FOREWORD

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Catastrophic global events create enormous destructive waves. These waves pull in vast swathes of the population in their surge, upending lives. Their seismic power can radically reshape communities, nations, and society itself.

Beyond the direct effect on the health of people who contract COVID-19, the pandemic brings cascading indirect impacts – on public health systems, on economies, on our capacity to interact with one another. However, the enormity of the damage affects our focus: we can see how a catastrophe has transformed our world, but less visible is the suffering of millions of individuals who are, or were, *of* this world.

There have been devastating individual consequences. The understandable decision to prioritise patients with COVID-19 has resulted in less attention for people suffering other serious disease. The economic and social reverberations of the pandemic have deprived people of their livelihoods, and suspended vital connections with family and loved ones.

As the number of people sick and dying worldwide climbs ever higher, *The Lancet* recently sought to shift the focus from numbers to individuals through a series of reflections on the lives of health professionals who have died from COVID-19. One striking account was of a doctor, Sara Bravo Lopez – known as Bravo. Like many of the health professionals in this series, she contracted the virus in the course of treating others. The tribute read:

> It was part of her job to assess patients that came into the facility. Cheerful and indefatigable, she had a gift for soothing patients … Bravo had taken a colleague's shift and was caring for patients who came into the health centre and were later diagnosed with COVID-19, [her colleague, Dr] Cabezudo said. 'She died because she loved her work, she did it bravely and she did it always thinking of others', he said.[1]

Dr Sara Bravo Lopez was 28 when she died.

In responding to a global crisis on the scale of the COVID-19 pandemic, governments face the same challenge we all do – striking the right balance between seeing and tackling the damage caused on a macro level, and responding to individual human suffering. All of the articles in this edition of the *University of New South Wales Law Journal* ('*Journal*') confront this challenge. All acknowledge that human rights can offer a great deal in meeting this challenge.

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1 Andrew Green, 'A Tribute to Some of the Doctors Who Died from COVID-19' (2020) 396(10264) *Lancet* 1720, 1721.

The modern incarnation of human rights was, in part, a response to the great crises of the Second World War and the Holocaust. The *Universal Declaration of Human Rights*,[2] together with the other core treaties that articulate the Grundnorms of international human rights law, were framed explicitly to deal with emergency times, including public health crises. They provide mechanisms to assist governments to respond robustly and effectively to such crises, while holding true to the lodestar of international human rights law: the protection of individual dignity.

International human rights law accepts that some impingement on certain derogable rights may be necessary in responding to an emergency, but it also sets important limits on the extent to which human rights can be restricted. Emergency measures must be prescribed by law; they must be necessary and proportionate to the threat that they aim to address; and any restrictions on human rights must be the minimum necessary to address the emergency. The need for the restrictions must be regularly and independently assessed and the moment they are no longer necessary, they must cease.

In this pandemic, the challenge of balancing human rights can be most visible and excruciating in the intensive care unit of a hospital that is struggling to cope with the numbers of critically ill people. Dr Eliana Close and Professors Simon Young, Tina Cockburn, Lindy Willmott and Ben White consider some of the legal challenges that arise when a health system is overwhelmed, forcing medical professionals to ration and prioritise vital, but scarce, medical resources. To date, Australia's health care system has been able to cope with the number of acutely-ill patients. Nevertheless, many other countries have experienced far greater numbers of patients needing acute care, and until effective inoculation and treatments for COVID-19 are widely available, the risk to Australia's health system remains real.

The authors sensitively acknowledge the weight and difficulty of these choices. They observe that, while ethical frameworks offer some help in navigating this fraught terrain, those frameworks are less prescriptive than legislation, leaving considerable scope for clinical discretion. The authors make the case for a more prominent role for the law – through a combination of administrative law, human rights, negligence and the courts' *parens patriae* jurisdiction – in setting clearer regulatory parameters around this area of decision making.

Beyond the direct health implications of the virus, perhaps the most striking effect of COVID-19 has been the way it has limited freedom of movement. Countries around the world have taken dramatic steps to curtail travel, with a view to limiting the spread of the pandemic. This has been especially significant for Australia. As a relatively isolated island continent, the strict limits set by the federal government on who may enter and leave the country, coupled with periodic restrictions on domestic travel, have had a marked effect on the entire population. Professors Michelle Foster, Hélène Lambert and Jane McAdam explore how, for refugees and those displaced by climate change, such travel restrictions can have life-or-death consequences.

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2 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

They also throw forward to a time after the current crisis has passed, imagining a scenario in which we applied 'the sense of urgency generated by COVID-19' to the crisis of climate change. They posit a more positive role for international law in guiding the world's response to that longer-term challenge, 'without resorting to the familiar emergency mechanisms of reactive, short-term, restrictive, and exceptional measures'.

Doctors Sara Dehm, Claire Loughnan and Linda Steele consider some of the implications of the pandemic for two other vulnerable groups: people in immigration detention and aged care facilities. The authors explore how extraordinary measures aimed at combating COVID-19 can intensify problems such as social exclusion for the people confined in these places. They present a compelling case for reducing the number of people in places of confinement, and for more stringent accountability to ensure those who remain have their human rights protected.

By their very nature, aged care and detention facilities limit the right to freedom of movement. However, lockdowns and other emergency measures have restricted all Australians' liberty to move around the community. Some countries have taken a strict, even authoritarian, approach to the enforcement of such emergency measures – there have been instances of countries overseas welding citizens into their homes to stop the spread of the virus, and some have suspended the usual democratic protections and ruled by decree.[3] Other countries have focused more on promoting or encouraging voluntary compliance, rather than seeking to arrest and punish anyone found to have breached an emergency order.

Dr Joseph Lelliott, Professor Andreas Schloenhardt and Ms Ruby Ioannou point to the dangers inherent in using the criminal law to contain the spread of the virus. Drawing on previous experience regarding the criminalisation of activity associated with HIV transmission, they argue for precise and narrow circumscription of criminal laws in this area, and judicious application of these laws, so as to preserve important human rights protections.

In ordinary times, criminal and other laws that limit individuals' basic freedoms are generally enacted by the legislature. While imperfect, parliamentary democracy carries with it a range of checks that enable careful scrutiny of draft laws before they are enforced. However, as Doctors Yee-Fui Ng and Stephen Gray observe, Australian governments have relied heavily on *executive* power to introduce emergency COVID-19 measures.

The use of executive power – often by ministers or senior government officials – is typically justified by reference to the urgency of addressing some aspects of the public health emergency. The democratic processes of scrutiny and review, which are a strength of the parliamentary system, generally take time. While acknowledging that some emergency measures were 'acceptable in the circumstances', the authors point to lessons we should draw from the Spanish Influenza and government responses to other emergencies over the last century.

3 I considered the alternative approaches in Edward Santow, 'We Must Combat COVID-19 but Creeping Authoritarianism Could Do More Harm than Good', *The Guardian* (online, 8 April 2020) <https://www.theguardian.com/commentisfree/2020/apr/08/we-must-combat-covid-19-but-creeping-authoritarianism-could-do-more-harm-than-good>.

They argue forcefully for alternative forms of post-hoc and other scrutiny, to preserve democratic legitimacy and to avoid unjustified encroachment on basic rights.

Not all laws have sought to limit rights in the pandemic. Dr Chris Martin explores legal measures taken by Australia's state and territory governments, largely to preserve the status quo in some parts of the property sector during a period that otherwise could have resulted in unprecedented numbers of evictions. He concludes that some measures have proven to have such an enduring value that they should be extended beyond this emergency period, while other measures need to be made fairer or adjusted to avoid damaging distortions in the property market.

The pervasive nature of the pandemic means that almost every part of government and the private sector has been forced to reckon with change. Everyone must 'pivot' – that is, quickly adapt their operations to accommodate the dramatic shift in circumstances.[4]

For the judicial branch of government, much of 2020 was effectively an unprecedented live experiment – one in which the legal profession was forced to pivot towards new technology and other measures to keep the system running. For example, social distancing challenged the sanctity of the courtroom. As lawyers and judges work from home, the legal profession's strict, apparently-immutable traditions liberalised overnight. Wig-and-gown dress codes have been relaxed; family members and pets have been visible and audible in online court hearings; one unfortunate lawyer in the United States even experienced the indignity of having the image of his face replaced with that of a fluffy white cat in an online hearing, due to the misapplication of a 'filter'.[5]

Reflecting on some of the more consequential implications for the justice system, Professor Michael Legg and Mr Anthony Song acknowledge the extraordinary speed of change. With 56 countries implementing some form of remote court system by mid-July 2020, they considered what this meant for the system's core values, including fairness for the parties and the ability to be heard.

Returning to the public health core of this pandemic, doctors must preserve the life of their patients while minimising side effects. This requires a focus on each patient as an individual. As the celebrated nineteenth century physician, Dr William Osler, observed, 'the good physician treats the disease; the great physician treats the patient who has the disease'.[6]

This is also the challenge facing our three branches of government. They must combat the public health emergency presented by COVID-19 while minimising the negative effects on our economy, on our democratic institutions and above all on our human rights.

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4 It seems almost no sector can escape the need to 'pivot'. See, eg, Mauro F Guillén, 'How Businesses Have Successfully Pivoted During the Pandemic', *Harvard Business Review* (online, 7 July 2020) <https://hbr.org/2020/07/how-businesses-have-successfully-pivoted-during-the-pandemic>.

5 '"I Am Not a Cat": Filter Makes Lawyer Look like Fluffy White Kitten in Court', *Sydney Morning Herald* (online, 10 February 2021) <https://www.smh.com.au/world/north-america/i-am-not-a-cat-filter-makes-lawyer-look-like-fluffy-white-kitten-in-court-20210210-p57155.html>.

6 See Robert M Centor, 'To Be a Great Physician, You Must Understand the Whole Story' (2007) 9(1) *Medscape General Medicine* 17435659:59.

If we respond to the pandemic as a big abstract problem, we are more likely to accept a greater level of harm than is absolutely necessary. By contrast, as the contributors to this edition of the *Journal* so powerfully show, if we seek to emulate Osler's great physician, by carefully assessing and weighing the impacts of our response *on individuals*, we are much more likely to achieve a balanced, nuanced response – one that ultimately reduces the sum total of human suffering and allows us as a society to emerge from this crisis with fewer permanent scars.