

Human Rights during a Global Pandemic

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Introduction

COVID-19 presents huge challenges to many aspects of Australian society, including in relation to the protection and promotion of human rights. The accountability of the Australian and New South Wales executive governments has been undermined through the suspensions of both the Commonwealth and NSW Parliaments for lengthy periods. A multitude of human rights have been adversely affected such as freedom of movement, the right to work and the right to education. Difficult questions have arisen in balancing certain rights against others, as the recent Black Lives Matter protests have demonstrated.

While the global pandemic calls for the imposition of extraordinary measures, that does not grant a leave-pass from respect for fundamental legal principles including human rights. The NSW Bar Association's Human Rights Committee (HRC) recognises the need for continuing vigilance to protect the rule of law, Parliamentary supremacy and a culture of human rights. There is a particular need to carefully scrutinise the effect of laws and policies on the vulnerable and those who may not have full agency to protect their own rights. In the wake of the numerous executive government interventions to control the spread of the virus, this article comments upon the suspension of the Federal and State parliaments and commends the proportionality test used in international human rights law as the appropriate measure for striking the balance between measures to contain the pandemic and guaranteeing the rights and freedoms of individuals.

Executive imposition of emergency measures

In NSW, the government made public health orders requiring the vast majority of people to stay at home and for the closure to the public of a large number of businesses, including pubs, bars and restaurants, places where the public gather, public facilities and places of entertainment.² These orders have had adverse impacts on the right to liberty, freedom of assembly and freedom of association.



At the federal level, numerous regulations have been made under the human biosecurity provisions of the *Biosecurity Act 2015* (Cth) (Biosecurity Act). The enabling provisions are very broad. Section 475 enables the Governor-General to declare that a "human biosecurity emergency exists". That declaration was made on 18 March 2020 and it is in force for the full period allowable under the Act, which is three months (s 475(4)(b)).³ The Act in s.476 provides a power to extend the period.

The regulations made subsequent to the 18 March 2020 declaration were made by the Minister for Health under s.477 of the Act, which enables the Minister to "determine emergency requirements during [a] human biosecurity emergency period". The regulations imposed under s.477 of the Biosecurity Act are what are sometimes called "Henry VIII" measures in that they prevail over other existing laws and impose criminal sanctions on those who do not comply. They are not subject to review by the Senate's scrutiny of delegated legislation committee.

Suspension of Parliament

The measures described above were taken by the executive rather than the legislative arm of government. This raises another important point. During the early phase of the pandemic in Australia, both the Commonwealth and NSW Parliaments were suspended, initially until 11 August 2020 and 15 September 2020, respectively.⁴

As a result of the suspensions, the primary accountability mechanisms such as sittings of the designated chambers and question time were suspended.

In response to public outcry about these suspensions, on 27 March 2020, the Public Accountability Committee of the NSW Legislative Council established an Inquiry into the NSW Government's Management of the COVID-19 Pandemic. And on 8 April 2020, a Senate Select Committee was established to provide scrutiny and oversight of the government's response to COVID-19.⁵ While the establishment of these measures is welcome, it is not the whole solution to the suspension of parliament.

With the easing of the crisis in Australia, the suspensions have diminished in length. However, the preparedness to suspend the parliaments for such lengthy periods is a matter of considerable concern. The proposed lengthy suspensions of the Commonwealth and NSW Parliaments may be contrasted with the approach in the United Kingdom, New Zealand and Canada where the Parliaments continued to sit.

It may also be recalled that the Australian Parliament kept operating through the Spanish Influenza of 1918-1919, the Great Depression and through both World Wars.⁶ And in contrast to those earlier periods, we now have the benefit of technology which could permit parliaments to sit remotely, as some parliamentary committees have decided to do (for example, the Senate Committee on Delegated Legislation).

Professor Anne Twomey has considered the constitutionality of meeting ‘virtually’ and has concluded that the legislature could lawfully continue to scrutinise the executive and represent the electorate through electronic means.⁷ The Commonwealth Parliament has already passed amendments to Standing Orders to allow reduced members to attend and to meet “in a manner and form not otherwise provided”.⁸

Striking the right balance

In addition to well-known common law rights, such as the right to liberty and the right to a fair trial, human rights law both internationally and domestically provides a well-understood and sophisticated framework for analysis of issues such as those arising in the time of COVID-19. Both the Law Council of Australia (LCA) and the Association have, over many years, successfully relied on the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (amongst other international instruments) as structured and powerful tools to advocate for the protection of human rights.

With very few exceptions (such as the right not to be tortured), no rights are absolute. Limitations on most rights are permissible in order to protect public health and safety. However, limitations are subject to strict criteria: they must be provided for by law and they must be clearly demonstrated by government to be necessary to achieve a legitimate purpose. This means that they must be rationally connected to achieving that, show a reasonable proportionality between the measure and the goal, and be the least restrictive measure necessary.

A proportionality test can be a valuable tool for law makers and others to test the justification of laws that limit rights and other important principles.⁹ Proportionality has been described as “the orienting idea in contemporary human rights law and scholarship”.¹⁰ Proportionality is also an accepted tool of analysis in Australian constitutional law.¹¹ Proportionality is also

the tool adopted by the Parliamentary Joint Committee on Human Rights (PJCHR), established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The PJCHR’s *Guide to Human Rights* states:¹²

A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.

Additionally, the HRC considers that other important protections in a time of public emergency are the protection against the arbitrary exercise of power; adequate supervision and accountability of those exercising power and rights upon affected parties to seek review in the courts of the exercise of powers.

The HRC considers that a human rights based approach to evaluating legal and policy measures imposed during a public health emergency calls for the following questions to be answered:

- a. Is the restriction on human rights embodied in a law that is sufficiently precise and certain so that persons affected know what is expected of them (the ‘quality of law test’)?
- b. Does the law or policy adversely affect human rights?
- c. Is the law or policy proportionate to the ends to be achieved (that is, is the law or policy strictly necessary or does it go too far?). In answering this the following considerations are relevant:
 - i. the nature of the right; and
 - ii. the importance of the purpose of the limitation; and
 - iii. the nature and extent of the limitation; and
 - iv. the relationship between the limitation and its purpose; and
 - v. any less restrictive means reasonably available to achieve the

purpose that the limitation seeks to achieve;

- d. Is the power which the law or policy confers:
 - i. arbitrary or applied on a discriminatory basis;
 - ii. a mandatory or discretionary power, and if the latter, is the discretion controlled or unfettered;
 - iii. subject to scrutiny by the Parliament;
 - iv. exercised transparently;
 - v. subject to review rights.

This human rights based approach to scrutinising measures proposed to be taken in response to the COVID-19 pandemic is a principled and structured guide to protecting human rights in these challenging times. **BN**

ENDNOTES

- 1 The Co-Chairs would like to acknowledge the assistance of numerous committee members who assisted in drafting an earlier version of this article.
- 2 These orders were made pursuant to s.7(1) of the *Public Health Act 2010* (NSW). The primary order concerning the requirement to ‘stay at home’ is included in the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020*.
- 3 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* dated 18 March 2020.
- 4 https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/April/COVID-19_and_parliamentary_sittings
- 5 See S Jenkins, “Senate Select Committee established to review government COVID19 response”, *The Mandarin*, April 9, 2020 (<https://www.themandarin.com.au/130316-senate-select-committee-established-to-review-governments-covid-19-response/>).
- 6 See Carr, K, “Parliament sat during world war two and Spanish flu, Morrison should not be cancelling it for coronavirus”, *The Guardian* (online) (<https://www.theguardian.com/commentisfree/2020/apr/03/parliament-sat-during-world-war-two-and-spanish-flu-morrison-should-not-be-cancelling-it-for-coronavirus>)
- 7 <https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540>
- 8 Ministerial orders made under *Biosecurity Act 2005* (Cth) in an emergency are not subject to disallowance by the Parliament; the only way in which they could be overturned is if Parliament were to enact a law.
- 9 ALRC Report 129, 2 March 2016, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129) at [2.60].
- 10 G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification and Reasoning* (Cambridge University Press, 2014) at p.1.
- 11 See *McCloy v New South Wales* (2015) 257 CLR 178 at [3] per French CJ, Kiefel, Bell and Keane JJ.
- 12 Parliamentary Joint Committee on Human Rights, *Parliament of Australia, Guide to Human Rights* (2014) (Guide to Human Rights) at p.8.