



# Questions Raised by Human Rights in COVID-19

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# Rule of Law and Human Rights

- “Rule of law” versus “Rule of power”
- Upholding rule of law requires attention to legal limits to powers exercised in emergency
- Centre discussion of human rights in this rule of law v rule of power paradigm - both state and non-state actors
- Consider human rights and exercise of power in both **law-making** and **law implementation/enforcement**

# 'Human Rights'

## Commonwealth obligations under 7 core human rights treaties

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

Victorian Charter incorporates rights articulated

**Limitations to rights – 'derogations' from treaties**

# Derogation and 'Limits to Limits'

- Not permitted from rights to life, to be free from torture, to be free from slavery, and to freedom of thought, conscience and religion (art 4(2) ICCPR))
- Others, permissible in 'times of public emergency which threaten the life of the nation' (art 4(1) ICCPR))
- **But** 'limits to limits':
  - \* Necessity
  - \* Proportionality
  - \* Non-discrimination

# 'Limits to Limits' in Charter

- '*[R]easonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'* (s 7(2), emphasis added)
- Limits must take into account:
  - '(a) [T]he nature of the right; and
  - (b) the importance of the purpose of the limitation; and
  - (c) the nature and extent of the limitation; and
  - (d) the relationship between the limitation and its purpose; and
  - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

# 'Limits to Limits'

Art 4(1) *ICCPR*:

- \* Necessity
- \* Proportionality
- \* Non-discrimination

S 7(2) *Charter*:

Limits must take into account:

- (a) [T]he nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

## Human Rights Considerations for Practitioners

1. Clear link between public health purpose and the limitation?
2. Implementation of limitation creating a discriminatory effect for vulnerable / marginalised population?
3. Role of discretion in implementation or enforcement; arbitrary limitation?

# Discussion

## Policing of Directives

[Covidpolicing.org.au](http://Covidpolicing.org.au)

- Limitations on freedom of movement, free expression, peaceful assembly for prevention of transmission of COVID-19
- Clarity of directives
- Data on enforcement
- Deriving a 'right to protest'

\*Other examples of limitations / responsibilities regarding right to life, right to health can be addressed in Q&A\*

# Considerations and Conclusions

## Human Rights Considerations for Practitioners

1. Clear link between public health purpose and the limitation?
2. Implementation of limitation creating a discriminatory effect for vulnerable / marginalised population?
3. Role of discretion in implementation or enforcement; arbitrary limitation?

## Conclusions

- Relevance of human rights in rule of law context; available for challenge both in law-making and law implementation / enforcement
- Rights under int'l law relevant in Victorian practice – available in *Charter*
- Utility of 'getting creative'; thinking broadly about rights available





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