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CASTAN CENTRE FOR HUMAN RIGHTS LAW

Submission to the Senate Select Committee on COVID-19

Prepared by

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2 June 2020

Terms of Reference

a. The Australian Government's response to the COVID-19 pandemic; and

b. Any related matters.

The Castan Centre for Human Rights Law welcomes the opportunity to make a submission to the Senate Select Committee on COVID-19. The Castan Centre's mission includes the promotion and protection of human rights. It is from this perspective that we make this submission.

In the first part of this submission, we set out some general concerns that the Castan Centre has with aspects of the COVID-19 response, before examining some key areas within our particular area of expertise, including human rights limitations and good governance, privacy, migration, protest and social inequality.

In doing so, we discuss Australian state and territory responses in addition to that of the Commonwealth as the Australian government is responding to COVID-19 with co-federal counterparts as part of a national mechanism of response.

Contents

Part 1: Summary of Submission

COVID-19 and the response of governments in Australia: Why human rights matter

The threat to human life represented by COVID-19 and the pressing need for a strong government response everywhere brings into operation a broad range of economic, social and cultural rights and civil and political rights. Individually and together, these rights play a role within one international system of law that is universal, indivisible, interdependent and interrelated.

Some of the particular rights engaged by the COVID-19 pandemic include:

- the right to life and the right to health;
- the right to freedom of movement and the right to assembly;
- the right to privacy, family and home; and
- the right to work.

Human rights matter in the context of COVID-19 because they impose an obligation upon governments to respect, protect and fulfil the rights to life and health of every person in the community without discrimination, and to do so in a way that does not unreasonably or unjustifiably interfere with other human rights.

Here we note that COVID-19 restrictions in Australia have limited many aspects of individual life – with legislation and executive determinations limiting travel and requiring persons to stay at home, self-isolate and go into quarantine. Such restrictions can unreasonably and disproportionately impact on Indigenous peoples and minority groups, and exacerbate existing inequalities in the enjoyment of rights.

We note that, although some restrictions are being eased in many parts of Australia, certain restrictions (such as social distancing) are likely to remain in operation for many months ahead. It is also possible that restrictions may be lifted and then resumed once more. Therefore, our human rights analysis of the response continues to be of significant relevance, especially in relation to vulnerable groups.

The rights to life and health

In the face of a pandemic that kills hundreds of thousands, infects millions and threatens the lives and wellbeing of billions of people, all persons expect governments to provide timely and accurate health information, protection from the disease, medical treatment when needed and, as soon as possible, a vaccine. The rights to life and health require governments to recognise and meet these expectations as a matter of right and obligation under international law with respect to all persons.

This obligation has some domestic legal force at the Commonwealth level, where legislation and regulations are assessed against human rights standards that include these rights, and in jurisdictions where human rights legislation enshrines the right to life[1] and the right to health.[2] While the rightful claim and the pressing need for such a government response is the same everywhere, the capacity of developing countries to respond is much less. This should weigh upon the conscience of all nations with the ability, indeed the international legal obligation, to provide international assistance, including Australia.

The right to freedom of movement

Under Australia's international law obligations, the right to freedom of movement is 'the right to liberty of movement'.[3] Under s 12 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), it is the right 'to move freely within Victoria and to enter or leave it and … to choose where to live'.[4]

At one level, the purpose of this right is obvious – to ensure that people (and families and groups) can move freely when and where they wish. Important though this is, it is *not* an adequate understanding of the *entire* meaning and importance of the right. The purpose of the right and the values and interests protected go well beyond freedom of movement as such and encompass personal actuation and development. Individuals usually want to exercise freedom of movement for reasons that are important to them personally. Stay-at-home or

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1 *Human Rights Act 2004* (ACT) s 9(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9; *Human Rights Act 2019* (Qld) s 16.
2 *Human Rights Act 2019* (Qld) s 37.
3 *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 12(1).
4 See also *Human Rights Act 2004* (ACT) s 13 and *Human Rights Act 2019* (Qld) s 19.

do-not-travel directions interfere with these interpersonal relationships and make for a life that is smaller and less fulfilling.

This is important to recognise in and of itself. That the separation requirements may be reasonable and justified does not lessen the significantly adverse consequences for the individual/s caused by the interference. Restrictions on the right to freedom of movement usually involve much more than physical restrictions; they can involve serious social and developmental restrictions which, in turn, impact on the realisation of other rights, including the right to live a dignified life. Social media contact can go only so far as a substitute. This is the reason why the human right to freedom of movement is so important. This is why government interference with the exercise of this right can cause serious personal hardship.

In our more detailed analysis of the human rights implications of Australia's COVID-19 response below, we also look at the impact of the restrictions on other aspects of human rights, such as the right to privacy (via the COVIDSafe app) and the right to assembly (via the restrictions on protest).

Part 2: Limiting Human Rights While Ensuring Good Governance

As illustrated by the Whole-of-Government Submission to this Senate Committee, the public health emergency we are experiencing has generated unprecedented government action. This has included measures which both promote and limit human rights.

It is well-established that most human rights are not absolute, and good governance may suggest, or even require as the case may be, that some human rights are limited for important public purposes, generally and in the COVID-19 situation. Nonetheless, given the importance of human rights *in and of themselves* (as discussed in Part 1 of this submission), any limitation of rights requires strict justification. Human rights limitations principles recognise, circumscribe and guide the exercise of the exceptional power of governments to limit human rights for important public purposes.

Below we outline the meaning of the limitations principles and their importance for the Australian government to carry out its function of good governance, both generally and in unprecedented times, such as a public health emergency.

Limitation of human rights generally

Whether or not a limitation to a human right is justified depends upon the test applying to the particular right in the particular context. In general terms, the purpose of limitations tests is to determine whether the limit is 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom', to use the language of s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). To be justified, the limitation must satisfy certain limitations principles, as follows:[5]

- Legality
- Necessity
- Legitimate purpose
- Proportionate
- Non-discrimination

The legality requirement upholds the rule of law and ensures that, in limiting rights, governments are subject to law and democratically accountable for any change to the law, for it is under law that individuals enjoy their human rights. The necessity requirement ensures that, absent this basis for limitation, individuals can enjoy fundamental rights and freedoms in their precious unlimited form. The legitimate purpose requirement ensures that the power of governance is not abused when limitations are imposed. The proportionality requirement ensures that limitations go no further than necessary, which is a guard against governance overreach: the limitation must be proportionate to the interests at stake – it must match and not exceed the protective purpose and be the least intrusive option for achieving it. The non-discrimination requirement ensures that, consistently with basic democratic principles founded upon respect for human dignity, limitations are not discriminatory.

Application of the principles in the deliberative processes of good governance should lead to the result that, when limitations are necessary for legitimate purposes, they are minimally intrusive, time-bound, targeted, proportionate, certain, non-discriminatory and transparent.

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[5] See generally, UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) E/CN.4/1985/4
< https://www.refworld.org/docid/4672bc122.html>.

Limitation of human rights in response to COVID-19

The limitations principles discussed above apply to all measures that limit human rights, or have the potential to do so, including emergency measures taken to stop the spread of COVID-19.[6]

Applied to the COVID-19 situation, the United Nations Office of the High Commissioner for Human Rights (OHCHR) advises that:

- 'Governments have to take difficult decisions in response to COVID-19. International law allows emergency powers must only be used for legitimate public health goals, not used as a basis to quash dissent, silence the work of human rights defenders or journalists, deny other human rights or take any other steps that are not strictly necessary to address the health situation.
  …
- Governments should inform the affected population of what the emergency measures are, where they apply and for how long they are intended to remain in effect, and should update this information regularly and make it widely available.
- As soon as feasible, it will be important for Governments to ensure a return to life as normal and not use emergency powers to indefinitely regulate day-to-day life, recognising that the response must match the needs of different phases of the crisis.'[7]

By applying the limitations principles to measures responding to the pandemic, governments may continue to exercise their function of good governance in the COVID-19 emergency in a way that gives maximum effect to human rights. The fact that most human rights are not absolute acknowledges that governments must sometimes take difficult decisions, yet the limitations principles ensures that they must do so through measures that are necessary for legitimate purposes, minimally intrusive, time-bound, targeted, proportionate, certain, non-discriminatory and transparent.

In the Parts that follow, we examine measures taken in Australia that illustrate the application of these principles in relation to the right to privacy, the rights of migrant workers and the right to protest. Before turning to these specific contexts, we comment on the parliamentary

[6] See e.g. United Nations Office of the High Commissioner for Human Rights, 'COVID-19 Guidance' <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>.

[7] United Nations Office of the High Commissioner for Human Rights, 'COVID-19 Guidance' <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>.

scrutiny mechanisms that exist in Australia to assess new measures for compliance with human rights. These mechanisms serve to hold governments to account for new measures they introduce and require them to justify any limitations to human rights against the limitations principles.

Part 3: Human Rights Concerns relating to the COVIDSafe App

The primary human right affected by the process of data collection, storage and use through the COVIDSafe app is the right to privacy.[8] We also note that lack of privacy protection in relation to data collected by it potentially affects other rights too, including:

- the right to equality to the extent that the data is collected for, and/or used for, a discriminatory purpose; and
- freedom of expression, which may be affected to the extent that the collection of contact data can have a chilling effect on speech.

However, in this part of the submission, we focus on the implications for the **right to privacy**.

The COVIDSafe app and the right to privacy[9]

Under international human rights treaties ratified by Australia, the right to privacy is the right not to be 'subjected to arbitrary or unlawful interference with [one's] privacy, family, home or correspondence' (Art 17(1) of the *International Covenant on Civil and Political Rights*).

Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), it is the right 'not to have [one's] privacy, family, home or correspondence unlawfully or arbitrarily interfered with' (section 13(a)).[10]

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[8] The legislative basis for the COVIDSafe app is a determination made by the Health Minister under the *Biosecurity Act 2015* (Cth) and the *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth).

[9] Greenleaf, Graham and Katharine Kemp 'Australia's COVIDSafe experiment, Phase III: Legislation for trust in contact tracing' (15 May 2020) *University of New South Wales Law Research Series* <https://ssrn.com/abstract=3601730>; Ponce Del Castillo, Aída 'COVID-19 contact-tracing apps: how to prevent privacy from becoming the next victim' *ETUI Policy Brief N°5/2020 European Economic, Employment and Social Policy* <https://www.etui.org/content/download/38859/391875/file/Covid-19+contacttracing+apps+Corona+Ponce + Policy+Brief+2020.05.pdf>; Watts, David 'COVIDSafe, Australia's Digital Contact Tracing App: The Legal Issues' (2 May 2020) <https://ssrn.com/abstract=3591622>; Councils for Civil Liberties 'Joint Statement on Covid-Safe Bill, Parliament must Strengthen Protections in Covid App Bill' (9 May 2020) <https://www.qccl.org.au/newsblog/joint-statement-covid-bill-09052020>.

[10] *Human Rights Act 2004* (ACT) s 12(a); *Human Rights Act 2019* (Qld) s 25(a).

Privacy is not an absolute right but any limitation of it should satisfy the tests of reasonableness and proportionality.

The Privacy Amendment (Public Health Contact Information) Act 2020 (Cth) amends the *Privacy Act 1988* (Cth) to provide protections for privacy in relation to the COVIDSafe app. However, it is arguably still subject to deficiencies. In addition, we have identified deficiencies in the general design of the app itself.

Design deficiencies of the COVIDSafe app

There has been a case made for the potential benefits of contact tracing and the role of the COVIDSafe app in supplementing manual tracing[11], but data protection principles require that the data collected does not go beyond more than is required and that it is collected in fair and reasonable manner. Installation of the app, and disclosure of data collected by the app, is voluntary. As a result, the data collection is based on user consent.

A key design feature of the Australian app is that it is a hybrid model, in which contact logging is decentralised, while contact tracing is centralised. The data stored in a centralised server includes, on registration, telephone number, post code and name of the user (which does not need to be the user's real name). Once a user is identified as having had contact with an infected person and decides to provide access to his or her contact data, this data is also stored centrally to enable contact tracing. This design feature increases the risk of possible cyber-attacks and also the risk that data may be used for purposes other than those that are specifically authorised.

A specific concern that has been raised is the fact that Amazon Web Services (AWS) has been chosen as the cloud storage platform for the data collected by the app. While the legislation requires that the data remain located within Australia, AWS is the subsidiary of a US incorporated entity, which falls within the reach of the US *Clarifying Lawful Overseas Use of Data Act 2018* (CLOUD Act). This means that it is likely that AWS would be required to provide access to data on the server to the US government if requested to do so. While a

[11] Department of Health, 'Operation of the COVIDSafe app' (19 May 2020) <https://www.health.gov.au/news/operation-of-the-covidsafe-app>.

company can refuse to provide data where doing so would violate the law of a 'qualifying foreign government', Australia does not currently qualify as such an entity.[12]

Deficiencies of the legislation

1. The information protected

The definition of 'COVID app data' under s 94D(5) of the *Privacy Act 1988* (Cth) is restricted to data that is 'registration data' or data that 'is stored, or has been stored', on a communication device (s 94D(5)(b)) and contains an exclusion in respect of 'de-identified statistical information about the total number of registrations through COVIDSafe' (s 94D(5)(d)).

This definition excludes derivative data, such as data that has been derived from data held by state and territory health bodies. Somewhat curiously, the wording of the provision does not fully put beyond doubt whether the contact data which a notified user uploads to the centralised store is covered by the definition. However, the Explanatory Memorandum makes clear that this data, which is central to the scheme as a whole, is protected 'COVID app data'.[13]

Similarly, it is not clear that it covers all of the data generated by the user's mobile phone that a telecommunications service provider is required to retain under s 187AA of the *Telecommunications (Interception and Access) Act 1979* (Cth). There is nothing specific in the amendments to the *Privacy Act 1988* (Cth) which excludes the operation of the data retention requirements under the *Telecommunications (Interception and Access) Act 1979* (Cth) in respect of data generated as a result of the use of the app.

A further issue is that the exclusion in respect of 'de-identified statistical information' does not make clear that it is restricted to information which does not reveal transaction-level data. This is problematic bearing in mind the issues that arose in respect of the release of supposedly 'de-identified' Medicare and PBS data.[14] If ostensibly de-identified information is

[12] Australia should qualify as a 'qualifying foreign government' for the purpose of the CLOUD Act when the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 is passed.

[13] Explanatory Memorandum to the Privacy Amendment (Public Health Contact Information) Bill 2020 (Cth) [56]-[57] <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6556_ems_a40793f4-58c6-4a27-987a-9853a300e820/upload_pdf/737815.pdf;fileType=application%2Fpdf>.

[14] Office of the Australian Information Commissioner, 'MBS/PBS data publication' (23 March 2018) < https://www.oaic.gov.au/privacy/privacy-decisions/investigation-reports/mbspbs-data-publication/>.

re-identifiable, it is presumable 'data relating to a person' and as such subject to Part VIIIA of the *Privacy Act 1988* (Cth).

2. Collection limitations

The Privacy Impact Assessment to the COVIDSafe app makes clear that what will in fact be collected is data about all other users who came within Bluetooth signal range even for a minute within the preceding 21 days.[15] This contradicts assurances given by the government that the data collected will be restricted to contacts within a range of 1.5 metres for periods of at least 15 minutes.[16] While this data filter out on the server after the user uploads its contacts, the Act does not include any specific data collection or use restrictions based on the distance or duration of contact.

3. Right to deletion

The right to request deletion of data is an important privacy safeguard. However, while s 94L enables a user to request the data store administrator to delete any registration data of the person that has been uploaded from the device to the National COVIDSafe Data Store, it does not appear to apply to that user's other COVIDSafe app, in particular any contact data uploaded by the user or data collected from the devices of other uses. It is not clear why the legislation does not allow a user to request the deletion of any contact log data.

4. Restrictions on third party collection

The government has claimed that the courts will not be able to issue an order, such as a subpoena, to enable litigants to gain access to COVIDSafe app data.[17] Apart from the general prohibition that prevents a person from collecting, using or disclosing COVIDSafe app data other than as provided for in s 94D, the Act does not expressly addresses the powers of the courts.

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[15] Department of Health, 'The COVIDSafe Application: Privacy Impact Assessment' (24 April 2020) [8.36] < https://www.health.gov.au/sites/default/files/documents/2020/04/covidsafe-application-privacy-impact-assessment-covidsafe-application-privacy-impact-assessment.pdf>.

[16] Ibid, [3.33]-[3.34].

[17] See e.g. Department of Health, 'Press conference about the COVIDSafe app launch' (26 April 2020) <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/press-conference-about-the-covidsafe-app-launch>.

5. Measures to prevent and provide redress from coercion

Prevention of coercion

The Act contains in s 94H important measures designed to prevent people being coerced into using the app. The actions prohibited include refusing to allow another person to participate in an activity (s 94H(2)(d)) or refusing to receive or provide goods or services (or insisting on receiving or providing less or more monetary consideration for them)(s 94H(2)(e)). While these are valuable protections, they do not explicitly deal with the situation where what is in issue is making a discount or other financial incentive conditional upon app usage. In addition, there is no ban on requiring disclosure of whether or not an individual is an app user, which potentially opens the door to other forms of coercion, such as social shaming.

As Castan Centre Member, Associate Professor Melissa Castan, and Associate Professor Kate Galloway have noted:

> 'The provisions do not go so far, however, as to prohibit coercion or refusal of service through asking for information about whether a person has downloaded the app. For example, if an employer asks an employee only to tell them whether or not they have downloaded the app and the employee refuses to disclose this information, there is no sanction if the employer takes disciplinary action against the employee. One's 'COVIDSafe Status' is itself, apparently, not considered protected information.'[18]

Redress against coercion

The privacy policy for the COVIDSafe app recognises the need for redress against coercion, suggesting that those who are coerced or 'feel pressured to install or continue to use' the app, or to 'agree to' upload their data, should lodge a complaint with the Department of Health, the Office of the Australian Information Commissioner (OAIC) or the Australian Human Rights Commission (AHRC). However, as Castan Centre Member, Associate Professor Melissa Castan, and Associate Professor Kate Galloway have noted, there are problems with using these complaint mechanisms in this context:

[18] Galloway, Kate and Melissa Castan 'COVIDSafe and Identity: Governance Beyond Privacy' *AUSPUBLAW* (11 May 2020) <https://auspublaw.org/2020/05/covidsafe-and-identity-governance-beyond-privacy>; republished on the Castan Centre for Human Rights Law Blog <https://castancentre.com/2020/05/20/covidsafe-and-identity-governance-beyond-privacy/>.

> 'The OAIC is a statutory agency overseeing complaints about privacy and data breaches. While this is the correct agency to investigate data breaches involving the app, its remit does not obviously include the power to investigate complaints about coercion concerning the app. Coercion about the app does not concern a breach of data use per se. It reflects treatment of a person based on their data status: whether or not they have downloaded the app.'[19]

The AHRC is empowered to receive complaints regarding discrimination and breaches of human rights. Discrimination is defined in s 3 of the *Australian Human Rights Commission Act 1986* (Cth) as:

> 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin… or any other distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and has been declared by the regulations to constitute discrimination'.

While a person's 'COVIDSafe app' status is not a ground upon which it is prohibited to discriminate, a person's access to the app may be related to a status or characteristic associated with a prohibited ground. For example, not everyone can afford a smartphone or have the ability to use a smartphone to download the app. A requirement by an employer or a shop owner that all persons that enter the premises must have the app on their phone may amount to indirect discrimination because it can have a disproportionate impact on persons with a status or characteristic related to a prohibited ground. However, we note here the limits of federal discrimination law, including its material scope of protection which is limited to 'employment or occupation' under the *Australian Human Rights Commission Act 1986* (Cth). Further, the link between a protected characteristic and the COVIDSafe App may be difficult to identify and establish.

The above concerns about redress against coercion or discrimination put into question the Health Minister's assurance that the Determination features 'the strongest ever possible protections'.[20]

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[19] Galloway, Kate and Melissa Castan 'COVIDSafe and Identity: Governance Beyond Privacy' *AUSPUBLAW* (11 May 2020) <https://auspublaw.org/2020/05/covidsafe-and-identity-governance-beyond-privacy>; republished on the Castan Centre for Human Rights Law Blog <https://castancentre.com/2020/05/20/covidsafe-and-identity-governance-beyond-privacy/>.

[20] Galloway, Kate and Melissa Castan 'COVIDSafe and Identity: Governance Beyond Privacy' *AUSPUBLAW* (11 May 2020) <https://auspublaw.org/2020/05/covidsafe-and-identity-governance-beyond-privacy>; republished

6. Sunsetting

The procedure for ending the use of the COVIDSafe app is dependent upon a subjective determination by the Minister that the app is no longer required or effective.[21] This is unsatisfactory both because of its vagueness and because it is subject to ministerial discretion. What would be preferable would be a sunset clause which requires the Parliament to review whether it is necessary for the Act to continue. A suggested timeframe for this would be after 6 months.

7. Broader implications for technology and human rights

We also underline that data should only be used for the purpose of responding to the COVID-19 pandemic and cease once the pandemic is over. In this regard, the tracing app raises the issue of 'mission creep'[22]: that the government will use it for COVID-19 purposes but continue to access the data once the pandemic is over. Second, these technologies must address risks in relation to discrimination against racial minorities and marginalised populations.

Additionally, on a more conceptual and long-term level, we would argue that we must rethink how privacy and technology interact. This is something which has been highlighted by the COVID-19 emergency but will remain a problem after the pandemic.

There are two aspects of concern here which require new legal approaches. First, there is often a lack of transparency in how technology is implemented in Australia. This may be a problem which can be remedied by a public education campaign to ensure that those affected by technology have at least a rudimentary understanding of how data is used by authorities and an understanding of their rights.

Second, given the nature of the information many people hold on their phones (photos, intimate messages et cetera) it could be argued that they are an extension of ourselves and are part of our private life, even perhaps part of our **identity**. This is because they reveal information that is reflective of our personal attributes. For instance, the types of dating apps on a person's phone reveal their sexual identity. Other information and apps may reveal an

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on the Castan Centre for Human Rights Law Blog <https://castancentre.com/2020/05/20/covidsafe-and-identity-governance-beyond-privacy/>.

21 *Privacy Act 1988* (Cth) s 94Y(1).

22 Langford, Sam 'Privacy Experts are Concerned about the Government's Coronavirus Tracing App. Here's Why' SBS (21 April 2020) < https://www.sbs.com.au/news/the-feed/privacy-experts-are-concerned-about-the-government-s-coronavirus-tracing-app-here-s-why>.

individual's political and religious beliefs. Mobile phones are therefore not simply 'telecommunications devices'. This means that human rights law must reconceptualise the concept of privacy and a 'private life' to deal with this societal fact.

In terms of specific changes to existing regimes, we would highlight that Australia does not have a statutory, legally-enforceable right to privacy. Therefore, as the Castan Centre recommended in a recent submission to the AHRC's Inquiry on Human Rights and Technology, a tort for serious invasion for privacy should be adopted.[23] This would allow for better protection against intrusion and misuse of private information and serve as an accountability mechanism for governmental actions in this area.

Part 4: The Effect of the COVID-19 Restrictions on Temporary Migrants

Background

Australia admits comparatively high numbers of 'temporary migrants', a designation covering many visa categories and types of migrants. Most temporary visas go to students and working holidaymakers. At the end of 2019, over 480,000 international students were living in Australia, while being also allowed to work for up to forty hours a fortnight.[24] At the same time, about 140,000 people were present under the Working Holiday Maker (WHM) visa program.[25] Temporary skilled migrants include, for instance, 65,000 workers on the Temporary Skill Shortage visa (which replaced the 457 Temporary work skilled visa in 2018), plus members of their families.[26] In addition, about 670,000 New Zealanders are also in Australia on visas which are, technically, temporary, though New Zealanders are allowed to live and work in Australia indefinitely.[27] Other people on temporary visas include seasonal workers and

[23] Castan Centre for Human Rights Law, 'Submission to the Human Rights Commission - Discussion Paper on Human Rights and Technology' (2020) <https://www.monash.edu/__data/assets/pdf_file/0004/2175862/Sub-to-HRC-on-HR-and-Technology.pdf>.

[24] Department of Home Affairs, 'Student visa and Temporary Graduate visa program report' <https://www.homeaffairs.gov.au/research-and-stats/files/student-temporary-grad-program-report-december-2019.pdf>.

[25] Department of Home Affairs, 'Working Holiday Maker visa program report 31 December 2019' <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-dec-19.pdf>.

[26] Department of Home Affairs, 'Temporary resident (skilled) report at 31 December 2019' <https://www.homeaffairs.gov.au/research-and-stats/files/temp-res-skilled-quarterly-report-31122019.pdf>.

[27] Love, Susan and Michael Klapdor 'New Zealanders in Australia: a quick guide' (updated on 13 February 2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/NewZealandersInAustralia>.

persons on bridging visas, such as asylum-seekers and those waiting for the outcome of a partner visa application.

The COVID-19 pandemic has left many of these migrants in particularly precarious positions despite the fact that many have, despite their designation as 'temporary', been living here for several years, and significant numbers in some categories, such as skilled temporary workers, are likely to become permanent residents.[28] The travel ban excluded all but some exceptional cases of temporary migrants, particularly affecting international students.[29] As Australia's temporary migrants are generally young and highly involved in the labour market,[30] reports quickly started to emerge of severe impacts on international students and temporary work visa holders in sectors such as hospitality and tourism who were deprived of their livelihoods because of the shutdown.[31] Given that migrants on temporary visas often have access to fewer networks and less informal support than most locals, labour market displacement puts extra pressure on them and can quickly result in loss of housing and other hardship.

The federal government's response to the precarious situation of temporary residents has been limited. Given the shortage of workers in critical sectors dependent on temporary migration, international students working in aged care and nursing, as well as those working for the major supermarket chains, were allowed to work more than the usual maximum 40 hours a fortnight.[32] At the same time, most temporary migrants, many of whom have lost their jobs, have been left to cope on their own with no **safety net**. Temporary migrants have already been excluded from basic welfare payments and Medicare and, unlike permanent residents, they are largely ineligible to access the JobKeeper Payment (apart from some New Zealanders on the temporary 444 visa). Instead, they have been advised to rely on 'family support', work or access their Australian superannuation.[33] Or, as the Prime Minister

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28 Mares, Peter 'All Work, No Stay?', *SBS* (20 August 2018) <https://www.sbs.com.au/allworknostay/>.

29 Department of Home Affairs, 'COVID-19 and the border: Coming to Australia' <https://covid19.homeaffairs.gov.au/coming-australia>.

30 Productivity Commission, *Migrant Intake into Australia* (2016), ch 11.

31 Pupazzoni, Rachel 'Calls for migrant workers to be included in JobKeeper subsidy amid coronavirus crisis' *ABC News* (8 April 2020) <https://www.abc.net.au/news/2020-04-08/migrant-workers-are-struggling-due-to-coronavirus-jobseeker/12129798>; Shea, Matt '"It's a Huge Weight": Australia's Migrant Workers Left to Survive Without Covid-19 Safety Net' *Broadsheet* (9 April 2020) <https://www.broadsheet.com.au/national/food-and-drink/article/its-huge-weight-australias-migrant-workers-left-survive-without-covid-19-safety-net>.

32 Department of Home Affairs, 'Coronavirus and Temporary Visa holders' <https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>.

33 Department of Home Affairs, 'Coronavirus and Temporary Visa holders' <https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>.

suggested, for those unable to support themselves, 'there is the alternative for them to return to their home countries'.[34]

While it is not unreasonable to expect genuinely short-term visitors to leave in the event of sudden health and economic crisis, many migrants have been unable to make arrangements to leave, or have nowhere to go.[35] This includes migrants who have lost their jobs and who are reliant on already-stretched charities for food and essentials.[36] Financial hardship means some are unable to pay rent and expenses and face homelessness.[37] This creates further risks, and especially so for the most vulnerable migrants. Many migrants on temporary visas are already exposed to exploitation by unscrupulous employers, and migrants struggling to support themselves are at risk of further abuse, including wage theft.[38] Moreover, migrants may be at serious risk of other harms, including that of contracting COVID-19, if they are unable to access health services, are forced to take on unsafe work and sleep rough or in cramped conditions.[39] The safety and security of the temporary migrant population is therefore crucially linked to public health and well-being of all Australians.

Commentators on the plight of Australia's temporary residents have correctly highlighted their substantial contribution to the economy, given that they are required to be economically self-sufficient and pay taxes.[40] Others have resorted to deeply unhelpful rhetoric, suggesting that temporary migrants are part of the problem and to blame for unemployment and low

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[34] Prime Minister, 'Press Conference – Australian Parliament House', *ACT* (3 April 2020) <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-030420>.

[35] Salim, Natasya, Shelton, Tracey and Jason Fang 'Migrant workers and international students stuck in Australia due to coronavirus travel bans', *ABC News* (8 April 2020) <https://www.abc.net.au/news/2020-04-08/asia-pacific-students-migrant-workers-travel-stuck-coronavirus/12105458>.

[36] Schneiders, Ben and Royce Millar 'Starved out of Australia: The workers without money or food', *Sydney Morning Herald* (3 May 2020) <https://www.smh.com.au/national/starved-out-of-australia-the-workers-without-money-or-food-20200429-p54o8u.html>.

[37] Pawson, Hal and Peter Mares 'Coronavirus lays bare 5 big housing system flaws to be fixed', *The Conversation* (12 May 2020) <https://theconversation.com/coronavirus-lays-bare-5-big-housing-system-flaws-to-be-fixed-137162>.

[38] Productivity Commission, *Migrant Intake Into Australia* (2016); Berg, Laurie and Bassina Farbenblum 'Migrant Workers' Access to Remedy for Exploitation in Australia: the Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310; Reilly, Alexander, Howe, Joanna, van den Broek, Diane and Chris F Wright 'Working holiday makers in Australian horticulture: Labour market effect, exploitation and avenues for reform' (2018) 27(1) *Griffith Law Review* 99.

[39] Refugee Council of Australia, 'Leading medical epidemiologist warns of major public health risk in excluding groups from COVID-19 response' (9 May 2020) <https://www.refugeecouncil.org.au/leading-medical-epidemiologist-warns-of-major-public-health-risk-in-excluding-groups-from-covid-19-response/>.

[40] Boucher, Anna 'Covid-19 is not only a health crisis, it's a migration crisis' *Lowy Institute* (2 April 2020) <https://www.lowyinstitute.org/the-interpreter/covid-19-not-only-health-crisis-it-s-migration-crisis>.

wage growth.[41] While evidence for these claims is scant and such contributions fail to understand the links between temporary and permanent migration,[42] both framings treat Australia's temporary migrants primarily as units of economic production, as opposed to, first and foremost, human beings. The rest of this submission advances the position that Australia's migrants are human beings with human rights, and that the federal government's response to COVID-19 needs to be assessed in light of this fact.

Migrants on temporary visas: a human rights perspective

International human rights law recognises migrants as human beings and highlights States' duty to respect and ensure the human rights of everyone within their jurisdiction. Even though Australia has not ratified the United Nations' main instrument on migrant workers' rights, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*,[43] Australia is party to both the *International Covenant on Civil and Political Rights* (ICCPR)[44] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[45] as well as the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD).[46]

Both the International Covenants cover migrants and prohibit discrimination on a number of grounds, including 'national origin' and 'other status'.[47] While the ICERD specifically does 'not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens' (Art 1(2)), the Committee on the Elimination of Racial Discrimination (CERD) has made it clear in its General Recommendation on Discrimination Against Non-Citizens that 'States parties are under an obligation to guarantee equality between citizens and noncitizens in the enjoyment of these rights to the extent

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41 Keneally, Kristina 'Do we want migrants to return in the same numbers? The answer is no' *Sydney Morning Herald* (3 May 2020) <https://www.smh.com.au/national/do-we-want-migrants-to-return-in-the-same-numbers-the-answer-is-no-20200501-p54p2q.html>.

42 Mares, Peter 'Labor's mixed migration message' *Inside Story* (6 May 2020) <https://insidestory.org.au/labors-mixed-migration-message/>.

43 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

44 *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

45 *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

46 *International Convention on the Elimination of all Forms of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

47 ICCPR, Arts 2(1), 26; ICESCR, Art 2(2); ICERD, Art 1(2).

recognized under international law.'[48] Similarly, the Human Rights Committee's (HRC) General Comment 15 maintains that 'the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness' and confirms that rights, including the right to life and freedom from torture, must be guaranteed without discrimination.[49] The Committee on Economic, Social and Cultural Rights (CESCR) has specifically emphasised that 'the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation'.[50]

The fact that all migrants have the right to life, freedom from ill-treatment, social security, health and housing, as per the International Covenants, does of course not render these rights automatically absolute or signify that differences in treatment between nationals and non-nationals can never be legitimate. For one thing, few human rights are absolute, and most civil and political rights can be limited in reasonable and proportionate ways when there is a good reason (such as a public health emergency); only few, such as freedom from torture or to cruel, inhuman or degrading treatment or punishment (Art 7 ICCPR), allow no limitations even when such good reasons exist. All economic, social and cultural rights in the ICESCR are subject to progressive implementation that is dependent upon available resources (Art 2(1)) and may be subjected to 'such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society' (Art 4). These limitations are well-known and not worth going into detail here.

What is worth elaborating on in this context is the fundamental guarantee of non-discrimination.[51] It means, simply put, that States must not unduly differentiate between people within their jurisdiction, but that they have a duty to respect, protect and fulfil the rights of all persons, including migrants. The CERD has concluded that 'differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such

[48] Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation No. 30: Discrimination against Non-Citizens' (2004), paragraph 3.
[49] United Nations Human Rights Committee (HRC), 'General comment No. 15: The position of aliens under the Covenant' (1986), paragraphs 1, 7.
[50] Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009), paragraph 30.
[51] ICCPR, Arts 2(1), 26; ICESCR, Art 2(2).

differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim'.[52] The HRC has made similar comments about the right to non-discrimination under the ICCPR.[53] The CESCR has noted that 'a failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority'.[54]

Determining whether differential treatment of groups of non-citizens, such as temporary residents, is unlawful requires careful analysis of complex economic and social realities, as well as the content and scope of relevant rights.[55] Given the global and unprecedented nature of the COVID-19 crisis and the need to take emergency measures in order to promote public health, as well as counteract the economic impact on citizens, it is clear that States can argue they are acting in pursuit of a legitimate aim when drawing certain distinctions between migrants, permanent residents and citizens. The question therefore comes down to an assessment of whether the measures excluding temporary migrants are also a reasonable and proportionate way of responding to the crisis. These questions are particularly difficult in relation to economic and social rights, where some States, including Australia, have often sought to limit access for non-nationals to, for example, social security and health services, even outside times of crisis.

To clarify States' obligations in this respect, the CESCR has notably underlined the importance of a minimum core content of economic and social rights, which must be ensured to everyone.[56] The Committee has elaborated on the scope of that obligation in relation to specific rights and, in some cases, specifically in relation to non-nationals. For instance, in relation to the right to social security, it has declared that:

> 'Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions,

[52] CERD, 'General Recommendation No. 30: Discrimination against Non-Citizens' (2004), paragraph 4.
[53] HRC, 'General comment No. 18: Non-discrimination' (1989), paragraph 13.
[54] CESCR, 'General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009), paragraph 13. Note that the ICESCR specifically allows only developing countries to limit the extent to which they guarantee economic rights to non-nationals (Art 2(3)).
[55] Chetail, Vincent, *International Migration Law* (OUP, 2019), chapter 2.3.
[56] CESCR, 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, Para 1 of the Covenant)' (1990), paragraph 10.

> including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.'[57]

Similarly, the CESCR has declared that States are 'under the obligation to *respect* the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services'.[58] Moreover, any assessment must take into account the fact that minimum subsistence rights (such as health and social security) are interlinked with other rights and may in extremis lead to breaches of absolute rights, such as freedom from cruel, inhuman or degrading treatment or punishment.

Despite the generally wide discretion States retain in this area, it is therefore both possible and essential to ask whether the federal government's response to COVID-19, in excluding temporary residents, has been both reasonable and proportionate. For distinctions between nationals and non-nationals to be consistent with international human rights law, the State has to be able to show that the difference in treatment serves a legitimate State objective, that the options pursued are reasonable and that the measures adopted meet the proportionality test.[59] Given that the federal government has made available an extensive economic rescue package for Australians and permanent residents, yet excluded temporary migrants who are in many respects more vulnerable than locals, this decision cannot be treated as prima facie reasonable and proportionate. It is instead up to the government to provide objective evidence to show that it has made every effort to use the resources at its disposition and that it has carefully considered all available alternatives, taking into account all relevant factors, including those related to social and health impacts.

However, no such case has been made to-date. Federal Treasurer Josh Frydenberg simply argued that the government 'had to draw the line somewhere'.[60] While that is undoubtedly true, as noted above, it is insufficient to make unsubstantiated claims of 'a lack of available

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[57] CESCR, 'General Comment No. 19, The Right to Social Security (art 9)' (2008), paragraph 37.
[58] CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12)' (2000), paragraph 34.
[59] Chetail, Vincent *International Migration Law* (OUP, 2019), chapter 2.3.2.
[60] Speers, David 'Josh Frydenberg joins Insiders', *ABC Insiders* (12 April 2020) <https://www.abc.net.au/insiders/josh-frydenberg-joins-insiders/12143636>.

resources'.[61] No objective and reasonable justification has been provided as to why the line was drawn in a way that simply excludes migrants on temporary visas from the scope of government support. No explanation has been put forward to demonstrate what, if any, alternatives to the wholesale exclusion of temporary residents were considered and how these alternatives take into account not just economic factors but social and health impacts. Even in purely economic terms, no modelling has been put forward to demonstrate the cost of including migrants on temporary visas and how that cost compares to the considerable tax and other contributions such migrants make. It is telling, given the deep-seated treatment of temporary migration in purely economic terms, that in this particular instance no calculations have been presented to justify why it is reasonable and proportionate to exclude this population altogether.

Moreover, no risk assessments appear to have been made that would recognise and seek to address the entrenched pre-existing vulnerabilities of migrants on temporary visas due, in large part, to successive governments that have limited the rights and agency of temporary residents.[62] Both the HRC and the CESCR have made it clear that States should not only refrain from discrimination, but in fact take positive action to *correct* existing conditions that perpetuate or exacerbate the situation of vulnerable populations.[63] Instead, the government's exclusion of temporary migrants further intensifies the economic and social risks experienced by them during the crisis. These include being denied access to adequate food, health services and housing.[64] In individual cases, it may even endanger life and amount to degrading treatment. Moreover, as these conditions make it harder for migrants to avoid infection, get tested and seek medical treatment, this exclusion may even put at risk the general welfare and life of the rest of the Australian population.

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[61] CESCR, 'General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009), paragraph 13. Note that the ICESCR specifically allows only developing countries to limit the extent to which they guarantee economic rights to non-nationals (Art 2(3)).

[62] Wright, Chris F and Stephen Clibborn 'A guest-worker state? The declining power and agency of migrant labour in Australia' (2020) *The Economic and Labour Relations Review* <https://doi.org/10.1177/1035304619897670>.

[63] HRC, 'General comment No. 18: Non-discrimination' (1989), paragraph 10; CESCR, 'General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009), paragraphs 8-9.

[64] See e.g. Schneiders, Ben and Royce Miller 'Starved out of Australia: The workers without money or food', *Sydney Morning Herald* (3 May 2020) <https://www.smh.com.au/national/starved-out-of-australia-the-workers-without-money-or-food-20200429-p54o8u.html>.

In conclusion, in relation to the exclusion of migrants on temporary visas, the response to the COVID-19 crisis fails to meet the basic requirements of international human rights law, putting at risk both migrants and the rest of the Australian population. As the precise content and scope of rights in relation to temporary migrants are not well understood, States have been tempted to treat migrants on temporary visas as if their basic rights require no consideration, arguing that migrants freely choose to participate in short-term migration schemes and are always free to leave.[65] This stance is also evident in the federal government's response to COVID-19, which has framed migrants as either an economic resource or a nuisance, to be exploited when economically useful and quickly discarded when not. While some states and territories have recognised the humanity of migrants on temporary visas and adopted limited support packages for some groups, the federal government has flatly refused to extend support to the vast majority of them.

It is true that migrants on temporary visas are not full members of the Australian community. Nor are they, however, purely visitors who can simply be expected to return 'home', especially during an unprecedented crisis that has resulted in States shutting their borders, in some cases even to their citizens. The economic framing of temporary migration has obscured the fact that Australia is bound by its international human rights obligations to consider temporary residents as human beings to whom the government owes certain duties. It is obligated to act in accordance with its international obligations, including the obligation to protect the life and health of migrants under its jurisdiction, as well as Australian citizens and permanent residents. In line with its international duties, the government must give good reasons for, or revoke, the unjustified exclusion of migrants on temporary visas from the scope of basic assistance, such as the JobKeeper scheme. It must, in fact, seek to take specific further measures to protect vulnerable migrants, for instance temporary workers who fall among the most vulnerable working people in Australia. To protect the rights of migrants and others, it must take urgent steps to address the foreseeable risks migrants face because of their inherently vulnerable position, exacerbated by the lack of support in the face of the crisis.

[65] About this mischaracterisation, see Boese, Martina and Kate Macdonald 'Restricted entitlements for skilled temporary migrants: the limits of migrant consent' (2017) *Journal of Ethnic and Migration Studies* 43.

Part 5: COVID-19 Restrictions and the Right to Protest

The COVID-19 restrictions at the federal, state and territory levels do not explicitly ban protest. However, restrictions have that effect indirectly due to the restrictions on movement in many of the states, which only allow movement for work, exercise, shopping for essential items and care giving. This is important because the act of protest is an exercise of the human rights of freedom of expression, freedom of assembly and freedom of association.

Human rights law and protest

International human rights law

The right to peaceful assembly is recognised under several international human rights instruments to which Australia is a party. For instance, Art 21 of the *International Covenant of the Civil and Political Rights* (ICCPR) states:

> 'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order … the protection of public health or morals or the protection of the rights and freedoms of others.'[66]

Therefore, it can be argued that certain limitations on the right to peaceful assembly are warranted due to the COVID-19 situation (comprising a public health emergency).[67] Similarly, freedom of expression under Art 19 of the ICCPR may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals (Art 19(3)). Limitations must be prescribed by legislation necessary to achieve the desired purpose and proportionate to the need on which the limitation is predicated.

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[66] We note that, under Art 4 of the ICCPR, countries may take measures derogating from certain of their obligations under the Covenant, including the right to peaceful assembly 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'. Such measures may only be taken 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.

[67] Note that the UN Special Rapporteur on the Right of Peaceful Assembly, Mr Christof Heyns, has noted that 'protection of public health ground may exceptionally permit restrictions to be imposed, for example where there is an outbreak of an infectious disease and gatherings are dangerous': see 'Draft General comment No. 37 on Art 21 The right of peaceful assembly, at [51] <https://www.ohchr.org /EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25682&LangID=E>.

Australian law

Australian case law has also established that peaceful assemblies are 'perfectly reasonable and entirely acceptable modes of behaviour in a democracy'[68] and that peaceful assemblies are 'integral to a democratic system of government and way of life.'[69]

Victoria, Queensland and the ACT expressly provide for a right to peaceful assembly in their human rights legislation.[70] These human rights are not absolute and can be limited (as per the discussion above). As the Federal Court of Australia said in the Melbourne Occupy case *Muldoon v Melbourne City Council*[71], the right of freedom of assembly provided for by s 16(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is, under s 7(2), 'subject to such reasonable limits as can be demonstrably justified in a free and democratic society'.[72]

Against this background, we find that some responses to protest during the COVID-19 restrictions have been unnecessary. We illustrate this by discussing below a case study involving arrest and imposition of fines on individuals protesting immigration detention in April this year.

Case study: Refugee detention protest April 2020

On 10 April 2020, activists took part in a car convoy protest in Melbourne to highlight the plight of refugees in detention who face a heightened risk of contracting COVID-19 due to overcrowded conditions in detention.[73] Despite the fact that participants in the protests were social distancing in cars, the police arrested one man[74] and fined 26 others a total of $43,000 because they were not in public for a reason allowed under COVID-19 restrictions (for instance, work, exercise, shopping for essentials or caregiving).

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68 *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [3]–[4] per Adams J.

69 *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [5] per Simpson J.

70 Section 16(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that 'Every Person has the right of peaceful assembly'; s 15(1) of the *Human Rights Act 2004* (ACT) provides that 'Everyone has the right of peaceful assembly'. See also s 22(1) of the Queensland *Human Rights Act 2019* (Qld).

71 *Muldoon v Melbourne City Council* [2013] FCA 994 at [420], [450].

72 *Muldoon v Melbourne City Council* [2013] FCA 994 at [420], [450].

73 Pearson, Elaine 'Coronavirus Poses Added Risks to Australia's Immigration Detainees' *Human Rights Watch* (2 April 2020) <https://www.hrw.org/news/2020/04/02/coronavirus-poses-added-risks-australias-immigration-detainees>.

74 Blakkarly, Jarni 'Melbourne refugee protesters fined $43,000 for breaching coronavirus rules', *SBS* (11 April 2020) <https://www.sbs.com.au/news/melbourne-refugee-protesters-fined-43-000-for-breaching-coronavirus-rules>.

Melbourne Activist Legal Support (MALS) issued a statement after the police action, expressing concern that the police response to the protest:

- 'Goes beyond the spirit of the Deputy's Chief's Health Officer Stay at Home directions which explicitly allows travel for both work and volunteering tasks;
- Fails to recognise the accommodative and safely organised nature of the event;
- Fails to recognise the compassionate nature of the event – which was designed to draw attention to a potential health crisis currently being ignored by public authorities; and
- Represents a dangerous, disproportionate and ultimately unnecessary limitation of civil and political rights.'[75]

We agree with these concerns. Whilst we recognise that the COVID-19 laws requiring social distancing and the 'stay-at-home' directions have a legitimate purpose in ensuring the safety and wellbeing of the community, the directions are too narrowly prescribed in the context of protest. We would contend that they should allow for protest which observes social distancing requirements.

A similar conclusion applies if we use the Australian Constitution's implied freedom of political communication. The implied freedom of political communication was first explained by the High Court in *Australian Capital Television v Commonwealth*[76] and *Nationwide News v Wills*.[77] In these cases, the High Court observed that a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provisions that the Constitution makes for a system of representative government, which guarantee that Parliament be 'chosen by the people' (ss 7 and 24).

In *Lange v Australian Broadcasting Corporation*[78], the High Court set out a two-stage test for the validity of laws thought to interfere with the implied freedom:

1. Does the law burden freedom of communication about government or political matters either in its terms, operation, or effect?

[75] Melbourne Activist Legal Support, 'Statement of Concern: Unique protest squashed by police due to COVID restrictions' (4 April 2020) <https://melbactivistlegal.org.au/2020/04/04/statement-of-concern-unique-protest-squashed-by-police-due-to-covid-restrictions/?fbclid=IwAR2HMjGNgAAGb8TY0qZ01a1vAFoDJbtYrRk2VAmATSI-f5tRwti1ySQVoKI>.
[76] (1992) 108 ALR 577.
[77] (1992) 177 CLR 1.
[78] (1997) 189 CLR 520.

2. If it does, is the law 'reasonably appropriate and adapted to serve a legitimate end in a way that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'?

For a law to be inconsistent with the implied freedom of political communication it must first be shown that it impinges upon political discussion and secondly, that it does not adequately serve, or is disproportionate in its impact, upon political communication by serving some other legitimate purpose. Proportionality analysis asks whether there is no practical or legislative alternative means of achieving the same purpose which has a less burdensome effect on the implied freedom of political communication.

When we apply this test to the refugee detention protestors arrested or fined under COVID-19 instruments, we find that:

- The refugee protestors were communicating political views.
- The instruments requiring social distancing have a legitimate purpose in ensuring the safety and wellbeing of the community, but they do not allow for protest.
- There is a clear practical alternative to achieve the same purpose which has a less burdensome effect. That is, the laws can and should be calibrated to allow for protest as a reason to leave home if participants observe any applicable social distancing laws (e.g. the protestors may be required to do so in a car or by standing 1.5 metres apart).

Part 6: COVID-19, Social Inequality, Participation and Good Governance

The United Nations has recognised that, while the COVID-19 virus does not itself discriminate, the *impacts* of the virus do.[79] The COVID-19 crisis has 'exacerbated the vulnerability of the least protected in society' by bringing to light entrenched economic and social inequalities and inadequate social welfare and health systems around the world.[80] In particular, the UN has emphasised that '[w]omen and men, children, youth and older persons, refugees and migrants, the poor, people with disabilities, persons in detention, minorities,

[79] United Nations, 'COVID-19 and Human Rights: We are all in this together' (April 2020), p 10 <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf>.

[80] United Nations, 'COVID-19 and Human Rights: We are all in this together' (April 2020), p 2 <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf>.

LGBTI people, among others' are uniquely impacted by the crisis.[81] It has urged states to 'ensure everyone is protected and included in response to this crisis'.[82]

To their full credit, governments have recognised this in Australia too. In response to the vulnerability of particular groups to the impact of COVID-19, many targeted measures have been introduced. There has been a moratorium on evictions. Measures to support homeless persons (including rough sleepers) and a number of rental assistance measures have been introduced. Action has been taken to combat domestic violence. The Whole-of-Government Submission to this Committee contains some detail in relation to the measures taken by Australian government to assist and protect vulnerable groups.

However, a feature of the response of Australian governments has been that few mechanisms have been established for enabling and ensuring community participation in policy formulation and implementation in relation to COVID-19 prevention and control measures. Commonwealth, state and territory governments have generally proceeded by way of direct action. This has demonstrated necessary leadership in a public health emergency, for which the governments deserve full credit. Australia's success has been internationally recognised. But few opportunities have been created for the participation by the people in developing policy and influencing decisions about COVID-19 responses, even though the responses have affected their lives in fundamental ways. This is regrettable.

There have been exceptions to this approach of limiting community participation in policy formulation and decision-making. For example, we understand that the Management Plan for Aboriginal and Torres Strait Islander Populations has involved input from representatives of those peoples. There is a Women's Advisory Committee on COVID-19 and an Advisory Committee for the COVID-19 response for People with Disability. But no Australian government has established a consultative mechanism by which all people in society can contribute to policy formulation and decision-making about measures that affect their lives in fundamental ways. Parliamentary democracy is of course the most important mechanism for ensuring governmental accountability for such policy and decisions. Fast action has been

[81] United Nations, 'COVID-19 and Human Rights: We are all in this together' (April 2020), pp 2-3 <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf>.

[82] United Nations, 'COVID-19 and Human Rights: We are all in this together' (April 2020), p 3 <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf>.

necessary, which limits the practical scope for participation. But it does not eliminate it. It is submitted that, by reason of the unprecedented interference in everyday life that the COVID-19 prevention and control measures have involved, steps should have been taken to enable a measure of community participation in at least some COVID-19 policy-formulation and decision-making.

The need for a measure of democratic participation is made all the more pressing because Australia has relatively weak pre-legislative and post-legislative human rights scrutiny. There is no national or constitutional Bill of Rights. Human Rights Acts at state and territory levels exist only in the ACT, Victoria and Queensland.

It is true that, at the national level, there is a Parliamentary Joint Committee on Human Rights. It has produced a series of important human rights scrutiny reports which have provided a welcome measure of meaningful human rights oversight of COVID-19 legislation (although Parliament has the last say).[83] There is also a Senate Standing Committee for the Scrutiny of Delegated Legislation. However, many COVID-19 instruments are exempt from parliamentary oversight and thereby the Committee's scrutiny. In response to the broad scope of delegated legislation that is exempt from parliamentary oversight, the Committee is conducting an inquiry into the exemption of delegated legislation from parliamentary oversight.

At the state/territory level, the COVID-19 measures that have impacted upon everyday life have typically been introduced through directives and orders that do not require a human rights assessment (through a Statements of Compatibility or Human Rights Certificate) to be produced and published. At best, they are subjected to limited (and not publicly available) human rights scrutiny. There is no system in the Australian states and territories for legal oversight of the human rights impact of COVID-19 measures that is comprehensive, transparent, participatory and intensive. The consequence is that unprecedented interference in the lives of people in society has occurred without such oversight. This too is regrettable.

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[83] Parliamentary Joint Committee on Human Rights, 'Human rights scrutiny report of COVID-19 legislation: Report 5 of 2020' (29 April 2020) < https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2020/Report_5/Report_5_of_2020.pdf?la=en&hash=A2BBA03FC42E9E39DC7298A19991765520825B1E >; Parliamentary Joint Committee on Human Rights, 'Human rights scrutiny report: Report 6 of 2020' (20 May 2020), chapter 1 < https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/reports/2020/Report_6/report_6_of_2020.pdf?la=en&hash=7ED618CE4ED6719FD6FDCD952B7F0FF745525AF4>.

It is particularly concerning that, despite the vulnerability of many in the community and the deep social impact of COVID-19 prevention and control measures, the Australian government has not established a co-ordinating body for social policy formulation and implementation in the recovery phase. The National COVID-19 Coordination Commission is concerned with jobs, business and the economy. Due to the impact of COVID-19 on the economy, this is an important and welcomed development. As COVID-19 has also impacted upon people, families and vulnerable groups, it is important and would be welcomed if the government's recovery co-ordination were to equally cover the impact of COVID-19 upon society.

It is well-known and accepted that, in times of economic and social crisis such as these, existing inequality, disadvantage and discrimination are usually exacerbated. Poverty and inequality in Australia will likely increase as a result of COVID-19, *unless* governments take action to prevent this from happening. Many members of the Australian community have benefitted from government assistance and response measures. Substantial numbers have not. Social cohesion, respect for human dignity and basic fairness demand that those most exposed to poverty, inequality and disadvantage should not be left to shoulder a heavier burden in the recovery phase. Good governance principles demand that a fair balance is set at the earliest stage. Increased opportunities for community participation in recovery policy-formulation and decision-making, bringing social policy and action into the frame of the co-ordination mechanism and ensuring better human rights scrutiny of ongoing prevention and control measures would enhance that kind of governance.

To conclude, COVID-19 will continue to deepen structural and systemic inequalities until governments leave no one behind in their response to, and recovery from, the pandemic. While the Australian governments have taken many commendable measures in support of vulnerable groups, good governance principles also require that measures taken enable and ensure community participation. Regrettably, there are only a few examples of such participation. The need for democratic participation is all the more pressing given the lack of a national or constitutional Bill of Rights in Australia and the relatively weak human rights scrutiny mechanisms at the parliamentary level. Further, a stronger emphasis is needed on social policy and action, alongside economic recovery, in order to enhance good governance and counter the discriminatory impacts of COVID-19, particularly as they affect the most vulnerable.

Part 7: Overall Conclusions and Key Recommendations

We began our submission by setting out why human rights matter in the context of COVID-19. On the one hand, human rights impose obligations upon governments to respect, protect and fulfil the rights to life and health of every person in the community without discrimination. On the other hand, meeting these obligations must not unreasonably or unjustifiably limit other human rights, such as the rights to privacy and peaceful assembly. This equation is one which international human rights law allows for given that most human rights are not absolute. Further, good governance may suggest, or even require, that some human rights are limited for important public purposes, generally and in the COVID-19 situation. However, any limitations must be strictly justified, subject to the limitations principles we discussed in Part 2: legality, necessity, legitimate purpose, proportionality and non-discrimination.

While international human rights law affords governments some margin to determine how to best balance the equation, striking the right balance is undoubtedly an incredibly difficult task, especially in unprecedented times such as these. The Australian governments should be commended for many measures taken to protect vulnerable groups from discriminatory impacts of COVID-19. For example, the moratorium on evictions.

However, in Parts 3 to 5, we expressed concerns about the governments' response in respect of the right to privacy (in the context of the COVIDSafe App), the rights of temporary migrants and the right to peaceful assembly. For the reasons set out in those Parts, we are concerned about the balance struck in these areas. For example, the right to protest should be protected provided it complies with social distancing restrictions. Reflecting back to Parts 1 and 2 of our submission, the importance of human rights, *in and of themselves*, require governments to ensure the enjoyment of human rights to the maximum extent possible in the situation.

Finally, we noted in Part 6 of our submission that the discriminatory impacts of COVID-19 will continue until governments leave no one behind in their response to, and recovery from, the pandemic. The exclusion of temporary migrants in the COVID-19 response as noted in Part 4 of this submission is a great concern. Regrettably, we also noted (with some exceptions) a lack of measures which enable and ensure community participation in policy formulation and implementation of measures responding to COVID-19. We also noted a focus on economic

recovery, which is to be welcomed, but ought to be accompanied by social policy and action. The need for participation and engagement by members of the community in the COVID-19 response is particularly important given the relatively weak pre-legislative and post-legislative human rights scrutiny measures in Australia. Notably, this is due to the lack of a national or constitutional Bill of Rights and the limited scope of parliamentary oversight mechanisms.

While some restrictions are being eased in many parts of Australia, certain restrictions (such as social distancing) are likely to remain in operation for many months ahead. Restrictions may perhaps be lifted and then resumed once more. Our human rights analysis and key recommendations below therefore continue to be of significant relevance, especially in relation to vulnerable groups.

The Castan Centre strongly recommends that the Australian governments:

1. ***Leave no one behind***: All groups in society must be included in COVID-19 response measures, temporary migrants are no exception.

2. ***Amend the design and legislation underpinning the COVIDSafe App***: The design and legislation underpinning the COVIDSafe App should be amended as discussed in detail in Part 3 of this submission.

3. ***Adopt a tort for serious invasion of privacy***: A tort for serious invasion for privacy should be adopted to afford better protection against intrusion and misuse of private information and to enhance government accountability in this area.

4. ***Allow for protest that complies with social distancing***: Laws can and should be calibrated to allow for protest as a reason to leave home if participants observe any applicable social distancing laws.

5. ***Ensure community participation***: Measures taken to respond to COVID-19 must include mechanisms that ensure and enable community participation in policy development and implementation.

6. ***Include focus on social policy and action***: Social policy and action must accompany economic recovery measures in order to recognise the impact that COVID-19 has on people, particularly vulnerable groups.

7. ***Strengthen human rights scrutiny and parliamentary oversight***: Human rights scrutiny and parliamentary oversight mechanisms must be strengthened at the federal, state and territory levels, particularly in respect of delegated legislation, such as the directions and orders made in response to COVID-19.

8. ***Adopt a national or constitutional Bill of Rights***: The need for comprehensive protection of human rights at a national or constitutional level is all the more pressing in light of the COVID-19 crisis, the impacts of which will continue to be felt, particularly by the most vulnerable.