Executive discretion in a time of COVID-19 – promoting, protecting and fulfilling human rights in the contemporary public health context

11th Austin Asche Oration in Law and Governance

Australian Academy of Law and Charles Darwin University

Emeritus Professor Rosalind Croucher AM
FRSA FACLM(Hon) FAAL TEP*

[*Professor Croucher spoke to this paper*]

Acknowledgments

Vice-Chancellor, Chief Justice, the Hon Austin Asche AC KC, members of the Judiciary, our Master of Ceremonies, Emeritus Professor Les McCrimmon, Fellows of the Academy of Law, distinguished guests, friends.

Thank you, Cyan Sue Lee, for your welcome to country. I, too, would like to acknowledge the traditional custodians of the land on which I am speaking this evening, and pay my respects to elders past, present and emerging, and acknowledge any Indigenous guests attending.

Honouring Austin Asche

I am honoured to give this Oration, the name of which recognises the extraordinary contribution made by the Honourable Austin Asche AC KC to the law, to the courts in which he served, and to this Territory.

When called upon to deliver eponymous lectures or orations, I consider it my duty to honour the subject first and finally, as conceptual bookends, with my nominated 'law and governance' subject as the part in the middle. I use 'bookends' as a deliberate metaphorical device, rather than 'sandwich', as, whatever else you say of Austin, he is indeed a literary man.

I remember vividly when I first met Austin. It was in Perth, where the Australasian Law Teachers Association, as it was then known,[1] was holding its annual meeting. It was in July 1991, some 31 years ago, and we were attending a reception at a judge's home in a posh part of Perth by the river. It was a balmy

evening with canapés in the garden. Austin and I started chatting. About succession law; about legal history; about books in general. It was a warm, eclectic conversation. Austin later sent me a copy of a book of which he had spoken, '£10,000 a year', by Samuel Warren. Not unlike some of Charles Dickens' *Pickwick Papers*, it is a satire, written, as the author said, 'to discriminate between virtue and vice, between sincerity and hypocrisy'. Its central character, Mr Tittlebat Titmouse, comes into an estate of £10,000 a year, and eventually loses it again. As an online source summarises, 'The story has no literary standing, and is verbose and overloaded with irrelevant matter. But the plot is ingenious, the legal complications are managed in a way that won the admiration of accomplished lawyers, and the story with all its faults contrived to arouse and maintain the reader's interest.'[2]

It certainly held my interest when, laid up with whooping cough in isolation for a fortnight in the Blue Mountains west of Sydney, the tale of Mr Titmouse was my companion.

Austin was fascinated by other aspects of the law of inheritance, so much so that when the Rule in Shelley's case was finally abolished in the Northern Territory in 2000, he held a wake for it, at which Justice Angel gave a funeral oration.[3]

Let me share Austin's explanation:

> In 1911, when South Australia flogged us off to the Commonwealth, that State still retained the old property law, including Shelley's case. So our property law remained what it was in 1911. South Australia changed its law later but by then, of course, had no jurisdiction over us. The Commonwealth didn't feel inclined to bother with the matter while we remained under their aegis, and there were more urgent things to attend to when we got self-government (insofar as we did get self-government). After all, the relevance of Shelley's case to any NT property transaction was precisely nil, and many felt a sentimental affection for a harmless, picturesque, old ruin, which by now only the NT possessed. There was some talk of preserving it as a tourist attraction and SPAR (the Society for the Preservation of Ancient Relics) felt that it could be housed in the Museum. However, sterner views prevailed and a jury presided over by Mildren J in his capacity as President of the Law Reform Committee found the Rule guilty of incomprehensibility, senility and dry rot. The death sentence was pronounced and carried out in December 2000 by the new improved Law of Property Act. *Hinc illae lacrimae*. ['Hence those tears'][4]

Territorians would appreciate both the erudition and the humour that lies in this gesture.

As this audience would keenly appreciate, Austin is also much beloved throughout the Territory.[5] The citation for his Companion of the Order of Australia award states: 'In recognition of service to the law, to tertiary education and to the community, particularly the people of the Northern Territory'.

As this is an oration in Austin's honour for the Academy of Law, it is also appropriate to emphasise that Austin is indeed a fine lawyer. His father, Eric, showed great foresight in naming him after the English Jurist, John Austin (1790–1859), the first Professor of Jurisprudence in England – although it is also said that his mother chose to name him after her Baby Austin car, presented to her by Eric as an engagement present.[6]

One does not find long biographical treatises about Austin, and any contribution he made was humble and self-effacing.[7] He is not what you would describe as a self-promoter. You see the man in what he writes, across literary and legal genres;[8] and what others say of him.[9] I also note the deep respect and admiration, as well as enduring love, that Austin has for his late wife, Dr Valerie Asche AM, an accomplished microbiologist, who left this earth just over three years ago.[10]

This evening's address is a partnership between the Academy of Law and Charles Darwin University, so it is fitting to note that Austin was there at the birth of the University that is now Charles Darwin University and our co-host this evening. Austin recalled it as 'a matter of enormous pride'; and not just for him, but for the Territory as a 'real step forward'.[11]

Among Austin's many interests was the topic of parliamentary democracy, which will provide the segue to my theme this evening.

In 2003, Austin presented an address entitled 'Parliamentary Democracy: Checks and Balances', at the annual conference of the Australasian Study of Parliament Group.[12] Austin was speaking of the 'checks and balances, the brakes and safeguards, which preserve our Parliamentary democracy from tyranny (on the one hand) and anarchy (on the other)'. His starting point was the early 18th century political philosopher, Charles Louis de Secondat, Baron de La Brède et de Montesquieu, known simply as 'Montesquieu', who began with 'the firm principle':

> that the concentration of governmental power in one body or person was a threat to liberty. He had before him the supreme example of that threat in the French government of his day which was an autocracy based on the simple dictum of Louis XIV '*L'etat c'est moi*' and we all know what that led to.[13]

Looping effortlessly back to the ancient Republic of Rome,[14] Austin then cited the acceptance of the people that,

> in times of danger, the State might be run temporarily by one person who could mobilise resources quickly and efficiently. They would elect a 'dictator' which is the first use of the term, and at that time meant no more than 'leader', with special powers which he was expected to relinquish when the danger had passed.[15]

One with such special powers, Austin continues, was Fabius Maximus Cunctator, who, having finally defeated the Carthaginians under Hannibal, handed his power back to the Republic and retired to his Sabine farm': 'Later Romans were not so lucky and they ended up getting loveable characters like Nero and Caligula'. The point about dictators, Austin reminds us, was summed up by Lord Acton in his famous dictum that 'all power tends to corrupt and absolute power corrupts absolutely'.

So, what about safeguards? For Montesquieu, the safeguards of the English constitutional system were the checks and balances provided by the 'separation of powers' – of the legislature, the executive and the judiciary.[16]

With respect to Australia, Austin urged that we have 'a thriving, viable democracy' and that, in cases of emergency 'when some form of tighter organisation of democracy is required', we have the defence power in the *Constitution*, which is accepted 'as a flexible power expanding if necessary in times of peril to enable greater government control over resources of manpower, and contracting when that peril is over'.[17]

Over two decades ago, and, with great prescience, Austin anticipated all the dynamics that would come into play when Australia was faced by emergency – not one requiring the defence power, but other forms of executive action.

Austin spoke of other checks and balances on arbitrary government: the climate of opinion, the party room and the Australian character. We have also seen the strength of these played out in our experiences of the COVID-19 pandemic.

Hence, I turn to the topic I chose for my contribution to this series of orations on the theme of law and governance: 'Executive discretion in a time of COVID-19 – promoting, protecting and fulfilling human rights in the contemporary public health context'. This evening I would like to explore the democratic challenges of emergency decision-making and the lessons that may be learned to ensure the rule of law is respected, particularly through drawing upon a human rights framework for assessing the appropriateness of emergency responses. It is

about the tests to the strength of the separation of powers, especially in times of emergency, and to the need for greater protections of human rights, including through the introduction of a federal Human Rights Act.

The COVID-19 emergency

The outbreak of the COVID-19 pandemic *was* an emergency: 'the worst communicable disease outbreak for Australia and globally since the 1918 Spanish flu'.[18] As at 28 October 2022, there had been over 625 million confirmed cases of COVID-19 globally, and over 6.5 million deaths.[19]

The responses to COVID-19 united – and divided – Australia. It is appropriate to summon up Charles Dickens in saying, 'It was the best of times, it was the worst of times'.[20]

We remembered the importance of quarantine as a first-line response – as it had been in 1919 in response to the 'Spanish flu' pandemic.[21] Failures in quarantine, such as following the arrival of the *Ruby Princess* in Sydney in March 2020 and breakdowns in hotel quarantine in Melbourne, Adelaide and Brisbane, resulted in mass community transmission – precisely as happened in 1919, when soldiers returning from World War One baulked at such constraints.[22]

On 18 March 2020, the Governor-General declared a 'human bio-security emergency' under the *Biosecurity Act 2015* (Cth), on the advice of the Health Minister,[23] and extended it regularly after that date until 17 April 2022. The declaration enlivened the emergency powers of the Health Minister, who could then determine 'any requirement' that the Minister was satisfied was 'necessary', among other things to 'prevent or control' the entry, emergence, establishment or spread of the listed human disease.[24]

The possibilities were vast.[25]

States also had similar legislative frameworks – such as the Directions in Victoria under the *Public Health and Wellbeing Act 2008* (Vic).[26] Matters were handled along the lines of the division of powers between the Commonwealth and the States and Territories. Things like migration, the economy and pharmaceuticals sat with the Commonwealth; restriction of movement and social isolation rules affecting businesses, schools, public spaces and communities, sat with the States – although the lines of demarcation were not always clear. Areas of overlap became sites for 'blame shifting', as one commentator observed, citing the handling of the *Ruby Princess* as an example.[27]

The responsibility for implementation was disbursed among other layers of government; and responsibility for enforcement fell in many cases to police officers, who were given discretionary powers to issue fines, arrest and charge people for breaching public health orders.

As an island nation, containment in the widest sense was, and is, necessarily our first option against the world; then containment of the spread of infection within – through quarantine, social distancing and personal hygiene – while vaccines were developed.

Australia's overall pandemic responses may appear to be relatively effective compared to the rest of the world in terms of a public health response.[28] On the other hand, Australians have also had to live with some of the most restrictive pandemic response measures in the world. 'Containment' involved significant incursions on people's rights and freedoms, especially freedom of movement.[29] International and internal borders were closed and restrictions implemented for extended periods of time. This included the unprecedented step of travel caps effectively preventing thousands of Australian citizens from re-entering Australia;[30] and an outright ban on citizens returning from India (with penalties of 5 years imprisonment or a $66,000 fine) during the Delta outbreak. The measures introduced were 'previously inconceivable';[31] and the combined effect of the restrictions was to 'reshape daily life in Australia as we knew it before March 2020'.[32]

Assessing the democratic challenges

There are two lenses to apply in exploring the democratic challenges of emergency decision-making: the first is the legitimacy of the significant delegations of power which has revealed significant gaps in the accountability of governments. The second lens is that of human rights compliance.

At the federal level, the limitations of existing mechanisms were exposed.

The sovereignty of Parliament

'What *is* the role of Parliament?' This was the question that opened the 2021 report of the Standing Committee for the Scrutiny of Delegated Legislation (SDL Committee) into its inquiry into the exemption of delegated legislation from parliamentary oversight. 'The answer to this fundamental question', they said, is to be found in s 1 of the *Australian Constitution*: the legislative power of the Commonwealth 'shall be vested in the Federal Parliament'.[33]

A foundational principle of our democratic structure is the sovereignty of Parliament – that the Executive has no right to suspend, dispense with or ignore the legislation passed by Parliament, without Parliament's consent. The courts also play a key role: 'it remains an axiomatic feature of our legal system that courts will review the legality of executive action',[34] – a proposition with which Montesquieu would have had no qualms.

But Parliaments nationwide transferred extraordinarily wide powers to executive governments and agencies, with significant impacts on individual rights and freedoms.[35] Emergency times required emergency measures.

Many restrictions on rights and freedoms were introduced through the mechanism of delegated legislation; many were also *exempt* from legislative oversight or review. Many measures were also implemented without sufficient transparency about government decision-making process, including regarding the evidence upon which decisions were based.[36] They were often accompanied by increased police enforcement powers.

While the 'modern reality is that Parliament must and should delegate many legislative functions to the executive branch',[37] Parliament still remains constitutionally responsible for lawmaking: the practice of delegation 'does not absolve the Parliament of responsibility for laws so delegated'.[38] A concern about how much was being delegated with *exemption* from disallowance,[39] prompted the inquiry by the SDL Committee in 2020–21.

The Committee noted an increasing volume of delegated legislation over time: 'from an average in the mid-1980s of around 850 disallowable instruments tabled each year, it currently sits around 1,500 each year'.[40] In addition, there is a trend for increasing amounts of delegated legislation to be exempt from disallowance. In 2019, 20% of the 1,675 laws made by the Executive were exempt from disallowance.; in 2020 it was 17.4% with a continuing upward trend.[41]

At the federal level, s 44 of the *Legislation Act 2003* (Cth) provides that delegated legislation may be exempted from disallowance in a number of ways. Under the *Biosecurity Act 2015* (Cth), determinations made by the Commonwealth Health Minister in response to a health emergency are not disallowable.[42] In practical terms, this meant that things like 'the Commonwealth's travel bans, orders taking over hotels to quarantine returning travellers, rules making it illegal to 'price gouge' when selling PPE, and regulations dealing with the use of data collected from the COVID tracing app, among countless others' were not disallowable.[43]

Ordinarily the disallowance framework provides an opportunity for parliamentary consideration – and disallowance – of legislative instruments. While disallowance is not common, the mechanism serves a crucial function, as it is through this process that delegated legislation can be scrutinised on technical and policy grounds.[44] But when an instrument is 'exempt' from disallowance, 'this scrutiny does not occur';[45] and without the ability scrutinise, as Professor Anne Twomey said to the SDL Committee, 'it can lead to Parliament effectively abdicating its power by simply not knowing how that power is being exercised'.[46]

Scrutiny is essential to democratic legitimacy of all measures – especially those made in situations of emergency. As the SDL Committee observed,

> If the Parliament is unable to scrutinise legislation because it has been exempted from disallowance, the Parliament's role as the ultimate lawmaking authority is diminished. As a matter of principle, the extent to which this is occurring is immaterial. If one accepts the principle that the legislative power of the Commonwealth is vested in the Parliament, any exemption from disallowance is problematic.[47]

This was not just about COVID-19 measures – although the Committee did use COVID 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'.[48] The Committee said that '[t]he urgency with which this issue must be addressed is heightened by the evident expansion of executive law making that is not subject to parliamentary oversight'.[49]

The Committee urged that Parliament must be able to exercise effective oversight of executive-made laws, 'before its ability to do so slips away'. Insisting that legislation must be subject to parliamentary oversight was 'not a matter of policy', but rather 'of ensuring the proper functioning of the institutions established by the Constitution'.[50]

So, there are questions to be asked here, and a realignment of accountability necessary.

The lens of international obligations

What of the expectations of our international obligations? Australia is a party to seven core international treaties that enshrine our commitments to human rights as a nation.[51]

International human rights law places clear obligations on States parties to protect the right to life and the right to health – especially in response to pandemics.[52]

The *right to life* has been described by the United Nations Human Rights Committee as 'the supreme right from which no derogation is permitted' – even in times of public emergencies.[53] States parties also have the *positive* obligation to take appropriate measures to protect lives during a pandemic. The right to life *trumps*, one might say.

The *right to health* 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'.[54]

In protecting the right to life and the right to health, however, there were necessarily incursions on other rights. Here, international human rights law provides the tools to assess such issues of intersections or *limitations* of human rights and freedoms in terms of proportionate responses.

Rights can be legitimately restricted in times of emergency and many rights contain express limitations within their terms.[55] Any limitations on the International Covenant on Civil and Political Rights (ICCPR) must still meet certain core criteria: they must support a legitimate aim and are provided for by law, strictly necessary, proportionate, of limited duration, and subject to review against abusive applications.[56] Importantly, the burden of justifying any limitation rests upon the State seeking to impose the limitation.

Incorporation of international obligations

While Australia has made promises to the world under these international treaties, the obligations of international law are not fully incorporated into domestic law. The rights that are protected are located in scattered pieces of legislation, the Constitution and the common law. It is incomplete and piecemeal. Specific Human Rights Acts have been passed in Victoria,[57] the Australian Capital Territory[58] and, most recently, Queensland.[59] However there is no overarching federal instrument, which means that a person's legal access to rights protections is wholly contingent on where they live – and the extent of protection is uneven.

Assessing incursions on rights through a human rights proportionality approach is not *entirely* absent from our legal framework. The *Biosecurity Act 2015* (Cth), for

example, does incorporate a justification and proportionality test for the exercise of the Minister's emergency power in s 477(4). Before exercising this power, the Health Minister must be satisfied of the following:

> (a) that the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined;
>
> (b) that the requirement is appropriate and adapted to achieve the purpose for which it is to be determined;
>
> (c) that the requirement is no more restrictive or intrusive than is required in the circumstances;
>
> (d) that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances;
>
> (e) that the period during which the requirement is to apply is only as long as is necessary.

This is a proportionality test that reflects the limitations framework of the ICCPR. The provision has an interesting provenance as the Biosecurity Act was introduced *after* the passage of the Human Rights (Parliamentary Scrutiny) Act (2011).[60]

The introduction of this Act was the outcome of the National Human Rights Consultation, led by Father Frank Brennan SJ, and which reported in 2009. The principal recommendation of the consultation report was for a Human Rights Act, based on a dialogue model – which is the model adopted in comparable jurisdictions, including the UK and New Zealand, as well as in Australian jurisdictions, the ACT, Victoria and now Queensland.[61]

Dialogue models grant each branch of government a distinct role to play, in line with the ordinary institutional functions each performs. Parliament considers human rights when it makes laws, the executive when it applies laws and policies, and the judiciary when it interprets laws.[62] The 'dialogue' occurs through mechanisms of mutual oversight and interaction. Most significantly, they do not involve the ability of the judicial branch to override legislation of the parliament.

They are *not* like the US model. Austin expressed his disquiet about the US approach, involving Constitutional embedding of rights, in a paper he delivered on 14 October 1981, as 'esoteric nepheloccoccygia'.[63]

While the Government of the day did not implement the key recommendation for a federal Human Rights Act, it did introduce the element of parliamentary

scrutiny through the lens of human rights. The Parliamentary Joint Committee on Human Rights (PJCHR) was established and the requirement that a statement of compatibility with human rights be provided.

The Bill for the Biosecurity Act therefore required such a statement of compatibility and pointed to the 'range of protections' in s 477(4).[64] The PJCHR assessed the Bill as having been drafted in a manner which was 'consistent with Australia's human rights obligations and that limitations on rights have been well considered with appropriate safeguards'.[65]

While there is still a big 'missing piece' in the federal protection of human rights – as indeed in the architecture of the Australian Human Rights Commission itself,[66] which was designed around having a Human Rights Act – the drafting of the Biosecurity Act with a proportionality test in such a key position is noteworthy.

Parliamentary scrutiny of COVID-19 measures

Two federal scrutiny committees turned considerable attention to COVID-19 measures: the SDL Committee, from the traditional scrutiny perspective, including whether the instruments 'unduly trespass on personal rights and liberties',[67] and the Parliamentary Joint Committee on Human Rights, from the perspective of human rights compliance.[68] The PJCHR at least could look at exempt instruments, although they were not required to include statements of compatibility.[69] The SDL Committee could not, until its own recommendation to allow it to do so was implemented from 1 July 2021.[70]

In April 2020, the PJCHR published a special thematic scrutiny report focusing on COVID-19 related Bills and legislative instruments, with an overview regarding the laws applicable to the protection of human rights in times of emergencies, with subsequent reports continuing a thematic section on COVID measures.[71] At the time, it was the only parliamentary committee that had the power to consider exempt instruments.

On 16 March 2021, the SDL Committee published its final report.[72] While the Committee used COVID-19 as illustrative, it was concerned with the use of delegated legislation more generally, a matter that had been of 'long-running concern'.[73]

In a submission to the Committee, Gabrielle Appleby, Janina Boughey, Sangeetha Pillai and George Williams urged that

> There are no clear, public, transparent rationales for when it is justifiable to exempt delegated legislation from parliamentary scrutiny. Worse, some mechanisms for disallowance themselves occur via delegated legislation [via the *Legislation (Exemptions and Other Matters) Regulation 2015* (Cth)][74]

Then in April, the Australian Senate established a Select Committee on COVID-19 to inquire into the federal government's response to the pandemic, with a very wide mandate.[75] It released its final report in April 2022. It made the following key recommendation:

> All Australian Governments ensure that restrictions enacted to combat the COVID-19 pandemic are proportionate, the minimum necessary intrusion on rights at all times and are removed fully as soon as the public emergency is over.[76]

This recommendation used the language of proportionality of human rights law – but in the absence of the legislative anchor of a Human Rights Act.

Within the existing frameworks of parliamentary scrutiny, key issues were identified, and action advocated. The current wholesale exemption of public health emergency orders from the scrutiny applicable to subordinate legislation was considered 'unacceptable'.[77]

> An exemption from disallowance means the Parliament, the institution charged with making laws, loses the chief mechanism it has to prevent delegated legislative power being exercised in a manner not foreseen or provided for in the primary legislation, or in a way that might otherwise be considered undesirable.[78]

The SDL Committee concluded that

> An exemption from disallowance means the Parliament, the institution charged with making laws, loses the chief mechanism it has to prevent delegated legislative power being exercised in a manner not foreseen or provided for in the primary legislation, or in a way that might otherwise be considered undesirable.[79]

COVID-19 measures brought these issues front and centre for public law scholars and the Committees. It brought focused attention on changes to the existing scrutiny processes and parliament's understanding of them.

The PJCHR has a different, but complementary scrutiny mandate. Statements of compatibility are currently not required for non-disallowable instruments. This became especially evident in relation to COVID-19 responses, many of which were made by way of legislative instruments under the *Biosecurity Act 2015* (Cth) and were exempt from disallowance.

Although they were not required to have statements of compatibility,[80] the PJCHR scrutinised many exempt legislative instruments without them in its thematic consideration of COVID-19 legislation. The committee then sought further information, largely from the Minister for Health, to establish whether the measures were compatible with human rights.[81] The ministerial responses and the committee's assessment of these legislative instruments 'provided greater information about the rationale for, and impact of, each instrument than was otherwise available'.[82]

In light of this experience, there is value in requiring a statements of compatibility for *all* legislative instruments, including those exempt from disallowance. This would address some of what has been described as the 'human rights blindspot' regarding delegated legislation.[83] A requirement to provide a statement of compatibility would at least require a demonstration of pre-legislative consideration of the impact on rights and a justification in terms of proportionality as to why the measure was required in the form it was proposed.

Such changes would improve the parliamentary scrutiny and democratic accountability of existing processes, within the technical scrutiny mandates of these two committees.

If an HRA had been in place at the federal level at the time of the COVID-19 outbreak, these recommendations would have been *built into* the decision-making responses of the Federal Government from the *outset* of the pandemic.

So, what difference would an embedded human rights framework have had? With, at its core, a federal Human Rights Act.

Human Rights Act

The key value of a human rights framework is the 'upstream' focus on decision making – to ensure that human rights are considered in the planning phase, encouraging greater due diligence, transparency and accountability. It requires decisions about prioritising resources and policy responses to be justified publicly with reference to human rights so that the public can properly assess them. It ensures that the stringent effects of emergency measures are mitigated through the provision of supports and the embedding of safeguards. It prevents emergency measures from becoming the 'new normal'.

A human rights framework sets out a balancing process that takes into account the needs of *everyone* in the community and prevents the most vulnerable from

falling through the cracks. It prevents arbitrary decisions and blanket rules by requiring sufficient flexibility to respond to individual circumstances: for example allowing a person to cross a border to bury a family member, or an elderly person to receive a visitor. It provides a check on executive power by drawing lines that should not be crossed – such as locking vulnerable citizens out of their own country. It ensures that responses to emergencies are humane.

A Human Rights Act may not lead to perfect results, but it would help us make better decisions. COVID-19 has highlighted the need for a shared set of rights and values to guide us through difficult times.

The proportionality framework of the Biosecurity Act was a start, but it was a long way short of a full embedding of human rights analysis to the decisions made under that Act. What we do not have is the piece at the foundation: the Human Rights Act which would give legislative embodiment to the protection of rights and freedoms, that would inform the framework of upstream decision-making, inform the way that legislation is made and interpreted. It would give the legitimacy of Australian law to Australia's commitments to the world.

Human rights law provides a framework for making decisions in times of crisis. During the COVID-19 pandemic, some expressed sentiments that human rights were not relevant, or less relevant, to such emergencies.[84] This is not the case – human rights law is *designed* to take into account emergency situations, and allows for limitations and even the suspension of certain rights where this can be justified by the circumstances. Crucially, human rights are most important in times of crisis, where the usual rule of law mechanisms and political norms are secondary to responding efficiently and effectively to emergencies. Human rights not only provide an important check on executive power; they *help* us make emergency decisions that are rational, balance multiple factors, minimise human cost, and prioritise human life.

When applying a human rights approach to COVID-19 measures such as lockdowns, we can come to conclusions about appropriate courses of action that align with human rights. Each measure must be lawful and clearly communicated to the public. COVID-19 measures are in pursuit of public health measures, and therefore have a legitimate aim. Whether a measure is reasonable, necessary and proportionate depends on the circumstances, including the level of risk to health (which changes over time), the necessity of the measure to addressing the health risk, and the extent of the impact on other important rights. For example, restrictions on the right to protest may be justified when the population is unvaccinated and COVID-19 is prevalent in the

community, but may be less justifiable when there are high vaccination rates and precautionary measures taken by the protest organisers to mitigate COVID-19 risks. The implementation must also be proportionate – for example, excessive or criminal sanctions for peaceful protesting would be unnecessary to realising the goal of the restrictions in protecting health.

The human rights framework also requires safeguards such as time constraints and reviews on any steps taken to limit human rights. If the measures are no longer necessary, they should cease. It has been noted that 'infrastructure deployed as a temporary measure tends to persist after crises'.[85] This must be avoided. Additionally, measures taken must be equitable and should not discriminate; for example, a person's nationality should not affect their access to social security and health services during a pandemic.

Australia's COVID response was relatively effective in protecting rights to life and to health, however there were key failures which resulted in human rights breaches, and insufficient consideration for certain vulnerable and marginalised groups throughout the COVID response. A domestic Human Rights Act would have provided law and guidance that may have improved Australia's response in certain key respects in those areas of law that sit with the Commonwealth government.

Do we need a Human Rights Act?

The idea of a federal Human Rights Act has been a topic of interesting engagement in previous Austin Asche Orations. The Hon Justice Patrick Keane AC delivered the first oration in 2011.[86] He was not a fan. The next year, in 2012, the Hon Michael Kirby AC CMG titled his Oration as a 'Riposte to Justice Keane'.[87] Befitting the opportunity and in the craft of the orator, it is fine speech. I note in particular how Mr Kirby shared with us his journey towards acceptance of, indeed the necessity for, and Australian Human Rights Act.

Reading this speech in preparation for writing my own, I was struck by its parallels with my own 'Road to Damascus' journey to embrace the importance of a Human Rights Act for Australia. I have written of this elsewhere.[88] Mr Kirby also reflected that he hoped Austin may have reached a similar understanding.

> I like to think that Austin Asche's lifetime engagement with the substance of law and with often vulnerable victims of the law will have brought him, as it has brought me, to a belief that Australians need to renew their statutory instruments of justice. Relevantly, this includes the adoption of a national Charter of Rights.[89]

Mr Kirby concluded that the absence of such a national Charter restricted – indeed denied – 'the people rights of access to enforceable liberty and equality amongst all persons'.[90] And that we should do just as the Brennan committee proposed.

Rather than revisiting where a Human Rights Act may have changed things – including for example the invidiousness of indefinite detention;[91] or, as Mr Kirby cited, the failure for so long to legislate for marriage equality – I would like to reflect on where Human Rights Acts *have* made a difference.

Where HRAs have been used to address COVID-19

The following are case studies provide examples of how HRAs have helped protect rights during COVID-19, drawn from Victoria and Queensland.

Victoria – accountability for public housing lockdown[92]

In 2020, after COVID-19 cases began emerging in nine high-rise public housing towers in inner north Melbourne, the Victorian Government imposed, without notice to residents, an extremely hard lockdown, detaining around 3,000 people in nine public housing towers. Restrictions were eased after several days for most of the towers, however 400 people in one tower remained in hard lockdown for two weeks in total, unable to attend work, visit the supermarket or, for the most part, access fresh air and outdoor exercise. People subjected to the lockdown complained to the Victorian Ombudsman which investigated whether the lockdown complied with the Victorian Charter.

The Ombudsman concluded that while swift action to address the public health risk in the towers was necessary, the *immediacy* of the lockdown was not justified, was not based on the advice of public health officials and led to many of the problems in the treatment of the residents. By imposing the lockdown without notice, the Ombudsman concluded that the Victorian Government had breached the residents' right to humane treatment when deprived of liberty. The Ombudsman stated that proper consideration was not given to the residents' rights when imposing the restrictions, as required by the Charter.

The Ombudsman made recommendations including that the Victorian Government apologise to the residents and introduce greater detention review safeguards into public health legislation. While the Victorian Government refused to apologise, it did support amendments to public health legislation.

Inner Melbourne Community Legal provided legal support to residents of the towers during the hard lockdown and has monitored Victorian Government responses to subsequent outbreaks in the towers in 2021. It reports that, while the government's refusal to apologise continues to impede the rebuilding of trust required to respond to the pandemic, and accessible timely communication in community languages remains problematic, there were significant improvements in the way government has responded to concerns about outbreaks afterwards. Notably, government has favoured a health response driven by community organisations and abandoned the heavy-handed police response that was a feature of the 2020 lockdown.

(a) Queensland: quarantine exemption for a woman with disability[93]

A woman planned to visit Queensland from interstate to pick up her assistance dog, with her mother and her carer, during a period of COVID-19 border restrictions. She was granted an exemption to enter Queensland where she agreed to isolate for 14 days and then spend a week receiving placement of the dog. However, when they tried to arrange for accessible quarantine accommodation, they were told the woman's needs could not be met and her exemption approval was withdrawn. The assistance dog had been trained specifically for the woman's needs at substantial cost and they were concerned that she would lose the dog allocated to her if she was unable to visit Queensland.

The complainant chose to have this matter dealt with under the Queensland Human Rights Act. Through *early intervention*, the complaint was successfully resolved for the woman. Her exemption application to enter Queensland was re-approved. Queensland Health organised suitable accommodation for her, her mother and her carer to complete 14-day hotel quarantine.

Conclusion

Emergencies 'require governments to govern differently'.[94] 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.

Our current system for protecting human rights lacks a sufficient level of proficiency, or *fluency*, to converse in human rights terms when discussing issues of major concern to the community. The past two and a half years has brought this into sharp relief. The language of rights has been on many people's lips since March 2020. But in our experiences of COVID-19 what was exposed was the potential for and experience of an imbalance in the separation of powers, and the absence of a commonly understood, let alone embedded, framework to help us grapple with the challenges that confronted us.

The beauty of a Human Rights Act, and other measures that *frontload* rights-mindedness, is that they are expressed in the positive – and they are *ahead* of any dispute. They become the foundation of improving decision making so that disputes can be avoided.

A statute *names* the rights; it provides an obligation to *consider* them and a *process* by which to do it – together supporting a cultural shift towards rights-mindedness, becoming part of the national psyche, not just an afterthought.

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.

Austin advocated that 'one of the greatest checks and balances of parliamentary democracy lies in the Australian citizen'. 'Our greatest protection against tyranny', he said,

> lies in the fact that we are a nation of sardonic realists. We are pretty scathing about the big noter and of anyone propounding impractical ideas. This may upset idealists, but it does make the career of an aspiring autocrat pretty difficult. It would be a most healthy experience for any of the nauseatingly egotistical tyrants who strut the stage of various countries of

> the world to appear before an Australian audience. Sooner or later, and probably sooner rather than later, as he started his ravings about how bloody marvellous he was, and how everyone should follow him to utopia, would be heard a raucous Australian voice, 'Are you fair dinkum sport?' Therein lies our strength.[95]

There is a freshness and reflectiveness in these observations that will strike a chord. We saw an aspect of this, 'are you fair dinkum?', in response to the revelations that the former Prime Minister had had himself sworn in to multiple ministries, without the knowledge of the relevant ministers, or the general public.[96]

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. The decisions may be justified, but how can we know without appropriate democratic scrutiny and accountability?

The language of human rights and the framing of limitations in terms of proportionality provides the foundation stone for ensuring that, when the emergency passes, the Fabius Maximus Cunctators of the world will hand their power back and retire to their Sabine farms.

---

[*] In this presentation I draw, in part, from material in Rosalind Croucher, 'Emergency powers need scrutiny: ensuring accountability through COVID-19 lockdowns and curfews is a human rights issue' Opinion (2021) (May) *Law Institute Journal* 19; Rosalind Croucher, 'Lockdowns, Curfews and Human Rights: Unscrambling Hyperbole' (2021) (2021) 28(3) *Australian Journal of Administrative Law* 137; Lorraine Finlay and Rosalind Croucher, 'Limiting Rights and Freedoms in the Name of Public Health: Ensuring Accountability During the COVID-19 Pandemic Response', in *Australian Public Health Law: Contemporary Issues and Challenges,* Belinda Bennett and Ian Freckelton (eds), forthcoming.

[1] On 1 July 2019, the Australasian Law Teachers Association (ALTA) was relaunched as the Australasian Law Academics Association (ALAA).

[2] <https://www.bartleby.com/library/readersdigest/1866.html>.

[3] 'Epitaph: The Rule in Shelley's Case' (2001) 26(3) *Alternative Law Journal* 147, 148.

[4] 'Epitaph: The Rule in Shelley's Case' (2001) 26(3) *Alternative Law Journal* 147, 148.

[5] 'Austin Asche is a man much beloved throughout the Northern Territory', ABC Radio Darwin (20 August 2021), <https://www.abc.net.au/darwin/programs/latelunch/late-lunch-with-austin-asche/13502852/>.

[6] Paul Rosenzweig, 'The service heritage of the Honourable Austin Asche AC 15th Administrator of the Northern Territory, 1993–1996' (1997) 38 *Sabretache* 19, 23.

[7] On the 50th anniversary of his admission as a barrister and solicitor of the Supreme Court of Victoria: 'Opinion: There've been some changes made' (2001) 26(3) *Alternative Law Journal* 110.

[8] For example, in addition to articles already cited, his learned historically-anchored analysis of the then new *Family Law Act 1975* (Cth), in 'Changes in the Rights of Women and Children under Family Law Legislation' (1975) 49 *Australian Law Journal* 387; his paper on 'The Rights of the Child'

presented as the first Vernon Collins memorial lecture in 1981 and published by the Australian Institute of Family Studies, filled with literary and legal historical references; a contribution on Rudyard Kipling, in 'Concealed Sign-posts' (2016) (March) *Kipling Journal* 16; the book review of *Saltwater People: The Waves of Memor*y by Nonie Sharp, (2003) 77 *Australian Law Journal* 194;

[9] For example, the article on Austin's service history: Paul Rosenzweig, 'The service heritage of the Honourable Austin Asche AC 15th Administrator of the Northern Territory, 1993–1996' (1997) 38 *Sabretache* 19.

[10] <https://tributes.theage.com.au/obituaries/105824/dr-valerie-asche-am/>.

[11] 'The Hon Austin Asche AC QC: Chairman of the University College of the Northern Territory 1987–1988 and Chancellor NTU 1989–1993', <https://www.cdu.edu.au/files/2019-08/transcript-austin-asche.pdf>.

[12] It was published the following year: Austin Asche, 'Parliamentary Democracy: Checks and Balances' (2004) 19(1) *Australasian Parliamentary Review* 139.

[13] Austin Asche, 'Parliamentary Democracy: Checks and Balances' (2004) 19(1) *Australasian Parliamentary Review* 139, 139.

[14] He also wrote of the ancient Greeks, such as his talk as Patron of the Historical Society of the Northern Territory in 2020, 'Herodotus: The Father of History' (2021) *Northern Territory Historical Studies* 94. In this paper Austin's central theme is of democracy as a 'sacred trust', paying tribute to the ancient Greeks for this.

[15] Austin Asche, 'Parliamentary Democracy: Checks and Balances' (2004) 19(1) *Australasian Parliamentary Review* 139, 139.

[16] Austin contrasted this separation, which is also the foundation of our own, with the American, 'where the President is removed from the legislature. Here, as in England, the Prime Minister or Premier sits in parliament, and with Cabinet, combines legislative and executive power': (2004) 19(1) *Australasian Parliamentary Review* 139, 141.

[17] Austin Asche, 'Parliamentary Democracy: Checks and Balances' (2004) 19(1) *Australasian Parliamentary Review* 139, 140.

[18] Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28 *Journal of Law and Medicine* 346, 359.

[19] World Health Organization, 'WHO Coronavirus (COVID-19) Dashboard | WHO Coronavirus (COVID-19) Dashboard With Vaccination Data' <https://covid19.who.int/>.

[20] The opening lines of *A Tale of Two Cities*, set during the time of the French Revolution.

[21] The virus earned its 'Spanish' adjective as the King of Spain was among one of its earliest victims. The most likely explanation is that 'a milder form of influenza carried to Europe by American troops in April 1918 was transformed into the Pandemic type which, by October, spread throughout Europe and into Africa, Asia and the Americas; Australia remained free from infection until the following January': Humphrey McQueen, 'The "Spanish" Influenza Pandemic in Australia, 1912–19' <https://labourhistorycanberra.org/2018/06/the-spanish-influenza-pandemic-in-australia-1912–19/>, originally published in Jill Roe (ed), *Social Policy in Australia – Some Perspectives 1901–1975* (Cassell Australia, 1976).

[22] See, eg, Humphrey McQueen, 'The "Spanish" Influenza Pandemic in Australia, 1912–19' <https://labourhistorycanberra.org/2018/06/the-spanish-influenza-pandemic-in-australia-1912-19/> originally published in Jill Roe (ed), *Social Policy in Australia – Some Perspectives 1901–1975* (Cassell Australia, 1976). Re the quarantine power of the Commonwealth, see John HL Cumpston, *Influenza and Maritime Quarantine in Australia* (Commonwealth of Australia Quarantine Services, Publication No 18, 1919). (Dr Cumpston is my maternal grandfather).

[23] *Biosecurity Act 2015* (Cth) s 477(1).

[24] *Biosecurity Act 2015* (Cth) s 477(1)(a).

[25] The Health Minister could determine matters such as requirements that apply to persons, goods or conveyances when entering or leaving specified places; requirements that restrict or prevent the movement of persons, goods or conveyances in or between specified places; requirements for specified places to be evacuated – and requirements for giving effect to this: *Biosecurity Act 2015* (Cth) s 477(3).
[26] See, eg, my consideration of aspects of these in Rosalind Croucher, 'Lockdowns, Curfews and Human Rights: Unscrambling Hyperbole' (2021) (2021) 28(3) *Australian Journal of Administrative Law* 137.
[27] Janina Boughey, 'Executive Power in Emergencies: Where Is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168, 169.
[28] For example, Australia's total and comparative number of deaths has been relatively low from a global perspective. Data from the John Hopkins University Coronavirus Resource Centre in March 2022 showed Australia as having had 5,691 deaths, 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, namely the USA with 970,009 deaths, Yemen with a case fatality rate of 18.1%, and Peru with 651.15 deaths for 100,000 population: Johns Hopkins University of Medicine, 'Mortality Analyses', *Coronavirus Resource Centre* (Webpage, 18 March 2022) <https://coronavirus.jhu.edu/data/mortality>.
[29] See, eg, the discussion in Kylie Evans and Nicholas Petrie, 'COVID-19 and the Australian Human Rights Acts' (2020) 45(3) *Alternative Law Journal* 175, 176–178. Australia has implemented a number of restrictions in response to the COVID-19 pandemic including significant restrictions on freedom of assembly and freedom of movement, often accompanied by increased police enforcement powers. Many measures and restrictions have been introduced through delegated legislation which has not been subject to oversight of parliament. At the federal level, this has included changes to visa arrangements and restricting travel overseas. See, eg, *Migration (LIN 20/122: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class GG) visa) Instrument 2020* (Cth) and *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth). At a State and Territory level, delegated legislation has been used to implement measure including self-isolation orders, restrictions of visitors to aged care facilities and restrictions on the size and place of gatherings. See, eg, *Public Health (COVID-19 Gatherings) Order (No 3) 2020* (NSW) and *COVID-19 Emergency Response (Schedule 1) Regulations 2020* (SA). Other legislated restrictions have often been passed quickly with minimal parliamentary scrutiny and have included increased powers for police.
[30] See, eg, Elias Visontay, 'More than 45,000 Australians stranded overseas registered for government help' *The Guardian* (Online, 21 September 2021) <https://www.theguardian.com/business/2021/sep/21/more-than-45000-australians-stranded-overseas-registered-for-government-help>.
[31] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) xv.
[32] Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28 *Journal of Law and Medicine* 346, 347.
[33] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [1.1].
[34] Janina Boughey and Lisa Burton Crawford, 'Executive Power in an Age of Statutes' in J Boughey and L Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 1, 2.

[35] Sarah Moulds, 'Scrutinising COVID-19 Laws: An Early Glimpse into the Scrutiny Work of Federal Parliamentary Committees' (2020) 45(3) *Alternative Law Journal* 180, 180–181.
[36] Senate Select Committee on COVID-19, *Final Report* (April 2022) [5.15]. See also, Paul Karp, 'Human rights commission says national cabinet should not be covered by secrecy laws' *The Guardian* (Online) 17 September 2021 < https://www.theguardian.com/australia-news/2021/sep/17/human-rights-commission-says-national-cabinet-should-not-be-covered-by-secrecy-laws>.
[37] Janina Boughey, 'Executive Accountability in Emergencies: Lessons from the COVID-19 Pandemic', paper presented at the Samuel Griffith Society Conference 2022, 2.
[38] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) xv.
[39] The existing framework for exemptions from disallowance is summarised in Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) ch 3.
[40] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [1.28].
[41] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021), [1.29].
[42] *Biosecurity Act 2015* (Cth) s 477(2).
[43] Janina Boughey, 'Executive Accountability in Emergencies: Lessons from the COVID-19 Pandemic', paper presented at the Samuel Griffith Society Conference 2022, 2.
[44] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [1.23].
[45] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [1.27].
[46] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [3.48]. See also [3.62].
[47] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [1.2].
[48] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Interim Report (7 December 2020) xiii.
[49] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [1.2].
[50] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [1.5], [1.4].
[51] The International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD).

[52] ICCPR art 6; ICESCR art 12. 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 [2]. See Sarah Joseph, 'International Human Rights Law and the Response to the COVID-19 Pandemic' (2020) 11 *Journal of International Humanitarian Legal Studies* 249, 250.

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

[54] ICESCR arts 12(2)(c), 12(2)(d).

[55] ICCPR art 12(3); ICESCR art 4.

[56] 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.

[57] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[58] *Human Rights Act 2004* (ACT).

[59] *Human Rights Act 2019* (Qld).

[60] 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, 323.

[61] *Human Rights Act 1998* (UK); *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 2004* (ACT); *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2020* (Qld).

[62] See, eg, Judicial College of Victoria, *Victorian Charter of Human Rights Bench Book* (2016) [1.2. Structure and Operation: a 'dialogue'] <https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57245.htm>.

[63] A list of ratifications is set out in the following table: <https://humanrights.gov.au/our-work/commission-general/chart-australian-treaty-ratifications-may-2012-human-rights-your/>

[64] Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 19.

[65] Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 33 [1.142].

[66] See, eg, Rosalind Croucher, 'Whither Human Rights and Freedoms Protections in Australia? Rights and Freedoms in the Age of COVID-19', Samuel Griffith Society 32nd Conference, 29–30 April 2022: <https://humanrights.gov.au/about/news/speeches/whither-human-rights-and-freedoms-protections-australia-rights-and-freedoms-0>.

[67] D Pearce and S Argument, *Delegated Legislation in Australia* (4th ed, 2012) 93. See discussion in Laura Grenfell, 'An Australian spectrum of political rights scrutiny: "Continuing to lead by example?"' (2015) 26 *Public Law Review* 19.

[68] For a summary of the parliamentary scrutiny committees, see, eg Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report no 129, 2015) ch 3.

[69] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9(1).

[70] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) rec 10.

[71] Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report of COVID-19 legislation: Report 5 of 2020* (29 April 2020). Subsequent reports included a section on COVID-19 measures: eg Commonwealth of Australia, Parliamentary Joint

Committee on Human Rights, *Human Rights Scrutiny Report: Report 6 of 2020* (20 May 2020), ch 1. The committee also compiled a list of all bills and legislative instruments introduced or registered in 2020 and 2021 in response (or partly in response) to the COVID-19 pandemic (including legislation which did not engage human rights). Legislative instruments registered in 2022 in response to COVID-19 were considered by the Senate Standing Committee for the Scrutiny of Delegated Legislation: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>.

[72] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021).

[73] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [7.1]. See also the Committee's 2019 report: Commonwealth of Australia, Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (3 June 2019).

[74] Gabrielle Appleby, Janina Boughey, Sangeetha Pillai and George Williams, Submission no 1 to Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (June 2020) 6.

[75] Sarah Moulds, 'Scrutinising COVID-19 Laws: An Early Glimpse into the Scrutiny Work of Federal Parliamentary Committees' (2020) 45(3) *Alternative Law Journal* 180, 182–183. See Parliament of Australia, *Senate Select Committee on COVID-19* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19>.

[76] Senate Select Committee on COVID-19, *Final Report* (April 2022) Recommendation 1.

[77] Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28 *Journal of Law and Medicine* 346, 360.

[78] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [3.24].

[79] Commonwealth of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight*, Final Report (16 March 2021) [3.24].

[80] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9(1).

[81] Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 32.

[82] Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series, August 2022, 32.

[83] Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046, 1074.

[84] See, eg, discussion in Sarah Joseph, 'COVID-19, risk and rights: the "wicked" balancing act for governments' *The Conversation* (Online) 16 September 2020 <https://theconversation.com/covid-19-risk-and-rights-the-wicked-balancing-act-for-governments-146014>.

[85] European Parliament, *EU Covid-19 Certificate: A Tool to Help Restore the Free Movement of People across the European Union* (Briefing Paper, May 2021) 2, 3.

[86] Patrick Keane, 'Sticks and Stones My Break My Bones, But Names Will Never Hurt Me' (2011) 2 *Northern Territory Law Journal* 77.

[87] 'Human Rights Protection in Australia: A Riposte to Justice Keane', Second Austin Asche Lecture, 2012: <https://www.michaelkirby.com.au/images/stories/speeches/2013/2654>.
[88] Most recently: 'Whither Human Rights and Freedoms Protections in Australia? Rights and Freedoms in the Age of COVID-19', Samuel Griffith Society 32nd Conference 30 April 2022: <https://humanrights.gov.au/about/news/speeches/whither-human-rights-and-freedoms-protections-australia-rights-and-freedoms-0>.
[89] Michael Kirby, 'Human Rights Protection in Australia: A Riposte to Justice Keane', Second Austin Asche Lecture, 2012, 24. (The speech can be found at michaelkirby.com.au, speech 2654.
[90] Michael Kirby, 'Human Rights Protection in Australia: A Riposte to Justice Keane', Second Austin Asche Lecture, 2012, 24.
[91] 'Bringing rights home: mapping an agenda on promoting, protecting and fulfilling human rights in Australia', Michael Kirby Justice Oration 2021, 25 August 2021.
[92] Human Rights Law Centre, *Charters of Human Rights make our lives Better: 101 Cases showing how* (2022) <https://www.hrlc.org.au/reports/2022/6/2/charters-of-human-rights-make-our-lives-better>. Original source: Victorian Ombudsman, Investigation into the detention and treatment of public housing residents arising from a COVID-19 'hard lockdown' in July 2020, 2020, Inner Melbourne Community Legal Centre.
[93] Human Rights Law Centre, *Charters of Human Rights make our lives Better: 101 Cases showing how* (2022) <https://www.hrlc.org.au/reports/2022/6/2/charters-of-human-rights-make-our-lives-better> Original source: Queensland Human Rights Commission, *The Second Annual Report on the Operation of Queensland's Human Rights Act 2020–21*, 157.
[94] Eric Windholz, 'Governing in a pandemic: from parliamentary sovereignty to autocratic technocracy' (2020) 8 (1–2) *The Theory and Practice of Legislation* 93
[95] Austin Asche, 'Parliamentary Democracy: Checks and Balances' (2004) 19(1) *Australasian Parliamentary Review* 139, 143.
[96] 'Outrage': <https://7news.com.au/politics/outrage-over-revelation-scott-morrison-secretly-swore-himself-into-three-ministries-c-7881165>; 'Shock': <https://www.news.com.au/national/politics/scott-morrison-shocked-minister-by-secretly-swearing-himself-into-cabinet-portfolio/news-story/ac7505f1648a335ccd01f88faf881086>. On 22 August 2022, the Solicitor-General presented his opinion that, while lawful, the PM's action 'was inconsistent with the conventions and practices that form an essential part of the system of responsible government prescribed by Ch II of the Constitution': *In the Matter of the Validity of the Appointment of Mr Morrison to Administer the Department of Industry, Science, Energy and Resources,* SG 12 of 2022 (22 August 2022) 4.