



Law Council
OF AUSTRALIA

Infection control measures of varying degrees are being enforced in different jurisdictions. How do we tackle the conflicts between public health and safety on one hand and personal privacy and individual human rights on the other?

Speech delivered by Pauline Wright, President of the Law Council of Australia at the virtual Presidents' Roundtable 'Resilience through COVID-19'.

27 April 2020

Since it first emerged last December, COVID-19 has had a devastating impact, requiring governments worldwide to navigate uncharted waters to maintain public health and safety.

Measures to control the spread of COVID-19 have affected almost every aspect of our lives – where we can go, what we can do, who we can see. Such restrictions are totally alien to Australians used to living in a liberal democracy.

Governments across Australia have restricted our behaviour including requiring us to maintain social distancing, to not gather in groups of more than two, and to stay at home except where necessary to buy essential supplies, exercise, or work if that cannot be done from home.

Governments must protect public health by controlling the spread of the virus. At the same time, they have an obligation to respect, protect and fulfil other human rights to which all persons are entitled under domestic and international law. This includes resolving tensions between conflicting rights.

The protection of public health and the protection of human rights are not contradictory objectives. The intersectionality of human rights is such that states should be able to calibrate laws to achieve both.

The right to life, which extends to taking appropriate steps to protect the right to life, is non-derogable. Governments may not derogate from it under any circumstances. Responses necessary to control the spread of this potentially fatal virus, and prevent unnecessary deaths are therefore within the scope of a state's duties under Article 6 of the ICCPR.

Freedom from discrimination must be respected, even during times of public emergency, as clearly expressed in Article 4 of the ICCPR. Governments must therefore ensure that all persons have equal access to medical treatment and that measures to control the spread of COVID-19 do not in practice disproportionately affect vulnerable groups.

Many human rights – including rights to privacy and freedom of movement – are qualified rights which may be reasonably restricted to pursue legitimate objectives – including national security and public health. International human rights law provides a framework to resolve these issues.

Lawmakers must therefore ensure that COVID-19 responses restricting individual human rights are necessary, reasonable, proportionate and do not outlast the pandemic.

Transparency, accountability and scrutiny are indispensable.

Biosecurity Act 2015

Australia's *Biosecurity Act of 2015* bestowed exceptional powers without the usual safeguards and independent oversight protections that apply to the exercise of coercive powers by law enforcement and security agencies.

The declaration in March of the COVID-19 human biosecurity emergency enabled the making of control orders, which can require Australians to:

- provide their contact information and health details (including body samples for diagnosis);

- undergo risk-minimisation interventions and/or medical treatment;
- accept restrictions on their movements; and
- accept isolation for specified periods.

There is no requirement for someone to be infected for a control order to be made, and the Commonwealth Chief Medical Officer may mandate compliance, with fines and gaol penalties for breaches.

Given the health risks of COVID-19, are these intrusions on individual human rights reasonable and proportionate?

These powers represent serious intrusions on human rights and liberties, and must be used with utmost caution and only as a last resort.

COVID-19 Tracing App

Our government yesterday released the CovidSafe app to assist in tracing the spread of COVID-19 and alert people who have been in close proximity to a confirmed case.

This app illustrates the tensions between safeguarding public health and respecting and protecting personal privacy.

Last week, the Law Council released nine core design principles, and called on the Federal Government to incorporate them into the legislative framework governing the app's operation.

We were pleased that CovidSafe adopts many of these principles. We particularly welcome the adoption of a consent-based model and the release of a Privacy Impact Statement to enable Australians to provide informed consent when opting in.

For the app to be effective, at least 40 per cent of Australians will need to opt in – trusting that the government will collect and access data for the sole purpose of contact tracing, and will store it securely.

Despite repeated assurances by the government that the app will not collect location data and that only state and territory health departments will have access to the data, community concern persists.

To help ensure that the public can be completely confident in the app, the Law Council looks forward to working with the government to address some outstanding issues, including independent oversight and reporting, when legislation comes before the parliament in May.

So where does this leave lawyers and law associations?

As governments ask individuals to make extraordinary sacrifices in this uncertain climate, trust and confidence in leadership has never been more important.

Facing extraordinary intrusions by governments into social, economic and political life, the legal profession and law associations are uniquely placed to ensure that COVID-19

responses are consistent with the rule of law, compatible with human rights obligations and subject to appropriate scrutiny.

We need to trust that these measures are well-designed to achieve their purpose, are necessary, reasonable, proportionate, and will not outlast the pandemic.

We need to ask whether restrictive measures may have a disproportionately harsh impact on vulnerable groups, and take particular care in developing safeguards to protect and uphold their rights.

I challenge myself, along with my esteemed colleagues at this roundtable to consider how our associations may best support and cooperate with government to achieve these aims, and facilitate trust in the jurisdictions and communities we serve.

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