



New South Wales
Council for Civil Liberties

NSW Council for Civil Liberties

submission to

**The Senate Select Committee on
COVID-19**

15 June 2020

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Submission to the Senate Select Committee on COVID-19

1 Introductory comments

The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to respond to this inquiry by the Senate Select Committee on COVID-19 (The Committee) into the Australian Government's response to the COVID-19 pandemic and other related matters.

NSWCCL, along with other civil society organisations, strongly advocated for the formation of this Committee in the context of what then appeared to be a lengthy and disturbing absence of parliamentary oversight of the Government responses to the COVID-19 health emergency¹.

Although the Australian Parliament is sitting more regularly than initially planned, the Committee's role continues to be extremely important. The creation of this specific-purpose Select Committee potentially provides the community with grounds for confidence that the massive Government response to the pandemic crisis is subject to focussed scrutiny.

The Committee's terms of reference² are appropriately broad and open-ended and its role was succinctly summarised by the Chair at its first public hearing:

This committee is a key vehicle to provide accountability, transparency and scrutiny of the Australian government's response to the pandemic for the Australian people.

The Chair's promised approach to Committee proceedings was positive and ambitious:

This is not your typical Senate committee. We will demand a lot of witnesses in terms of a cooperative approach that is based on working together in the national interest to ensure all aspects of our response are the best they can be. Political grandstanding will be kept to a minimum.³

2 NSWCCL perspective

This submission focusses on four broad aspects of government responses to the COVID-19 health emergency that are of most concern to us

- i) The adequacy and fairness of emergency support programs to assist people and businesses adversely effected by the pandemic in the immediate, transitional and longer term
- ii) The commitment of governments to shape the rebuild of the Australian economy post - COVID towards the creation of a fairer, more just and environmentally sustainable society,
- iii) The critical importance of ensuring that the extraordinary emergency powers given to Ministers and authorities and the extraordinary restrictions of Australians' normal freedoms

¹[Joint Media Release 2 April 2020](#)

² a) Inquire into the Australian Government's response to the COVID-19 pandemic; and b) any related matters and report by 30 June 2022

³ [Senator Gallagher: Public Hearing 23 April 2020.](#)

of movement and association, and the right to privacy, are necessary and proportionate for the protection of public health and safety at the time; and that the roll back of these powers and restrictions happens as soon as the health and safety risk is sufficiently reduced; and that at some foreseeable point in time all these extraordinary measures are fully repealed.

- iv) Effective governance structures and processes to effectively scrutinise the integrity of the allocation of the vast public resources that will be expended in emergency, transitional and long-term programs during and post the COVID-19 emergency. **This includes transparency and open government processes which should be manifest during the operation of this Committee.**

3 Committee access to information

To date the Committee has held 13 public hearings in which it has taken evidence from and questioned key government agencies, officials and Ministers. Media reporting of these hearings has been an important source of public knowledge about Government and agency processes - including problems.

We note that the Committee has encountered difficulties in gaining requested information from the Government⁴ but we are hopeful, despite this typical reluctance for public disclosure by the Government, that the Committee's reports will be able to deliver on the 'accountability, transparency and scrutiny' goals.

Recommendation 1

NSW Council for Civil Liberties recommends:

- i) the Senate Select Committee on COVID-19 strenuously asserts all its available authority to access Government information that it deems relevant for the effective conduct of its inquiry and that, with the exception of highly classified information, this information should be available to the public through public hearings and its reports;**
- ii) and that the Committee should list in its reports all unreasonable refusals by Ministers, Officials and agencies to supply information appropriately sought by the Committee.**

4 The immediate context

The focus of the Committee to date has been on the Government's rapid emergency response to the pandemic crisis. The Government's rapid roll-out of unprecedentedly large funding programs to support millions of persons and businesses effected by the pandemic and the associated and also unprecedented health-related restrictions has been largely welcomed by the community.

NSWCCL largely agrees with this view and considers the Australian Government management of the crisis to date to be highly commendable. Not surprisingly given the necessary haste, mistakes were made, and the design of some programs had unforeseen problems – some, but not all, of which have been progressively remedied.

⁴ As an example, the recent refusal of the Minister for Finance to make available critical economic modelling data to the Committee. Public Hearing 9 June 2020. (transcript not yet available)

It was quickly evident that many groups of people in need were intentionally or inadvertently overlooked or excluded from these emergency support programs and have been experiencing significant deprivation. Some have been left utterly bereft of housing or income and have had to rely on state/local government support or charity.

Many others - and most shamefully those in various kinds of detention – were not able to abide by the health safety rules which were mandated as essential for the rest of the population. Although this disturbing situation has not yet resulted in any significant outbreaks of the virus, it remains an issue as long as there is no effective vaccination to provide protection within these confined contexts. Alternative solutions must be pursued and the most obvious is releasing those who do not pose a threat to the community.

It is imperative that those groups who were excluded intentionally or otherwise from the emergency support programs are given support in this transition stage and are encompassed within the long-term strategies.

Recommendation 2

NSW Council for Civil Liberties recommends the Senate Select Committee on COVID-19:

- i) identifies those groups of people in Australia who are in urgent need of financial or other assistance but have been excluded from the current emergency support programs and advises Government as to their need for adequate support in the transitional and longer-term context;**
- ii) gives a high priority to effective means of protection for detained persons including by release of those who do not pose a threat to the community.**

In this context, NSWCCCL supports the many calls for the \$60 billion over-allocation for the JobKeeper program to be immediately allocated to provide urgently needed support for these groups. The Government had calculated that the economy over the long-run could accommodate the expenditure of this \$60b on relief programs. It is unconscionable - and unnecessary - that it should not be immediately allocated to people known to be in as great, if not greater, need than those receiving the support.

Recommendation 3

NSW Council for Civil Liberties recommends that the \$60 billion over-allocation to the JobKeeper program be immediately reallocated to the support of people with urgent needs of financial or other support but currently excluded from the emergency support programs.

5 A measured transition

There has been uncertainty and unease in relation to the Government's transition plan from the emergency support programs to a longer-term scenario. The core concern is that the Government will abruptly end emergency support funding leaving many without any, or adequate, income or support.

This has been particularly concerning in relation to the Government's recent announcement that the emergency fee-free access to **child care** will cease on 12th July and the Government will revert to the prior mix of gap-fees and government subsidy program.

This will force many families to remove their children from child care and will have a have a disproportionate impact on women who will (largely) take over the child minding and will thus be unable to return the workforce – or forced to reduce their hours of employment

In addition, the Government has indicated that the child care industry will be the first to lose access to the JobKeeper support funding which is currently being paid to about 120,000 childcare workers.

It is accepted that these changes will lead to numbers of child care centres closing – reducing both employment and child-care places. Many of these 120,000 workers will not be able to return to their employment because their jobs will disappear or they will have to stay home to provide child care. The vast majority of these workers are women.⁵

It is puzzling that the Government has made this decision now to cut the JobKeepers support for child care workers when the JobKeepers program is in the process of being reviewed by Treasury and the report of that review is due by 23 July anyway. The Government needs to make public the detailed economic modelling and other data that led it to make this surprising decision.

There appears to be a lack of logic in the Government's approach to this industry when child care provision is a known significant factor in increasing workforce participation. From an economic perspective it does not seem a smart decision. From a fairness perspective it is very disappointing⁶ and unacceptable that changes which so disproportionately harm women are being pushed through.

Recommendation 4

The NSW Council for Civil Liberties recommends:

- i) the Government immediately reconsider its recently announced cessation of JobKeepers funding for the child-care work-force;**
- ii) failing that, the Senate Select Committee on COVID-19 requests the Treasury or the Treasurer to provide it with all economic and workforce modelling and other data on which the Government based its decision on 7th June to end the JobKeepers funding for the child care industry before the conclusion of the current review of the program by Treasury and**
- iii) the Committee closely examines the Treasury report on its Review of the JobKeepers program when it is released in July with a view to assessing its findings and recommendations in terms of projected impact on the child care workforce.**

More generally, there are concerns that the Government will abruptly end its funding of the emergency support programs regardless of whether this will result in many people being returned to extreme hardship. This is particularly so in relation to those who previously relied on the indisputably, grossly inadequate Newstart unemployment benefit of around \$40 a day. This level of

⁵ ACTU President says 95% of the 200,000 workers in the childcare industry are women.

⁶ *Warnings that women will be hardest hit by reintroduction of childcare fees*: SMH 9 June 2020

⁶ See SMH 9 June 2020

support was unable to support minimal, adequate living costs before the pandemic and is less likely to be adequate post the crisis⁷.

Regardless of the cost, as a comparatively wealthy country, Australia must be able to devise an economic and a social system which provides an adequate, minimum living standard for all.

Recommendation 5

NSW Council for Civil Liberties recommends the Government manage the exit strategy from the current emergency support and safety-net programs so as to avoid sudden withdrawal of funds and develops appropriate transition plans to ensure persons on these programs are not left without adequate living support.

6 A better future

The CCL considers it of immense importance that the Committee gives a great deal of attention to the longer term rebuild of our economy and society and the underpinning values and principles which should shape that future. Senator Gallagher has indicated:

One of the challenges for this committee is that we have to be both backward looking, because we're a scrutiny committee of decisions made by government, and also forward looking, because our constituents certainly expect us to help them get a better picture about what their weeks and months are going to be like, to the extent that we can⁸.

We are at a point in Australia where the Government and the community have turned their attention to the exit strategy from the pandemic threat, the loosening or removal of the extraordinary restrictions on our normal freedoms of movement and socialising and the winding down of the major assistance programs for people and businesses.

This may be disrupted by a second and possibly third wave of the virus – but as it is recognised that there may be no effective vaccine for COVID-19, we must nonetheless begin to plan for the future we want - with or without COVID-19.

The pandemic has both exposed and exacerbated serious inequalities and injustice in Australia. But we have also glimpsed how our governments, politicians and experts can work collaboratively and constructively for the public good with strong community support⁹. There is currently a perceptible hope in the community that, as we rebuild our economy, we will seize the rare opportunity to do so in a way that will create a fairer and more just society.

The Treasurer has recently asserted he wants 'to ensure that Australia bounces back stronger on the other side of this crisis'. **A 'stronger' Australia is one that ensures all its people have**

⁷ The PM has asserted his intention of ending the JobSeeker supplementation and returning the unemployment benefit to its previous level in September. *PM firm on ending subsidies, wants borders open.* [Financial Review](#) 10th June 2020

⁸ [Senator Gallagher Public Hearing 23 April 2020.](#)

⁹ This is reflected in recent ANU polling revealing a substantial increase in confidence in the Commonwealth Government between January and April from 27% to 57% and in the public service from 49% to 65%. Reported in SMH 5th May 2020

adequate income and living standards and equal access to justice - and shapes its economy around that goal.

NSWCCL is firmly in the camp of those arguing for a major ‘reset’ rather than a ‘snap-back’ of our economic priorities and goals. We urge the Committee, as the immediate response to the pandemic is wound back, to take a broad view and give a high priority to identifying key areas in which new approaches have the potential to take us in a fairer and more just direction.

This will involve a major rethink of our approaches to, and the goals of, our economy and our taxation and social welfare systems. A fairer society obviously requires a significant shift in the current grossly uneven share of wealth across the population.

The Select Committee on COVID-19 of course cannot be the driver of a wholesale change of direction of this order, but it can be a strong and important contributor to a growing community realisation of the need for major change relating to fairness, justice and sustainability and a determination to achieve such change.

Recommendation 6

NSW Council for Civil Liberties recommends that the Senate Select Committee on COVID-19, consistent with its reference to inquire into ‘any related matters, gives significant consideration to new economic and social policies and programs which over the short and longer term are conducive towards the creation of a fairer, more just and environmentally sustainable society than is currently the case in Australia.

7 Indigenous Australians

At the time of writing, Australia is experiencing an increasingly acrimonious public debate generated by the huge **Black Lives Matter** (BLM) rallies which took place across Australia on Saturday 6th June and calls from some for similar rallies to held the following week. Governments and police are strongly resisting the possibility of further rallies in the pandemic context¹⁰.

The debate goes beyond the usual issues around mass protests because of the obvious health safety issues involved in large-scale gatherings during a pandemic. But the heat in the debate also reflects the intensity of the anger - and despair- of indigenous Australians on one side and the deep reluctance of many Australians, including some of our political leaders, to accept the prevalence of racism in Australia and its many harmful manifestations¹¹.

The anger of the demonstrators at the calm brutality of the Minneapolis policeman pressing his knee on the man’s throat for 8 minutes and 46 seconds until he was dead was amplified by our own

¹⁰ In NSW a small rally called by the Refugee Action Coalition for Saturday 13/6/2020 has been prohibited by the Supreme Court. The organisers have announced they intend to proceed. ABC news on line 12/6/20

¹¹ Eg [@Mark Latham](#) MLC NSW Parliament: FACT: “No Indigenous has been murdered by a prison guard or police officer in Australia since the Royal Commission into Aboriginal Deaths in Custody in 1991. The 432 number is pure Fake News run by the ABC, SBS and others”. 8:20 AM · Jun 10, 2020·Twitter Web App

shameful and ongoing history of the killing of indigenous Australians and particularly the 430 plus deaths in custody since the 1990 Deaths in Custody Royal Commission.

This feels like a pivotal moment from which could emerge a significant change of direction in relation to the unresolved issues in Australia's treatment of our Indigenous people. Or alternatively, a failure to respond positively to this moment could lead to an escalation of anger and frustration – and ongoing discrimination and injustice against our indigenous community.

NSWCCL believes it is most important that the Committee gives high priority to considering the immediate impact of the pandemic on our Indigenous people and ways in which the exit from the current emergency provisions can be shaped to ensure them a safer and fairer future.

(Of course we recognise this is a task that, while integral to its brief goes well beyond Committee's brief or capacity to address.)

We urge the Committee to give time in public hearings for Indigenous people to present their perspectives. We recognise that many of the biggest injustices they experience are largely State responsibilities,¹² however the Australian Government does have the responsibility for, and opportunity to take probably the most significant step towards healing relationships by accepting in full the Uluru Statement from the Heart and moving seriously towards its implementation.

This is surely a prerequisite for a 'stronger' Australia.

The Australian Government also has a key role in leading a serious and determined effort to end Aboriginal deaths in custody and a re-commitment to implement the many still-current recommendations of the 1990 Royal Commission¹³.

The stunning and deliberate destruction of a unique Aboriginal sacred site with evidence of 46000 years of continual occupation by mining company Rio Tinto - with full knowledge of its significance – dramatically demonstrates the inadequacy of current land rights legislation and the fundamental lack of respect for indigenous culture and history.

The integration of COAG into a new National Cabinet structure will hopefully facilitate more effective progress on hard issues such as these which cross state/federal jurisdictions.

A large coalition of justice groups has made a commendable attempt in the current environment to focus Government and public attention on an immediate way forward. They have put forward 5 reforms which – as they say – could be implemented tomorrow if there was a will to do so:

- i) Repeal punitive bail laws, mandatory sentencing laws and decriminalise public drunkenness.
- ii) Stop imprisoning Aboriginal and Torres Strait Islander children and raise the age of legal responsibility from 10 to 14 years.

¹²: eg. deaths in custody; massive over-representation prison incarceration rates for children and adults; staggering increase in the numbers of indigenous children in care -a new stolen generation? lack of adequate housing and medical services; protection of significant sites from mining companies etc)

¹³ Minister Ken Wyatt is reported as having initiated discussions with states, federal officials and Indigenous leaders on 'Closing the Gap' recommendations in response to the BLM protests and state and federal officials are due to discuss new and stricter targets in health and education. The Australian June 2020

- iii) Legislate for independent investigations of deaths in custody and the resourcing of independent police oversight bodies.
- iv) Implement all recommendations from the royal commission into Aboriginal deaths in custody, the Australian Law Reform Commission's Pathways to Justice report and the "countless independent investigations, coronial inquests and reports that have been published in the three decades since".
- v) End the solitary confinement of Aboriginal and Torres Strait Islander people in police and prison cells through legislative safeguards and by setting up independent bodies to monitor the conditions and treatment of people detained.¹⁴

Recommendation 7

NSW Council for Civil Liberties recommends that:

- i) **the Senate Select Committee on COVID-19 gives a high priority to issues relating to Indigenous Australians and invites (if it has not already so done) them to present their perspectives to the Committee**
- ii) **the Australian Government reconsiders its position and adopts the Uluru Statement from the Heart in full as an important step in recognising the need for reconciliation and truth telling**
- iii) **the Australian Government takes immediate and effective action to protect Indigenous sacred sites from destruction by mining and other interests**
- iv) **the Senate Select Committee on COVID-19 gives close consideration to support needed post COVID-19 to address the particular post-COVID issues effecting Indigenous Australians.**

8 High vulnerability of persons in detention

People in detention are at great risk in the context of a pandemic – especially as, in most places of detention, there is over-crowding and limited or no capacity to provide space for social distancing practices. These include prisoners in the justice system gaols, asylum seekers in detention in Australia and off-shore in PNG and Nauru and persons in immigration detention centres for a variety of reasons.

Many of these people are detained unnecessarily or unlawfully. NSWCCCL and many others have long argued that many of those currently in gaols should be released and that legitimate asylum seekers should be removed from detention and accommodated in the community while their applications are processed- and that off-shore detention should cease. There are available powers and alternative accommodation options to allow this to occur should Governments choose to do so.

The pandemic crisis- with the strong possibility of future second and third waves - has dramatically elevated the importance of action on this front.

¹⁴ [Guardian](#) 12 June 2020

NSWCCL endorses the Joint Submission by civil society groups and individuals: **OPCAT, Places of Detention and COVID-19** already submitted to the Committee¹⁵ and will not duplicate the detailed arguments put forward in that submission.

We specifically endorse the recommendations in that submission and incorporate them in this submission.

Recommendation 8¹⁶

- i) Federal, State and Territory Governments must take immediate action to reduce the number of people held in places of detention. This should include responsibly releasing people who are at higher risk of significant harm should they contract COVID-19, including Aboriginal and Torres Strait Islander people, elderly people, people with chronic health conditions, people living with disabled people with mental health conditions, children, young people, pregnant women, primary caregivers for young children, refugees and people seeking asylum.**

- i) Federal, State and Territory Governments must prohibit the use of solitary confinement, and other practices that amount to torture or cruel, inhuman or degrading treatment or punishment, including isolation and quarantine measures that amount to effective solitary confinement, in places of detention.**

- ii) Federal, State and Territory Governments must urgently designate and/or establish National Preventive Mechanisms as part of their response to the COVID-19 pandemic, to oversee the conditions of detention and treatment of people in places of detention, which must, at a minimum, comply with international human rights standards. Governments must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations during this process**

- iii) Federal, State and Territory Governments must guarantee all oversight bodies, including National Preventive Mechanisms, unimpeded access to all places of detention and persons detained throughout (and beyond) the duration of the COVID-19 pandemic. Governments and places of detention must co-operate with oversight bodies, accommodate inspections and respond to requests for information.**

- iv) In order to ensure greater transparency, Federal, State and Territory Governments must provide regular, updated and accurate information to the public and to oversight bodies on its response to the COVID-19 pandemic in relation to each place of detention. Oversight bodies should publicly report on the information they receive through this process, at regular intervals, and ensure that the voices of**

¹⁵ Submission 79

¹⁶ We extend our thanks to the Human Rights Law Centre and other writers of this submission for their invitation to use or build on their work.

people in places of detention are heard in this process.

- v) **Federal, State and Territory Governments must not adopt unreasonable measures that will further undermine or limit existing formal and informal mechanisms of oversight and transparency.**

9 High vulnerability of persons with a disability

Ongoing difficulties with the implementation of the NDIS have been compounded by the impact of the pandemic on people with a disability in a variety of ways.

Access to medical care became more difficult and in-home support was interrupted as carers were unable to attend and many were particularly vulnerable to the virus. One recent survey has 40% of people with a disability reporting they have less support as a result of the crisis. A survey by **People with Disability Australia** reported 90% of respondents had experienced an increase in expenses.¹⁷

The Government has not been willing to extend the Jobseekers supplement to those on the Disability Support Pension¹⁸. This Committee should consider the fairness of this decision.

The provision of funded Telehealth service for access to medical advice has alleviated the problem of disabled persons' access to medical care and there is a strong argument from the community and doctors for its continuation.

The recent shocking neglect of a disabled woman by her carer and her resulting death¹⁹ has again highlighted the lack of adequate safeguards for disabled people accessing support through the NDIS. The NDIS Quality and Safeguards Commission is reported as having taken action against only 17 individuals and 7 providers from 74 incident reports.²⁰

There is a Royal Commission currently investigating 'violence against, and abuse, neglect and exploitation of, people with disability' and related issues which is due report by April 2022. Although this is a major issue, it should not be necessary for the Committee to duplicate this investigation.

The Committee should urge the Government to continue funding for the Telehealth service and consider whether there are grounds for providing supplementary support to those on the Disability Support Pension.

Recommendation 9

NSW Council for Civil Liberties recommends that:

- i) The Australian Government should maintain funding for the Telehealth service on a permanent basis**
- ii) The Senate Select Committee on COVID-19 investigates whether there are reasonable and fair grounds for the Government to provide supplementary financial support to**

¹⁷ [PRObono](#) 10 June 2020, *New survey reveals the financial costs of COVID-19 for people with disability*

¹⁸ It did make two one-off payments of \$750 to recipients.

¹⁹ [Guardian](#) 31 May 2020 *The death of Ann Marie Smith: a shocking case of neglect, or a failure of the system?*

²⁰ *Ibid*

compensate for impact of the pandemic on persons relying on the Disability Support Pension

10 Extraordinary powers, executive decision making and law by regulation

As was the case during both World Wars, the Government's response to the COVID-19 Crisis has been enabled by the provision of extraordinary powers to Executive Government and Government agencies. This has been achieved largely through the mechanism of regulations under the expansive human biosecurity provisions of the Biosecurity Act 2015 (Cth)²¹. The regulations flowing from this Act are not disallowable by Parliament and override any existing Australian law. They are time-limited to 3 months- but this sunset period can be extended as deemed necessary by the Minister.²²

The volume of the COVID-19 regulations is immense. As of writing²³ there 172 specific COVID-19 'instruments' listed on the Senate Standing Committee for the Scrutiny of Delegated Legislation site. This poses a major problem for the Committee in terms of capacity to engage with all or most of the regulations.

We note that regulations that are not disallowable by Parliament are not required to have a statement of compatibility with human rights²⁴ and therefore the Parliamentary Joint Committee on Human Rights which determined to continue to meet to scrutinise COVID-19 legislation cannot formally assess their compliance with human rights. We also note the Senate Standing Committee for the Scrutiny of Delegated Legislation is not able to scrutinise regulations which are not disallowable by Parliament and cannot scrutinise any policy dimensions of delegated legislation.

These are significant constraints on the capacity of these Committees to scrutinise the COVID-19 regulations, but they are nonetheless flagging regulations likely to be of concern and bringing them to the attention of the COVID-Committee.

It is however obvious that the Committee will not be able to scrutinise in detail 172 plus regulations and legislation. It be limited by capacity as to how much and which aspects of the Government's COVID-19 response it can meaningfully scrutinise over the next two years. In this context it is important that the Committee has adequate support and resources for it to fulfil its brief in a meaningful and useful manner.

Recommendation 10

NSW Council for Civil Liberties recommends that the Government provides the Senate Select Committee on COVID-19 with sufficient resources - including adequate numbers of staff with appropriate skills and experience and communication technology - to enable it to fulfil its role effectively over the next two years.

²¹Biosecurity Act 2015 (Cth) s475

²²Ibid s476

²³9 June 2020

²⁴Human Rights (Parliamentary Scrutiny) Act 2011 (section 9) only requires statements of compatibility to be provided for legislative instruments that are subject to disallowance.

The scope and potential impact of these regulations across the economy, social security and public health areas as well and on freedom of movement and social behaviour are very significant. A legal academic noted at the end of March this emerging significance:

*The new development in the face of the coronavirus crisis is that rather than regulations being understood to be limited to the regulatory micro-politics associated with implementing the technical legal details of a statutory scheme, they are becoming the legal form for implementing major social changes with substantial economic impacts, albeit in the short term*²⁵

The speed, scope and innovation of the Government's response (and that of the States) to COVID-19 has been widely praised and, most importantly, to date, it has been successful in minimising the impact of the pandemic in Australia. The obvious need for rapid action has been Governments' justification for this broad-brush, no-argument use of regulations.

We concede there is obvious merit in this position – for the short-term.

11 Constraints on rights and liberties.

The NSWCCCL accepts that most of the extraordinary COVID-related constraints on rights to free movement and social gatherings have been justified as necessary for the protection of public health and safety in the short term. Many of the problems experienced were related to the instability of the early constraints which were changing at great rapidity, especially at the State level, resulting in widespread confusion. This has been exacerbated by apparent inconsistencies in the regulations particularly in relation to size of gatherings and social distancing and some manifestation of over-reach in police enforcement.

However, we are concerned about the large number of COVID-19 regulations that are not disallowable by Parliament, are not tightly drafted and allow largely unscrutinised exercise of very considerable and arbitrary powers by Executive Government and agencies. This was justifiable in the immediate initial stages of the pandemic when great speed and decisive action were pivotal to its successful containment. But as we move into the transition stage and a new normal (which may include a second or third COVID wave), the COVID-19 regulations should be systemically reviewed to assess their ongoing need and their compatibility with accepted principles for good regulations and good regulation-making in a Parliamentary democracy.

Regulations should be subject to disallowance by Parliament.

²⁵ Andrew Edgar: Challenge to law making laws and principles. <https://auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/>. This trend of course did not start with the COVID-19 crisis. It has been a steadily creeping trend in law making for years- and civil liberties and legal bodies have consistently argued against the trend and its dangerous, undemocratic implications.

Recommendation 11

NSW Council for Civil Liberties recommends all COVID-19 regulations should be reviewable by Parliament to ensure that they are necessary, and abide by principles of justice and fairness and compatibility with human rights

12 Right to leave Australia

The Overseas Travel Ban Emergency Requirements determination²⁶ came into operation on 25th March and prevented Australian citizens and permanent residents from leaving Australia – with some exemptions. This is a regulation that should be reviewed by the Committee at its first sunset date. In our view it is particularly problematic.²⁷

First of all, it is not evident to us that a ban on persons leaving Australia is essential for the protection of Australians' public health and safety. They are **leaving** Australia. Their departure will not threaten public health and safety in Australia.

A requirement for them to have a current COVID-19 test result indicating that they are virus-free as well as on the spot temperature testing could be essential pre-travel requirements and would give protection for staff and fellow travellers and for persons at transit points and at the country of destination.

Re-entry to Australia is tightly regulated. Australia has in place bans on entry from designated countries and requires a 14 days quarantine period for incoming travellers. These provisions should provide adequate protection against a returning citizen or permanent resident posing a threat to the health and safety of Australians.

We note that in his response to a question from Senator Di Natale at a Committee Public Hearing that Professor Murphy did leave open the possibility of the restriction being loosened but with a caveat about the absence of a vaccine:

Senator DI NATALE: So you wouldn't envisage some change where people are allowed to travel again but with there being a strict enforcement of quarantine on their return?

Prof. Murphy: That is a possible measure. If the epidemiology changed in some countries, that could easily be a measure. But again, one of the challenges with this virus, in the absence of a vaccine, is that no-one in the world has a very clear path about the future. We have relatively good short-term planning frameworks and we're going to reassess things as

²⁶ [Biosecurity \(Human Biosecurity Emergency\) \(Human Coronavirus with Pandemic Potential\) \(Overseas Travel Ban Emergency Requirements\) Determination 2020 \(25 March 2020\)](#)

²⁷ Our attention was drawn to this regulation by a complaint both about refusal of an exemption and lack of communication/explanation as to the reasons given. We were of the view that the complainant clearly had a compelling reason for travel.

*we go. If a good vaccine candidate appears in the next few months, that could change our strategy completely.*²⁸

If the ban is to remain in force until we have a vaccine it could be a very long -if not permanent -ban. We do not think that is feasible or acceptable.

If the motivation for this regulation is to protect the would-be traveller from unwise traveling and potential self-harm, that is not in our view adequate justification. There is abundant public information as to the COVID-status of most countries and the risks of overseas travelling by air or sea. It is certainly sufficient for a person to make an informed judgment as to the risks they might be taking and balance this against their personal reason for travel. This would include consideration of the risk that they may not be permitted to re-enter Australia.

The Committee should give consideration to the repeal of this regulation. If however, the view that it is a necessary restriction is upheld, we would propose amendments to the regulation.

The regulation provides exemptions for a list of designated categories of persons²⁹ on the grounds of 'exceptional circumstances'. The 'exceptional circumstances' are demonstrated by the eligible person providing 'a compelling reason' for needing to leave Australian territory.³⁰ The decision to grant the exemption on the basis that there are exceptional circumstances demonstrated by a compelling reason (or vice versa) can be made by any APS employee in the Australian Border Force.

There are no specifications as to the level or qualifications of the ABF employee nor any criteria or examples to clarify 'exceptional circumstances' or a 'compelling reason'. As with other COVID regulations there is no avenue for merit review.

Great distress can be caused by blocking travel. The grounds for exercising a discretionary exemption need to be more clearly defined and the empowered official must hold an appropriate relevant senior position in the AFP. Ideally a citizen or permanent resident should have access to an appeal process and ideally a merit appeal – though this may be justifiably dispensed with in the COVID-19 crisis context.

While most applications for exemptions have been approved a significant number of applicants have been rejected. It is not possible to assess the grounds for the approvals or rejections as no information as to any 'reason' is available.

²⁸ Committee Public Hearing 23 April 2020, p13.

²⁹ (a) a person ordinarily resident in a country other than Australia; (b) a person who is member of the crew of an aircraft or vessel (other than the outgoing aircraft or vessel) or is a worker associated with the safety or maintenance of an aircraft or vessel (other than the outgoing aircraft or vessel); (c) a person engaged in the day-to-day conduct of inbound and outbound freight; (d) a person whose travel is associated with essential work at an offshore facility; (e) a person who is travelling on official government business (including a member of the Australian Defence Force) Ibid, s6 Exemptions-general

³⁰ Ibid, s7(2) Exemptions - granted by an APS employee in the Australian Border Force

Recommendation 12

NSW Council for Civil Liberties recommends the Senate Select Committee on COVID-19 considers the Overseas Travel Ban Emergency Requirements determination 2020 with the view to recommending its repeal; or failing that, recommending it be amended to:

- i) provide greater guidance as to a definition or clarification of ‘exceptional circumstances’ and a ‘compelling reason’ and
- ii) specify the appropriate status and skill level for any official given authority to determine whether or not to grant an exemption.

13 Privacy and the COVIDSafe App

The Australian government has enacted the *Privacy Amendment (Public Health Contact Information) Act 2020 (Act)*. The Act, largely reproduces the biosecurity orders which made it possible to begin to download and operate the COVIDSafe App (App).

NSWCCL argued for significant amendments to the legislation as initially proposed³¹ and accept that the Government has been responsive to the widespread community concerns about privacy aspects of the App and has built in additional privacy protections. However, substantial privacy and other issues remain and need to be addressed.

There is still considerable community resistance to the App for a variety of reasons – but lack of confidence in the effectiveness of protections for individuals’ privacy beyond the specified purpose remains a key issue.

We welcomed the Government’s decision to commission a Privacy Impact Assessment (PIA) but it is disappointing that its scope was limited to compliance with the Privacy Act 1988 and the privacy principles, rather than a wide-ranging review of the most appropriate options for the particular context including more privacy-friendly decentralized options.

Consideration should have been given to whether the App and its operation was a necessary and proportionate response given the risks to privacy and the legitimate objective to protect public health. At this point in time it is not clear that the App is contributing in a major way to effective tracking.³²

The authors of the PIA recommended compliance with the anonymity and pseudonymity Privacy Principle but this of course is meaningless when an individual’s phone number is central to the operation of the system.

Transparency is important in establishing community confidence. Instead, aspects of the Government’s information campaign were misleading and amounted to spruiking of the App when clear, accurate and relevant information – including information as to risks - was required.

³¹ Councils for Civil Liberties Public Statement Parliament Must Strengthen Protections In Covid App Bill (9 May 2020) <https://www.nswccl.org.au/covidsafe_bill_parliament_must_strengthen_protections>

³² Taylor, J. (24 May 2020) How did the Covidsafe app go from being vital to almost irrelevant? *The Guardian* <<https://www.theguardian.com/world/2020/may/24/how-did-the-covidsafe-app-go-from-being-vital-to-almost-irrelevant>>

It was important that clear and accurate information was given as to the data collected by the App. The Committee has already heard that, contrary to some widely publicized statements, the App is not limited to collecting information about users who come within 1.5 metres for at least 15 minutes.³³ The App indiscriminately logs most encounters which are only filtered once uploaded to the National Data Storage.

More openness as to potential problems with the App might have allowed Australians to be less perturbed by the technological flaws that immediately emerged³⁴ or the fact that contact tracing was not actually functional until the States and Territories got onboard.³⁵

The App is hopefully not a permanent feature for tracking Australians' movements. The Act empowers the Minister to determine a day from which he is satisfied that the App is no longer required or effective.³⁶ It not appropriate that the expiry date for this legislation should be determined by the subjective belief of the Health Minister.

The decision as to when the *Privacy Amendment (Public Health Contact Information) Act 2020 (Act)* is repealed should be made by Parliament on the basis of regular Parliamentary reviews.

While the NSWCCCL has not opposed the App outright, we are concerned that the mass, voluntary use of a tracking device as a normal part of daily life, will open the way for additional intrusive surveillance devices to be seen as 'normal'. It is therefore important that this App is clearly an exceptional technical device, justified only for the short term to address a serious health crisis, and will be withdrawn when that crisis need no longer applies.

Australians' freedom of movement should not be predicated on the downloading of the App. This is recognised by the Government and both the COVIDSafe Privacy Policy and s94H of the Act state that no user should feel pressured to install or continue to use it. Nonetheless it is to be expected that pressures will be put on people to demonstrate they have the App and that it is opened for them to gain access to some places and events.³⁷ This will need to be monitored by Parliament.

Recommendation 13

The NSW Council for Civil Liberties recommends that the Parliament reviews the need for the COVIDsafe APP legislation at 6 monthly intervals with a view to it being repealed as soon as the APP is not necessary for effective tracking of the spread of the virus.

14 The right to protest

The right to protest is not specifically constrained by COVID-19 legislation but, as has been dramatically demonstrated in the controversy around the Black Lives Matter demonstrations across

³³ [Senate Select Committee on COVID-19](#) - 06/05/2020 12:50:00

³⁴ Rollins, A (5 May 2020) Coronavirus: federal government faces criticism over bugs and flaws in COVIDsafe app Canberra Times <https://www.canberratimes.com.au/story/6745024/govt-under-pressure-over-app-bugs-and-flaws/>

³⁵ Taylor, J. (5 May 2020) Covidsafe app: how Australia's coronavirus contact tracing app works, what it does, downloads and problems The Guardian <<https://www.theguardian.com/australia-news/2020/may/05/covid-safe-app-downloads-ios-android-iphone-australian-government-covidsafe-tracking-how-to-download-install-works-working-problems-australia-coronavirus-contact-tracing>>

³⁶ s94Y

³⁷ Galloway, K & Castan, M (11 May 2020) COVIDSafe and Identity: Governance Beyond Privacy *AUSPUBLAW* <<https://auspublaw.org/2020/05/covidsafe-and-identity-governance-beyond-privacy/>>

Australia in early June, it is effectively and significantly constrained by the broad restrictions on gatherings and social distancing rules. This is appropriate.

More significantly, it is also constrained by a real tension between the need to protect public health and safety and the right and need to protest on urgent, serious matters. NSWCCCL put out a statement on this in the context of the debate as to the pros and cons of attending the BLM rally³⁸.

This reasonable tension was inflamed by the heated rhetoric of some political and community leaders about the recklessness and selfishness of the BLM demonstrators and their disregard for the health and well-being of the wider Australian community which seems to have been successful in generating unnecessary tension and division in the community.

This was unwarranted rhetoric. There was a clear recognition by the organisers and most participants as to the need to observe the health safety rules and an understanding of the risks involved in the demonstration. Participants were exercising their lawful right to protest on a matter of great and urgent importance and appear to have done so in an orderly fashion respecting the health safety rules in so far as possible.

Our concern is that this inflamed debate will encourage Police to refuse authorisation to future demonstrations on the grounds of the COVID-19 crisis - which could last for a long time. If the Police bans are thwarted by the Courts, it is quite probable that governments will respond by introducing new legislation to further limit the right to demonstrate.

We saw this happen in a number of jurisdictions in response to growing environmental protests against mining and natural gas extraction a few years ago.

Protest rallies must abide by health and safety laws. But it is important that there is consistency in the way this is assessed and in the rules about allowable gatherings. This is not always the case.

It is very important to a healthy democracy that the right to protest is not further constrained in Australia. It was appropriate and responsible for people to choose to participate in the lawful BLM rallies last week with the knowledge that there was a real risk of infection being spread -as long as they observed the health and safety rules.

Recommendation 14

The NSW Council for Civil Liberties recommends that the Senate Select Committee on COVID-19 closely monitors any restrictions placed on protest rallies for reasons associated with the COVID-19 health crisis to assess whether the grounds for such restrictions are soundly based and that any such restrictions are time limited and do not extend beyond the COVID-19 health crisis.

15 Governance matters: national cabinet and COAG

The decision at a COAG meeting on 13th March to create a national cabinet to manage the COVID-19 crisis was a successful initiative. The recent decision to broaden its ambit and absorb COAG could

³⁸NSWCCCL Public Statement: [Black Lives Matter Protests](#) 7th June 2020

also be a positive move in so far as it could improve the capacity of governments to manage the many issues beyond COVID-19 which cross state and federal jurisdictions³⁹. Numbers of issues as to how this body would actually function and its rules and procedures have not yet been made public and probably are not yet agreed by the PM and the state and territory leaders.

There is one major problem that will require a solution for this to be an acceptable 'reform' – from what we do know it appears that one outcome will be a significant loss of transparency in relation to the deliberations and decisions of the Australian Governments - both state and federal.

Whereas COAG was a relatively open forum and subject to the FOI Act, the new body will be constrained by the highly secretive rules that apply to the National Cabinet deliberations and associated documents will be exempted from the FOI provisions⁴⁰. The 'Cabinet-in -confidence' classification is routinely abused to shield information from being publicly accessible by journalists or other interested members of the community.

A statement on COAG deliberations and decisions is released a week after the meetings and State Premiers and Ministers usually give public briefings on the outcomes in their sessions. Disagreement between the states or between states and the Commonwealth are regularly publicly aired and debated. This would be impossible if 'cabinet' solidarity rules were applied to the new national Cabinet. This restriction may be difficult to apply as the Premiers will be representing their states – but it is likely that greater secrecy agreements will apply and will restrict the public flow of information to something considerably less than has been available from COAG meetings.

NSWCCCL considers it critical the degree of openness typical of COAG procedures is not abandoned in favour of the far more secretive Cabinet rules and procedures.

The Prime Minister has indicated that the National Cabinet rules will apply to the new body. To date there are no publicly available rules as to how the current Cabinet rules will apply to the new body and hopefully these rules can be modified. If this is not possible the amalgamation of COAG and the National Cabinet should not proceed.

Apart from the likelihood of a major expansion of secrecy, there is a widely perceived danger that this consolidation -including the disbanding of most, if not all, of the separate Ministerial COAG Councils – will lead to a further undesirable shift towards unaccountable executive government in Australia.

This of course will be exacerbated if the Australian Parliament does not resume more regular parliamentary sittings allowing greater scrutiny of Executive Government activity.

Recommendation 15

The NSW Council for Civil Liberties recommends:

- i) that the Prime Minister and State and Territory Premiers/Chief Ministers ensure that the structure, rules and procedures of the new National Cabinet demonstrably increase**

³⁹Local Government, which was a participant in COAG, has not been included – this should be given further consideration

⁴⁰ For comparative details see the [COAG Handbook](#) and the [Cabinet Handbook](#)

- transparency and accountability of Executive Government to the people of Australia and its Parliaments.**
- ii) that the Prime Minister make public in the near future draft detailed rules and procedures for the National Cabinet to allow community comment on them and for the state and Australian Parliaments to consider them**
 - iii) The Senate Select Committee on COVID-19 in so as its brief permits should scrutinise the new National Cabinet rules and procedures to ensure that they enhance openness and accountability appropriate to a healthy democracy**
 - iv) The Australian Parliament should resume a full program of sitting days for the rest of this year to ensure adequate scrutiny and oversight of government activity**

16 Governance matters: national integrity body

There is widespread recognition of the urgent need for a strong anti-corruption /integrity body at the national level. The Government agrees, but has proposed a weak and limited model which would manifestly fail to make a serious difference to corruption and maladministration evident within Government and administration.

This lack is of particular significance in the COVID -19 context where the expenditure /allocation of very large sums of money is being done quickly and with very scant specified criteria or procedures and limited transparency, scrutiny or accountability.

The danger of this is evident. Existing mechanisms are inadequate in a normal context – see the lack of consequences in relation to the clear Sports Rort prior to the last election - notwithstanding a strong and credible, damning report by the Auditor-General. In the emerging exit phase, the scrutiny and accountability challenges will be far greater given the ongoing pressure for speedy allocation of funds to get the Australian economy back into gear.

The Committee has a brief to interrogate Ministers and agencies about these allocations and the monitoring of implementation of funded programs and should pursue this strongly. However, the task is well beyond the capacity of the Committee. NSWCCCL considers it is now imperative for the Government to move to establish a strong and broad based national anti-corruption and integrity body. The challenge for the nation will be to persuade the Government to abandon its faux model and accept the need for a stronger body which needs to be established quickly.

The Committee could have a persuasive role on this issue.

The NSWCCCL has long advocated a strong and broad-based model which:

- i) has jurisdiction across the totality of national public administration, including all public service agencies, public sector entities outside the public service, Federal Parliament including ministers and their staff, members of Parliament and the federal electoral and funding systems.**
- ii) has the power to investigate serious and/or systemic corrupt conduct by a person not a public official when the corrupt conduct will have an adverse effect on public administration the power to investigate serious and/or systemic corrupt conduct by a person not a public official when the corrupt conduct will have an adverse effect on public administration**

- iii) has the power to hold public hearings as part of its investigations. The decision to exercise this power in individual investigations should be decided on the basis of public interest and fairness criteria

In the interim, the work load of the Auditor-General will be considerably greater than normal. Additional resources should be allocated to this office and it would appear to be essential for the powers of the Auditor-General and to be reviewed and strengthened, so that his findings and recommendations carry authority and Ministers and agencies are held accountable to respond appropriately and quickly.

Recommendation 16

The NSW Council for Civil Liberties recommends that the Federal Government moves quickly to establish a strong and effective national integrity body so that all relevant aspects of the Government's COVID-19 related programs are subject to scrutiny in relation to corruption and maladministration. This body should: have a wide jurisdiction across public administration and federal parliament and electoral funding (see i) above); have the power investigate serious and/or systemic corrupt conduct; be able to self-initiate corruption investigations; and have the power to hold public hearings when in the public interest.

17 Concluding comment

The NSW Council for Civil Liberties hopes this submission is of assistance to the Committee in fulfilling its important scrutiny and oversight role in relation to the Government's response to the COVID-19 pandemic. This is an agenda of more consequence to the nation and the Australian people than any since World War II.

NSWCCL will make itself available to answer questions or discuss further if the Committee so wishes. This submission was written by Dr Lesley Lynch member of the NSWCCL executive and convenor of our National Security and Counter Terrorism Group. Michelle Falstein, NSWCCL Secretary and convenor of our Privacy and Data Group provided considerable input.

Michelle Falstein

**Secretary
NSW Council for Civil Liberties**

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