Australia and the right of repatriation

Why have 'stranded' Australian citizens brought a complaint against their government in the United Nations?

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When compared with many other nations, Australia's response to the COVID-19 crisis has been a success story. A key pillar of Australia's success has been its closure of international borders. On 20 March 2020 Australia sealed its borders to everyone except its citizens, residents and temporary visa holders in a confined number of circumstances. Those who return from abroad are also required to quarantine in dedicated hotels for fourteen days and undergo a rigorous testing regime. The hotel quarantine system substantially reduces the number of COVID-19 cases that can be imported into Australia.

While over 200,000 people have returned through the hotel quarantine system, tens of thousands of Australian citizens and residents continue to struggle to return. At time of writing, over 36,000 citizens are registered with the Department of Foreign Affairs and Trade (DFAT) as requiring assistance to return home. Nearly 5000 of these are classified as vulnerable. The true figure is estimated to be far higher, as citizens cannot register until they have attempted to return home of their own accord. With a large Australian diaspora and the number of citizens leaving the country for essential reasons only slightly lower than the number returning, the problem is not going anywhere.

Australia's constitution notably lacks an express bill of rights, meaning there is limited protection of citizenship and the right of repatriation domestically. For this reason, a group of 'stranded' Australian citizens have now brought a complaint against Australia in the United Nations' Human Rights Committee.

In this post I argue that the experience of citizens and residents stranded abroad once more highlights the limitations of Australia's reliance on political, rather than rights-based, mechanisms to ensure government action is proportionate. A rights-based assessment would ensure rigour and focus in how Australia determines its caps — and whether alternatives could allow more citizens to repatriate safely. For the reasons I set out below, a political assessment of the appropriate cap cannot supply that rigour: its objectivity is compromised by the political goals it pursues.

Arrival caps and 'quarantine federalism': who is accountable?

The reason Australian citizens and residents struggle to return home is largely because Australia has capped the number of people that may arrive each week. These caps are designed to reduce pressure on hotel quarantine systems that are run by the states, which have had a number of outbreaks due to system failures — including that which led to Victoria's tragic second wave.

While the federal government has the legal power over international borders and therefore determines how many people can arrive each week, it does so in consultation with the states. State governments decide how many arrivals they are willing and able to accept into their individual quarantine programs and therefore set cap amounts in practice.

In addition to the states' quarantine programs, the Federal government operates a quarantine facility in Howard Springs in Darwin. That facility provides quarantine for arrivals on repatriation flights, which are offered exclusively to those registered with the DFAT.

State arrival caps have consistently been lower than demand. They have also been volatile. Victoria, for instance, suspended its hotel quarantine program for the duration of its second wave. It suspended its

program a second time in response to a leak in February 2021 that resulted in a state-wide five day 'snap lockdown'. Queensland temporarily halved its intake in response to a leak in March 2021.

The lack of stability in caps prevents Australia from implementing an advance 'booking system' for hotel quarantine, as used in New Zealand. Instead, prospective arrivals are usually given limited notice that they have been 'bumped' off a flight, often after terminating employment and leases. Without a booking system, private airlines retain the discretion over which passengers they 'bump'. At reduced capacity — with as little as 30 passengers per flight— airlines prioritise business class passengers ahead of economy, creating further financial obstacles for citizens seeking to return.

Who is responsible for assisting Australians to return home? The picture is complex. Quarantine is a concurrent legislative power under the Australian constitution. This means the Federal government may choose to exercise it, or it may not — in which case it can fall to the states. The Federal and state governments meet regularly through 'National Cabinet', which decided at an early stage that the states would assume responsibility for managing hotel quarantine. Like its German analogue, National Cabinet's deliberations remain secret. It is therefore unclear why the states assumed responsibility for hotel quarantine. The Federal Liberal National government insists that the primary responsibility for repatriating Australians lies with the states; it has committed to expanding its repatriation program, but only in a supporting role and not enough to address demand. The Federal Labor opposition — along with some Labor state governments — has argued that the Commonwealth is 'constitutionally responsible' for quarantine. Both positions emerge within the context of a federal election campaign and misrepresent the complexity of concurrent powers. The opacity surrounding National Cabinet's decision for the states to assume responsibility aggravates this. If voters cannot clearly identify which governments are responsible for stranded Australians' circumstances, it becomes more difficult to agitate for change.

Political constitutionalism and proportionality

Citizens stranded abroad have limited avenues of legal recourse domestically. Australia lacks an express bill of rights. Its constitution is one of the world's oldest operating; its drafting predated the post-war explosion of rights catalogues. Unlike other old constitutions, it has not been amended to incorporate rights catalogues. It relies instead on political mechanisms — such as federalism and bicameralism — to limit the power of government by counterbalancing the will of differently constituted majorities against one another. This has elsewhere been referred to as 'political constitutionalism'.

Some principles and protections that operate similarly to rights have been 'implied' from nature of institutions established within the constitution. This includes a freedom of political communication, implied by the system of representative and responsible government that provisions for elections establish. Such implications have been important, particularly given the notorious difficulty of amending the Australian constitution. And yet implications remain limited to what is necessary to give effect to institutions in the constitution. Where they protect the rights of minorities, they do so incidentally. While some academics such as Kim Rubenstein have argued that citizens may have a non-express right to re-enter Australia, proving this right exists would be lengthy, complex and not guaranteed. Apart from this, there is limited protection of citizenship and the rights that flow from it under the Australian constitution. This should not surprise us: the constitution was drafted at a time when Australians were, and remained, British subjects. Minority rights were explicitly rejected during the constitutional conventions — minorities "must trust to the sense of justice of the majority".

Australia's reliance on political constitutionalism to check government power poses unique problems in times of crisis. Crises reorient decision-making toward utilitarianism and the collective — majorities — toward which Australia's system is already tilted. They create an atmosphere of urgency and fear that deflects concern away from rapidly constituted minorities

'caught under the wheels' of collective-benefitting measures. This undermines dispassionate analysis of whether alternative measures exist that could achieve the same ends — which a judicially supervised proportionality analysis would determine.

Repeated cap reductions following hotel quarantine failures present a case study of this effect. Many of the 'leaks' have been avoidable. Leaks that caused Victoria's second wave were largely propelled by outsourcing to private contractors and poor departmental coordination, resulting from successive cuts to public health. Subsequent leaks in other states have resulted through poor systems of ventilation and protocol for personal protective equipment, connected with Australia's delayed recognition of the aerosol mechanism for COVID-19 transmission. When leaks have occurred, arrival caps have been the 'moving part'. Australia therefore continues to take less than half of the arrivals relative to its population than neighbouring New Zealand. In a system where accountability mechanisms rise and fall on the back of majorities, there is little political pressure on government to ensure a measure is proportionate where that measure is popular. Border closures have been the government's most popular restriction. An Ipsos poll in December 2020 reported than 83% of Australians supported sealing international borders completely — allowing no one in or out regardless of the reason. Whether alternatives exist that would allow more citizens to safely return home at large scale, as in Taiwan and Singapore, is a question that government is relatively free to ignore.

Aspects of the decision-making surrounding caps at both federal and state level reflect that vacuum of accountability. For instance, Victoria recently reduced its cap after the Federal government refused to approve an additional stream for 'economic cohorts'. It did not then offer those additional places for repatriation. Understandably, a political assessment of proportionality will consider broader factors within its calculus of risk — in this case, the economic contribution that other arrivals would make. Yet this speaks to the advantages of a judicially supervised, rights-based proportionality assessment: it introduces rigour into that calculus and focusses the inquiry on the right being restricted, with priority accorded to rights because of their importance.

International law as a last resort

Australians stranded abroad have turned to the United Nations as a last resort. Importantly, the individual complaints procedure under the United Nations requires that domestic remedies be exhausted. As we have seen above, it's unlikely domestic remedies exist.

Article 12(4) of the International Covenant on Civil and Political Rights provides that no one shall be arbitrarily deprived of the right to enter their own country. Unlike other rights of movement that flow from article 12, limitations on the right to re-entry require far greater justification. The Human Rights Committee has stated that there are "few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable". The COVID-19 pandemic is the first of its kind in the post-war era and to emerge since the global ascension of the rights paradigm. There is no UNHRC jurisprudence as yet regarding how a pandemic or public health emergency interacts with the right of re-entry. The outcome of the Australian complaint may provide guidance for other states and in future pandemics.

The question, then, is whether Australians are being arbitrarily restricted from returning. There are strong arguments in favour of limiting arrivals. Research has found a correlation between high volume of international arrivals and COVID-19 deaths. Current caps do not fully prevent Australians returning — they merely delay that return, make it extremely difficult and default it to market-based mechanisms. And yet it is clear, when viewing systems in Taiwan and Singapore, that safe repatriation is possible at far greater scale than the Australian system permits. The Human Rights Committee will consider the reasonableness, necessity and proportionality of the current system, including whether less draconian alternatives could achieve the same end and whether restrictions are based on clear and predictable legal criteria. As Jane McAdam and Ben Saul argue, this will include assess-

ing whether Australia is allocating sufficient resources to maximise the number of returns.

Even within this avenue, stranded citizens face obstacles. Australia has a record of disregarding the United Nations' findings — particularly regarding its treatment of its First Nations and people seeking asylum. It may be years before a resolution is reached. But crucially, the existence of a complaint refocuses public attention on the question of proportionality — and is a much needed reminder in the Australian context that majoritarian support is not the sole measure of legitimacy.

Broader lessons

Crises can act as a 'Petri dish' for the cultures and weaknesses of a system in ordinary times. Problems that flow from Australia's lack of bill of rights and disregard for international law have been long-standing. The collateral damage has disproportionately affected minorities — including Australia's First Nations — who enjoy limited protection within a system designed to serve majorities. Against the weight of that history, the experience of Australian citizens stranded during a pandemic will be temporary and minor. What that experience can teach, however, is how quickly wholly unexpected events can 'flip' membership of a majority; new minorities can be rapidly constituted, including amongst those who traditionally enjoy the privilege and protection afforded by their membership of a majority. This is a lesson for all.

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