

## **Submission to the Commonwealth Government COVID-19 Response Inquiry**

*Dr Bruce Chen, Senior Lecturer, Deakin Law School and*

*Dr Maria O'Sullivan, Associate Professor, Deakin Law School*

### **Overview**

We provide this submission in our capacity as legal academics with expertise in human rights law and public law. We have both contributed public commentary and analysis on COVID-19 over the past three years.<sup>1</sup> Bruce Chen has published peer-reviewed work on the interpretation of emergency laws and court challenges to the exercise of emergency powers. His work demonstrates the importance of other accountability mechanisms during times of emergency. Maria O'Sullivan has published peer-reviewed work on the use of automated decision-making. This will be of relevance in considering ways in which to increase the efficiency of pandemic-related decisions.

### **1. Use of Technology and Pandemics – Automated Decision-making, Trust and Digital Access**

The use of technology (including apps to facilitate close contacts/tracing and the use of automated government decisions), will be an integral component of preparing adequately for future pandemics. This is a complex area which raises significant legal issues of privacy, human rights, accountability and transparency, and fairness. We highlight the following issues:

#### ***1.1 Automated Decision-making – Administrative Justice and a Remedy***

Australian government agencies are very committed to the increasing use of automation in order to increase the efficiency of government decision-making and this is likely to be a significant factor in dealing with future pandemics. We agree that automated decision-making has the capacity to increase the speed of certain decisions. For instance, automation could be used to facilitate border entry decisions (such as the processing of border entry exemptions which were subject to significant delays during COVID-19).

However, in developing automation for future pandemics, we would underline the need to consider issues of human rights, accountability and transparency, administrative justice<sup>2</sup> and the right to an effective remedy.<sup>3</sup>

#### ***1.2 Contextual issues - Digital Access and Public Trust***

In addition to the above, there are two things that need to be considered in using technology to facilitate pandemic-related decisions.

---

<sup>1</sup> See, eg, Chen's media commentary: 'Vaccine Rule Challenge will Exceed 100 Plaintiffs', *The Age* (Melbourne, 23 October 2021); 'Why Vax Mandate is Delicate', *Herald Sun* (Melbourne, 4 October 2021); 'Our Human Rights Still Remain', *Herald Sun* (Melbourne, 17 September 2020); 'Civil Liberties have been put at Risk', *The Australian* (Sydney, 26 August 2020); 'Andrews is Walking a Fine Line with Victorians' Trust by Moving to Extend the State of Emergency', *Herald Sun* (Melbourne, 25 August 2020); 'Masks are Fit for Purpose', *Herald Sun* (Melbourne, 11 August 2020); and O'Sullivan's media commentary: 'Proposed changes to pandemic powers in Victoria', ABC News Radio, 16 November 2021; Victoria's 'vaccine economy' future, ABC Radio National, Life Matters, 7 September 2021; 'How life might change for the unvaccinated', ABC Signal Podcast, 7 August 2021; 'Can vaccine passports help us prevent spread of the delta variant?', ABC Radio National, Life Matters, 22 July 2021; 'Should freedoms increase for Australians who are fully vaccinated against COVID-19?', ABC Melbourne Radio, Conversation Hour, 7 July 2021.

<sup>2</sup> See Yee-Fui Ng, Maria O'Sullivan, Moira Paterson and Normann Witzleb, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *UNSW Law Journal* 1041.

<sup>3</sup> Maria O'Sullivan, 'Automated Decision-Making and Human Rights: The Right to an Effective Remedy' in Janina Boughey and Katie Miller (eds), *The Automated State: Implications, Challenges and Opportunities for Public Law* (Federation Press, 2021).

## *Digital Access*

The use of apps and other automated tools make significant assumptions about digital literacy and access in the community. These are accentuated during a pandemic. This was highlighted in the 2021 Victorian Ombudsman Report on the administration of exemption permits during Victorian state border closures:

Many people found it difficult to comply with the Department's requirements. It is not clear what thought, if any, the Department gave to the likely difficulties facing people away from home; those unfamiliar with technology, the internet or without access to it; or other practicalities to obtain the required documentation.<sup>4</sup>

Thus, disparities in digital access (particularly in rural and remote communities) will need to be considered in developing the use of automation in future pandemics.

## *Public Trust*

Given the problems encountered during the rollout of the COVID Safe App and subsequently, the significant harm caused through the use of automation by Robodebt, there needs to be consideration as to increasing public trust in the use of technology by governments. This needs to be done to ensure that the use of technology will be accepted and utilised effectively and safely by members of the public.

## **2. Human Rights and the *Biosecurity Act***

As a State Party to a number of core international human rights treaties, Australia has agreed to be bound by human rights standards, including under the *International Covenant on Civil and Political Rights* ('ICCPR') and *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').

### **2.1 Relevant Human Rights**

Some of the COVID-19 response measures by the Commonwealth Government were: early quarantine requirements and establishing quarantine facilities; entry and exit requirements into and out of Australia, including vaccination, testing and face masks; prohibiting entry from 'high risk' countries; banning overseas travel; preventing entry and requiring departure of cruise ships; prohibiting entry into remote (including Aboriginal) communities; and regulating use of the COVID Safe App and data.

These response measures limited a wide range of human rights, including:<sup>5</sup> right to freedom of movement and to choose their residence (ICCPR, Article 12(1)); right to leave and enter their own country (ICCPR, Article 12(2) and (4)); right to liberty (ICCPR, Article 9) and right to humane treatment when deprived of liberty (ICCPR, Article 10); right to privacy, family and home (ICCPR, Article 17(1)); right to equality and non-discrimination (ICCPR, Articles 2(1), 3 and 26; ICESCR, Articles 2(2) and 3)); and right to protection of families and children (ICCPR, Article 23 and 24; ICESCR, Article 10).

At the same time, the response measures taken sought to protect the right to life (ICCPR, Article 6) and right to the highest attainable standard of health (ICESCR, Article 12). The COVID-19 pandemic often gave rise to difficult balancing equations, bearing in mind that most human rights are not absolute and may be limited for reasonable and demonstrably justified reasons. In our view, the Commonwealth legislative framework could be amended to improve response measures. It did not adequately direct for such rights-

---

<sup>4</sup> Victorian Ombudsman, *Investigation into Decision-making under the Victorian Border Crossing Permit Directions*, 7 Dec 2021 <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-decision-making-under-the-victorian-border-crossing-permit-directions/#discretionary-decision-making-under-the-border-directions>>.

<sup>5</sup> The State and Territory response measures limited an even broader range of human rights, including, rights to freedom of expression, assembly and association, right to freedom of thought, conscience and religion, right to take part in cultural life, right to work, and right to education.

balancing considerations to be canvassed *before* measures were decided upon. The measures also lacked accountability for their rights-limiting impacts *after* they were made.

## 2.2 The Biosecurity Act

Commonwealth Government response measures were implemented predominantly through the *Biosecurity Act 2015* (Cth). Section 477 of that Act was the primary power under which the Health Minister could determine emergency requirements.<sup>6</sup> That power is subject to proportionality testing (section 477(4)) but the question is, ‘proportionate to what?’ It makes no reference to human rights standards. As a result, certain exercises of this power had insufficient regard to the significance and value of individual’s human rights.<sup>7</sup> We are also concerned there was at times a lack of evidence to justify the extent of limitation on such rights (as well as at State and Territory level).<sup>8</sup>

Moreover, legislative instruments would usually be subject to parliamentary scrutiny and disallowance. However, the *Biosecurity Act* expressly excludes section 477 determinations from this safeguard (section 477(2)). Given the volume of determinations made, often with highly significant impacts on human rights, and their re-making to the extent of being quasi-permanent – this is a significant gap in oversight and accountability. We reiterate the recommendation by the Senate Standing Committee for the Scrutiny of Delegated Legislation that such determinations should be subject to parliamentary scrutiny and disallowance.<sup>9</sup> A further implication of the exclusion is that section 477 determinations are not subject to the preparation of statements of compatibility. Usually, legislative instruments must be accompanied by an assessment of whether that instrument is compatible with human rights under international human rights treaties.<sup>10</sup> The lack of official and public reasoning for why human rights were limited by response measures lacked transparency and did not engender public trust. We point to the Australian Human Rights Commission’s recommendation that such determinations should be subject to the statements of compatibility scheme<sup>11</sup> (or an alternative scheme).<sup>12</sup>

## 3. Final Comments

We make some final, related comments. First, common law courts are known for their tendency to defer to the executive during times of emergency. In our view, this was arguably borne out in Australia during the COVID-19 pandemic. Second, judicial review claims before the courts were limited in their utility and scope for several reasons. Third, the pandemic demonstrated that the exercise of Commonwealth<sup>13</sup> (and State)<sup>14</sup> executive power is subject to few constitutional restraints in times of emergency. The above observations point to the need for greater preparedness for scrutiny by Australian parliaments, which did not sit for significant periods of time during the pandemic.

---

<sup>6</sup> See also *Biosecurity Act*, ss 44 and 45 determination of entry and exit requirements into and from Australia.

<sup>7</sup> See Bruce Chen, ‘The COVID-19 Border Closure to India: Would an Australian Human Rights Act have made a Difference?’ (2021) 46(4) *Alternative Law Journal* 320 and Elizabeth Hicks, ‘Proportionality and Protracted Emergencies: Australia’s COVID-19 Restrictions on Repatriation Rights Compared’ (2023) 45(1) *Sydney Law Review* 77.

<sup>8</sup> See, eg, Bruce Chen, ‘Comments: The Victorian COVID-19 Response: Reflections on *Loiello v Giles*’ (2021) 32(1) *Public Law Review* 8 regarding the Victorian lockdown curfew.

<sup>9</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Interim Report, 2 December 2020) 70 [4.77]. In Victoria, pandemic orders are now subject to a disallowance procedure: see *Public Health and Wellbeing Act 2008* (Vic), s 165AU.

<sup>10</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 9.

<sup>11</sup> Australian Human Rights Commission, *Free & Equal – Position Paper: A Human Rights Act for Australia* (December 2022) 315.

<sup>12</sup> In Victoria, pandemic orders now require a statement on the *Charter of Human Rights and Responsibilities Act 2006* (Vic): see *Public Health and Wellbeing Act 2008* (Vic), s 165AP(2)(c) and (d).

<sup>13</sup> It remains unclear whether there is a constitutional freedom to leave and re-enter Australia.

<sup>14</sup> See, eg, *Gerner v Victoria* (2020) 270 CLR 412 regarding Victorian lockdowns restricting intrastate movement; and *Palmer v Western Australia* (2021) 272 CLR 505 regarding Western Australia state border closures.