COVID-19 and the Australian Human Rights Acts

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Abstract
This article considers how the response to COVID-19 in Australia may be examined and challenged by the Human Rights Act 2004 (ACT), the Charter of Human Rights and Responsibilities 2006 (Vic) and the Human Rights Act 2019 (Qld) (collectively, the Australian HRAs). It also considers the unique model of rights protection provided at the Commonwealth level under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (2011 Act). The authors argue the Australian HRAs and the 2011 Act have the potential to play a key role in scrutinising some laws implementing the COVID-19 measures, and action taken under those laws.

Keywords
Human rights law, Charter of Rights, police powers, privacy, Queensland, Victoria, Australian Capital Territory

The COVID-19 pandemic has caused devastating loss of life and economic stagnation across the globe. Governments quickly introduced laws and policies to reduce the spread of the virus, ease the burden on health systems, and assist ailing economies. Australia is no exception in this regard. The scale and scope of the government response at the Commonwealth, state and territory levels have been nothing short of massive.

This article considers how the COVID-19 response may be examined and challenged by the Human Rights Act 2004 (ACT) (ACTHRA), the Charter of Human Rights and Responsibilities 2006 (Vic) (Victorian Charter) and the Human Rights Act 2019 (Qld) (QHRA) (collectively, the Australian HRAs). We also consider the unique model of rights protection provided at the Commonwealth level under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (2011 Act). As we show, the Australian HRAs and the 2011 Act have the potential to play a key role in scrutinising some laws implementing the COVID-19 measures, and action taken under those laws.

Of course, the outbreak of COVID-19 required quick, decisive and effective action to be taken by Australian governments. We do not propose to comment on what the most appropriate measures should have been, or should be in the future. Nor do we seek to draw conclusions on the compatibility of actions taken under such measures with the frameworks for the protection of human rights established by the Australian HRAs. Such assessments are complex and both fact- and jurisdiction-specific, requiring consideration of

1See George Williams and Daniel Reynolds, 'The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) Monash University Law Review 469.
various legal, health, scientific and economic factors. However, history tells us that in times of crisis, human rights are vulnerable to serious infringement. Moreover, measures taken in a crisis can endure for prolonged periods. Indeed, while governments have eased various restrictions in Australia, measures of some kind are likely to be in place for some time. Our aim is to explore some of the available legal tools which can be used to scrutinise such measures, in order to ensure that human rights are protected in an appropriate manner, notwithstanding the need for effective and ongoing action in response to the virus. This is especially so as some of the usual avenues of government scrutiny, including through parliamentary sittings and human rights scrutiny processes, have been limited because of COVID-19 measures. We explore this issue of scrutiny below, but first consider some rights that have been implicated by the COVID-19 measures and how these potential rights infringements may be assessed against the standard of proportionality established in the Australian HRAs.

Rights and proportionality

Whether the action taken by the Australian Commonwealth, state and territory governments in relation to COVID-19 will have breached the rights protected by the Australian HRAs and the 2011 Act is dependent on a form of proportionality analysis. Indeed, balancing competing public and private interests lies at the very heart of human rights law. For example, all rights protected under the Australian HRAs may be limited under those Acts. This includes even those rights, such as the right to life, which are considered ‘supreme’ and non-derogable under international human rights law. The relevant limitation clauses under the Australian HRAs require limits imposed under law to be reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The jurisprudence that has developed on the limitations clause in the Victorian Charter requires that there be reasonable proportionality between the limitations imposed on the rights or freedoms and the object or purpose which the limitation seeks to achieve. This proportionality principle provides an analytical tool to ensure measures taken in the ACT, Victoria and Queensland are consistent with the rights set out in the respective legislative instruments. In our view, it may also provide a useful framework for scrutinising action taken by other Australian governments.

Rights implicated

Measures taken by the Australian Commonwealth, state and territory governments in relation to COVID-19 have raised a number of rights issues.

One of the ubiquitous and most significant human rights implications of the COVID-19 measures relates to the restriction on freedom of movement. Restrictions have been implemented within states and territories (for example by requiring residents to stay at home, subject only to specified exceptions), and more broadly (notably through the closure of several state borders). Some of these restrictions on movement have been challenged at the Commonwealth level, under the Constitution. To the extent that restrictions on movement are imposed by the governments of the ACT, Victoria and Queensland, these may be unlawful infringements of the protection of freedom of movement afforded under the Australian HRAs. This is of particular interest where police fine people for breaching the directions on social distancing. Many of these directions have been criticised (including by senior members of the police) for lacking clarity, resulting in inconsistent application. Police are public authorities or public entities under the Australian HRAs, and are therefore bound by the ‘conduct’ obligations set out in the Australian HRAs, including to act compatibly with human rights and give proper consideration to human rights in their decision-making. Further, if these fines are being inconsistently and unjustifiably applied to certain minority groups, this discrimination may also be a breach of the right to equality.

A range of other rights issues have arisen. For instance, Victoria Police arrested and fined activists holding a car convoy protest outside a hotel in Melbourne where refugees and asylum seekers were being detained. This action may have infringed rights relating

1See eg, Re Application under Major Crimes (Investigative Powers) Act 2004 (2009) 24 VR 415; [2009] VSC 381 at [148]; Kracke v Mental Health Review Board (2009) 29 VAR 1; [2009] VCAT 646 at [111].
2At the time of writing, three constitutional challenges to State (Qld and WA) border closure restrictions had been issued in the High Court: Mineralogy Pty Ltd and Jacobson v State of Queensland [2020] HCATrans 71 (4 June 2020), Travel Essence Pty Ltd CAN 143 823 590 v Jeannette Young, The Chief Health Officer for the State of Queensland [2020] HCATrans 72 (4 June 2020) and Palmer v The State of Western Australia [2020] HCATrans 62 (28 May 2020).
3Consider Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38(2) Melbourne University Law Review 362.
4ACTHRAs s 28; Victorian Charter s 7(2); QHRA s 13.
5See eg, Kracke v Mental Health Review Board (2009) 29 VAR 1; [2009] VCAT 646 at [111].
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11Michael Fowler, ‘Police fine man $1652 for driving to a bike trail, then withdraw it’, The Age (online, 7 April 2020) https://www.theage.com.au/national/victoria/police-fine-man-1652-for-driving-to-a-bike-trail-then-withdraw-it-20200407-p54hye.html.
12ACTHRAs s 40; Victorian Charter s 4; QHRA s 9.
13ACTHRAs s 40B; Victorian Charter s 38; QHRA s 58.
14ACTHRAs s 8; Victorian Charter s 8; QHRA s 15.
15Coronavirus deaths rise to 13 in Victoria, Melbourne refugee protesters fined by police’, ABC News (10 April 2020) https://www.abc.net.au/news/2020-04-10/coronavirus-easter-victorians-told-to-stay-home-this-weekend/12140378.
to protest, such as rights to freedom of expression,11 peaceful assembly and freedom of association,12 and taking part in public life.13 In addition, the subject matter of the protest raises human rights concerns. Detention and quarantining may increase a person’s risk of contracting COVID-19, which raises questions as to whether the government has fallen foul of the requirement for humane treatment while liberty is deprived14 or even the prohibition against cruel, inhuman or degrading treatment.15

Analogous claims about detention breaching human rights could be made by prisoners. Indeed, there are various potential rights issues arising in the criminal justice context. For one, as Fullerton J held in the NSW Supreme Court,16 the virtual hearing of a criminal case because of court closures in the wake of COVID-19 may not constitute a fair hearing, which is a right under the Australian HRAs,17 as well as at common law.18 In relation to criminal detention, the possibility that rights have been breached may be heightened where prisoners are vulnerable to the effects of COVID-19 and/or pose a low risk of reoffending if released. Furthermore, the circumstances may render the detention of juvenile offenders disproportionate and therefore not in accordance with the requirement to act in the best interests of the child.19 These questions about criminal detention also raise concerns about the right to life,20 which at least under international law, imposes positive obligations on States parties to protect against a risk to the life of persons in their care.21 However, the right to life may also prove important in justifying many of the government responses, which have been taken for the direct purpose of reducing loss of life.

Another right which may have been infringed by anti-COVID-19 measures is the right to education, which is protected under s 36 of the QHRA and s 27A of the ACTHRA. Both provisions provide a right of access to school education appropriate to the child’s needs. Questions arise as to whether the home-schooling measures implemented in Queensland and the ACT could have breached these rights in certain instances. For example, an obvious issue arises where students do not have access to learning resources or classes online. However, any potential breach of the right to education as a result of this may be ameliorated by the provision of laptops, internet access devices and alternative teaching mechanisms to students, as has occurred for some children in both Queensland and the ACT. Perhaps more problematic is the provision of education services to some children with learning difficulties. For some such children, the provision of home-based learning may fall short of their education needs because of their learning difficulty. In such cases, a claim that s 36 of the QHRA has been breached could be made in conjunction with a claim that the right to equality under s 15 of the QHRA has been breached, or alongside a claim under the Anti-Discrimination Act 1991 (Qld). An analogous claim under the ACTHRA could rely on s 27A(3)(a), which provides that ‘everyone is entitled to enjoy these rights [to education] without discrimination’.

However, claims that the right to education has been breached would face difficult hurdles. As with the right to health services under s 37 of the QHRA, the right to education in the QHRA and ACTHRA is modelled on the International Covenant on Economic, Social and Cultural Rights (ICESCR), which in general only requires the rights to be ‘progressively realised’ and subject to resource availability.22 The ACT Attorney-General noted as much when introducing the 2012 Amendment which inserted the right to education into the ACTHRA, when he stated that the government was committed to a ‘step-by-step approach in realising this right’.23 As such, it is likely that the ACT and Queensland governments would argue that any shortfalls in the provision of access to adequate education services for children was rational and reasonable, owing to the pressures on resources that the COVID-19 outbreak caused.

As at the time of writing, governments at all levels had begun progressively easing restrictions. Central to this roadmap back to normality has been the COVIDSafe app, the widespread uptake of which the Commonwealth government believes has the potential to slow the spread of the virus in Australia. And while this is a positive development, the app raises various concerns about the right to privacy, which may also arise for other contact tracing measures taken by Commonwealth, state and territory governments. Whether the right to privacy has been breached by

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1ACTHRA s 16; Victorian Charter s 15; QHRA s 21.
2ACTHRA s 15; Victorian Charter s 16; QHRA s 22.
3ACTHRA s 17; Victorian Charter s 18; QHRA s 23.
4ACTHRA s 19; Victorian Charter s 22; QHRA s 30.
5Victorian Charter s 10; QHRA s 17. See also ACTHRA s 11(2).
6R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 11) [2020] NSWSC 382.
7ACTHRA s 21; Victorian Charter s 24; QHRA s 31.
8See, eg, Dietrich v The Queen (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
9ACTHRA s 10; Victorian Charter s 17(2); QHRA s 26(1).
10ACTHRA s 9; Victorian Charter s 9; QHRA s 16.
11See UN Human Rights Committee, General Comment No 36: Article 6 (Right to Life), CCPR/C/GC/36 (2019).
12In particular, see ICESCR art 2. But see, UN Committee on Economic, Social and Cultural Rights, General Comment No 3 (The nature of States parties obligations), E/1991/23 (1990) [9].
13ACT, Parliamentary Debates, Legislative Assembly, 29 March 2012, 1498 (Simon Corbell, Attorney-General) http://www.hansard.act.gov.au/hansard/2012/week04/1498.htm.
such measures will depend on matters such as how data are collected, who will (and will not) access the data, how the data will be used, and how and when the data will be destroyed. In this regard, the enactment of the Privacy Amendment (Public Health Contact Information) Act 2020 by the Commonwealth government is welcome, as was the government’s public release of the COVIDSafe application source code. The privacy amendments (inter alia) create offences relating to matters including the collection, use and disclosure of data, as well as impose obligations for the destruction of the data collected through the app. The combined effect of such enhanced privacy protections and transparency are encouraged, as a means to reduce the likelihood of privacy breaches and to ensure the public has confidence in the measures being taken.

Human rights scrutiny

The Australian COVID-19 measures, at least in the early phases of their implementation, have been met with limited human rights scrutiny. This is in part because of heavily reduced sittings of Parliaments across the country, and because of the short timeframe in which measures have been implemented. In this environment, Parliamentary Committees may play an important role in scrutinising human rights issues. It was welcome to see that the Parliamentary Joint Committee on Human Rights (PJCHR) resolved on 9 April 2020 to meet regularly by teleconference to continue its scrutiny work, including of legislation relating to the COVID-19 pandemic. By the end of April, it had already reported in this area. However, another important mechanism of rights scrutiny, being ‘statements of compatibility’, has been somewhat neglected.

One of the common features of the Australian HRAs and the 2011 Act is that they each require pre-enactment scrutiny of Bills for human rights compatibility via ‘statements of compatibility’. Similar requirements exist in Victoria for statutory rules and legislative instruments, in Queensland for subordinate legislation, and at the Commonwealth level for legislative instruments that are disallowable under s 42 of the Legislation Act 2003 (Cth). Regrettably, a number of important Determinations were made by the Commonwealth government without statements of compatibility or human rights certificates, presumably because these instruments were not required. For example, the COVIDSafe app was initially regulated by a Determination made under s 477 of the Biosecurity Act 2015 (Cth), which states that ‘section 42 (disallowance) of the Legislation Act 2003 does not apply to the determination’. As a result, the Minister was not under an obligation to issue a statement of compatibility in relation to the COVIDSafe Determination. However, the Minister could still have done so. This may have been particularly useful when the government announced plans to launch the COVIDSafe app and in the early phase of its rollout in the country, when privacy concerns were being raised by the media and in the public. It was only after the app was put on legislative footing via the Privacy Amendment (Public Health Contact Information) Act 2020 that such a statement of compatibility was issued.

It is worth pausing to consider what difference human rights compatibility statements might make in relation to Determinations implementing COVID-19 measures. The relevant Minister responsible for preparing a Determination would be required to set out an assessment of the compatibility of the Determination with the human rights and freedoms contained in seven core international human rights treaties which Australia has ratified. Put simply, the statement of compatibility requirement necessitates that the Minister squarely confront how the measures interfere with rights and consider whether restrictions on rights are proportionate. When such a statement is not prepared, this form of human rights scrutiny of the Commonwealth action does not occur in respect of that Determination. It is in this context that we agree with the PJCHR, which has stated:

> [G]iven the potential impact on human rights of legislative instruments dealing with the COVID-19 pandemic, the committee considers it would be appropriate for all such legislative instruments to be accompanied by a detailed statement of compatibility.

27Parliamentary Joint Committee on Human Rights, Report 5 of 2020 (29 April 2020) https://www.aph.gov.au/Parliamentary_Business/Committees/ Joint/Human_Rights/Scrutiny_reports/2020/Report_5_of_2020.
28ACTHRA s 37; Victorian Charter s 28; QHRA s 38.
29Subordinate Legislation Act 1994 (Vic) s 12A.
30Subordinate Legislation Act 1994 (Vic) s 12D.
31QHRA s 41.
322011 Act s 9.
33Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 (Cth).
34See 2011 Act s 3.
35Parliamentary Joint Committee on Human Rights, Report 5 of 2020 (29 April 2020) 4.
Remedies

While the Australian HRAs provide for pre-scrutiny of laws, they also provide remedies for rights breaches, albeit that the remedial regimes in the Acts differ somewhat. For example, the provision for human rights complaints to the Queensland Human Rights Commission under s 64 of the QHRA is not replicated in the ACTHRA or the Victorian Charter.

In so far as litigation in court is concerned, the most likely remedy in relation to COVID-19 measures might be for breach by a public authority or public entity of the conduct obligations set out in the various Australian HRAs. Of interest is the interlocutory decision in Rowson v Department of Justice and Community Safety [2020] VSC 236 in which Ginnane J of the Supreme Court of Victoria considered the possibility of an injunction to restrain the Secretary of the Department of Justice and Community Safety from acting unlawfully under the conduct obligations in s 38(1) of the Victorian Charter.

In future litigation relating to COVID-19 measures, practitioners might look to some of the decided cases to see the relief available. A range of remedies have been ordered under the Victorian Charter including mandatory and prohibitive injunctions, permanent stays of a criminal prosecution, orders in the nature of certiorari quashing a decision, habeas corpus, and declarations that decisions made were unlawful. For example, in Certain Children v Minister for Families and Children (No 2), the Supreme Court of Victoria prohibited the Secretary of the Department of Justice and Regulation from detaining children at a place of detention that had been declared unlawful because it breached the children’s human rights. The Court also directed the removal of a child from Barwon Prison to a youth justice precinct. Such precedents may prove fruitful for litigants seeking redress for human rights breaches under the Australian HRAs. As an example, the same form of injunctive relief might be available in respect of a prisoner being held in solitary confinement conditions under new emergency powers because of COVID-19, where the conditions fail to comply with the minimum standards of detention protected by Australian HRAs. However, in Victoria and Queensland the limitations imposed by s 39 of the Victorian Charter and s 59 of the QHRA would first have to be overcome, since in these jurisdictions, unlike the ACT, there is no direct cause of action against a public authority or entity for a breach of a human right.

Conclusion

Australian governments took strong action in response to the COVID-19 pandemic and continue to do so. Thankfully, these measures have so far yielded positive results. Nevertheless, it is important that the legal measures taken to date, and those implemented going forward, only infringe our rights and liberties in a manner and for a period of time proportionate to the threat faced. The application of these measures by public authorities such as the police also needs to be proportionate and free of unjustified discrimination. The proportionality tests under the Australian HRAs provide a helpful standard for all jurisdictions to use to determine whether the measures taken to fight COVID-19, and their application in practice, have been human rights-compliant. In the ACT, Victoria and Queensland, the Australian HRAs may also be relied on in court proceedings where the legal measures, or their application, have fallen short of these requirements.

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36ACTHRA s 40B; Victorian Charter s 38; QHRA s 58.
37Certain Children v Minister for Families and Children (No 2) [2017] VSC 251.
38Baker (a Pseudonym) v DPP [2017] VSCA 58.
39Haigh v Ryan [2018] VSC 474.
40Antunovic v Dawson [2010] VSC 377.
41Burgess v Director of Housing & The Victorian Civil and Administrative Tribunal (No 2) [2015] VSC 70.
42[2017] VSC 251.
43ACTHRA s 40B.