

Submission

to the Health Minister of NSW &
Attorney-General of NSW on the
Public Health (COVID-19 Restrictions
on Gathering and Movement) Order
2020

8 April 2020



**Marrickville
Legal Centre**
From the inner west,
serving NSW

Submission by Marrickville Legal Centre to the Health Minister of New South Wales & Attorney-General of New South Wales on the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020

Marrickville Legal Centre recognises the importance and necessity of acting swiftly and placing temporary restrictions on the movement of people in order to reduce the impact of the COVID-19 Pandemic. This submission is intended to contribute to clarity around the terms of the new Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (“the Order”). The recommendations contained herein are intended to enable members of the public to comply with the order, whilst minimising the spread of COVID-19.

Wide police discretion guided by the frequently changing public health updates may be desirable in a pandemic. However, vulnerable members of the public may struggle to comprehend the terms of the Order and may unwittingly be subject to criminal sanction. If there is public confusion around the scope of the Order, it may result in the police, the public, and courts interacting physically more, rather than less, frustrating the purpose of the Order.

Marrickville Legal Centre submits that it is important that the Order be clear, capable of compliance, and communicated widely, given a breach may result in a criminal conviction and penalty.

1. Exercise as a reasonable excuse – Part 2, Clause 5

Under Clause 5 of the Order, a person may leave the house if he/she has a “reasonable excuse”, including for the purpose of exercising. The Order expressly permits travel for the purposes of work or education. However, it is not clear whether persons can travel for the purpose of exercise. There is ambiguity as to whether the Order permits travel to less crowded or safer areas. This is particularly significant for people from low socio-economic backgrounds, who may live in areas where it is not safe or practical to exercise. For example, someone wishing to ride a bicycle may not feel safe riding if they live in a remote location accessible only by narrow roads. Similarly, a resident of a densely populated urban area may be better able to comply with social distancing in parklands outside their local neighbourhood.

We note that on 4 April 2020, the New South Wales Police Force posted on their Facebook page that it was permissible to leave home “for some brief exercise in your own neighbourhood”. This does not accord with the terms of the Order, which does not prohibit exercising outside one’s neighbourhood, nor does it limit such exercise by a requirement of brevity. This distinction between Police interpretation of the Order and the terms of the Order is a source of confusion in the community.

We submit that a purposive interpretation of the public health concerns behind the Order should permit people to travel reasonable distances for the purpose of exercising.

Recommendation 1: That Schedule 1 of the Order be amended to include reasonable travel for the purpose of exercising.

2. Visiting an intimate partner who is not a household member

There is significant anxiety and uncertainty amongst members of the community in relation to whether a person is allowed to visit an intimate partner who is not a member of their household. The State of Victoria initially indicated that partners who are not members of the same household are not allowed to visit each other under the terms of the Victorian Direction. The Victorian Direction was amended on 3 April 2020 to permit a person to “visit a person with whom they are in an intimate personal relationship”.

The position remains unclear in New South Wales and seems to be a matter of police discretion. The NSW Police Commissioner, Mick Fuller, stated on 1 April 2020 that visiting an intimate partner would constitute “care”. Commissioner Fuller also stated that “care” includes visits to partners, for “mental health”.

Schedule 1 lists a range of “reasonable excuses” for leaving one’s residence, which includes providing “care and assistance (including personal care) to a vulnerable person”. Unless the relevant intimate partner is a “vulnerable person”, visiting an intimate partner would not constitute “care” under the Order. Schedule 1 also includes “emergencies and compassionate reasons”. It is unclear whether visiting an intimate partner can constitute “compassionate

reasons” in circumstances where it appears next to the term “emergencies”. This inconsistency between the wording of the Order and the Police Commissioner’s public statements is a source of confusion in the community.

Recommendation 2: That Schedule 1 of the Order be amended to expressly permit visitation between intimate partners who are not members of the same household.

3. Visiting parents and family

It is unclear what is prohibited with regard to familial reunion under the Order. As noted in Section 2, a person is permitted to leave his/her place of residence to provide care to vulnerable persons, or for “emergencies and compassionate reasons”.

Schedule 1 also lists a “reasonable excuse” as including visiting between parents, siblings and children for the purpose of “continuing existing arrangements for access to, and contact between, parents and children or siblings”. The wording of this “reasonable excuse” would appear limited to circumstances involving split households with “children” under 18 years of age, where existing plans or family law orders are in place.

The Order would therefore appear to preclude, for example, the following situations:

- A 55-year-old mother cooks a meal for her working adult children and grandchildren, leaving her residence for the purpose of dropping this food off outside their home. Her adult children and grandchildren are not “vulnerable persons” as that term would ordinarily be understood. She may not have reasonable excuse for leaving her residence.
- A son who is 21 years old and lives alone visiting his 55-year-old father who lives alone. His father is not a “vulnerable person” as commonly understood. The son may not have a reasonable excuse for leaving his residence.

There is also no definition of the term “vulnerable person”, and there is concern in the community as to their ability to leave home in order to provide assistance to parents and other family members. For example, a 60-year-old mother who lives alone might have been considered fit, healthy, and active outside the COVID-19 pandemic. In the context of this pandemic, is she now to be considered a vulnerable person? Furthermore, are two fit and healthy parents over the age of 70 who have now been advised not to leave their home considered “vulnerable”?

Recommendation 3: That Schedule 1 of the Order be amended to permit visitation between members of the same family or kinship group.

Recommendation 4: That the definition of “vulnerable person” in the context of the COVID-19 pandemic be clarified.

4. Public education

Many of our clients have difficulty distinguishing between social distancing guidelines, which are to be practiced wherever possible, and the conduct prohibited by the Order, which is now subject to criminal sanction.

This difficulty is exacerbated by the fact of Federation. Different messages have been provided from the federal and state jurisdictions. We are concerned that absent a widespread public information campaign, members of our community will remain in a heightened state of confusion and anxiety about their liability to criminal penalty for matters which are not subject to criminal penalty, such as standing within 1.5m of another person when that is unavoidable.

For example, there is significant confusion as to the term “essential”, which has been used by government figures to distinguish between permissible and non-permissible activities, such as the types of “exercise” one can undertake and the types of “goods” which it is permissible to obtain. The term “essential” does not limit any of the activities which constitute a “reasonable excuse” in Schedule 1 of the Order. The flexible use of this term has created confusion and anxiety in the community as to liability for criminal sanction for undertaking activities which are not in fact prohibited by the Order, but may not ordinarily be considered “essential”, such as purchasing books or clothing (which would constitute the purchase of “goods” pursuant to Schedule 1).

We note that when Stage 4 restrictions were introduced in New Zealand, members of the public received an emergency text message outlining the prohibitions which were in place.

Recommendation 5: That the NSW Government engage in an immediate public education campaign which clearly outlines the conduct which now constitutes a criminal offence.