

Opening statement – Senate Estimates, Thurs 22 October 2020

Emeritus Professor Rosalind Croucher AM
President, Australian Human Rights Commission

This year, 2020, has raised unprecedented challenges for the human rights of all Australians.

Protecting the lives and health of the entire community has required extraordinary measures being introduced across all levels of government.

This has come with severe consequences for people's ability to move freely in the community, to travel across state borders, to be with family and friends, and to undertake their means of business.

Everyone has been, and continues to be, affected.

On behalf of the Australian Human Rights Commission, I extend my sincere condolences to the families of the 905 people who have lost their lives to date during the COVID-19 pandemic in Australia.

Losing a loved one is hard at the best of times.

But to do so in circumstances where there are restrictions: on visiting an ailing family member, particularly if they are in an aged care facility; on travelling to visit a dying family member; and ultimately, on being able to be present at a funeral to celebrate their life is very tough and deeply saddening.

The Commission has been monitoring the measures that have been introduced by the federal government since March and our Commissioners have provided advice on a range of key issues. We have been focused on:

- privacy protections relating to the COVID-Safe App
- the gendered impact of the pandemic and economic response measures to address this
- the mental health impacts on children
- the vulnerability of older Australians to elder abuse and employment discrimination
- measures to build social cohesion and combat the scourge of racism in the community

- the vulnerability of people in immigration detention and of temporary visa holders in the community
- community solutions to keep Aboriginal and Torres Strait Islander peoples safe, and
- guidance for health and disability care providers for persons with disability.

We continue to receive complaints under our discrimination and human rights jurisdictions relating to the pandemic. Initially, these were significantly focused on experiences of racism. Since then, the focus has been on human rights breaches, and race and disability discrimination. Between January 2020 and this morning, we have received 316 complaints and 1,200 COVID related written enquiries.

Chair, recently we have heard much public debate about the tension between protecting public health and protecting human rights. I welcome these debates—and particularly the ‘rights consciousness’ to which they give voice. These debates are all about human rights—because measures that protect public health also operate to protect human rights, like the right to life.

If these measures are to restrict *other* human rights, then they must meet clearly defined tests set out in international law: being necessary to protect public health, and proportionate to meet that goal, with the least restrictive measures to do so.

Assessing the appropriateness of restrictions, at any given point in time, is a complex task, and one that can rapidly change as the impact of the virus also shifts—such is the nature of emergency responses.

It is why decisions that are made within a short window of time—perhaps within 24 hours—must be subject to regular, ongoing scrutiny. Because what was appropriate, in the circumstances of three months ago, may not be so justified in the circumstances of today.

Chair, there are some challenges that we, and the community, have faced in assessing whether the human rights impact of the emergency measures is justified.

As with other scrutiny measures at the federal level—such as the Parliamentary Joint Committee on Human Rights—the Australian Human Rights Commission is limited by statute to scrutinising *federal* enactments and proposed enactments.

Why have we not formally examined the public health orders imposing restrictions in Victoria or border closures in other states? Because we do not have the legislative mandate to do so.

This pandemic has been unusual in that many decisions have been made collegially by governments, at the National Cabinet, and the responsibility for implementation has then been disbursed among other layers of government.

Different layers of scrutiny have then applied, depending on whether measures are legislated; whether they are in the form of 'disallowable' instruments; or whether, as has been the case for a number of measures, they are introduced through instruments that are *not* disallowable or reviewable, and which have not included human rights compatibility analysis.

The use of legislative instruments means there is not the same level of independent scrutiny as regular legislation. Much of the scrutiny comes *after* the fact. There has also been the use of extraordinary measures, known generically as 'Henry VIII' clauses, whereby delegated instruments can change the meaning of legislation agreed by the Parliament.

I am concerned at the lack of transparency in explaining the continued justification for some emergency measures, and even for identifying precisely which level of government is responsible for some of them.

The checks and balances that ordinarily exist are integral to our democracy. Australians have been, and continue to be, exposed to potentially unnecessary restrictions of their rights and freedoms, because of the lack of transparency and accountability.

The complexity of our federal system also makes it difficult to ensure appropriate scrutiny of these measures.

For example, *who* is responsible to assist Australians to be repatriated to Australia? It would seem it is a federal obligation, and something where consular assistance would be necessary. But it is the role of states to determine how many passengers can arrive in each state or territory.

What is the impact of this? I am concerned that Australia—as in *all* our governments—may not be meeting the obligation in Article 10 of the Convention on the Rights of the Child to take steps in an 'expeditious manner' to enable a child or their parents to enter or leave Australia for the purpose of family reunification.

We are now almost nine months since the first COVID-19 case was confirmed in Australia on 25 January, and with the rapid growth of transmissions overseas we have a long way to go before it is over.

We need to embed a human rights scrutiny process better into all emergency responses, to ensure that any intrusion on our rights is always fully justified, and the debate is had at the time the restrictions are considered—not afterwards.

Such scrutiny would aid in maintaining public trust and ensuring compliance with restrictions. It would also provide a safeguard that when we plan for recovery from this crisis, no-one gets left behind.

Chair, if I could conclude by reflecting on the life and achievements of the former Age Discrimination Commissioner, the Hon Susan Ryan AO.

Ms Ryan is of great importance in the history of the Australian Human Rights Commission, and of human rights in Australia. She was the instigator of the Sex Discrimination Act of 1984, and the first female Cabinet member for the ALP. She was the inaugural Age Discrimination Commissioner, from 2011 to 2016, and, for a time, acted as Disability Discrimination Commissioner. I had the privilege of working with Ms Ryan, when I was President of the Australian Law Reform Commission and leading an inquiry into barriers to work for older Australians in Commonwealth laws, for which Ms Ryan was a part-time Commissioner.

Ms Ryan was widely respected across political lines and acknowledged as a fierce advocate for human rights and for fairness—evident so powerfully in the condolence motions in this Parliament.

Her landmark *Willing to Work* national inquiry into employment discrimination against persons with disability and older people holds many important lessons as we navigate the pandemic and its economic consequences.

On behalf of the Australian Human Rights Commission, I pay tribute to Susan Ryan and acknowledge her deep and lasting contribution to the Commission, and more importantly, her legacy for Australia.

In his condolence motion, the Prime Minister, the Hon Scott Morrison MP, said that ‘Susan Ryan will be remembered as someone who sought to make our country bigger and more open to every citizen. She leaves a legacy that will endure.’

Senator Wong spoke of Ms Ryan’s wanting to make Australia better; and Senator Henderson spoke of her as a warrior for women and education.

When Ruth Bader Ginsburg passed away in September, Susan tweeted: ‘A massive loss to humanity. Vale RBG.’

It is also a fitting tribute for Susan: A great loss to humanity. Vale Susan Ryan.

Chair, we stand ready to assist the committee with your questions.

Thank you.