
Book Review

Editor: Angelina Gomez

PANDEMICS, PUBLIC HEALTH EMERGENCIES AND GOVERNMENT POWERS: PERSPECTIVES ON AUSTRALIAN LAW

Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law, edited by Belinda Bennett and Ian Freckelton, The Federation Press, 2021, 448 pages: ISBN: 9781760022969. Softcover \$150.00

Covering as many topics as there were restrictions during the pandemic, this recently published text will no doubt serve many purposes for many people. The COVID-19 pandemic has brought substantial changes that have touched on the way we interact with the government, private enterprise, and one another. It is therefore unsurprising that the law has an important role to play during such an obvious public health crisis. This edited text, which is divided into four sections covering context, government, legal responses, and health care, provides a useful and accessible analysis of the diverse legal and related issues that arose during the pandemic. That analysis may assist legal practitioners, legislators, policy makers, and health care professionals in ensuring that any response to a future pandemic is swift, effective and proportionate.

It has become commonplace, throughout this pandemic, to encounter the term “unprecedented” as a description for the events through which we are living. That term may not, however, be entirely appropriate. Gabrielle Wolf (Chapter 3) situates the COVID-19 pandemic in its historical context, among the five other pandemics which Australia has experienced. During the Spanish flu pandemic, for example, attempts were made at co-ordinating a public health response between the States and the relatively young Commonwealth. That coordinated response collapsed into confusion, border closures, and government finger-pointing after Victoria failed promptly to notify the New South Wales authorities that an infected individual would be entering the State: *plus ça change, plus c'est la même chose*.

It is therefore necessary to reflect on the successes and failures of our response to this pandemic, which receive detailed treatment throughout this text. In Chapter 2, Mary-Louise McLaws draws attention to the commonalities between the numerous COVID-19 quarantine breaches. Such failures include ventilation rates below minimum standards, failures to vaccinate quarantine workers and their families, and lack of enforcement of mask mandates. Shortcomings in government decision-making have also been scrutinised in the various inquiries, inquests, and reports that have taken place during the pandemic, which are themselves comprehensively surveyed by Ian Freckelton (Chapter 6). Learning from these experiences is undoubtedly important, although flexibility also has its merits in a rapidly unfolding crisis. In Chapter 11, Terry Carney argues that, at least in the case of economic hardship payments in health emergencies, it would be misguided to rely too heavily on advance planning or on mirroring responses to previous emergencies.

Questions have also arisen about the legal and political relationship between the Commonwealth and the States. The allocation of responsibility for co-ordinating Australia's pandemic response has been a source of confusion for both the public and government. One encounters an accessible introduction to the constitutional aspects of these questions in Professor Anne Twomey's Chapter 4, “Federal and State Powers to Deal with Pandemics – Cooperation, Conflict and Confusion”. The chapter canvasses the overlap between the legislative powers of the Commonwealth and the States, the scope of the Commonwealth's quarantine power, the legally ambiguous character of the so-called “National Cabinet”, and the application of s 92 of the *Constitution*, which guarantees that trade, commerce, and intercourse among the States be absolutely free. Quarantine, at least where not an unreasonable or unnecessary burden, as Professor Twomey notes, has long been considered a legitimate qualification to that constitutional guarantee.

We have also seen the term “public health emergency” used frequently to describe the present circumstances. Indeed, every State and Territory except New South Wales formally declared a public health emergency. What exactly does that mean? In Chapter 5, Peta Stephenson, Ian Freckelton and Belinda Bennett outline the legal consequences of declaring a public health emergency and the adequacy

of current oversight mechanisms. The authors explain that many public health directions are exempt from parliamentary disallowance procedures, leaving Parliament with limited capacity to formally scrutinise the executive's exercise of wide-ranging emergency powers. In this respect, they echo the comments of Lord Sumption, who expressed grave concern at the dearth of scrutiny mechanisms for various regulations made in the United Kingdom during the pandemic.

Comparison with the United Kingdom can be useful, especially where our parliamentary system is concerned. What emerges from Fiona McDonald and Claire Horwell's comparative analysis of facemask mandates in Australia and the United Kingdom (Chapter 9) is that contrasting mechanisms were used to institute those mandates. In the United Kingdom, the mandate was created by delegated legislation, whereas in various Australian States, they were created by public health directives. In the former case, their status as delegated legislation ensured that they were open to scrutiny post-enactment, whereas, for example, the use of public health directives in Victoria placed those directives outside the scope of Parliament's conventional oversight mechanisms.

Scrutiny, accountability, and trust concerns do not arise merely in relation to the exercise of government powers. In a crisis more than ever, multinational corporations are entities which for better or worse play a decisive role in determining our nation's response. In Chapter 7, entitled "Obtaining COVID-19 Vaccines: How the Government Sold the Parachutes", Justin Malbon explains how the Australia-US Free Trade Agreement has effectively nullified the Commonwealth's ability to procure vaccines in a public health emergency without the consent of pharmaceutical companies. In Chapter 10, Normann Witzleb and Moira Paterson consider Australia's experience with privacy regulation and the lessons that can be learned from the public response to the concept of the COVIDSafe app. Given the numerous scandals in which multinational technology companies have been embroiled, and the great power and responsibility wielded by pharmaceutical companies during a public health emergency, the lessons proposed by the authors deserve close attention.

In light of the concerns and uncertainties described above, it is perhaps unsurprising that some commentators suggest rights charters as a way of maintaining trust in governing institutions and formalising rights protections. In considering the impact of human rights, or their absence, on government decision-making during the pandemic, George Williams and Sophie Rigney (Chapter 8) draw attention to positive public health outcomes that can be achieved when human rights are taken seriously. They refer to two examples: the exercise of the right to self-determination in First Nations communities' responses to the pandemic, and the impact of the Victorian Charter of Rights and Responsibilities on administrative decision-making in that State. The authors draw upon the outcomes achieved in those case studies to argue that the time has come for a federal Charter of Rights and an Indigenous Voice to Parliament. Calls for a Charter of Rights may encounter opposition from those concerned about the polarising impact of the Bill of Rights in the United States. However, the authors' discussion about the outcomes achieved in Indigenous communities during the COVID-19 pandemic adds support to the need for and significance of an Indigenous Voice to Parliament.

This is explored in greater depth in Chapter 18, in which Fiona Stanley, Marcia Langton, Sandra Eades and James Ward observe that First Nations communities have been distinctly successful in managing the pandemic in Australia. There are important lessons in this experience for closing the health gap that persists between First Nations Australians and the rest of the population, as well as managing future pandemics. The authors dismantle the misconception that proximity to health care alone can explain the health gap: fewer than 20% of First Nations Australians live in remote communities. Instead, the authors suggest that the key to First Nations Australians' success in managing the pandemic was self-determination. Communities were listened to and entrusted with coordinating their own pandemic responses, including through partnerships with Indigenous health organisations. As the authors conclude:

Enshrining the Aboriginal and Torres Strait Islander Voice into the Australian Constitution will mean that the First Nations response to the pandemic is not a one-off historical moment but rather normal business for governments and how they work with Aboriginal and Torres Strait Islander People and organisations.¹

¹ Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers* (Federation Press, 2021) 310.

Beyond shedding new light on how we interact with institutions, COVID-19 has brought about changes in how we interact with each other: at work, at home, in care and in the courtroom. Joellen Riley Munton (Chapter 12) considers the challenges posed by the pandemic for the regulation of work health and safety in Australia, with specific reference to the relationship between precarious work and public health. Important questions also arise about working from home, including the safety of the home environment, work intensification, and flexibility arrangements. Economic equalities that already persist in this regard, may be exacerbated by the COVID-19 pandemic. So too have inequalities between women and men been exacerbated, as illustrated by Belinda Bennett and Claire Brolan in Chapter 17. Women, they argue, have been particularly impacted by the pandemic, in their capacities as workers and carers, as targets of domestic abuse, and in access to health care services. What emerges clearly from Bennett and Brolan's well-researched chapter is that gender must be considered explicitly in devising a response to any future public health emergency.

Post-separation parenting during the COVID-19 pandemic is addressed by Donna Cooper in Chapter 14. She surveys the key issues which have come before the courts since the pandemic began, including the impact of stay at home orders on parenting arrangements, and border closures on parents seeking to relocate interstate or internationally. Cooper notes that the Federal Circuit and Family Court established a dedicated COVID-19 List for urgent cases, providing an initial court date within three business days. Court arrangements and the administration of justice during the pandemic more broadly are discussed by Nigel Stobbs and Ian Freckelton (Chapter 15), canvassing the effects on court procedure, bail, sentencing and custody.

Contractual relationships have also been impacted by the pandemic. To what degree does our contract law already offer solutions to the problems created by COVID-19? Could Australian contract law, for example, be refashioned by the issues arising from the pandemic? Such changes, Katy Barnett and Matthew Harding suggest (Chapter 13), may not be seen for decades. It appears, however, that any issues that have arisen from the pandemic and its consequences can, at least to some extent, be accommodated within our existing contract law, according to orthodox principles of contractual interpretation and the doctrine of frustration.

Other chapters consider the interaction between law and health during a pandemic. Marie Bismark, Ron Paterson, and Owen Bradfield (Chapter 16) set out the foundations of patient and practitioner rights. In addition to their legal qualifications, the former two authors worked as frontline medical practitioners throughout the pandemic. Their perspective warrants attention, as do the many interesting case vignettes, which demonstrate the sometimes unexpected complexities which arise in a health care setting during a pandemic. In Chapter 19, Melinda Martin-Khan and Elizabeth Beattie discuss the systemic problems with residential aged care which the pandemic has highlighted. Chapter 20 considers legal and ethical questions surrounding urgent health research, with a focus on vaccine development and administration. Chapter 21 discusses the impacts of the pandemic on end of life decision-making, advance care planning and estate planning. It appears desirable, from that chapter, that certain temporary changes instituted during the pandemic be made permanent. In considering any such legal and regulatory reform, however, the government must ensure that safeguards for the more vulnerable members of our society are in place, while nevertheless respecting their autonomy.

In the foreword to the text, immunologist Peter Doherty notes that it brings together a "spectrum of informed opinion and expertise that greatly broadens our perceptions of the pandemic challenge". He was not wrong. The strength of this text lies in the breadth of its coverage, which both highlights and explains the very many ways in which the COVID-19 pandemic has impacted upon our lives. Given the enormous social and economic disruption the pandemic has caused, it is imperative that we learn from the successes and failures of our response. One cannot go wrong with this edited text as a starting point.

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Tipstaves at the Supreme Court of New South Wales 2021