are not without limitations. To begin with, even if a police officer establishes reasonable suspicion under s 71A PHA, the word “may” confirms that the officer still has the discretion *not* to arrest. The same can be said of other powers in the table above.

Police officers may also seek to exercise their regular power of arrest without warrant under s 99 *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) (LEPRA) for any offence, as long as the elements of s 99 are satisfied. However, such power should only be exercised as a measure of last resort, in accordance with the principles the Supreme Court articulated in *DPP v Carr*<sup>30</sup> and *DPP (NSW) v Matthews-Hunter*.<sup>31</sup>

Although the issue of “arrest as a last resort” under s 71A PHA is untested at the time of writing, there is some force to the view that police should not exercise this discretionary

power of arrest differently to their substantive power under LEPRA, especially in circumstances where the power is temporary and pertains to a period of severe restrictions on people’s liberty.

### Police discretion when issuing fines: what is a “reasonable excuse”?

During the pandemic, NSW Police have been conducting “proactive patrols” in order to question individuals who may be flouting the restrictions. Fines have already been issued for conduct including attending a party, driving without a reason, sitting in a public park, drinking in a restaurant with friends and hosting a barbecue.<sup>32</sup> While some of these individuals were engaged in flagrant breaches, other groups of vulnerable people such as the homeless and people with disabilities have expressed concern that a lack of discretion in applying the rules relating to a “reasonable excuse” has placed them at a higher risk of receiving fines for activities which are reasonable.

Conjecture about what members of the public could and could not do under the First Order hinges in part on whether the word “includes” in cl 5 of the First Order has an exhaustive or expansive meaning in the context of the provision.<sup>33</sup> Rules of statutory interpretation may help to resolve this issue. A construction which promotes the objects of the Act shall be preferred,<sup>34</sup> and where there is ambiguity or the ordinary meaning conveyed by the text leads to a result that is manifestly absurd or unreasonable, reference to extrinsic material like an Explanatory Note is authorised.<sup>35</sup>

### Objects of the Public Health Act

The objects of the PHA are multiple, but include to control risks to public health, and to promote the control and prevent the spread of infectious diseases. Subsection 3(2) emphasises that “[t]he protection of the health and safety of the public is to be the paramount consideration in the exercise of functions under this Act”. Unsurprisingly, the stated object of the First Order was to deal with the public health risk of COVID-19 and its possible consequences.

To achieve legal clarity, it is arguable that people’s movement should be limited to the activities originally listed in Sch 1 of the First Order given the aim was to minimise the risk of community transmission.

### The list of “reasonable excuses” is not exhaustive

There are, however, multiple reasons why the list of “reasonable excuses” can be interpreted as non-exhaustive

25 Sections 10 and 70 PHA respectively.

26 Section 103(4) *Biosecurity Act*.

27 Section 103(3)(b) *Biosecurity Act*.

28 Section 104 *Biosecurity Act*.

29 Section 479 *Biosecurity Act*.

30 (2002) 127 A Crim R 151 at [35].

31 (2014) 242 A Crim R 319 at [35], [50].

32 NSW Police Force website, Latest News, 2 April 2020 at [www.police.nsw.gov.au/news](http://www.police.nsw.gov.au/news), accessed 5/5/2020.

33 One element of the offence in s 10(b) PHA for failing to comply with a Ministerial direction is that a person must have notice of the direction. It is currently unclear how having “notice” may be interpreted in the context of rapidly changing Ministerial directions.

34 Section 33 *Interpretation Act* 1987 (NSW).

35 Section 34(1)(b) *Interpretation Act*.