



Law Council
OF AUSTRALIA

Office of the President

2 September 2020

Ms Jane Halton AO
National Review of Hotel Quarantine
Department of the Prime Minister and Cabinet
PO Box 6500
CANBERRA ACT 2600

By email: sally.hill@pmc.gov.au

Dear Ms Halton

National Review of Hotel Quarantine

The Law Council appreciates the opportunity to contribute to the National Review of Hotel Quarantine (**Review**), as established by the National COVID-19 Coordination Commission (**Commission**). Due to the short timeframe in which to provide input, the Law Council has not had an opportunity to seek the views of its Constituent Bodies, and as such, is only able to provide a high-level contribution to the Review. The Law Council is, however, grateful for the contribution of its National Human Rights Committee to this submission.

From the outset, the Law Council acknowledges that the hotel quarantine measures have been developed in response to an unprecedented public health emergency, and at an extremely challenging time for policy makers at all levels of government.

The 14-day quarantine period has been a critical aspect of Australia's attempts to control the spread of COVID-19, as has the use of hotels to isolate returned overseas travellers. While mandatory quarantining measures have been responsible for much of the success in Australia's COVID-19 response, the manner in which hotels have been utilised for this purpose requires holistic consideration, particularly in relation to any actual or perceived issues with human rights, privacy and administrative law. The Review is an important opportunity to undertake this scrutiny.

Regard for the Victorian hotel quarantine inquiry

The Commission will be aware that an inquiry is currently underway in Victoria, focussed on the actions of government agencies, hotel operators and private contractors in relation to the hotel quarantine program in Victoria (**Victorian Inquiry**). The Victorian Inquiry is due to report by 6 November 2020.

While it is unclear whether the report of the Victorian Inquiry will be available prior to the conclusion of the Review, it will be critical for the Review to have regard to the proceedings of the Victorian Inquiry which have already highlighted a range of issues regarding oversight, transparency of processes and the adequacy of facilities for those under hotel quarantine arrangements in Victoria.

Complexity of the legal framework

On 27 March 2020, the Prime Minister announced that the National Cabinet had agreed that from 28 March 2020, all travellers arriving in Australia will be required to undertake a mandatory 14-day self-isolation at a designated facility. It was further announced that designated facilities will be determined by the relevant state or territory government, implemented under state and territory legislation, and enforced by state and territory governments with the support of the Australian Defence Force and the Australian Border Force where necessary.¹

Under the current arrangements, the hotel quarantine program operates with a mix of federal and state involvement. The Australian Constitution specifies quarantine as the responsibility of the Commonwealth Government, which is predominately exercised through the *Biosecurity Act 2015* (Cth), while the implementation of hotel quarantine measures has been the responsibility of individual states, largely directed by public health authorities in each jurisdiction.

One theme that has emerged from the Victorian Inquiry proceedings to date has been the experience of returning travellers being unable to obtain a clear understanding of what the hotel quarantine measures would entail upon their arrival in Australia, or indeed the applicable processes during their quarantine period.² This lack of clarity is perhaps unsurprising in a framework that is operating in a fluid environment under successive executive orders across multiple jurisdictions and in the absence of a publicly-accessible central repository of information.

While appreciating the inherent power of each state to implement programs such as the hotel quarantine measures, the Law Council submits that there is a need to ensure greater alignment in the process adopted between jurisdictions. Clearly, a fragmented legislative framework is not well-suited to responding to a national public health crisis that is persisting for a prolonged period.

In this regard, the Law Council notes the views of the Australian Medical Association in relation to the need for uniformity, including calls for an independent national centre for disease control that would provide a 'uniform, acknowledged source of direction' when responding to public health situations such as the current pandemic'.³

The Law Council submits that in the absence of a realignment of responsibilities between the Commonwealth and the states on these matters, there will likely continue to be inconsistencies in measures such as the hotel quarantine programs, including in relation to the use of personnel to enforce them and the standards of accommodation provided. These differences in jurisdictional approaches have, regrettably, allowed for the politicisation of many of these issues, which has at times distracted from the primary goal of such measures, namely, to promote the public health of Australian communities.

¹ Prime Minister of Australia, Media Release (27 March 2020), <<https://www.pm.gov.au/media/update-coronavirus-measures-270320>>.

² See for example, COVID-19 Hotel Quarantine Inquiry 'Transcript of day 5 hearing' (20 August 2020), 189-197.

³ Dana McCauley 'Melbourne quarantine breach sparks calls for independent medical body' *The Sydney Morning Herald* (online, 25 June 2020), <<https://www.smh.com.au/politics/federal/melbourne-quarantine-breach-sparks-calls-for-independent-medical-body-20200625-p55664.html>>.

Human rights and quarantine arrangements

The COVID-19 pandemic, and in particular the quarantining arrangements, engage multiple human rights. These include the rights to life, the right to the highest attainable standard of physical and mental health, the right to humane treatment in detention, freedom of movement, the right to security of the person and freedom from arbitrary detention, and the right to non-interference with privacy, family, or the home.

There is, however, a disconnect between Australia's obligations at international law, and their translation into Australian domestic legislation. It appears, including in the current pandemic, that Australians may genuinely believe that their rights are protected by law, when this may not always be the case.

The need to resolve tensions which arise between conflicting rights is not always well understood in the Australian community. Instead, specific rights are sometimes raised by different community sectors in isolation, to the detriment of others' rights and in a manner which can distort the debate. For instance, some may emphasise that current quarantine requirements infringe their freedom of movement or freedom from arbitrary detention, without reference to how governments and lawmakers must resolve these issues in light of their broader obligations, including to respect, protect and fulfil others' rights to life and health.

As the Law Council notes in its policy statement '*Human Rights and the Legal Profession*', certain human rights are absolute, and no limitation upon them is permissible.⁴ These are the prohibition on genocide, freedom from torture, cruel, inhuman or degrading treatment or punishment, the right to be free from slavery and servitude, the prohibition on prolonged arbitrary detention, the prohibition on imprisonment for inability to fulfil a contractual obligation, the prohibition on the retrospective operation of criminal laws, the right to recognition as a person before the law, freedom from systematic racial discrimination.⁵ For all other rights, limitations (or restrictions) may be imposed provided certain standards are met.

Some rights have express limitation clauses setting out when the rights may be limited, while others have implied limitations, and some treaties contain a general limitation clause. In general, where a provision appears to limit rights, the Parliamentary Joint Committee on Human Rights (**PJCHR**) considers three key questions:

- whether and how the limitation is aimed at achieving a legitimate objective;
- whether and how there is a rational connection between the limitation and the objective; and
- whether and how the limitation is proportionate to that objective.

The Law Council endorses the approach of the PJCHR regarding the assessment of limitations on human rights and considers that any imitation must be necessary, reasonable, and proportionate to a legitimate purpose.

⁴ Law Council of Australia, '*Human Rights and the Legal Profession*' (May 2017), available at <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/human-rights-policy>>.

⁵ For example, the rights in Articles 6(3), 7, 8 (1) and (2), elements of 9(1), 11, 15, 16, 18 and elements of Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights* are absolute: see Article 4(1). Other rights are capable of being subject to narrowly prescribed restrictions: for example Articles 12, 14, 19, 21 and 22.

This framework for resolving tensions is clearly relevant to any deliberations concerning COVID-19 responses, including the hotel quarantine measures.

The Law Council considers that a federal human rights act, which reflects Australia's international law obligations, would promote Australians' understanding that human rights are universal, indivisible and interdependent and interrelated. It would also provide a much-needed framework to resolve tensions which arise when rights conflict.

In the absence of such an act, the current domestic legal framework makes it difficult to know how to appropriately balance competing rights, and the relevant factors to be weighed in this context.

A comprehensive rights framework would not always provide simple solutions to the tensions that arise in practice when human rights intersect. Sometimes, governments are called upon to make difficult choices that leave parts of a community feeling aggrieved. Nevertheless, it would provide a means of reconciling competing human rights claims that focus on accommodating the differing needs of the community.

This is particularly relevant to ensuring that Australians understand the range of factors that governments must weigh in reaching complex decisions which infringe their rights, particularly in a public health national emergency situation. Long-term, it may help to also help to facilitate a greater awareness that with individual rights and freedoms, come corresponding responsibilities.

Contact

Should you require any further information or wish to discuss, please contact the Law Council's Director of Policy, Dr Natasha Molt at natasha.molt@lawcouncil.asn.au, or on (02) 6246 3754.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President