



1 March 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Additional Information – An inquiry into a COVID-19 Royal Commission

At the public hearing on 1 February 2024 the Committee Chair asked all witnesses to consider on notice the need for checks and balances when an emergency declaration is issued, and importance of the parliament having oversight in those circumstances.

In response to that question on notice please find attached a chapter entitled 'Limiting Rights and Freedoms in the Name of Public Health: Ensuring Accountability during the COVID-19 Pandemic Response' that I co-authored with the President of the Australian Human Rights Commission, Emeritus Professor Rosalind Croucher AM.¹

This chapter directly addresses the question raised by the Chair. It starts with the observation that the 'checks and balances that ordinarily exist are integral to our democracy' and goes on to examine 'three key features of the pandemic decision-making response that highlight the importance of scrutiny measures even in times of emergency, namely the transfer of power from the parliament to the executive, the introduction of the National Cabinet, and the increased reliance on expert decision-makers'.

While it is recognised that decision-making processes may need to be different during an emergency, the chapter concludes that 'it is important to ensure that

¹ This chapter was published in Belinda Bennett and Ian Freckelton (eds), *Australian Public Health Law: Contemporary Issues and Challenges* (The Federation Press, 2022), 120-137.

Australian Human Rights Commission
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emergency decision-making itself does not permanently undermine the rule of law and core democratic structures’.

Yours sincerely

Lorraine Finlay
Human Rights Commissioner

Limiting Rights and Freedoms in the Name of Public Health: Ensuring Accountability during the COVID-19 Pandemic Response

Lorraine Finlay and Rosalind Croucher

I Introduction

It has now been over two years since the World Health Organization declared that COVID-19 could be characterised as a pandemic.¹ The impact of the pandemic on a global scale has been profound. As at March 2022, there had been over 464 million confirmed cases of COVID-19 globally, and over 6 million deaths.² In April 2020, the International Monetary Fund was warning that ‘the global economy will experience its worst recession since the Great Depression’³ and, more recently, highlighted the extent to which the pandemic has reversed gains in poverty reduction, with an additional 95 million people expected to have entered the ranks of the extreme poor in 2020.⁴

The pandemic, and pandemic response measures, have also resulted in significant limitations on people’s rights and freedoms. In an attempt to curb the spread of the virus, save lives and protect public health, governments across the world, including in Australia – at State, Territory and federal levels – have imposed substantial restrictions on individual human rights. The pandemic ‘has made clear the fragile nature of many of the liberties we take for granted’,⁵ with the Democracy Index 2020 describing the pandemic

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- 1 World Health Organization, ‘WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020’ <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>.
 - 2 World Health Organization, ‘WHO Coronavirus (COVID-19) Dashboard | WHO Coronavirus (COVID-19) Dashboard With Vaccination Data’ <<https://covid19.who.int/>>.
 - 3 International Monetary Fund, *World Economic Outlook: The Great Lockdown* (April 2020) xii.
 - 4 International Monetary Fund, ‘Questions and Answers: The IMF’s response to COVID-19’ <<https://www.imf.org/en/About/FAQ/imf-response-to-covid-19#Q4>>.
 - 5 M Eburn, ‘Civil Liberties in the Face of Disaster’ (2020) 42 (August) *The Bulletin (Law Society of South Australia)* 6, 6.

response as leading to ‘the biggest rollback of individual freedoms ever undertaken by governments during peacetime’.⁶

While many of the most significant pandemic restrictions in Australia had either been removed by early 2022, or were being gradually eased, the pandemic continues to have an ongoing and direct impact on human rights. The reality is that pandemic-related restrictions will be with us for the foreseeable future. Emergency declarations remain in operation at the national level and in a majority of States and Territories (at the time of writing), which enable governments across Australia to continue to exercise extensive emergency powers. While emergencies clearly require quick and decisive action by government, the extended duration of this emergency ‘is testing governance and democratic institutions the world over’.⁷

A foundational principle of our democratic structure is the sovereignty of Parliament – but different layers of scrutiny have applied to the emergency measures, depending on whether measures are legislated; whether they are in the form of ‘disallowable’ instruments; or whether, as has been the case for a number of measures, they are introduced through instruments that are not disallowable or reviewable, and which have not included human rights compatibility analysis. This is not just of concern in relation to COVID-19 response measures, but more generally, posing serious challenges to Parliament’s constitutionally recognised law-making role.⁸

This chapter will explore the democratic challenges of emergency decision-making and the lessons that may be learned to ensure the rule of law is respected. The checks and balances that ordinarily exist are integral to our democracy. Australians have been, and continue to be, exposed to potentially unnecessary restrictions of their rights and freedoms because of the lack of transparency and accountability that surround emergency measures. This chapter considers decisions where specific responses have been challenged and uses them as instructive illustrations of how human rights principles can inform decision-making, especially in times of crisis. It does this through examining three key features of the pandemic decision-making response that highlight the importance of scrutiny measures even in emergencies, namely the transfer of power from the parliament to the executive, the introduction of the National Cabinet, and the increased reliance on

6 The Economist Intelligence Unit, ‘Democracy Index 2020 in Sickness and in Health?’ <<https://d1qqtien6gys07.cloudfront.net/wp-content/uploads/2021/02/democracy-index-2020.pdf>>.

7 E Windholz, ‘Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy’ (2020) 8(1-2) *The Theory and Practice of Legislation* 93.

8 See eg Senate Standing Committee for the Scrutiny of Delegated Legislation, *An Interim Report in Its Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (7 December 2020). The Committee used delegated legislation made in response to COVID-19 as a case study to ‘shine a light on the deeper, systemic issues which inhibit Parliament from effectively overseeing delegated legislation at all times, not just during emergencies’: xiii.

expert decision-makers. These examples are used to explore the intersection between public health and human rights, and the importance of ensuring accountability in emergency responses.

International human rights law places clear obligations on ‘States parties’ to protect the right to life and the right to health. Public health concerns are an expression of both. International human rights law also provides the tools to assess issues of limitations on human rights and freedoms in terms of proportionate responses. This chapter uses the example of restrictions imposed in the interests of public health in response to the COVID-19 pandemic as an illustration of the topic ‘public health law and human rights’.

II The Human Rights Framework

A Rights

All nations – including Australia – ‘have positive obligations under international human rights law to take steps to combat pandemics’.⁹ On 30 April 2020 the United Nations Human Rights Committee (UNHRC) emphasised that ‘in the face of the COVID-19 pandemic, States parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction’.¹⁰ Measures taken to save lives and protect public health during the COVID-19 pandemic give effect to these obligations.

With respect to the right to life, Art 6 of the *International Covenant on Civil and Political Rights* (ICCPR)¹¹ provides that every human being has the inherent right to life and that no one shall be arbitrarily deprived of life. The right to life has been described by the UNHRC as ‘the supreme right from which no derogation is permitted’, even in times of public emergencies.¹² In addition to a prohibition against arbitrary deprivation, the right to life also encompasses a positive duty upon States parties to protect life. This includes States parties being required to ‘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’.¹³ The ‘prevalence of life-threatening diseases’ was highlighted by the UNHRC as one example of the general conditions that need to be addressed.¹⁴ While

9 S Joseph, ‘International Human Rights Law and the Response to the COVID-19 Pandemic’ (2020) 11 *Journal of International Humanitarian Legal Studies* 249, 250.

10 United Nations Human Rights Committee, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic* (30 April 2020), CCPR/C/128/2 (UNHRC, *Statement on Derogations*) [2].

11 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 993 UNTS 171 (entered into force 23 March 1976) (ICCPR).

12 United Nations Human Rights Committee, *General Comment No 36: Article 6: Right to Life*, CCPR/C/GC/36 (3 September 2019) [2].

13 *Ibid* [26].

14 *Ibid*.

the right to life is not absolute – with Art 6 implicitly recognising ‘that some deprivations of life may be non-arbitrary’¹⁵ – it requires, at a minimum, that governments take appropriate measures to protect lives during a pandemic.

The right to health under Art 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹⁶ recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ and requires States parties to take necessary steps for ‘[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases’ and ‘[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness’.¹⁷ Under the ICESCR a State party must take steps to achieve the full realisation of the outlined rights progressively ‘to the maximum of its available resources’.¹⁸ In the context of the pandemic, this includes the establishment of prevention and education programs to help prevent the spread of COVID-19, the creation of a system of urgent medical care to assist with the treatment of COVID-19, and efforts to control COVID-19, including ‘using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control’.¹⁹

At the same time, these public health measures have impacted significantly on a range of other human rights and freedoms, affecting most facets of daily life, including:

travel restrictions on people entering and leaving countries and also within countries; containing transmission by requiring people to stay at home with only immediate family or housemates; banning indoor and outdoor gatherings of people, or allowing some gatherings but with a maximum number of people; requiring people to quarantine or self-isolate; postponing face-to-face teaching in schools and universities and moving to online classes; closing certain businesses (such as cafes, gymnasiums etc.) or restricting how they operate; postponing elective surgeries; and mass-scale testing and contact tracing programmes.²⁰

Additional restrictions imposed include night-time curfews, mandatory testing and, in some contexts, requirements for vaccination. These measures affect a wide range of human rights including, *inter alia*, freedom of

15 Ibid [10].

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

17 ICESCR Art 12(2)(c), (d).

18 Ibid Art 2(1).

19 Office of the High Commissioner for Human Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)*, UN Doc E/C.12/2000/4 (11 August 2000) [16].

20 F McGaughey, MA Kenny, A Maguire and S Harris-Rimmer, ‘International Human Rights Law: Lessons in the Era of COVID-19’ (2021) 27(2) *Australian Journal of Human Rights* 189, 191.

movement;²¹ right of peaceful assembly;²² freedom of association;²³ freedom of thought, conscience and religion;²⁴ the protection against arbitrary arrest or detention;²⁵ right to privacy;²⁶ right to work;²⁷ right to an adequate standard of living;²⁸ right to education;²⁹ and the right to take part in cultural life.³⁰ The combined effect of the restrictions has been to ‘reshape daily life in Australia as we knew it before March 2020’.³¹

B Limitations on Rights

Rights can be legitimately restricted in times of emergency and many rights contain express limitations within their terms. For example, the right to freedom of movement under Art 12 of the ICCPR is expressly subject to restrictions that ‘are provided by law, are necessary to protect national security, public order, public health or morals or the right and freedoms of others, and are consistent with the other rights recognized in the present Covenant’.³² Rights outlined in the ICESCR may be subject ‘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’.³³ Importantly, the burden of justifying any limitation rests upon the State seeking to impose the limitation.³⁴

The ICCPR also allows for States parties to derogate from their obligations ‘[i]n time of public emergency which threatens the life of the nation’ – but only ‘to the extent strictly required by the exigencies of the situation’ and only ‘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’.³⁵

21 ICCPR Art 11.

22 Ibid Art 21.

23 Ibid Art 22.

24 Ibid Art 18.

25 Ibid Art 9(1).

26 Ibid Art 17.

27 ICESCR Art 7.

28 Ibid Art 11.

29 Ibid Art 13.

30 Ibid Art 15(1)(a).

31 P O’Brien and E Waters, ‘Public Health Emergency Powers and Accountability Mechanisms’ (2021) 28(2) *Journal of Law and Medicine* 346, 347.

32 ICCPR Art 12(3)

33 ICESCR Art 4.

34 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [12]. These principles were formulated at a conference sponsored by non-governmental organisations in Siracusa, Italy, in 1984. The object of the conference was to achieve a consistent interpretation and application of the limitation and restriction clauses of the ICCPR.

35 ICCPR Art 4(1).

What are the human rights implications with respect to derogation and the COVID-19 pandemic? First, certain rights are non-derogable even during a state of emergency – including the right to life.³⁶ Secondly, countries are required to notify the United Nations Secretary-General formally of any Art 4 derogation. Thirdly, the UNHRC stressed that while States parties may temporarily invoke their right of derogation when ‘confronting the threat of widespread contagion’, and ‘only to the extent strictly required by the exigencies of the public health situation’, States parties should not rely on a derogation when they are able to achieve their public health objective by invoking limitations contained within the rights themselves.³⁷ Australia has not exercised its derogation power at any time during the COVID-19 pandemic.³⁸

In essence, while international human rights law allows for many human rights to be restricted as part of a pandemic response, any limitations must meet certain core criteria:

- they must be prescribed by law;
- they must be necessary and proportionate to the evaluated risk;
- governments must be transparent about the reasons why they consider restricting human rights is necessary;
- any limitations on human rights should be the minimum necessary to address the emergency and in place for the shortest time needed to deal with the emergency;
- the measures must be consistent with international law and must not discriminate against people on the grounds of race, sex, age, disability or sexual preference; and
- the need for the restrictions must be regularly assessed, and the moment they are no longer necessary, they must cease.³⁹

III Australia’s Pandemic Management Framework

In Australia, the primary responsibility for emergency management has rested with State and Territory governments, with ‘relatively similar’ emergency legislation and established emergency response agencies in each.⁴⁰ At

36 Ibid Art 4(2).

37 UNHRC, *Statement on Derogations*, above n 10, [2(c)].

38 Australian Government Attorney-General’s Department, ‘Absolute Rights’ (Public Sector Guidance Sheet) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights>>.

39 Australian Human Rights Commission, ‘What is the Commission’s View on Limiting Human Rights During COVID-19?’ <<https://humanrights.gov.au/about/covid19-and-human-rights/what-commissions-view-limiting-human-rights-during-covid-19>>.

40 International Federation of Red Cross and Red Crescent Societies, *Legal Preparedness for International Disaster Response in Australia: Laws, Policies, Planning and Practices* (Strategy 2020, March 2010) 2-3.

the national level, the Commonwealth Government does not have a broad emergency power granted to it under the Australian Constitution,⁴¹ relying instead upon specific powers under specific laws that could be invoked in response to specific emergency situations and responding to state requests for assistance in emergencies. The power to declare a national emergency was given a legislative basis in December 2020 with the passage of the *National Emergency Declaration Act 2020* (Cth).

One such specific emergency situation covered by national law was the management of human biosecurity emergencies under the *Biosecurity Act 2015* (Cth) ('Biosecurity Act'). A 'human biosecurity emergency' may be declared by the Governor-General if the Health Minister is satisfied that a disease 'is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale' and that the declaration 'is necessary to prevent or control' either the entry, emergence, establishment or spread of the disease into Australian territory or a part of Australian territory.⁴²

A human biosecurity emergency was first declared by the Governor-General with respect to COVID-19 on 18 March 2020.⁴³ Such a declaration results in extraordinary powers being granted to the Health Minister. During the emergency period, the Health Minister may determine any requirement or give any direction that is considered necessary to prevent or control the entry, emergence, establishment or spread of the disease in Australian territory or part of Australian territory, or to prevent or control the spread of the disease to another country, or to give effect to a relevant recommendation made by the World Health Organization.⁴⁴ Determinations made under s 477(1) are legislative instruments, but are not subject to disallowance.⁴⁵ A person commits an offence if they contravene a requirement or direction, with the maximum penalty being imprisonment for five years or \$66,600 (or both).⁴⁶

At the State and Territory level, governments have likewise exercised extensive emergency powers as a result of the combined effect of existing emergency management and public health laws. All Australian jurisdictions declared 'states of emergency' in March 2020 as a result of the emerging COVID-19 pandemic, with the exception of New South Wales where

41 *Royal Commission into National Natural Disaster Arrangements: Report* (Report, October 2020) [15].

42 *Biosecurity Act 2015* (Cth) ('Biosecurity Act') s 475(1).

43 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth). The emergency period has subsequently been extended on eight separate occasions. At the time of writing, the relevant declaration was set to end on 17 April 2022: *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).

44 *Biosecurity Act* ss 477, 478.

45 *Ibid* s 477(2).

46 *Ibid* s 479.

the Minister for Health relied instead on non-emergency powers under the *Public Health Act 2010* (NSW) to issue various public health orders.⁴⁷ In all jurisdictions, the powers that were exercised were extraordinary. For example, even in New South Wales, where a state of emergency was not formally declared, the powers available to the Minister for Health were significant, allowing the Minister to ‘take such action’ and ‘give such directions’ as the Minister considered necessary to deal with a risk to public health. Failing to comply with a public health direction without reasonable excuse is an offence in New South Wales that attracts a potential maximum penalty of imprisonment for six months or a fine of up to \$11,000 (or both) for an individual, with an additional \$5500 fine for each day the offence continues.⁴⁸

When we look at Australia’s overall pandemic response, it appears to be relatively effective compared to the rest of the world. For example, Australia’s total and comparative number of deaths is relatively low from a global perspective. Data from the Johns Hopkins University Coronavirus Resource Center showed Australia as having had 5691 deaths (at the time of writing), with a case fatality rate of 0.1% and 22.44 deaths per 100,000 population. This contrasts starkly to the worst performing countries by each measure (at the same point in time), namely the United States with 970,009 deaths, Yemen with a case fatality rate of 18.1%, and Peru with 651.15 deaths per 100,000 population.⁴⁹ Similarly, on global rankings from early 2022, calculated to include a variety of pandemic-related health, economic and social factors, Australia consistently performs strongly. For example, Australia ranked fifth on Bloomberg’s COVID Resilience Ranking,⁵⁰ ninth on the COVID Performance Index compiled by the Lowy Institute,⁵¹ and fifth on the COVID Economic Recovery Index produced by the Horizon Group.⁵²

On the other hand, Australians have also had to live with some of the most restrictive pandemic response measures in the world. These have been imposed at a significant cost, and in many cases, it is the most marginalised and disadvantaged in our community who have disproportionately borne

47 Clayton Utz, ‘COVID-19 Response: Government Powers and Directives’ <<https://www.claytonutz.com/covid-19-response/government-powers-and-directives>>.

48 Ombudsman New South Wales, ‘NSW Public Health Restrictions to Deal with the COVID-19 Pandemic: A Chronology’ (Issues Backgrounder No 5/November 2020, NSW Parliamentary Research Service) <<https://www.parliament.nsw.gov.au/researchpapers>> 3.

49 Johns Hopkins University of Medicine, ‘Mortality Analyses’, *Coronavirus Resource Centre* (Web Page, 18 March 2022) <<https://coronavirus.jhu.edu/data/mortality>>.

50 Bloomberg, ‘The Covid Resilience Ranking: The Best and Worst Places to be as the Omicron Threat Fades’ (24 February 2022) <<https://www.bloomberg.com/graphics/covid-resilience-ranking>>.

51 Lowy Institute, ‘Covid Performance Index: Deconstructing Pandemic Responses’ <<https://interactives.lowyinstitute.org/features/covid-performance/>>.

52 ‘Covid Economic Recovery Index’ <<https://www.covidrecoveryindex.org/ranking>>.

the burden.⁵³ While the emergency powers exercised by Australian governments have led to a pandemic response that is counted as one of the most successful in the world by various global measures, ‘at the same time, it is essential to recognise the extraordinary nature of these powers, the enlarged authority they give to the State, their capacity for interference with individual liberties, and the possibility of misuse’.⁵⁴

IV Accountability Measures

Ensuring that extraordinary powers exercised in times of emergency are still subject to an appropriate degree of scrutiny and accountability is essential for a variety of reasons, including to aid in encouraging compliance with restrictions, to prevent overreach and misuse of emergency powers, to ensure that the limits placed on our human rights are necessary and proportionate, to maintain the longer-term health of our democratic foundations, and to maintain broader public trust in our governments and institutions. While it is recognised that emergencies ‘probably necessitate a decrease in certain formal accountability mechanisms’, it is important to ensure that ‘[a]ny limits on formal accountability should be justifiable’ and ‘limits to government accountability must not become permanent features of the way governments make rules’.⁵⁵

Three key accountability measures that have been highlighted during Australia’s pandemic response will be considered here, namely the transfer of power from the parliament to the executive, the introduction of the National Cabinet, and the increased reliance on expert decision-makers. These examples highlight the intersection between public health and human rights, and the importance of ensuring accountability in emergency responses.

A Transfer of Power from the Parliament to the Executive

A key feature of the pandemic response in Australia has been that ‘parliaments nationwide have transferred extraordinarily wide powers to executive governments and agencies’.⁵⁶ While emergency circumstances may warrant temporary changes to decision-making processes, a concern with the shift from the Parliament to the Executive as the primary decision-makers is the potential to reduce the transparency, scrutiny and debate that is provided

53 D O’Sullivan, M Rahamathulla and M Pawar, ‘The Impact and Implications of COVID-19: An Australian Perspective’ (2020) 2(2) *International Journal of Community and Social Development* 134, 140-142.

54 O’Brien and Waters, above n 31.

55 J Boughey, ‘Executive Power in Emergencies: Where Is the Accountability?’ (2020) 45(3) *Alternative Law Journal* 168, 174.

56 R Croucher, ‘Emergency Powers Need Scrutiny: Ensuring Accountability Through COVID-19 Lockdowns and Curfews is a Human Rights Issue’, Opinion (May 2021) *Law Institute Journal* 19.

by the Parliament at the time that measures are first introduced and before they take effect. This is particularly important for measures that limit or restrict human rights. The checks and balances provided by parliaments are integral to our democracy, and are important even, indeed especially, in times of emergency.

1 *Interruption of Parliamentary Processes*

An early indication of the marginalisation of Parliament with respect to emergency powers being exercised during the pandemic came with the almost immediate announcement from parliaments across the country that sitting times would be reduced. For example, at the national level, both the House of Representatives and the Senate resolved to adjourn on 23 March 2020, with the federal government presenting a revised sittings calendar that would effectively have suspended the national Parliament for almost five months.⁵⁷ The Centre for Public Integrity calculated that the proposed adjournment would result in an almost 30% reduction in the sitting days originally planned that year for the House of Representatives. It noted that Australia was not alone among comparable countries in suspending parliamentary sittings in response to the global pandemic, however found that Australia was ‘an outlier for taking the most drastic action’.⁵⁸

Similar adjournments were also proposed in State and Territory parliaments. A particularly lengthy adjournment was envisaged in New South Wales, with both the Legislative Assembly and Legislative Council adjourning on 24 March 2020 and agreeing to return on 15 September 2020. Parliament could be recalled as necessary in the public interest, however, and both chambers were recalled earlier than scheduled (with both sitting again on 12 May 2020).⁵⁹ While in most cases the actual adjournments did not last as long as originally envisaged, they are still reflective of a marginalisation of Parliament during an emergency period. Professor George Williams has described the parliamentary adjournments as leaving ‘a gaping hole at the centre of our democracy’,⁶⁰ with Nicholas Cowdery describing them as ‘unacceptable and dangerous’.⁶¹

57 Parliament of Australia, ‘COVID-19 and Parliamentary Sittings’ (2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/April/COVID-19_and_parliamentary_sittings>.

58 The Centre for Public Integrity, ‘Pandemic International but Shutting Parliament Uniquely Australian’, Briefing Paper (1 April 2020) <<https://publicintegrity.org.au/new-research-pandemic-international-but-shutting-parliament-uniquely-australian/>>.

59 T Drabsch, ‘The Impact of the COVID-19 Pandemic on Parliament’, NSW Parliamentary Research Service e-brief 01/2021 <<https://apo.org.au>>.

60 G Williams, ‘Parliamentary Break Leaves Hole in our Democracy’, Gilbert + Tobin Centre of Public Law <<https://www.gtcentre.unsw.edu.au/news/2020/04>>.

61 NSW Council for Civil Liberties, ‘Prolonged Parliamentary Adjournment Unacceptable and Dangerous for Democracy’ (Media Release, 30 March 2020).

Adjournments of parliaments were combined with changes to a range of parliamentary procedures. Significant pandemic response measures were therefore subject to reduced parliamentary scrutiny following the suspension of standing and sessional orders. For example, for the sittings of the NSW Legislative Assembly on 24 March 2020, pairing arrangements were changed to allow a greater number of Members to be absent from the parliament, the public galleries were closed to the public, and standing and sessional orders were suspended to allow for the swift passage of pandemic-related emergency laws.⁶²

Measures were also passed very quickly. For example, the group of cognate emergency measures introduced into the NSW Parliament on 12 March 2020 were passed the very next day. Taken together, the *COVID-19 Legislation Amendment (Emergency Measures – Treasurer) Bill 2020* (NSW), *COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Bill 2020* (NSW) and *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Bill 2020* (‘the NSW Emergency Measures Bills’) comprised almost 70 pages of amendments, designed to ‘amend 40 New South Wales Acts and four New South Wales regulations across multiple portfolios’ and contained amendments that were described by the Attorney General as ‘significant’.⁶³

The Legislation Review Committee did have the opportunity to scrutinise the laws, but did not report until 2 June 2020 – several weeks *after* the laws had been passed. While the Committee formed the view that the human rights impacts of the laws were necessary and proportionate in light of the public health emergency created by COVID-19, it did identify potential impacts on a range of human rights – including rights to privacy, freedom of movement, right to a fair trial and the right to personal physical integrity.⁶⁴ The usual scrutiny processes were clearly truncated to allow for the urgent passage of this legislation.

While changes to sitting patterns and other arrangements may be practically necessary to respond to an emergency situation, it is also important to ensure that such changes do not undermine the capacity of the parliament to perform its representative, deliberative, scrutiny and accountability functions. The importance of protecting the fundamental role of parliament in our democratic system of government was highlighted by Steven Chaplin:

Given the difficulties, it would be easiest to suspend Parliament for the duration. It is an emergency after all. Just let the government do what it needs to do, spend what it must, and we can sort it all out when it’s over. And, if some modicum of authorization is required, just call a minimum quorum Parliament

62 Drabsch, above n 59, 3.

63 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 May 2020 (Mark Speakman, Attorney General).

64 Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* (No 15/57, 2 June 2020) (‘Legislation Review Digest’) v-xvii.

together, grant the government all the extraordinary powers it needs (or asks for), then suspend Parliament. Quick, easy, clean and efficient. Also, dangerous, autocratic, and wholly inconsistent with the Westminster system of government that underpins constitutions throughout the Commonwealth.⁶⁵

Stephen Mills described the overall crisis response as demonstrating ‘a growing capacity and willingness of the executive to govern without Parliament, and an acquiescent Parliament unable to define a more assertive role for itself’.⁶⁶ In his view, the reduced parliamentary sittings and restrictions imposed on the operation of federal parliament ‘served to eliminate or substantially compromise its capacity to perform its key functions’.⁶⁷

2 *Delegated Legislation*

This decline in parliamentary capacity during the pandemic coincided with the rapid expansion of executive decision-making and the use of delegated legislation. Given that the executive arm of government is characterised – at least by comparison to parliament – as making fast and direct decisions, it is perhaps natural that it is seen as the arm of government best suited to decision-making in an emergency. Indeed, in *Pape v Commissioner of Taxation*,⁶⁸ Gummow, Crennan and Bell JJ observed (in the context of the 2008-2009 global financial crisis) that ‘[t]he Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here’.

While executive decision-making might allow for the immediate responses that are required in an emergency situation, there are attached risks in terms of reduced scrutiny and accountability. Delegated legislation is not subject to the same level of parliamentary oversight, is less transparent, and does not have the same level of representative legitimacy. With respect to restrictions on human rights, the core questions of necessity and proportionality are less likely to be subject to the rigorous examination that is needed *before* the measures take effect when the restrictions are made by way of delegated legislation, and there is less opportunity for any unintended practical consequences to be identified and addressed.

A clear example of this can be seen in the increased use of delegated legislation during the pandemic response in Australia. Many of the public health orders and directions that have directly impacted on human rights during the pandemic have been imposed under delegated legislation, with a significant proportion being imposed by delegated legislation that is not

65 S Chaplin, ‘Protecting Parliamentary Democracy in “Plague” Times: Accountability and Democratic Institutions During the Pandemic’ (2020) 46(1) *Commonwealth Law Bulletin* 110, 111.

66 S Mills, ‘Parliament in a Time of Virus: Representative Democracy as a “Non-Essential Service”’ (2019-2020) 34(2) *Australasian Parliamentary Review* 7.

67 *Ibid* 9.

68 [2009] HCA 23, [233].

disallowable.⁶⁹ For example, as noted above, determinations made by the federal Health Minister under a declared human biosecurity emergency are not subject to disallowance by parliament. Professor George Williams has described the declaration of a human biosecurity emergency as vesting the Health Minister ‘with unfettered personal power of a kind normally only found in a dictatorship’.⁷⁰ During the COVID-19 pandemic these determinations have included restrictions to overseas travel, mandatory pre-departure testing and mask wearing for international flights, restrictions on the movement of cruise ships, protections for the supply and sale of certain essential goods, restrictions on retail stores at international airports, price gouging protections, and protections for remote communities.

The Centre for Public Integrity highlighted other key examples of significant law-making powers delegated to the Executive as part of the pandemic response,⁷¹ including the \$40 billion advance to the Finance Minister with broad discretion as how those funds were spent,⁷² the power for the Minister for Social Services to alter eligibility rules and payment rates for all social security payments,⁷³ and the broad powers for the Treasurer to set rules for the \$130 billion JobKeeper scheme.⁷⁴

It is not just the width of the powers that raises concerns, but the sheer volume of delegated legislation – posing ‘serious challenges to Parliament’s constitutionally recognised law-making role’.⁷⁵ For example, the NSW Parliamentary Research Service stated that 49 public health orders were made by the NSW Health Minister between 15 March 2020 and 24 February 2021.⁷⁶ Such orders are not subject to the tabling and disallowance powers that ordinarily apply in the case of delegated legislation.

Dr Peta Stephenson and Professor Jonathan Crowe point to the undermining of core features of the legislative process through the use of delegated legislation, including the reduced oversight of laws introduced as part of the pandemic response.⁷⁷ For example, the Centre for Public Integrity highlighted

69 See eg Boughey, above n 55, 170.

70 G Williams, ‘Australians Must Brace for a “Big Brother” Intrusion on the Personal Liberty we all Take for Granted’, *The Australian* (22 March 2020).

71 The Centre for Public Integrity, *Executive Law-making Doubles While Accountability Decreases*, Briefing Paper (September 2020) <<https://publicintegrity.org.au/wp-content/uploads/2020/09/Briefing-paper-executive-lawmaking-doubles.pdf>>.

72 *Appropriation Act (No 5) 2019-2020* (Cth) and *Appropriation Act (No 6) 2019-2020* (Cth).

73 *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).

74 *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth).

75 Senate Standing Committee for the Scrutiny of Delegated Legislation, above n 8, xiii.

76 Under the *Public Health Act 2010* (NSW) s 7. At the federal level, the Senate Standing Committee for the Scrutiny of Delegated Legislation undertook an inquiry into the exemption of delegated legislation from parliamentary oversight and noted that, in 2019, 20% of the 1675 laws made by the Executive were exempt from disallowance: Senate Standing Committee for the Scrutiny of Delegated Legislation, above n 8, xiii.

77 P Stephenson and J Crowe, ‘Queensland Public Health Laws and COVID-19: A Challenge to the Rule of Law?’, *Australian Public Law* (Blog Post, 21 August 2020)

in September 2020 that ‘of the 293 federal legislative instruments made since the beginning of the COVID-19 crisis, 53 instruments or 18% are exempt from *any* scrutiny by Parliament, including the scrutiny of the Senate Committee and disallowance by the Parliament’.⁷⁸ In December 2020 an interim report by the Senate Standing Committee for the Scrutiny of Delegated Legislation found:

The significant volume of delegated legislation made by the executive, and the frequent exemption of this delegated legislation from parliamentary oversight, pose serious challenges to Parliament’s constitutionally recognised law-making role.⁷⁹

B The National Cabinet

A second feature of the pandemic response in Australia that has important implications for accountability is the introduction of the ‘National Cabinet’. The National Cabinet was formed on 13 March 2020 as an intergovernmental forum consisting of the Prime Minister, the State Premiers, and the Chief Ministers. The National Cabinet was designed to ensure a coordinated response to the COVID-19 pandemic, and has been described by the Prime Minister as having ‘proven to be a much more effective body for taking decisions in the national interest than the COAG structure’.⁸⁰ While it was originally a temporary body, it has now been established as a permanent replacement to the Council of Australian Governments (COAG) model under the name of the National Federation Reform Council.⁸¹

The National Cabinet has been described as ‘one of the major strengths’ of the Australian pandemic response in the way that it has ‘allowed Australian governments to share information and coordinate an effective national response to the emergency’.⁸² However, concerns have also been raised about the accountability deficit that is inherent within the National Cabinet structure. For example, while the Department of Prime Minister and Cabinet has stated that the National Cabinet operates according to the longstanding conventions of Cabinet government, including the principles of cabinet responsibility and cabinet solidarity, it is difficult to see how this can be the case in practice. As Associate Professor Janina Boughey has observed,

<<https://www.auspublaw.org/blog/2020/08/>>; see too P Stephenson, I Freckelton and B Bennett, ‘Public Health Emergencies in Australia’ in B Bennett and I Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021).

78 The Centre for Public Integrity, above n 71.

79 Senate Standing Committee for the Scrutiny of Delegated Legislation, above n 8, xiii.

80 Prime Minister of Australia, ‘Update Following National Cabinet Meeting’ (Media Release, 29 May 2020), <<https://www.pm.gov.au/media/update-following-national-cabinet-meeting>>.

81 ‘A New Federal Architecture’ (Web Page), <<https://federation.gov.au/about>>.

82 Boughey, above n 55, 169.

the National Cabinet is not accountable in the same way that federal, state and territory cabinets are. As an intergovernmental body, it is not responsible to a single parliament, but to nine separate parliaments. This complicates the way responsible government functions in practice. Leaders will be able to answer any questions of their respective parliaments and parliamentary committees by simply explaining that the jurisdiction is committee to a particular course of action through the intergovernmental agreements. This tends to curtail any opportunity for parliamentary input or debate.⁸³

In effect, the National Cabinet ‘emerged to occupy a new space for executive action, operating without accountability linkages back to any legislature’.⁸⁴

While there have been criticisms of the National Cabinet as being undemocratic and unaccountable,⁸⁵ Jennifer Menzies has suggested that National Cabinet has taken a ‘crisis leadership role’ and, as such, should be seen as performing a different role from parliament. She suggests that the National Cabinet allows for the rapid decision-making and focus on effective implementation that is needed in a time of national crisis, and concludes that once the crisis has passed ‘the full democratic accountability processes can scrutinise the decisions taken’ and ‘the checks and balances of the democratic constraints on our leaders will reassert themselves’.⁸⁶ With the transition of the National Cabinet from a ‘peacetime war cabinet’⁸⁷ to a permanent feature of the federal governance framework (as the National Federation Reform Council), it remains to be seen if the body will evolve to allow for the reassertion of democratic checks and balances, and the strengthening of accountability linkages.

C Expert Decision-making

A third feature of the pandemic response in Australia that has important implications for the protection of human rights has been the delegation of extensive decision-making powers to medical-scientific experts, who have seen their role ‘metamorphose from decision making input into decision-maker’.⁸⁸ Throughout the pandemic we have seen elected representatives minimising their own responsibility for decisions – including for decisions that have significantly limited human rights – by claiming that they are simply ‘following the experts’. Dr Eric Windholz has pointed to this elevated role for experts in decision-making being evident ‘in the daily press conferences to which Australians have become accustomed, with the Prime Minister (of the

83 Ibid.

84 Mills, above n 66, 9.

85 Ibid 12-13.

86 J Menzies, ‘Explainer: What is the National Cabinet and is it Democratic?’ (Blog Post, 31 March 2020), <<https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>>.

87 Boughy, above n 55, 169.

88 Windholz, above n 7, 94.

country) or Premier (of a State) standing side-by-side with that jurisdiction's Chief Medical (Health) Officer to announce new restrictions and the bases for them'.⁸⁹

The advice provided by Chief Health Officers (or Chief Medical Officers as they are called in some jurisdictions) has been given enormous weight by political leaders during the pandemic – and used to justify a wide range of restrictions. To give just one example, when giving evidence before the Public Accounts and Estimates Committee as part of the *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic*, the Victorian Premier responded to questioning about the decision to lockdown the North Melbourne and Flemington public housing towers on 4 July 2020 – a lockdown which the Victorian Ombudsman subsequently concluded appeared to be contrary to law and incompatible with residents' human rights⁹⁰ – by claiming the decision was based on the advice of the Chief Health Officer and that 'there is no alternative but to accept the advice of the Chief Health Officer'.⁹¹

While public health expertise is critically important when making decisions during a pandemic, we must also acknowledge that experts are not infallible, may not always agree, and may (even subconsciously) be influenced by personal values or biases. Hence, even when placing reliance on experts it is important to expose expert advice to a range of different perspectives and viewpoints and to ensure that it is interrogated and challenged before a final decision is reached. This is particularly important in the context of public health measures that restrict individual rights as 'absent other voices and considerations, public health emergency response measures risk being overly prescriptive and unnecessarily wide reaching'.⁹²

Assessing the appropriateness of restrictions, at any given point of time, is a complex task, and one that can rapidly change as the impact of the virus also shifts – such is the nature of emergency responses. Public health experts can only ever provide an incomplete answer to the complex public policy questions that need to be addressed. While measures such as travel restrictions, school closures and mask mandates were all introduced as public health measures to reduce the impact of COVID-19, they all had impacts that extended beyond the effect on public health. The economic and social impacts of the pandemic restrictions are also significant, and need to

89 Ibid.

90 Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020* (December 2020), <<https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/Public-housing-tower-lockdown/Victorian-Ombudsman-report-Investigation-into-the-detention-and-treatment-of-public-housing-residents-arising-from-a-COVID-19-hard-lockdown-in-July-2020.pdf>> 4.

91 Public Accounts and Estimates Committee, Parliament of Victoria, Transcript (11 August 2020) 8 (Daniel Andrews, Premier).

92 Windholz, above n 7, 109.

be factored into the decision-making process. This does not suggest that the health advice should be disregarded, but rather

the point is simply that while health experts are well placed to provide health advice, they are not best placed to weigh up the full range of factors that need to be considered when responding to a pandemic. The people best placed to do this are our democratically elected representatives, who are able to seek expert advice from a wide range of sources, weigh up all of the policy considerations that need to be taken into account, and who are then ultimately accountable to the people for the decisions that they make.⁹³

Another concern raised about the elevated decision-making role given to Chief Health Officers and other public servants during the pandemic has been the reduced transparency and accountability that attaches to bureaucratic decision-making. This was highlighted by Ginnane J in *Loiello v Giles*, which was a proceeding concerning the legality of a curfew imposed on residents of Restricted Areas in Melbourne by way of the *Stay at Home Directions (Restricted Areas) (No 15)*. The Direction was made under statutory powers exercisable during a State of Emergency. The curfew was described by Ginnane J as ‘a major restriction of human rights and liberties of the free people of Victoria. No instance of a curfew being imposed in Victoria by the Executive exists in living memory’.⁹⁴

Although the Court ultimately upheld the legality of the curfew, some sharp observations were made about the decision-making process. The Direction in this case was authorised by Associate Professor Giles, who was an authorised officer and senior medical adviser in the Department of Health and Human Services. Ginnane J observed that in an emergency, when decisions are being made to restrict or remove basic liberties, the principle of accountability contained in the *Public Health and Wellbeing Act 2008* (Vic) (which refers to ensuring that decisions are ‘transparent, systematic and appropriate’) assumes particular importance. It was noted that it was not clear how the authorised officer was chosen to make Directions, why the Chief Health Officer did not make Directions, and that the Department organisational structure concerned with exercising the emergency powers was unclear. Ginnane J concluded that:

Parliament may wish to reconsider who should exercise these emergency powers and whether their exercise should be required to take into account matters such as the social and economic consequences of their exercise.⁹⁵

⁹³ L Finlay, ‘Refounding Democracy’ (2021) 1 *Essays for Australia* 21, 30-31.

⁹⁴ *Loiello v Giles* [2020] VSC 722, [2]. See the consideration of the case in R Croucher, ‘Lockdowns, Curfews and Human Rights: Unscrambling Hyperbole’ (2021) 28(3) *Australian Journal of Administrative Law* 137.

⁹⁵ *Loiello v Giles* [2020] VSC 722, [132].

V Conclusion

Emergencies ‘require governments to govern differently’.⁹⁶ But what of appropriate scrutiny? The question of whether Australians have been exposed to potentially unnecessary or disproportionate restrictions of their human rights is an important one. It deserves to be given comprehensive consideration in the post-pandemic environment – to ensure that appropriate lessons are learned, and that future emergency responses embed a strong and more effective human rights scrutiny process. While the suspension of reflection and review mechanisms may be necessary in a time of emergency, it is important to ensure that emergency decision-making itself does not permanently undermine the rule of law and core democratic structures.

International human rights law provides the core criteria for assessing restrictions on rights – all of which should guide the accountability of public health measures in the name of the pandemic. We need to embed a human rights scrutiny process better into all emergency responses, to ensure that any intrusion on our rights is always fully justified, and the debate is had at the time the restrictions are considered – not afterwards.

Such scrutiny would aid in maintaining public trust and ensuring compliance with restrictions. It would also provide a safeguard that when we plan for recovery from this crisis, no one gets left behind. Embedding human rights thinking more broadly in decision-making, and the accountability measures that express it – such as statements of compatibility and openness to providing the evidence on which decisions are based – will assist in ensuring the maintenance of trust in our governments and our parliaments, and those who are delegated to act on our behalf, especially in times of emergency, a trust that has been the foundation of our democratic structure for hundreds of years.

⁹⁶ Windholz, above n 7, 93.