

“Do not enter!”

Balancing and protecting human rights in a health crisis

9 December 2021

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

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Introduction

The COVID-19 pandemic has focused public attention on regulatory, legislative and policy responses to dealing with a serious and life-threatening public health challenge. In many respects, our expectations and assumptions of individual freedoms and human rights have been subject to challenge with the realisation that in a serious health crisis, individual human rights and freedoms to which Australia has international obligations, were in tension and conflict with each other. Where human rights are in conflict with each other, there is a need to embark on a process of balancing rights. This may entail imposing some limitations on the extent to which rights can be fully enjoyed, the idea of which has been a confronting realisation for some people.

There are also legitimate questions as to whether the Australian Government reached the appropriate balance in some circumstances. In particular, some of the restrictions concerning border closures and freedom of movement have caused particular distress and harm to families who have been separated, Australian citizens and residents unable to return and students whose educational opportunities have been significantly limited. This policy paper will review those restrictions in the context of Australia's international human rights obligations and consider whether the restrictions have met the critical requirement of being reasonable and proportionate in the given circumstances.

One salient lesson from the last two years is that the COVID-19 pandemic presented constantly changing circumstances and an ever-shifting policy landscape. The manifestation of new and highly contagious variants, the rapid development, supply and roll-out of vaccines, the varying availability of fit-for-purpose quarantine facilities, the capacity of the hospital and allied health system to manage surges in infections, and the response capacity of the 'test, trace, isolate, and quarantine' (TTIQ) system have all been subject to variation in what has been proved to be a changing and highly volatile environment. This means that what is considered reasonable and proportionate will depend on prevailing conditions and various factors that exist at a particular point in time. These conditions and factors are subject to variation.

As Australia progresses through its stages of re-opening borders and easing restrictions, it is appropriate to reflect on how the Australian Government managed to balance these competing rights and to consider whether additional legislative human rights protections would ensure that any restrictions placed on human rights as a result of this balancing process are only those which are proportionate, reasonable and demonstrably justified in a free and democratic society.

The Australian Lawyers Alliance (ALA) acknowledges that the issues concerning balancing competing human rights have played out in several ways since the start of the COVID-19 pandemic. This has included various levels of restrictions on domestic movement, state/territory border closures,

requirements for using various technologies to enter premises (i.e. QR code check-ins), requirements concerning the wearing of masks in various locations and situations, and mandatory vaccination for certain professions and workplaces. The issues concerning the process of balancing competing human rights are also relevant to these restrictions. This policy paper does not provide an encompassing analysis of the way in which human rights limitations may or may not be reasonable and proportionate in each of these situations. This paper concentrates specifically on the restrictions that were put in place regarding international borders and international travel. However, the need for a legislative framework that enables an appropriate balancing of human rights that are in tension or conflict is necessary for all restrictions which were introduced to manage the health crisis.

It has become apparent that Australia lacks a legislative framework that enables an appropriate balancing of human rights where they are in conflict or tension with each other and/or with other important public interests such as health. This policy paper contemplates what principles should underly the process of considering what is proportionate and reasonable in any given situation, to ensure that human rights are not breached. In particular, it is submitted that a Federal legislative human rights charter would provide additional protection to human rights in Australia, enhance our democracy by building a stronger human rights culture in Australia and set out an appropriate formula by which human rights can be balanced against each other and other competing public interests.

Closing borders, restricting travel and Australia's International human rights obligations

Determinations regarding border restrictions and limitations on international travel should always respect international human rights norms, including the right to enter and exit one's country and the right to maximum physical health. How those human rights interact with each other must be a critical consideration for policies aimed at responding to pandemics, such as border closures.

The extent to which Australia may close its borders to prevent exit and entry is subject to Australia's international human rights obligations under the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

Freedom of movement - Article 12, *International Covenant on Civil and Political Rights*

Under Article 12 of the *ICCPR*:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Under Article 12.3 the right to leave one's own country can be subject to restrictions provided by law that are necessary to protect public health. The UN Human Rights Committee ('UNHRC') has stated that the laws authorising the application of restrictions should use precise criteria. The UNHRC has also stated that such restrictive measures must conform to the principle of proportionality – they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.²

² Office of the High Commissioner for Human Rights. 1999. CCPR General Comment No. 27: Article 12 (Freedom of Movement). Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999. *CCPR/C/21/Rev.1/Add.9, General Comment No. 27*, paragraphs 13-14.

The UNHRC noted that in relation to Article 12.4, the right of a person to enter her or his own country recognises the special relationship of a person to that country. The fact that Article 12.4 is not subject to the limitations allowable under 12.3 recognises the importance and significance of this right and that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. The UNHRC notes that in no case may a person be arbitrarily deprived of the right to enter her or his own country, and that this applies to all State action, legislative, administrative and judicial. The UNHRC states that the right guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the particular circumstances.³

The right to family life - Article 17, *International Covenant on Civil and Political Rights*

Given that 30 per cent of Australia's population were born overseas, many of whom still have family overseas, the consequences of travel restrictions regarding the separation of families also have significant human rights implications. Article 17 of the *ICCPR* states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 recognises the right to have a family and family unity. As noted by the Human Rights Law Centre (HRLC), the Australian Government has agreed to uphold this right, recognising the importance of families to a healthy and thriving society. Border restrictions which have resulted in lengthy and arbitrary separation of families may amount to a violation of this right, particularly where the length of separation is substantial and ongoing, as well as where the need for such restrictions diminishes as vaccination rates increase and access to appropriate quarantine facilities is facilitated.⁴

³ Ibid, paragraph 21.

⁴ Human Rights Law Centre. 2021. *Families left behind – Submission to the ANAO's audit of international travel restrictions during COVID-19*. 30 June 2021. Available at <<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/60de47b701f11b4f47857ac6/1625180090518/Human+Rights+Law+Centre+submisison+to+ANAO+audit+-+30.06.2021.pdf>>.

The right to enjoy highest attainable standard of physical and mental health - Article 12, *International Covenant on Economic, Social and Cultural Rights*

Australia's obligations to comply with the rights in Articles 12 and 17 of the *ICCPR* must also be balanced against the obligations to comply with Article 12 of the *ICESCR*. The latter states:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

For the present purposes it is important to note that the Australian Government recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and has an obligation to take steps necessary for the prevention, treatment and control of epidemic diseases. Such steps may involve implementing certain measures that may restrict the rights under Articles 12 and 17 of the *ICCPR*.

The right to life - Article 6, *International Covenant on Civil and Political Rights*

Article 6.1 of the *ICCPR* states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

In 2018 the UN Human Rights Committee ('UNHRC') issued a General Comment on Article 6 describing the right as 'the supreme right from which no derogation is permitted.' It stated that the right is most precious...

for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights.⁵

The General Comment further states that the right concerns the entitlement of individuals to be free from acts and omissions that may be expected to cause their premature death.⁶ Moreover, the General Comment makes specific mention of the duty on States to protect life implies that States' parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity, and that these general conditions may include the prevalence of life threatening diseases.⁷ These measures include ensuring access without delay by individuals to essential goods and services such as health care and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services and emergency response operations.⁸

The General Comment states that States' parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters, which may adversely affect enjoyment of the right to life.⁹

In terms of responding to a serious health crisis such as a pandemic, Article 6 clearly places obligations on State parties to adopt appropriate measures to address the situation that poses a threat to life or a threat to enjoyment of the right to life with dignity.

⁵ United Nations Human Rights Committee (2018). *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*. CCPR/C/GC/36. 30 October 2018. Paragraph 2.

⁶ Ibid, paragraph 3.

⁷ Ibid, paragraph 26.

⁸ Ibid.

⁹ Ibid.

The process of balancing rights where they may conflict

The above discussion of the rights under the *ICCPR* and the *ICESCR* illustrates how human rights to which Australia has a duty to protect and fulfil, can at times be in conflict with each other. It is therefore important to consider how these rights should be balanced where there may be some conflict or inconsistency in giving them effect. This process requires ensuring that where giving effect to one right may involve imposing restrictions or limitations on another right, that those restrictions are proportionate, reasonable and demonstrably justified in a free and democratic society. This means consideration of the following:

- whether the objective that the rights-limiting law is trying to fulfil is of sufficient importance to warrant overriding the protected right or freedom – that is, the objective must relate to concerns which are pressing and substantial;
- whether the means adopted to limit the right are designed to meet the objective in question;
- whether the means adopted impose the least possible restriction on the rights – that is, what other options were available that did not involve a restriction on the rights; and
- whether there is proportionality between the effects of the measures and the objective which the rights-limiting law is seeking to achieve.¹⁰

Where two or more rights may be in conflict or there may be some difficulty in reconciling two or more rights, the reconciliation process requires consideration of the nature of the rights for which there may be some difficulty in reconciling. In this context consideration must be given to appropriately balancing the rights under Articles 12 and 17 of the *ICCPR*, with the right to life under Article 6 of the *ICCPR* and the right to enjoy maximum physical health under Article 12 of the *ICESCR*.

Moreover, any limitation on the rights under Articles 12 and 17 of the *ICCPR* in order to implement measures to prevent, treat and control an epidemic so that individuals may enjoy the right to life and the right to maximum physical health, must be the least possible restriction of the rights to freedom of movement, and exhibit proportionality between the effects of the measures and the objective which the law limiting the rights to freedom of movement is seeking to achieve.

¹⁰ *R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ.

Australia's border restrictions – did we get the right balance?

As Australia's vaccination rates increase to an overwhelming majority of the population, and domestic and border travel restrictions are progressively eased, it is important to reflect with the benefit of hindsight whether the restrictions imposed struck the right balance in terms of human rights which appeared to be in conflict, as indicated above. Such a process facilitates future planning in the face of similar health crises or pandemics, or in the event that further strains of COVID-19 appear and require urgent measures to safeguard the health and welfare of people domiciled in Australia.

As a general principle, the Government should ensure that any exercise of its mandatory or coercive powers under the *Biosecurity Act* be reasonable and proportionate and comply with Australia's international human rights obligations under the *ICCPR* and *ICESCR*. Moreover, any limitations of the rights in those human rights conventions should not be implemented if there is a less restrictive means reasonably available to achieve the purpose that the limitations seek to achieve.

The assessment of what restrictions, limitations or conditions of international travel will be proportionate and reasonable will be dependent on prevailing conditions and various factors that exist at a particular point in time. These conditions and factors have been subject to variation in what has been proved to be a constantly changing and highly volatile environment. Restrictions and limitations that may be considered disproportionate and unreasonable at one point in time, may subsequently be appropriate in another time or context. Some of the factors that may influence this consideration were identified in the Doherty Institute modelling, as relevant for the Australian Government to consider when formally transitioning from the earlier phases to the later phases of Australia's National COVID-19 Response:¹¹

- Likely emergence of new variants within Australia or internationally exhibiting one or more of heightened transmissibility, severity or immune escape;
- Changing global epidemiology of COVID-19 affecting the risk profile of travellers from different countries and regions;
- Waning of vaccine-derived and natural immunity over time;

¹¹ The Peter Doherty Institute for Infection and Immunity, *Doherty Modelling Report for National Cabinet* (Report, 30 July 2021) <<https://www.doherty.edu.au/news-events/news/doherty-institute-modelling-report-for-national-cabinet>>, 4.

- Development of new vaccine products (for example, multivalent or specific VOC vaccines) and schedules including administration of booster doses to high risk subgroups or whole population;
- Population fatigue and the potential for declining compliance with restrictions;
- Potential for future development of readily bioavailable therapeutics that might be used for either or all of transmission reduction, prevention of disease progression and life-saving therapies.¹²

These and any other relevant factors are not static. Accordingly, any measures and restrictions on movement and travel will require constant and ongoing review to consider whether they are appropriate and proportionate to the existing prevailing context. This may mean particular restrictions or combination of restrictions are considered appropriate and proportionate at a particular time.

Particular situations from the Australian experience which require closer analysis include:

1. The right of return for Australian citizens overseas;
2. The separation of families due to border restrictions;
3. Conditions relating to vaccination requirements and quarantine;
4. Health system capacity.

The right of return for Australian citizens

As noted above, Article 12.4 of the *ICCPR* states that no one shall be arbitrarily deprived of the right to enter her or his own country. This particular right recognises the special relationship of a person to her or his country and there are very few circumstances in which deprivation of the right to enter one's own country could be reasonable.

This particular question was drawn into sharp focus in late April 2021 when the Australian Prime Minister announced that all people, including permanent residents and Australian *citizens* would be banned from attempting to return to Australia, to escape the COVID-19 wave hitting India. The Australian Government banned all flights from India and issued a direction which threatened people with up to five years jail and \$66,000 fines if they managed to fly to Australia after being in India in the previous 14 days. The ban was implemented by the Health Minister through the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—

¹² Ibid.

High Risk Country Travel Pause) Determination 2021 ('the Determination') using powers from broad-ranging, emergency provisions in the *Biosecurity Act 2015* (Cth) ('the *Biosecurity Act*').

The India travel ban was subsequently challenged in the Federal Court. The Federal Court held that the ban was proportionate in accordance with the *Biosecurity Act*, and noted that the ban was then imposed for 14 days only.¹³ Some of the underlying medical advice for the ban was produced in the proceedings.¹⁴ It was noted that there were limited exemptions to the ban, such as those 'travelling on official government business on an Australian official or diplomatic passport',¹⁵ despite the fact that there is no reason to suppose such persons were less likely to be infectious than any other Australians in India. The proceedings were discontinued after the initial ruling, as the travel ban had expired.

At the time, there was significant concern that the travel ban was in breach of Australia's human rights obligations under the *ICCPR*.¹⁶ The UN Office of the High Commissioner for Human Rights expressed concern that the Determination under the *Biosecurity Act*, and the severe penalties imposed for its breach, would amount to a violation of Australia's obligations under Article 12 of the *ICCPR*. Noting that the UN Human Rights Committee has emphasised the narrow authority to refuse nationals' return, and considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable, the UNHCHR stated that "in assessing the issue of arbitrary deprivation, key factors to be taken into account are its necessity to achieve a legitimate end and its proportionality, including whether it is the least intrusive approach to accomplish its public health objectives".¹⁷

This event highlighted the need to ensure the adoption of the least intrusive and rights-restrictive approach in achieving public health objectives of protecting individuals right to enjoyment of maximum physical and mental health. In particular, the importance of ensuring safe, purpose-built quarantine facilities for returning Australian citizens and residents was illustrated as an essential

¹³ *Newman v Minister for Health and Aged Care* [2021] FCA 517, [61].

¹⁴ *Ibid*, [38] and [55].

¹⁵ Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 Section 7 – <<https://www.legislation.gov.au/Details/F2021L00533>>.

¹⁶ Human Rights Law Centre, *The Morrison Government should help Australians get home from India* (Web Page, 3 May 2021) <<https://www.hrlc.org.au/news/2021/5/3/the-morrison-government-should-help-australians-get-home-from-india>>.

¹⁷ Daniel Hurst, 'UN raises serious human rights concerns over Australia's India travel ban', *The Guardian* (online at 5 May 2021) <<https://www.theguardian.com/australia-news/2021/may/05/un-raises-serious-human-rights-concerns-over-australia-india-travel-ban>>.

measure to ensure an appropriate balance of the right of Australians to return to their country and the right of all people in Australia to enjoy maximum physical and mental health.

The separation of families

As stated above, the border restrictions have resulted in lengthy and arguably arbitrary separation of families. This may amount to a violation of article 17 of the *ICCPR*, which recognises the right to have a family and family unity. Given the medical evidence indicating illness and harm to adults and children arising from prolonged separation from family is harmful, particularly in terms of mental health,¹⁸ such border restrictions may also be in violation of Article 12 of the *ICESCR*, referred to above.

The ALA agrees with the Human Rights Law Centre (HRLC) that policies that separate people from relatives and loved ones should never be the accepted norm, particularly when such policies are ongoing with no projected end, and that urgent reforms are needed to prioritise the reunification of families.¹⁹

Of particular concern are the limitations on the automatic exemption from inward travel restrictions to an immediate family member of an Australian citizen or permanent resident,²⁰ defined as a spouse, de facto partner, dependent child or legal guardian.²¹ As noted by the HRLC, this narrow interpretation of family excludes many relationships such as parents, grandparents, non-dependent children, siblings, aunts and uncles, people who are engaged to be married, as well as other extended or informal family members.²²

The ALA strongly recommends that automatic exemptions from the inwards travel restrictions should be available to all members of the family unit of Australian citizens, permanent residents and

¹⁸ Professor Louise Newman AM and Dr Sarah Mares, *Mental Health and Wellbeing Implications of Family Separation for Children and Adults Seeking Asylum*, available at <<https://www.hrlc.org.au/family-separationhealth-impacts>>.

¹⁹ See n 4, p6.

²⁰ Australian Government Department of Home Affairs, *Inwards Travel Restrictions Operation Directive* (v5, 20 March 2020), available at <<https://www.homeaffairs.gov.au/covid-19/Documents/inward-travel-restrictions-operation-directive.pdf>>.

²¹ Australian Government Department of Home Affairs, *Immediate family of Australian citizens or permanent residents or New Zealand citizens usually resident in Australia* (Web Page, 22 November 2021) <<https://covid19.homeaffairs.gov.au/immediate-family-australian-citizens-or-permanent-residents-or-new-zealand-citizens-usually-resident-australia>>.

²² See n 4, p6.

temporary visa holders, including – at a minimum – parents, grandparents, non-dependent children, siblings, and those intending to marry.

Vaccination and quarantine

It is apparent that for the foreseeable future, In Australia, as in other countries, vaccination status will be a key consideration in allowing travel movements. The International Air Transport Association (IATA) adopted this position in the written material it developed in respect of its “Travel Pass” app solution for facilitating proof of identity and vaccination status/COVID-19 test results:

IATA Travel Pass will help give governments the confidence to reopen borders without quarantine. To reopen borders without quarantine, governments need to be confident that they are mitigating the risk of importing COVID-19. Testing, or proof of vaccine, is the solution. IATA Travel Pass will manage and verify the secure flow of testing or vaccination information between governments, airlines, laboratories and travellers which will guarantee the traveller’s COVID-19 status.²³

The ALA submits that it is important that the requirement for vaccination as a condition for international travel be continually reviewed, be assessed as proportionate and reasonable to the circumstances that present at that time, and that there is no less restrictive means reasonably available to achieve the purpose such a requirement seeks to achieve. Any such requirement should include appropriate exemptions for those people who for certified medical reasons are unable to be vaccinated. For people in this category, other appropriate risk-mitigation measures will be needed, such as a period of minimum quarantine.

In relation to quarantine requirements, the ALA submits that there is an urgent need for Australia to expand Australia’s quarantine capacity, as recommended by the 2020 *National Review of Hotel Quarantine*. That review recommended bolstering Australia’s quarantine capacity for emergencies.²⁴ Australia needs dedicated national purpose-built quarantine facilities in each State and Territory, rather than interim solutions like hotel quarantine, to enable trade and travel to continue in the event of future pandemics – other risks to public health and consequent public

²³ International Air Transport Association, *IATA Travel Pass Q&A* (Web Page, 2021) page 2 , <<https://www.iata.org/contentassets/2b02a4f452384b1fbae0a4c40e8a5d0c/travel-pass-faqs.pdf>>.

²⁴ “The Australian Government should consider the establishment a national facility for quarantine to be used for emergency situations, emergency evacuations or urgent scalability.” See <<https://www.health.gov.au/sites/default/files/documents/2020/10/national-review-of-hotel-quarantine.pdf>>

health emergencies have already been noted and better identification or prediction of their ability to affect us needs to happen.²⁵

The ALA also submits that the Australian Government needs to give careful consideration to its approach to quarantine in the coming months and years. The ALA agrees with the HRLC that the approach to quarantine should place human rights at the centre of its design. In practice, this would mean:

- adopting the least restrictive form of detention which will be effective to protect life and health;
- detaining people for the shortest period necessary to protect life and health;
- protecting all other human rights that do not need to be restricted;
- allowing flexibility in detention arrangements for certain people or groups (examples include children, older people, people with mental illness or disabilities, or people who require specialist medical treatment);
- adopting a tailored approach to respond to different levels of risk;
- regularly reviewing in order to adapt the program to respond to the best available medical evidence on transmission risks and the current circumstances around community transmission in both the departure country and the Australian jurisdiction where the person arrives.²⁶

The ALA also supports the HRLC's call for Australian governments to adopt a risk-based approach to quarantine that establishes home quarantine programs in all jurisdictions for people arriving who have suitable home accommodation in which to quarantine. In addition, quarantine responses should be tailored to particular circumstances such as the level of transmission in the person's country of departure, whether the period of quarantine can be reduced with ongoing testing, and the emergence of new variants of the COVID-19 virus.²⁷

²⁵ Maureen Miller, 'The next pandemic is already happening – targeted disease surveillance can help prevent it', *The Conversation* (online, 1 June 2021) <<https://theconversation.com/the-next-pandemic-is-already-happening-targeted-disease-surveillance-can-help-prevent-it-160429>>.

²⁶ Human Rights Law Centre. 2021. *Submission to the Second National Review of Quarantine Arrangements*. p.4. <<https://www.hrlc.org.au/submissions/2021/9/21/australian-governments-should-adopt-a-risk-based-approach-to-quarantine-that-moves-beyond-mandatory-hotel-quarantine-detention>>.

²⁷ Ibid p2.

Health system capacity

One of the biggest concerns throughout 2021 was the capacity of the Australian public and allied health systems to deal with the demand and pressures arising from a surge in COVID-19 infections. According to a 2020 study, at that time there were 2,378 available ICU beds in Australia, with an identified ability to surge to almost 7,000 ICU beds.²⁸ There remains considerable doubt as to whether there is sufficient staff to operate these beds during a surge in ICU admissions, particularly in regional and remote areas.²⁹

The ALA submits that it is essential that the Australian Government substantially increase funding to public health systems across all States and Territories to expand capacity for hospitals, ICUs and allied health services.

In addition, the need to ensure capacity to maintain test-trace-isolate-quarantine (TTIQ) processes supported by public health and social measures (PHSMs) (e.g. QR check-in codes, masks in certain environments, appropriate social distancing measures, etc) will be important to manage any outbreaks, achieve suppression and reduce the need for further lockdowns or border restrictions.³⁰

²⁸ Edward Litton, Tamara Bucci, Shaila Chavan, Yvonne Y Ho, Anthony Holley, Gretta Howard, Sue Huckson, Philomena Kwong, Johnny Millar, Nhi Nguyen, Paul Secombe, Marc Ziegenfuss and David Pilcher. 2020. Surge capacity of Australian intensive care units associated with COVID-19 admissions. *Medical Journal of Australia*. Published online 30 March 2020 at <<https://www.mja.com.au/journal/2020/surge-capacity-australian-intensive-care-units-associated-covid-19-admissions>>.

²⁹ Rick Morton, 'States unable to staff ventilator capacity' *The Saturday Paper* (online 28 August 2021) <<https://www.thesaturdaypaper.com.au/news/politics/2021/08/28/exclusive-states-unable-staff-ventilator-capacity/163007280012361#hrd>>.

³⁰ Doherty Modelling – Final Report to National Cabinet, 5 November 2021, available at: <https://www.doherty.edu.au/uploads/content_doc/Synthesis_DohertyModelling_FinalReport__NatCab05Nov.pdf>

A way forward – a Federal Human Rights Charter

The ALA submits that the Australian legal system provides an inadequate level of protection for human rights. While the Australian legal system provides some protections for particular individual rights and a limited range of remedies where those rights are infringed, the ALA submits that these protections are piecemeal and located in a range of different pieces of legislation, regulations, the Constitution and the common law. As result, there is a low level of rights awareness in the Australian community, making it difficult to ensure strong protection of human rights overall in Australia. In addition, there are significant gaps in human rights protections within the legal framework which make it difficult to give effect to Australia's international human rights obligations or to provide an appropriate balancing of human rights where they may be in conflict or apparent tension.

The ALA submits that these defects would be largely addressed through the development of a federal legislative human rights charter. Such a charter would provide additional protection to human rights in Australia, enhance our democracy by building a stronger human rights culture in Australia and give expression to important Australian values such as equality, diversity, respect and inclusion.

Australia is the only western democracy without a national Human Rights Act, Bill of Rights or Charter of Rights. In 2009, the largest ever nationwide consultation on human rights protections was conducted, with almost 9 out of 10 Australians consulted supporting a Charter of Rights. An independent panel of experts headed by Father Frank Brennan recommended that Australia adopt a Charter of Human Rights.³¹

The ALA submits that the model of human rights protection that best suits Australia's system of parliamentary democracy, maintaining the sovereignty of Parliament, is a federal legislative human rights charter that follows a dialogue model of human rights protection (similar to what exists in the UK, New Zealand, Victoria, the ACT and Queensland).

A federal human rights charter would give domestic effect to Australia's international human rights obligations. In addition, a legislative charter of human rights can provide a formula by which human

³¹ National Human Rights Consultation (2009): <http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_the_Consultation.html> (last accessed 15 June 2019); National Human Rights Consultation Report (2009), Recommendation 18: <[http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)_NHRC+Report+\(Recommendations\).pdf/\\$file/NHRC+Report+\(Recommendations\).pdf](http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)_NHRC+Report+(Recommendations).pdf/$file/NHRC+Report+(Recommendations).pdf)> (last accessed 15 June 2019).

rights are balanced against each other and other competing public interests. This is achieved by a provision that sets out the circumstances in which a human right can be limited.

The legislative human rights instruments in New Zealand, Victoria, the ACT and Queensland all contain a provision which provides that human rights can be subject only to reasonable limits that can be justified in a free and democratic society. This is similar to the limitations provision contained in the Canadian *Charter of Rights and Freedoms*, which is entrenched in the Canadian Constitution. According to the Canadian Supreme Court, for a limitation on a right to be reasonable and demonstrably justified, two conditions must be satisfied:

- The objective of the law that seeks to limit human rights must be of sufficient importance to warrant overriding a protected right or freedom. The objective must relate to concerns which are pressing and substantial; and
- The means chosen to achieve that objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are designed to meet the objective in question, whether they impair rights or freedoms as little as possible and whether there is proportionality between the effects of the measures and the objective which the law that seeks to limit human rights is seeking to achieve.³²

This proportionality test has been enshrined in the ACT *Human Rights Act 2004* (s28), the Victorian *Charter of Human Rights and Responsibilities Act 2006* (s7(2)) and the Queensland *Human Rights Act 2019* (s13). The ALA submits that a similar provision should be included in a federal human rights charter. In this way a federal human rights charter would provide a proportionality test that will enable a considered approach to balancing the rights under Articles 12 and 17 of the *ICCPR*, with the right to life under Article 6 of the *ICCPR* and the right to enjoy maximum physical health under Article 12 of the *ICESCR*.

³² *R v Oakes* [1986] 1 SCR 103, 137-8, per Dickson CJ.

Conclusion

With an overwhelming majority of eligible Australians availing themselves of one of the COVID-19 vaccines, we are starting to acquaint ourselves with the new reality of living with COVID, with the hope that the restrictions and limitations associated with the pandemic period will not be reimplemented as it evolves into an endemic. As borders reopen we are uplifted by images of Australians returning home after months of being stranded overseas, families reuniting and loved ones coming back together. However, we are also reminded of the heavy physical and emotional toll that many have borne over the last two years, not just with the illness itself, but the pain associated with separation from family and friends. It is therefore necessary to reflect on the processes employed in imposing the measures and restrictions and consider whether the Australian Government reached the appropriate balance in some circumstances.

In relation to the issue of border restrictions and limitations on travel, several human rights issues have arisen, including: freedom of movement, the right to family life, the right to enjoy the highest attainable standard of physical and mental health and the right to life. What has been apparent are the tensions and potential conflicts between these rights in a pandemic environment.

As Australia starts to progress through its stages of re-opening borders and easing restrictions it is appropriate to reflect on how the Australian Government managed to balance these competing rights, what principles should underly the process of considering what are proportionate and reasonable limitations on human rights in any given situation, and whether additional legislative human rights protections would ensure that any restrictions placed on human rights are only those which are proportionate, reasonable and demonstrably justified in a free and democratic society.

The ALA submits that a genuinely balanced and proportionate Australian Government response will be one that appropriately and proportionately balances the rights of all Australians to enjoy the highest attainable standard of physical and mental health with their rights to freedom of movement; and one that fosters a reasonable and proportionate exercise of the Australian Government's coercive powers, including via the *Biosecurity Act*.

The ALA submits that a federal legislative human rights charter would give domestic effect to Australia's international human rights obligations and provide a formula by which human rights can be balanced against each other and other competing public interests. Such a charter would provide additional protection to human rights and enhance our democracy by building a stronger human rights culture in Australia and give expression to important Australian values such as equality, diversity, respect and inclusion.