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Dear Panel Members,

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney welcomes the opportunity to provide a submission to the Commonwealth Government COVID-19 Response Inquiry. The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable, and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

Since 2020, we have engaged in research concerning the legality of restrictions on human mobility during COVID-19, assessed against States' obligations under international human rights law. Australian policies have been a particular focus of our research, and we are grateful for an Australian Research Council Special Research Initiative grant (SR200200683) which funded much of this work.

This submission focuses on the human rights impacts and legality of Australia's international border controls. It draws directly on some of our published work, to which we refer you for more detailed analysis. For copyright reasons, we cannot upload this material but can share it with you.

- **Restrictions on entry:** Regina Jefferies, Jane McAdam and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2021) 27 *Australian Journal of Human Rights* 211–31 https://www.tandfonline.com/doi/full/10.1080/1323238X.2021.1996529

- **Restrictions on exit:** Regina Jefferies and Jane McAdam, 'Locked In: Australia's COVID-19 Border Closures and the Right to Leave' (2023) 41 *Australian Year Book of International Law* 185–231 https://brill.com/view/journals/auso/41/1/article-p185_8.xml

Introduction

During the first two years of the COVID-19 pandemic, Australia went to extraordinary lengths to contain the spread of the virus through border controls. This entailed a near-blanket ban not only on travel to and from the country, but also on movement between the states and territories, and even between local government areas. The idea was that if people could not circulate, then nor could COVID-19. However, over time – and particularly when vaccines became widely available – this approach became increasingly disproportionate and unnecessary. The failure to consider or evaluate the non-COVID-19 related health and human impacts of the measures had significant, adverse impacts on people's lives – and at times constituted violations of Australia's obligations under international human rights law.

The complex interplay between Commonwealth and state/territory responsibilities with respect to quarantine led to a situation in which internal policy settings aimed at curbing the spread of COVID-19 resulted in the functional exile of large numbers of people who call Australia home. Rather than a coordinated, holistic and proportionate response aimed at ensuring the health and well-being of Australian citizens at home and those seeking to return from overseas, the Commonwealth and

National Cabinet effectively endorsed arbitrary caps on the number of incoming travellers, placing an almost singular reliance on hotel quarantine that persisted long after the widespread availability of vaccines and policy alternatives.

Restrictions on entry

Australia recorded its first COVID-19 case in January 2020, and in March it closed its international borders to all but Australian citizens and permanent residents. Despite a formal legal entitlement to return, the practical effect of Australia's travel and quarantine measures left tens of thousands of people stranded abroad.

From 10 July 2020, Australia set a weekly cap on the number of people permitted to enter Australia, directly linked to the hotel quarantine capacity of the states and territories (even though they and the Commonwealth have concurrent powers for quarantine). This meant that Australia's international border controls were effectively set by state/territory authorities – something that was 'virtually unprecedented'.[1]

The right to enter one's country is articulated in the core international human rights instruments and is broadly recognized as a fundamental common law right. Under article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), States must not arbitrarily deprive a person of their right to enter their own country (whether a citizen or permanent resident). The right to enter is not subject to any exceptions. The only constraining factor is that the right cannot be deprived 'arbitrarily'. Although it is no longer apparent from the treaty's text, the drafting records reveal that the notion of 'arbitrariness' was intended to connote a sole exception—refusal of entry to an individual who had been lawfully exiled.[2] It was considered that illness/health would not be inappropriate grounds for preventing return.[3]

The UN Human Rights Committee has explained that 'arbitrariness' 'guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances'.[4] Thus, at most, the right to enter could only be reasonably curtailed by brief, temporary restrictions that pursued a legitimate objective and were necessary, reasonable, proportionate and based on clear legal criteria. Importantly, Australia needed to show that there were no less restrictive measures that could be taken to safeguard public health—such as quarantine. In our view, Australia's travel caps constituted an arbitrary restriction on Australians' right to return home.

Restrictions on exit

During this same period, extraordinary border controls meant that most Australian citizens and permanent residents were barred from leaving the country. These settings remained in place for two years, despite significant public health developments over this period. They separated people from family and friends abroad; curtailed opportunities for work, education and travel overseas; and created ongoing uncertainty and anxiety about the future. While international law permits limitations on the right to leave a country 'to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others',[5] the limitations imposed must be necessary, proportionate, the least intrusive measure to achieve the desired result[6] and 'consistent with' other human rights,[7] including the right to be free from discrimination, the right to life, the right to family

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[1] Jane McAdam and Ben Saul, 'Under Human Rights Law, Australian Runs Out of Excuses for Leaving Citizens Stranded Overseas', *Sydney Morning Herald* (10 December 2020) https://www.smh.com.au/national/under-human-rights-law-australia-runs-out-of-excuses-for-leaving-citizens-stranded-overseas-20201210-p56mc6.html.
[2] Stig Jagerskold, 'The Freedom of Movement' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 182,
[3] See discussion in Regina Jefferies, Jane McAdam and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2021) 27 *Australian Journal of Human Rights* 221.
[4] UN Human Rights Committee, *General Comment No 27 (67): Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (18 October 1999), para 21.
[5] ICCPR, art 12(3).
[6] Human Rights Committee (n 4) para 18.
[7] ICCPR, art 12(3).

reunification, the right to be free from cruel, inhuman or degrading treatment, and the right to health. Furthermore, the assessment of necessity should not be static but re-evaluated over time as circumstances change.

Our analysis of recently released data regarding outbound travel exemptions reveals that, contrary to these requirements, the form and operation of the outbound travel restrictions bypassed analysis of the intrusiveness and proportionality of the measures themselves, instead shifting the burden to individuals to request an exemption on the basis that preventing their departure was overly intrusive or disproportionate in their particular circumstances. The data on discretionary exemption decision-making further cast doubt on whether the restrictions were implemented consistently with other human rights. Additionally, the measures were not adjusted as circumstances changed, even as vaccinations became widespread and other measures for controlling the spread of the virus became available.

The Australian Border Force bore responsibility for administering discretionary exemption requests. It was also responsible for evaluating whether travellers met an automatic exemption category, although airlines were also tasked with determining whether such an exemption applied. The role of airlines here stretched beyond typical administrative checks and appears to have constituted a form of administrative decision-making. While the automatic and discretionary exemption categories changed over time, they were not clearly delineated and decision-making was characterized by a high-degree of discretion without meaningful access to administrative or judicial review. There were stark differences in approval rates between different categories and countries which raise serious questions of discrimination. For instance, 'more than two-thirds of exemption requests for travel to the United Kingdom were approved during the period from 1 August 2020 through 25 April 2021, compared to just 46% for India and 59% for China', during a period in which the UK was experiencing a significant outbreak of COVID-19.[8]

The *International Health Regulations* direct that any measures to protect public health 'shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection' (art 2) and must be implemented with 'full respect for the dignity, human rights and fundamental freedoms of persons' (art 3) and 'applied in a transparent and non-discriminatory manner' (art 42). Australia's outbound travel restrictions do not appear to have met these criteria, given that quarantine and other health responses were already in place and additional protective measures became available over time. Numerous aspects of decision-making as to whether exemptions applied in individual cases were characterized by arbitrariness, including the involvement of airlines in deciding whether an automatic exemption was met, as well as inconsistent decisions, the absence of precise criteria, no detailed written reasons for refusal, a lack of review of negative determinations.

Conclusion

It is highly questionable whether Australia's wide-ranging and blunt restrictions were necessary, reasonable or proportionate as time passed. The shifting balance of rights and restrictions should have been constantly re-evaluated – and justified – in light of changing circumstances. Furthermore, the failure to consider non-COVID-19 health and human rights impacts when evaluating these factors rendered the analysis incomplete. Finally, multijurisdictional fragmentation, inconsistency and a lack of interoperability between Commonwealth, state and territory systems were significant attendant problems. Had such systems been in place, some of the more extreme limitations on people's movement may have been avoided.

Please do not hesitate to contact us if we can be of further assistance.

Yours sincerely,

Professor Jane McAdam AO and Dr Regina Jefferies

[8] Regina Jefferies and Jane McAdam, 'Locked In: Australia's COVID-19 Border Closures and the Right to Leave' (2023) 41 *Australian Year Book of International Law* 185, 228.