MAAT'S METHOD

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December 12, 2023

To: Department of the Prime Minister and Cabinet,
PO Box 6500
Canberra ACT 2600

Re: Commonwealth Government COVID-19 Response Inquiry Terms of Reference

Dear Officer,

SUBMISSION

Introduction

The Department of the Prime Minister and the Cabinet (**the Department**) have invited submissions for the Commonwealth Government COVID-19 Response Inquiry (**the Inquiry**).

This is a submission by Maat's Method, a dedicated human rights law firm. We practice only in areas of law which are corollary to, or influenced by, the obligations Australia holds under the various international human rights treaties and covenants Australia is a signatory to. This submission is authored by Peter Fam, our Principal who has particular expertise and experience as a specialist human rights lawyer in private practice, in Government and now for Maat's Method.

A. Executive Summary

1. Australia as a nation is founded on the rule of law and has a strong common law and jurisprudential tradition of protecting the rights and freedoms of individuals. Fundamental elements of our Governance structure and laws serve to protect these rights and freedoms, including the separation of powers between the judiciary and the executive and the Principle

of Legality, which ensures that legislation should not infringe fundamental rights and freedoms unless the legislation expresses a clear intention to do so and the infringement is reasonable.

2. Domestically, Australia has comprehensive statutory frameworks in place intended to protect the right of Australian citizens to privacy, as well as the right to equal treatment and freedom from discrimination. The High Court has found that the Constitution contains an implied freedom of political communication, and there remains some open questions as to whether other rights, such as freedom of movement, are protected as well (via prohibitions on restrictions of trade between States, for example).

3. On the international stage, Australia has asserted itself as among the leaders in becoming a party to and advocating for the core international treaties and covenants. Australia was one of only eight nations involved in drafting the Universal Declaration of Human Rights. In addition, Australia as a nation is a party to the seven core international human rights treaties. These are:

    a. the International Covenant on Civil and Political Rights (**ICCPR**);
    b. the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
    c. the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**);
    d. the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);
    e. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**);
    f. the Convention on the Rights of the Child (**CRC**); and
    g. the Convention on the Rights of Persons with Disabilities (**CRPD**).

(collectively, the **Core Treaties**)

4. In addition, Australia is also a party to the UN Declaration on Bioethics and Human Rights.

5. Australia also took the additional step of signing the optional protocols to the above Treaties, emphasising Australia's responsibility to uphold them, and increasing Australia's obligations under them.

6. We are concerned that the aforementioned protections did not mitigate an unprecedented and serious breach of the human rights of Australian citizens since early 2020, and call into the question the practical efficacy of these protections.

B. Did Australia fulfill its obligations under the Core Treaties? If not, why?

7. There are a long list of Treaty articles and parts that were breached during Covid-19. In most cases, the rationale provided was one of the following:

    a. The Core Treaties allow derogations from obligations under them in certain circumstances, including generally in times of public emergency; and

    b. The Core Treaties have (in most cases) not been formally enshrined in Australian domestic law, leading to a lack of enforceability.

8. Both of the above rationales are oversimplifications of the true position at law. With regards to the former, the Core Treaties are very particular about the circumstances in which these derogations can occur (see Part II, Article 4 of the ICCPR, for example), and several treaty provisions are themselves non-derogable, meaning the aforementioned exceptions do not apply (see Part III, Article 7 of the ICCPR for example). With regards to the latter, several rights protections have been enshrined into Australian domestic law, and the Australian Human Rights Commission, itself enacted by statute, is tasked with defending the rights obligations of Australian citizens whether or not those rights are enshrined in domestic statute. It is worth noting that the AHRC Act itself actually includes several of the international human rights conventions which Australia is party to, and which the Act's definition of 'human rights' refers to, within it.

9. A full and comprehensive assessment of the rights enshrined under the Core Treaties (and in the ICCPR in particular) must occur, vis a vie the measures implemented by Federal, State and Territory Governments, for the purpose of assessing whether rights derogations were compliant with Australia's obligations under international human rights law, and for the purpose of informing Australia's approach to such a pandemic in future. To date, no

such detailed analysis has occurred, and such analysis is owed to the many Australians whose fundamental rights and liberties were severely curtailed by the Federal and State Government responses to Covid-19.

C. Did the Australian Human Rights Commission discharge its Statutory Duties?

10. The Australian Human Rights Commission is a statutory body established by the *Australian Human Rights Commission Act 1986* (**the AHRC Act**). In general, the Core Treaties render it incumbent on party states to ensure there is a domestic mechanism in place for the protection of the human rights protected under those Treaties. The Australian Human Rights Commission is intended to fulfill that function for Australian citizens.

11. The AHRC Act makes clear the "duties" (Section 10A) and "Functions" (Section 11) of the Commission. First, with **emphasis added**;

> **10A Duties of Commission**
>
> (1) It is the duty of the Commission to ensure that **the functions of the Commission under this or any other Act are performed:**
>
> **(a) with regard for:**
>
> **(i) the indivisibility and universality of human rights**; and
>
> (ii) the principle that every person is free and equal in dignity and rights; and
>
> (b) efficiently and with the greatest possible benefit to the people of Australia.

12. So, any expression of the functions of the Commission must be maintained with regard for the indivisibility and universality of human rights. Importantly, the Act defines 'human rights' as follows;

> **Human rights means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument.**

13. Section 11 of the Act lists the various functions of the AHRC. Relevantly, these include (emphasis added);

> **11 Functions of Commission**
>
> (1) The functions of the Commission are:
>
> …
>
> **(d) the functions conferred on the Commission by section 31; and**
>
> **(e) to examine enactments**, and (when requested to do so by the Minister) proposed enactments, **for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right,** and to report to the Minister the results of any such examination; and
>
> **(f) to:**
>
> **(i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and**
>
> **(ii) if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and**
>
> (g) to promote an understanding and acceptance, and the public discussion, of human rights in Australia; and
>
> …
>
> (j) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights; and
>
> **(k) on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument**; and
>
> …
>
> **(n) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or**

practices of a kind in respect of which the Commission has a function under paragraph (f); and

…

(p) to do anything incidental or conducive to the performance of any of the preceding functions.

14. So, it is the very statutory function of the AHRC to:

    a. "inquire into any act or practice that may be inconsistent with or contrary to any human right" (and in particular, with any covenant or declaration specifically included in the Act), and, "effect a settlement of the matters that gave rise to the inquiry" (**First Function**); and

    b. to perform the functions conferred on the AHRC by section 31 which have to do with equal opportunity in employment and occupation (**Second Function**); and

    c. to examine enactments (ie; laws) for the purpose of ascertaining whether those laws are, or would be, inconsistent with or contrary to any human right; and to report to the Minister the results of same (**Third Function**).

15. During Covid-19, the Commission received an unprecedented number of complaints, and requests for help, from the Australian public, noting in their responses to those requests that due to their inundation, complainants had to wait up to six months for a response. Clearly, the Australian public had a perception that the AHRC would assist them, and sought that assistance, desperately.

16. With respect to their First Function, the AHRC did not make any inquiry into any act or practice that was inconsistent with or contrary to any human right. Part of their stated reasoning for this was an interpretation of the words "act" and "practice" in the AHRC Act which encompassed measures taken by Federal Government, but not State or Territory Governments. Even if this interpretation of the AHRC Act is correct (which is questionable), it is not clear why the AHRC did not make any inquiry into the actions of Federal Government during the most significant human rights impositions in Australia's history.

17. With respect to their Second Function, Section 31 of the AHRC Act states that the AHRC is obligated:

    a. "to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, have, or would have, the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and to report to the Minister the results of any such examination"; and

    b. "To inquire into any act or practice (including any systemic practice) that may constitute discrimination".

18. The definition of "discrimination" which applies to Section 31 of the AHRC Act includes discrimination on the basis of medical record. It is unclear why the AHRC did not inquire into the widespread practice of employers in Australia restricting their employees from working on the basis of their medical record (vaccination status).

19. With respect to their Third Function, Covid-19 saw the widespread use of public health orders and public health directives to severely limit the human rights of Australian citizens in an unprecedented way. The AHRC is the body in Australia with the power and duty to examine these controversial enactments, and did not do so. If Covid-19 was not reason enough to enact this function, what is?

D. Why did the Principle of Legality fail as an effective barricade to human rights breaches in Australia during Covid-19?

20. The Principle of Legality (**the Principle**) is a rule of statutory construction which states that, in the absence of clear indication to the contrary, it is to be presumed when interpreting a statute that the statute was not intended to modify or abrogate fundamental rights (see Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15 at 437; "Coco"). Australia does not have a bill of rights, so the principle has often been said to be a fundamental protection in Australian law.

21. However, in Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320, the plaintiffs sought to rely on the Principle to challenge the public health orders made under the auspices of Section 7 of the Public Health Act 2010 (NSW), only to find his Honour's conclusion that, because the Public Health Act is an Act that deals with "public safety…curtailing the free movement of persons including their movement to and at work are the very type of restrictions that the PHA clearly authorises. Hence, the principle of legality does not justify the reading down of s 7(2) of the PHA to preclude limitations on that freedom" [at 9]. This precedent suggests that the Principle will be powerless to dilute any Act of Parliament which allows for particular human rights limitations or derogations, which in turn calls into question the utility of the Principle.

E. Has the law in Australia on Informed Consent been ignored?

22. Australia has a long legal history of upholding the central medical tenet of fully informed and free consent.

23. Various domestic statutes, such as the *Guardianship Act 1987 (NSW)*, the *Mental Health Act 2007 No 8 (NSW)* and the *Victorian Charter of Human Rights and Responsibilities Act 2006 (VIC)* contain definitions of the concept that are generally analogous. The latter, for example, has the following definition: "A person must not be…subjected to medical or scientific experimentation without his or her full, free or informed consent".

24. This is, again, an example of a human right which Australia has covenanted into via an international treaty (Part III, Article 7 of the ICCPR) which has been enshrined into our domestic law.

25. The principle is also reflected in the many regulations that inform both the medical and legal professions in this country. For example, the Code of Conduct for doctors states unequivocally that "informed consent is a person's voluntary decision about medical care that is made with knowledge and understanding of the benefits and risks involved". The Australian Law Reform Commission states that "Informed consent refers to consent to medical treatment and the requirement to warn of material risk prior to treatment. As part of their duty of care, health professionals must provide such information as is necessary for the patient to give consent to treatment, including information on all material risks of the

proposed treatment. Failure to do so may lead to civil liability for an adverse outcome, even if the treatment itself was not negligent". There are many other examples.

26. In the common law, there is a well-known positive duty for Doctors to warn patients of material risks inherent to any treatment proposed (see *Rogers v Whittaker (1992)).* A 'failure to warn' patients of material risk, and the subsequent breach of duty of care at common law, is the foundation of most medical negligence cases in Australia, of which there are thousands per annum.

27. In *Wallace v Kam [2013] HCA 19*, the High Court was clear:

> *The common law duty of a medical practitioner to a patient is a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment […] The component of the duty of a medical practitioner that ordinarily requires the medical practitioner to inform the patient of material risks of physical injury inherent in a proposed treatment is founded on the underlying common law right of the patient to choose whether or not to undergo a proposed treatment.*

28. Given the above, which must be described as a comprehensive and consistent approach in Australian law, it is remarkable that so many Australian citizens underwent vaccination against Covid19, a provisionally approved medical treatment, in circumstances where they:

    a. Did not fully understand the material risks associated with that treatment; and
    b. Were subjected to significant social and economic pressures to undergo that treatment.

29. It is not unreasonable to argue that **nobody in Australia** was capable of providing fully informed and free consent to vaccination against Covid-19, given the pressure being exerted daily by employers, media and politicians, and the inaccurate and incomplete information being made available to them.

30. This poses the question of whether the law on informed consent in Australia has been bypassed or ignored, and if so, how and why this was allowed to occur.

F. Is the Separation of Powers functioning appropriately in Australia?

31. The Australian Constitution distributes power to govern between the Parliament, Executive and the Judiciary. With respect to the judiciary, this is an important separation, because the judiciary is often tasked with assessing the legality and correctness of Government laws and decisions. Indeed, this is one of the primary functions of the judiciary.

32. On 27 September 2021, a decision in the matter of Jennifer Kimber v Sapphire Coast Community Aged Care Ltd (C2021/2676) was handed down by a full bench of the Fair Work Commission.

33. That decision featured a dissenting judgment by Deputy President Lyndall Dean, which was highly critical of the approach taken by Governments in Australia to Covid-19. It is, to date, the only decision by a member of any Tribunal or Court in Australia that has been critical of the measures taken by Government in response to Covid-19.

34. This may be partly due to the way the Deputy President was punished for her judgment. President Justice Iain Ross immediately barred the Deputy President from appeal cases. The President told the Deputy President that her conduct constituted "misuse of her statutory office" and that she had breached "basic principles of quasi-judicial decision-making including criticising government policy and doing so in highly inflammatory terms". She was forced to undergo professional conduct training.

35. Of course, members of the Fair Work Commission, as well as other Tribunals and Courts in Australia, are appointed by the Government. The removal of an appointee from the Fair Work Commission can only be done through a vote by Parliament.

36. By contrast, the Judge who heard perhaps the most famous case involving the assessment of Government measures against Covid-19, and who essentially endorsed the actions of Government as lawful and reasonable, has recently been elevated to the High Court.

37. It is not unreasonable to wonder whether such elevation would have occurred if that Judge was to have made a different decision in that case, and whether that kind of potential detriment may have influenced, consciously or subconsciously, his decision. High Court

judges, of course, are appointed by the Governor-General, who is part of the Parliament and the Executive.

38. The question thus must be asked: is it appropriate that judicial officers be appointed and promoted by members of Parliament and the Executive given they are often tasked with critiquing the decisions of those members?

G. Are our discrimination and privacy laws adequate to protect people against discrimination on the basis of their medical status, and to protect people's private medical information?

39. Federal and State discrimination statutes focus on 'protected attributes', including race, sex, pregnancy, marital status, family responsibilities, breastfeeding, age, disability, sexual orientation, gender identity or intersex status. These protected attributes do not include medical status or record, despite the AHRC Act including 'medical record' within its definition of 'discrimination' (but not 'unlawful discrimination', which has a different definition).

40. This means that, in brief, somebody who has been discriminated against in Australia on the basis of their medical record or status cannot proceed to the Federal Court accordingly. The only means of action available to that person is, if the discrimination occurred in the context of their employment, to complain to the AHRC pursuant to Section 31 of the AHRC Act, and to hope that the AHRC chooses to inquire into and conciliate the issue. This is not very effective protection. Do we need a more explicit protection against this form of discrimination?

41. With respect to Privacy, Covid-19 saw employers intrude violently into the private medical histories and records of their employees, often with no regard for the Australian Privacy Principles, enshrined in the Privacy Act 1988 (Cth) which provide stringent restrictions and conditions on the collection and storage of this information. In almost all cases, employers said that the collection of employees' vaccination status was lawful and reasonable to ensure that the employee could safely perform the inherent requirements of their job – but this is an oversimplification of a law which is supposed to be applied in exceptional circumstances

only, based on the individual circumstances of each employee. Did employers generally breach Federal and State privacy laws in Australia during Covid-19, and if so, how and why was this allowed to happen, and how can it be avoided in future?

12 December 2023

Sincerely,

[redacted]

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