# Emergency policies: anti-Covid processes

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## Summary:

This note considers the 2020 assessments by Per Capita and the Institute of Public Affairs of processes underpinning anti-Covid emergency measures in NSW, Victoria and Queensland.

The assessments are part of a wider project annually examining processes underpinning selected public policies. The purpose is to seek improvements to the operation of Australia’s democracy.

Per Capita and the Institute rated the processes for anti-Covid policies in each of the three States to be around the same mediocre level. It gave them a pass-mark.

This note disagrees. It suggests the assessments were somewhat mis-focussed on the declaration of an emergency rather than the things that matter to the public and to democracy – the regulation making that the declarations enabled.

The better focus, on regulation making, would reveal the Victorian and Queensland responses to be grossly unsatisfactory. This is in keeping with judicial observations that Victoria’s Parliament should step in to change the regulation making process in that State. It is also in keeping with some criticisms that the approach to regulation making in Queensland had been a threat to rule of law.

The NSW approach, while not ideal, was superior to that of the other States. The principal reason is: unlike those States, in NSW a Minister - who is directly accountable to Parliament - makes the regulations. There is greater control and transparency of the regulations. Moreover, the obfuscation and confusion created by Victorian and Queensland Premiers, diminishing democratic processes and perhaps infringing laws, is not possible in NSW.

Despite this note disagreeing with the assessments, and with the other claims that State anti-Covid regulation making is ‘in order’, the project is worthwhile.

Per Capita, the Institute, the authors and researchers should be encouraged to continue. Those guiding and reviewing the work, however, should take greater care.

*On disagreeing with a view that Victoria and Queensland had better processes for developing their anti-Covid emergency policies than NSW.*

## 1. Introduction

Professor Percy Allan AM is chair of the Evidence-based Policy Research Project.[[1]](#endnote-1)

The project is laudable. With the non-partisan newDemocracy foundation, it asks two ‘think tanks’ – one from the ‘left’, one of ‘free market’ persuasion – to assess development of selected Government policies against stated criteria.

The criteria for assessment are ten attributes of good public decision-making. They comprise matters such as: need; objectives; alternatives; stakeholders; communication.

A point is awarded for each criterion met. The top possible mark is 10. Scores of 7 or more are considered ‘acceptable’. Scores below, 5 ‘unacceptable’.[[2]](#endnote-2)

Each think tank – Per Capita Australia and the Institute of Public Affairs – independently conducts the assessment and publishes findings. Professor Allan then averages results.[[3]](#endnote-3)

Like the jadebeagle, the project draws information only from the public domain. The reason lies in the origins of the project whose purpose is to improve the workings of our democracy. Information withheld from the public usually detracts from those workings.

In 2020, twenty Commonwealth and State policies were considered. Given the events of the year, several related to emergencies, for which modified criteria were used.

On 27 November, Professor Allan provided a summary of results in the public policy journal, Pearls and Irritations. Formulation of nine policies were acceptable, two unacceptable, nine ‘mediocre’. Highest scoring formulations were in Queensland’s Personalised Transport Ombudsman (9.5) and the Federal My Health Record (9.0).[[4]](#endnote-4)

Professor Allan made a comment familiar to followers of infrastructure policy:

*‘As with previous years’ case studies the research found that most scope for improvement in ‘normal’ policy-making was comparing the costs and benefits of alternative policy options, explaining how a policy decision would be rolled out and issuing a Green Paper to invite public feedback before announcing a policy decision in a White paper.’*

Three policies related to invocation of emergency powers used for the Covid pandemic. The averaged results were: NSW 6.0, Victoria 6.5, and Queensland 6.0. This note considers only those. Before that, it might be noted formulation of the two identified Commonwealth Covid emergency policies – Jobkeeper and CovidSafe - both scored 7.5.

## 2. Results

Professor Allan argued where a policy needs to be made on the run such as in bushfire, flood, earthquake or pandemic crises, less time is available to design the policy, yet:

*‘For ‘emergency’ policymaking the research suggests that governments should give more attention to weighing up alternative options and methods, disclosing key data and consulting recognised experts in the subject matter before deciding a particular course of action.’*

The results for invocation of emergency powers reported by per Capita and the Institute are set out in next two tables.

**Table 1: Per Capita results for invocation of emergency powers**

|  |  |  |  |
| --- | --- | --- | --- |
| **Criteria** | **NSW** | **Vic.** | **Qld.** |
| Urgency | Yes | Yes | Yes |
| Need | Yes | Yes | Yes |
| Objectives | Yes | Yes | Yes |
| Options | No | No | No |
| Mechanisms | No | No | No |
| Analysis | No | Yes | Yes |
| Pathway | Yes | Yes | Yes |
| Consultation | No | No | No |
| Communication | Yes | Yes | Yes |
| Review | Yes | Yes | Yes |
| ***Total out of 10*** | ***6*** | ***7*** | ***7*** |

**Table 2: Institute of Public Affairs results for invocation of emergency powers**

|  |  |  |  |
| --- | --- | --- | --- |
| **Criteria** | **NSW** | **Vic.** | **Qld.** |
| Urgency | Yes | Yes | No |
| Need | Yes | Yes | Yes |
| Objectives | Yes | Yes | No |
| Options | No | No | Yes |
| Mechanisms | No | No | No |
| Analysis | No | No | Yes |
| Pathway | Yes | Yes | Yes |
| Consultation | No | No | No |
| Communication | Yes | Yes | No |
| Review | Yes | Yes | Yes |
| ***Total out of 10*** | ***6*** | ***6*** | ***5*** |

Per Capita’s report, published in November, rated Victoria’s and Queensland’s invocation process as sound. It rated NSW’s process mediocre.

The Institute’s report, dated October, rated all formulation of invocations mediocre. Reasons are outlined in the relevant reports.

## 3. Subject matter

The subject matter of the reports is not straightforward. That is likely to have contributed to results that appear unusual.

To simplify: the anti-Covid restrictions experienced by the public - such as lock-downs, business closures, people per square metre rules, border closures – were made by an individual person via a regulation. Each regulation was in a legal document signed by that person. The regulations were not made directly by Parliament or by groups.

The legal ability - power - for the person to make such types of regulation usually arises when an emergency is declared. The Institute claimed NSW anti-Covid regulation making was an exception, as the power existed without such a declaration.

The power to make such an emergency declaration usually rests with a Government Minister or Governor (General). The declaration is not made by Parliament.

The scheme of powers – who can make an emergency declaration, who can then make regulations and what type of regulations can be made – are set out in legislation made by the relevant Parliament.

Such a scheme means policy responses to emergencies usually involve a two-step process.

The first step, invocation of emergency powers precedes - and therefore differs from its use to allow - the making of regulations. It is the formulation of that first step – to make a declaration – that the per Capita and Institute reports sought to consider. That is an important topic, not least because the Prime Minister wants a similar power.

However, the public feels consequences only after, and to the extent of, the second step - the making of regulations.

It is not entirely clear the reports fully appreciated the distinction between the steps. Both reports appeared to consider matters beyond the invocation of emergency powers. Both appeared to introduce into their assessments some matters related to the second step – the making of regulations. Otherwise they could not have assessed NSW, which did not undertake the first step.

That extension beyond the stated topic is understandable. The issues arising from processes of making an emergency declaration are highly intricate and not amenable to detailed public explanation. For example, issues can include disallowability of instruments, control over Parliamentary review proceedings and actual or effective self-declaration of jurisdiction.

Also, it would be difficult for widely disseminated reports to explain why they did not consider the only matters impacting the public.[[5]](#endnote-5)

A lack of equal appreciation among the reports of the difference between the first and second steps – between the making of an emergency declaration and the consequences that follow - might partly explain the differences in their ratings. The differences are shown in Table 3 (below).

**Table 3: Differences between per Capita and Institute reports**

|  |  |  |  |
| --- | --- | --- | --- |
| **Criteria** | **NSW** | **Vic.** | **Qld.** |
| Urgency | = | = | 1 |
| Need | = | = | = |
| Objectives | = | = | 1 |
| Options | = | = | 1 |
| Mechanisms | = | = | = |
| Analysis | = | 1 | = |
| Pathway | = | = | = |
| Consultation | = | = | = |
| Communication | = | = | 1 |
| Review | = | = | = |
| ***Total***  | ***0*** | ***1*** | ***4*** |

Table 3 shows a consensus of the reports about formulation of emergency declaration policy in NSW and Victoria but not for Queensland.

The different ratings for Queensland given by per Capita and the Institute are striking – the reports did not agree on nearly half the criteria.

Further striking is the results presented in Tables 1 and 2 – which together has Victoria performing best – conflict with national-level public and expert criticism of processes behind Victorian and Queensland regulations. The criticisms of regulations in those States have been more severe than of NSW.

For example, in early November 2020, Victoria’s Supreme Court said of that State’s anti-Covid response:

*‘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.'[[6]](#endnote-6)*

While for Queensland, in August 2020 – prior to a series of high-profile seemingly inexplicable regulatory decisions – legal academics offered:

*‘notwithstanding the important public health goals of these measures, the way they have been implemented poses a significant challenge to the rule of law.’[[7]](#endnote-7)*

The above comments, if accepted, would preclude award of a ‘pass-mark’ to the processes for making anti-Covid regulations in those two States.

## 4. Is the presented picture right?

The per Capita and Institute reports did not want to make an assessment of regulations.

Undoubtedly, there will be other more detailed analyses of the content of the regulations which will cover the critical issues of legality and necessity. The reports did not seek to pre-empt these. Nor does this note.

However, were the reports to consider only the making of emergency declarations, they would have been unable to provide a rating for NSW. That is because NSW did not make such a declaration.

The purpose of such a declaration is to enable anti-Covid regulation making. Hence, that the reports assessed NSW implies they intended to consider conditions that underpinned the making of regulations – whether or not there was an emergency declaration.

The wider objective of the reports is to contribute to a better functioning democracy. To do so, the best focus would be on those conditions – which underpin regulation making – most relevant to the operation of democracy.

Rather than the ten criteria used in the reports, this suggests three themes are more relevant to an assessment of processes. These are:

1. Accountability, to Parliament, of the regulation maker;
2. Pre-conditions about which the regulation maker needs to be satisfied;
3. Visibility to the public of the process for making regulations.

 On these criteria, my ratings would be as in Table 4.

**Table 4: Ratings**

|  |  |  |  |
| --- | --- | --- | --- |
| **Criteria** | **NSW** | **Vic.** | **Qld.** |
| Accountability (out of 5) | 4 | 1 | 1 |
| Preconditions (out of 2) | 1 | 0 | 0 |
| Visibility (out of 3) | 2 | 0 | 0 |
| ***Total***  | ***7*** | ***1*** | ***1*** |

The results in Table 4 are radically different to those in the reports. They reflect my view of the public evidence pointing to a reasonable process for regulation making in NSW.

However, in my view the evidence is that Victoria and Queensland had an almost complete absence of proper process for regulation making. This is made worse by political pretences otherwise. Rather, the responses in Victoria and Queensland were anathema to democracy. An explanation, based on each of the criteria in Table 4, follows.

### 4.1 Accountability

Accountability relates to the potential for democratic processes, centred on Parliament, to control regulation making and decisions in a timely fashion.

A summary of my assessment of how regulation making conformed with democratic accountability is in Table 4.1.

**Table 4.1: Conformance with democratic accountability**

|  |  |  |  |
| --- | --- | --- | --- |
| **Accountability** | **NSW** | **Vic.** | **Qld.** |
| Appropriateness of delegation (3 points) | 3 | 0 | 1 |
| Confirmation of regulations | 0 | 1 | 0 |
| Adherence to legislation | 1 | 1 | 0 |
| ***Total (out of 5)*** | ***4*** | ***2*** | ***1*** |

#### 4.1.a Appropriateness of delegation

Accountability processes work best when legislation appoints a Minister, who is directly answerable to Parliament, to be the regulation maker. This was the case in NSW.

Queensland legislation appointed a relatively senior public servant to the regulation making role. That practice has been adversely compared with regulation making in the UK and New Zealand – where Departmental heads made the regulations.[[8]](#endnote-8)

Victorian legislation appointed the position of Chief Health Officer to the regulation making role. That position does not appear to be held by a relatively senior official. That was severely criticized by the Victorian Supreme Court which virtually recommended Parliament change the situation.[[9]](#endnote-9)

#### 4.1.b Confirmation of regulations

Best practice for ensuring accountability involves Parliament confirming regulations.

A somewhat weaker, but acceptable, approach is for regulation to be subject to repudiation – disallowance - by part of the Parliament, for example an Upper House. This seems to be the case only, partly, for Victoria’s anti-Covid regulations.

While the Parliaments in each State sat too infrequently to effectively control the public impacts of anti-Covid regulation making, Victoria is better on this sub-criterion than the other two States.[[10]](#endnote-10)

#### 4.1.c Adherence to legislation

Accountability also requires observance of express limits to the regulation making power.

This was the case in NSW and Victoria – the latter indicated by the Court accepting the validity of the curfew extension.[[11]](#endnote-11)

It does not appear to be the case for Queensland. For example, there the legislation required regulations to be revoked ‘as soon as reasonably practicable’ when not necessary. Instead, on occasions, regulations were not revoked until convenient for purposes other than public health – for example, the advent of school holidays.[[12]](#endnote-12)

### 4.2 Preconditions

To exercise regulation-making power, the maker needs to be satisfied of certain conditions. For example, that the regulation is necessary. Demonstration of this is essential to assure the emergency declaration is being used to proper effect.

A summary of public observance of preconditions for regulation making is in Table 4.2

**Table 4.2: Preconditions for making regulations**

|  |  |  |  |
| --- | --- | --- | --- |
| **Preconditions** | **NSW** | **Vic.** | **Qld.** |
| Demonstration of legality | 0 | 0 | 0 |
| Demonstration of minimum imposition | 1 | 0 | 0 |
| ***Total***  | ***1*** | ***0*** | ***0*** |

#### 4.2.a Demonstration of legality

A precondition is for the regulation maker to assure the public of the legality of the regulation.

There is no public evidence this step was undertaken in any of the three States. With the exception of NSW, the available evidence suggests to the contrary.

In Victoria, some regulations appeared to be irrational. In Queensland, some regulations were against express terms of the Constitution without public legal justification.[[13]](#endnote-13)

It is also desirable for the regulation maker to assure that future enforcement actions are likely to be compatible with the purpose of the regulation and the objects of the legislation.

The public evidence suggests this was ignored, at best, in the three States. There were reports of irrational enforcement actions, interpretations, exemptions and failures to issue exemptions.[[14]](#endnote-14)

In NSW and Victoria there were suggestions of knowledge that some enforcement actions were inconsistent with regulations yet the regulation maker did nothing to correct this. The leading example is Harwin’s case.[[15]](#endnote-15)

#### 4.2.b Demonstration of minimum imposition

Minimum imposition relates to the extent and duration of regulations.

Valid emergency powers are only available for as long as the emergency exists. Regulations enabled by those powers are valid only for so long as they are necessary. A precondition for an emergency-type regulation is reasonable satisfaction of its necessity.

As anti-Covid regulations infringed other activities permitted by other laws, the regulation maker should also need to be satisfied that the regulation was and remained the minimum necessary for the objective.

The process-assessment of this centres on a specific statement expressing the regulation maker’s satisfaction of necessity. Regulations in each of the three States were prefaced with such a statement. However, none included an attestation that the regulations were the minimum necessary for the objects of the legislation.

Further, some attestations and related explanations seemed peculiar, and others may have been made under external pressure.[[16]](#endnote-16)

As there is not yet an objective standard to assess whether anti-Covid regulations imposed only the minimum necessary restrictions, an assessment needs to consider a benchmark.

NSW is clearly the benchmark. It achieved the legislative objective with minimum interference on other activities.[[17]](#endnote-17)

There was widespread and expert opinion that regulations in Victoria and Queensland interfered with activities and rights significantly more than was necessary. Not all of those opinions were rebutted. In effect, in those States the regulation maker did not demonstrate the (minimum) necessity of regulations.

Similarly, NSW is the benchmark for the minimum duration of restrictions. Both Victoria and Queensland virtually admitted keeping some restrictions in place longer than necessary.[[18]](#endnote-18)

### 4.3 Visibility

Visibility of decision making extends beyond public presentation of ‘evidence’, into assurance that such evidence – and not other matters – determined the decision.

Relevant matters include public certainty about who made the regulation, that the regulation is consistent with public information, and that the regulation is defended against challenge in proper processes. Table 4.3 summarises visibility.

**Table 4.3: Visibility of decision making**

|  |  |  |  |
| --- | --- | --- | --- |
| **Visibility** | **NSW** | **Vic.** | **Qld.** |
| Identity of regulation maker | 1 | 0 | 0 |
| Regulation consistency with information | 0 | 0 | 0 |
| Meeting challenges to regulation | 0 | 0 | 0 |
| ***Total***  | ***1*** | ***0*** | ***0*** |

#### 4.3.a Identity of regulation maker

A fundamental issue is confidence in the identity of the regulation maker and the integrity of the process they used.

Among other things this means clear, constant public assurance the person making the regulations is not an overt - or covert - cats-paw of another party.

In NSW the regulation maker was the Minister for Health. Being a member of Cabinet, there is no question about the identity of the NSW decision maker.

At various times, increasingly as restrictions became more popular locally, the Premiers of Victoria and Queensland publicly claimed they made anti-Covid regulatory decisions. The relevant legislation did not provide for that.[[19]](#endnote-19)

There could be substantial problems if the Premiers of those two States did in fact make the relevant anti-Covid regulatory decisions. Even their ‘urging’ for particular regulations, exemptions and extension or termination of regulations could constitute corruption.[[20]](#endnote-20)

These claims of the Premiers, uncontradicted by those with actual power to make the regulations – and even by Oppositions! - was the anti-thesis of visibility and transparency. They created confusion about accountability. That is anti-democratic.

#### 4.3.b Regulation consistent with information

Criteria for the making of particular regulatory restrictions, the bases of such criteria and information about meeting criteria, remained something of a mystery in all three States.

It is possible to argue Queensland was the worst offender, as some of its regulations were diametrically opposed to publicly available information. Particularly regarding ‘exemptions’ from restrictions, some decisions in Queensland appeared strange and discriminatory.[[21]](#endnote-21)

The attempt to publicly explain ‘criteria’ supposedly behind Queensland’s border closures, a policy commenced in late March, started five months later in September.

It comprised part of an argument put by some experts to and accepted by the Federal Court just a week earlier as a reasonable approach. The argument was: 28 continuous days of no recorded community transmission in a State indicated negligible probability of uncontained Covid.

That criterion was visibly not applied to the ACT, with other reasons found for persisting with Queensland’s closure against the territory - which had been Covid free for more than twice the 28 days. That persistence conflicted with a key finding in the same Federal Court case - there was no Covid reason for a border closure against the ACT.[[22]](#endnote-22)

While NSW and Victoria regulations did not attract quite such notoriety as Queensland’s, some specifics, for example the ‘holiday house’ exemptions, lacked any rational public policy or public evidentiary basis.[[23]](#endnote-23)

The divergence, instability and unpredictability in regulations and restrictions - at times contrasting with stable or predictable events - further attested to the lack of proper connection between ‘evidence’ and policy expressed in regulations.

While there was a national ‘road map’ to ease anti-Covid restrictions, States developed their own, different, ones. Whatever lay behind the road maps was kept within Governments, perhaps following the example of the ‘national Cabinet’ whose only conformance with cabinet conventions comprised a claim all advice should remain secret.[[24]](#endnote-24)

Arguably, Government road maps in Victoria and Queensland were counter-productive as the powers to change regulations remained solely with officials not Ministers. Their road maps misled the public on the issue critical to democratic accountability: who was responsible for regulations?[[25]](#endnote-25)

Only in NSW was there discernible improvement of aligning regulations to information, but then only after the Special Commission of Inquiry into the Ruby Princess.

#### 4.3.c Meeting challenges to regulation

A fundamental matter is that a regulation is defended when properly challenged, for example, in a court. Failure to do so could suggest lack of confidence in the decision to make the regulation.

All three States faced public questioning of, and legal challenges to, some of their regulations.

Governments in each were quick to claim questions about the merit of their State’s regulations – even regulations supposedly made independently of Governments - were ‘politically motivated’.

There were occasions when NSW and Victoria sought to avoid courts deciding legal challenges. Queensland agitated in the media to have the legal case against its border closure dropped which it eventually was.

Aversions to answering questions and to resolving disputes by proper processes – and use of the media and political pointscoring - was disturbing. This was especially so given near unanimity of views among legal academics that courts would be reluctant to overturn regulations made in the name of emergencies – opinions later largely confirmed.[[26]](#endnote-26)

An inference that might be drawn is: States had received, but not disclosed, advice doubting the legality of the regulations in question.

In NSW, the penalty notice issued to Mr Harwin stood for twelve weeks before being withdrawn the day the matter was to be heard in court.[[27]](#endnote-27)

Victoria’s curfew was abandoned shortly after a legal challenge to it was mounted. There was then an application to effectively terminate the case.[[28]](#endnote-28)

Whatever the reason for such co-incidences, a possible impression is of bullying ordinary citizens by measures in which Governments have little confidence.

## 5. Conclusion

Per Capita and the Institute of Public Affairs claimed processes behind the emergency declarations for Covid in NSW, Victoria and Queensland were satisfactory, albeit leaving significant room for improvement. That accords with ongoing commentary, such as recent remarks by Professor George Williams, along the lines that State responses to Covid are ‘in order’.[[29]](#endnote-29)

To an extent, such views are understandable. The pandemic is not over and, at present, community responses to Government requests and regulations are likely to determine its outcome. Undue criticism of anti-Covid regulations may lessen community cooperation and contribute to worse health outcomes.

However, this note demonstrates processes for NSW, Victorian and Queensland regulatory responses to Covid were – on publicly available information - far from being ‘in order’. The public information points to substantial defects in each.

In Victoria and Queensland, the problems have been large – some conflict with democratic principles.

The process for NSW’s regulatory response was better. However, it continues to suffer the stigma of the Government’s failure to satisfactorily explain the Harwin matter.

The Supreme Court of Victoria is not alone in stressing that the importance of Governments following correct – legal – process is heightened in times of emergency. The reason is Australian democracy, and rule of law, is something to be valued.

Even without considering ‘economic’ matters, responses to Covid are not, and should not be, just about health.

Yet if regulatory responses to Covid were just about health, as many in Governments want the public to believe, some were strange. Some responses were contrary to what would be expected from uncontested public evidence.

This points to a trap in process-only assessments. It is not good enough to merely point to evidence and a decision such as to make a regulation. A proper process must ensure policy is supported – not contradicted - by public evidence.

Any continuation of faulty processes and bad decisions, some eight months after anti-Covid regulations were introduced, could not be excused any longer on grounds of a need to make them ‘on the run’ as suggested by Professor Allan.

The pandemic may merit being called an emergency - for the purpose of permitting certain regulations. However, in Australia it should have long ago stopped being considered a crisis excusing knee-jerk reactions - no matter how pleasing to partisan electorates.[[30]](#endnote-30)

The idea behind the project undertaken by Per Capita and the Institute is excellent. The organisations, and their authors should be encouraged to continue this important work and to set out their findings with the welcome clarity of their latest reports.

This note does not seek to discourage that work or the researchers involved.

It does, however, suggest the issue of assessing processes behind emergency responses merits greater consideration by those guiding and reviewing that work.

J Austen

 December 2020

1. Professor Percy Allan AM is chair of the Evidence-based Policy Research Project facilitated by the newDemocracy Foundation and funded by the Susan McKinnon Foundation. He is a Visiting Professor at the Institute of Public Policy and Governance, University of Technology Sydney, a public policy, management and finance adviser and a former Secretary, NSW Treasury. [↑](#endnote-ref-1)
2. <https://johnmenadue.com/latest-findings-on-how-well-our-governments-make-policy/>

Professor Allan explained:

 *‘the ten attributes of good decision making are identified by Professor Kenneth Wiltshire AO, the J. D. Story Professor of Public Administration at the University of Queensland Business School. Four of these criteria were modified for those case studies involving urgent emergency policy responses.*

*The Wiltshire criteria focus on good process, not results, because the net fiscal, social, economic and environmental impact of a policy may not be known for a long time. The think tank reports’ findings involve judgements only about the way a legislated policy was made, not whether it was good or bad policy per se.’* [↑](#endnote-ref-2)
3. <https://www.newdemocracy.com.au/wp-content/uploads/2020/11/EBP20-Per-Capita-Report.pdf>;

<https://www.newdemocracy.com.au/wp-content/uploads/2020/11/EBP20-IPA-Report.pdf> [↑](#endnote-ref-3)
4. <https://johnmenadue.com/latest-findings-on-how-well-our-governments-make-policy/> [↑](#endnote-ref-4)
5. An example of the last was identified in Victoria, where the Chief Health Officer advised the Minister to declare a state of emergency, thereby creating powers for the Officer to issue regulations: <https://www.newdemocracy.com.au/wp-content/uploads/2020/11/EBP20-IPA-Report.pdf>, p.23. [↑](#endnote-ref-5)
6. Loielo v. Giles: <https://www.supremecourt.vic.gov.au/sites/default/files/2020-11/Loielo%20v%20Giles%20%5B2020%5D%20VSC%20722_0.pdf> [↑](#endnote-ref-6)
7. <https://auspublaw.org/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-of-law/> [↑](#endnote-ref-7)
8. In Loielo v. Giles (note vi above) the court said:

*‘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 orders’* [↑](#endnote-ref-8)
9. Relative seniority of regulation makers is in <https://www.thejadebeagle.com/covid---july-2020.html>, refs document, Table at p.6.

In Loielo v. Giles (note vi above) the court said:

*‘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.’* [↑](#endnote-ref-9)
10. Disallowable: NSW <https://auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/>

Victoria: <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-covid-19>; <https://www.parliament.vic.gov.au/assembly/publications-a-research/fact-sheets/230-sarc/scrutiny-of-regulations>

Queensland: <https://auspublaw.org/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-of-law/>

Parliamentary sittings: <https://www.thejadebeagle.com/covid---july-2020.html>, refs document. [↑](#endnote-ref-10)
11. The decision in Loielo v. Giles (note vi above) held the regulation under challenge to be valid. [↑](#endnote-ref-11)
12. School holidays: see <https://www.thejadebeagle.com/tinpot-update.html>, a detail. [↑](#endnote-ref-12)
13. For example, Victoria prohibited fishing, golf and swimming while allowing travel to holiday homes. NSW allowed fishing, golf and swimming but prohibited travel to holiday homes in ‘the regions’. See: <https://www.thejadebeagle.com/covid---may.html>. [↑](#endnote-ref-13)
14. Examples of irrational enforcement are noted in <https://www.thejadebeagle.com/covid---may.html>.

A notorious example is noted in <https://www.thejadebeagle.com/tinpot-update.html>, a detail. [↑](#endnote-ref-14)
15. The case of Mr Harwin, including the failure of the NSW Government to face court, is noted in <https://www.thejadebeagle.com/covid---july-2020.html>, refs document. [↑](#endnote-ref-15)
16. An example of a peculiar explanation is in <https://www.thejadebeagle.com/tinpot-update.html> a detail.

Further examples, also from Queensland, relate to the border closure in April-May when infections on the Queensland side adjacent to the border were more than 10 times those on the NSW side with the gap widening:

*‘On 11 April – the time of full border closure – Gold Coast had recorded 181 cases and Tweed 14. By 7 May, Gold Coast cases had increased to 194, Tweed had remained at 14.’*

[https://www.thejadebeagle.com/covid---may.html -1](https://www.thejadebeagle.com/covid---may.html%20-1) and Queensland’s later identification of ‘hotspots’. <https://www.thejadebeagle.com/covid---july-2020.html>, refs document.

Possible external pressure is identified in the following from Loielo v Giles (note vi above) regarding the person signing the regulation:

*'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’…….*

*‘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.* [↑](#endnote-ref-16)
17. It is arguable legislative objectives for anti-Covid regulations in Queensland differ from those in NSW and Victoria by: being limited to Covid; not having regard to risk; only relating to the disease within the community – and not the disease elsewhere. The objectives are:

NSW: to deal with a risk to public health and its possible consequences <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2010-127#sec.7>

Victoria: deal with serious risk to public health <http://classic.austlii.edu.au/au/legis/vic/consol_act/phawa2008222/s198.html>

Queensland: to assist in containing, or to respond to, the spread of COVID-19 within the community <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-2005-048> s.362B [↑](#endnote-ref-17)
18. Victoria: The abandonment of the curfew during Loielo v. Giles, a case challenging the curfew, virtually admitted it was kept on too long. See note vi above.

The official given the power to make regulations – the Chief Health Officer - had reportedly doubted whether the curfew should have been introduced saying it ‘*was not a public health measure*’: <https://www.kiis1011.com.au/lifestyle/health-beauty/chief-health-officer-brett-sutton-says-he-never-asked-for-a-curfew-for-melbourne/>

That the curfew regulations – initiation and extension – were made by people authorised (to make regulations) by the Chief Health Officer, raises other questions. Such authorisation is inconsistent with the Officer’s reported view of the curfew, yet the Officer did not revoke the authorisations or the curfew.

Queensland: adopted a practice of reviewing border closures at the end of every month e.g. <https://statements.qld.gov.au/statements/90322>

That statement implied the Premier, made or directed regulatory decisions e.g.

*‘The Premier said the hard border closure put Queenslanders first.“I said that when the moment came, I would not hesitate,” the Premier said.’*

A further implication was the end-of-month reviews would be done by or for the Premier.

However, the practice of end-of-month reviews appeared contrary to the express terms of the relevant legislation:

*‘362EWhen public health directions must be revoked*

*The chief health officer must revoke a public health direction as soon as reasonably practicable after the chief health officer is satisfied the direction is no longer necessary….*.’

The Premier’s purported involvement in decision making also appeared contrary to the express terms of the legislation:

*‘62FADelegation*

*…(2)However, the chief health officer must not delegate the chief health officer’s power to give a public health direction.’*

The very limited – Covid spread only - legislative objects in Queensland, unlike in NSW or Victoria where wider considerations may be appropriate, would seem to confirm those conclusions (see note xvii above).

<https://www.legislation.qld.gov.au/view/html/inforce/current/act-2005-048#sec.362FA>

Practical examples of Queensland regulatory rules remaining in place too long are in note xii above and the text supported by note xxii below. [↑](#endnote-ref-18)
19. Victoria: Announcement of regulations by the Premier, in advance of those regulations being made by someone else - supposedly independently - is discussed in Loielo v. Giles (note vi above).

Queensland: <https://www.afr.com/politics/palaszczuk-won-t-budge-on-borders-as-cases-hit-zero-20201101-p56ahk>

Note how the report had the regulation maker merely providing advice to the Premier. [↑](#endnote-ref-19)
20. The issue of potential corruption arising from Premiers purporting to make decisions /regulations that have been entrusted to officials was raised by a former NSW ICAC Commissioner:

*"if the minister is not the appointed decision-maker, directing or urging a public servant to make a decision preferred by the minister" could be considered corrupt conduct”*

<https://www.thejadebeagle.com/sydney-update-nov-2020.html> [↑](#endnote-ref-20)
21. The case of the nurse in <https://www.thejadebeagle.com/tinpot-update.html>, a detail, is an example of a strange decision. Preclusion of the nurse from attendance at the funeral was inconsistent with announced policy and other exemption decisions. The evidence publicly available indicated her attendance at the funeral could not increase the probability of infection of others in Queensland. The ‘explanation’ of Queensland taking great care of allowing attendance at funerals had no bearing on the situation.

The prevention of northern NSW residents from travelling into Queensland - at a time when the relevant border area of Queensland had more than ten times the infections of the relevant area in NSW (April-May) - is another example of an apparently strange decision, diametrically opposed to the public evidence. [↑](#endnote-ref-21)
22. Queensland’s criteria, 3 September 2020: <https://7news.com.au/lifestyle/health-wellbeing/queensland-gives-clearest-explanation-as-to-when-border-restrictions-will-be-eased-c-1288718>.

Federal Court determination of 25 August is discussed in <https://www.thejadebeagle.com/tinpot-update.html>. [↑](#endnote-ref-22)
23. The ‘holiday house rules’ are outlined in <https://www.thejadebeagle.com/covid---may.html> [↑](#endnote-ref-23)
24. National cabinet secrecy: <https://auspublaw.org/2020/10/the-national-cabinet-presidentialised-politics-power-sharing-and-a-deficit-in-transparency/> [↑](#endnote-ref-24)
25. The ‘national’ road map for easing restrictions is at <https://www.pm.gov.au/sites/default/files/files/covid-safe-australia-roadmap.pdf>.

It set out three stages for that easing. It said States would set their own timing. That is not the only thing States set. Some States have had up to twice as many stages so far – and restrictions have not been fully eased: <https://www.covid19.qld.gov.au/__data/assets/pdf_file/0016/127150/DPC7309-COVID-19-Restrictions-roadmap.pdf?nocache-v13>.

The effect of the road maps is to create confusion, exaggerate ‘progress’ being made and demonstrate inconsistent approaches among the States. [↑](#endnote-ref-25)
26. <https://www.abc.net.au/news/2020-04-23/fact-check-state-border-closures-australian-constitution-corona/12164440>

<https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fcommentary%2Fcoronavirus-why-state-border-closures-passed-court-test%2Fnews-story%2F9b9cd9a8a78a9586e9d7a4e894d5256b&memtype=anonymous&mode=premium> [↑](#endnote-ref-26)
27. <https://www.thejadebeagle.com/covid---july-2020.html>, refs document. [↑](#endnote-ref-27)
28. <https://www.supremecourt.vic.gov.au/sites/default/files/2020-11/Loielo%20v%20Giles%20%5B2020%5D%20VSC%20722_0.pdf>, para 133. [↑](#endnote-ref-28)
29. <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fcommentary%2Fcoronavirus-why-state-border-closures-passed-court-test%2Fnews-story%2F9b9cd9a8a78a9586e9d7a4e894d5256b&memtype=anonymous&mode=premium> [↑](#endnote-ref-29)
30. Anti-Covid regulations were introduced in Australia in late March 2020. [↑](#endnote-ref-30)