

Australia, Covid-19, and the India Travel Ban

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AUSTRALIA, COVID-19, AND THE INDIA TRAVEL BAN

OLIVERA SIMIC*

As of 20 March 2020, the Australian Government closed the country's international borders and enforced a ban on overseas travel to and from the country. The citizens of Australia have become the only citizens among democratic nations who cannot leave the country unless they receive an exemption from the Department of Home Affairs. Australia's ban on travel has been among the strictest in the world. On 30 April 2021, the Morrison Government moved to threaten Australians trying to return home from the then COVID-19-ravaged India with fines and jail time. This was the first time in its history that Australia banned its own citizens from returning to their homeland, to the point of enacting criminal sanctions for those who attempted to do so. In this paper, I look at how extraordinary measures stipulated in the Biosecurity Act 2015 (Cth) have affected Australian citizens' human rights and freedoms. I use the India travel ban as a case study in this paper. The paper argues the unprecedented move to ban all flights to and from India by the Federal Government was disproportionate, unnecessary, and life threatening for stranded citizens. I draw on media, human rights reports, and available data to analyse how the biosecurity laws were arguably enforced with little or no regard for fundamental human rights, including the right to life and healthcare. This decision ultimately resulted in the deaths of overseas citizens from COVID-19, who were banned from returning to their own homeland.

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I INTRODUCTION

While most of the countries in the world have experienced thousands of deaths and cases of infection, Australia had only reported 1,637 COVID-19 related deaths and 158,547 cases since the pandemic began as of 24 October 2021.¹ However, most of the deaths and infectious cases had been acquired only from July 2021. Prior to this time in the pandemic, Australia had been largely free of the virus.

Australia has been praised for its response to the pandemic and efforts to save lives.² Until July 2021, the majority of infected cases were not from community transmission but detected from within the hotel quarantine system that housed Australian citizens returning from overseas.³ Due to early closure of international borders — with exemptions only for Australian citizens, permanent residents, and their immediate family — Australians have been living mostly COVID-19 free lives. Apart from New South Wales and Melbourne, where the repeated heavy-handed lockdowns lasted more than six months during 2020 and 2021,⁴ most other states and their citizens have lived “normal”

¹ ‘COVID 19 summary statistics’, *Australian Government Department of Health* (Web Page, 22 November 2021) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-case-numbers-and-statistics>>.

² William A Haseltine, ‘What Can We Learn From Australia’s Covid-19 Response?’, *Forbes* (online, 24 March 2021) <<https://www.forbes.com/sites/williamhaseltine/2021/03/24/what-can-we-learn-from-australias-covid-19-response/?sh=1de0cb483a01>>.

³ *Ibid.*

⁴ Antonia Noori Farzan and Miriam Berger, ‘Melbourne lifts one of world’s longest lockdowns after 111 days’, *The Washington Post* (online, 28 October 2020) <<https://www.washingtonpost.com/world/2020/10/28/melbourne-australia-coronavirus-lockdown-111-days/>>.

lives in comparison to other countries in the world. Australia's success relied on a strong public health response enforced by the government that focused on vigilant testing, tracing, and quarantine. It also relied on the closing of international borders which prevented citizens and non-citizens from not only entering the country, but also from leaving it.

However, this success has come with a mostly invisible and unacknowledged human cost. As of October 2021, the international border has been closed for the past 19 months, prohibiting Australians from travelling out of the country unless they have an exemption. In August 2021, the government introduced exemptions for Australian citizens who ordinarily reside in other countries too. They must seek exemption to leave Australia if they want to return to their country of residence.⁵ Australia is the only country amongst the democratic nations that locked in its citizens by effectively banning them from leaving the country under the pretext of safeguarding public health.⁶

Australia is also the only country to have locked out its citizens through the imposition of travel caps on the number of people who can fly back home due to the limited number of available quarantine spaces.⁷ In July 2021, the travel caps for incoming passengers were reduced even further by 50%.⁸ As a result, as little as 20 passengers would touch down at the country's international airports on a daily basis.⁹ It became the norm that airplanes would fly with 600 empty seats.¹⁰ The combination of international border closures and a limited number of passengers per flight with only a handful of airlines willing to still fly to Australia created disarray in international travel. As of September 2021, more than

⁵ 'COVID-19 and the border: leaving Australia', *Australian Government Department of Home Affairs* (Web Page, 5 October 2021) <<https://covid19.homeaffairs.gov.au/leaving-australia#toc-3>>.

⁶ Sophie Meixner, 'Australia's outbound travel ban is one of the strictest coronavirus public health responses in the world', *ABC News* (online, 31 August 2020) <<https://www.abc.net.au/news/2020-08-31/coronavirus-covid-outbound-international-travel-ban-morrison/12605404>>.

⁷ Latika Bourke, "A bloody outrage": Leaving Aussies stranded a breach of human rights, says Alexander Downer', *The Sydney Morning Herald* (online, 8 April 2021) <https://www.smh.com.au/world/europe/a-bloody-outrage-leaving-aussies-stranded-a-breach-of-human-rights-says-alexander-downer-20210407-p57hbi.html?fbclid=IwAR1wdS-yN_5rp7GRfqy-RkHdGSAKFivId_PeQHM1qui33NBUMRFhFZyaF1Y>.

⁸ 'COVID-19: Inbound passenger cap decreased', *Berry Appleman & Leiden LLP* (Web Page, 16 July 2021) <<https://www.bal.com/bal-news/australia-covid-19-inbound-passenger-cap-decreased/>>.

⁹ Elias Visontay, 'Planes fly empty into Australia as international arrivals Covid cap bites', *The Guardian* (online, 7 July 2021) <<https://www.theguardian.com/australia-news/2021/jul/07/planes-to-fly-empty-into-australia-as-international-arrivals-covid-cap-bites>>.

¹⁰ Rhiana Whitson, 'Australia plans to reopen international borders by Christmas, but detail is light on', *ABC News* (online, 27 September 2021) <<https://www.abc.net.au/news/2021-09-27/travel-international-borders-qantas-cathaypacific-singapore/100485428>>.

45,000 Australians remain stranded overseas, not being able to return to their homes.¹¹ These citizens are registered with the Department of Foreign Affairs and Trade as willing to return to Australia on one of the government's repatriation flights. Most of them remain stranded in India.¹²

At least 54 Australian citizens have died from COVID-19 while abroad waiting to return home.¹³ In April 2021, exhausted and disappointed from being ignored by the government to be allowed to return to their country, three Australian citizens who had been stranded overseas for months lodged a petition to the United Nations Human Rights Committee.¹⁴

Australia also remains the only democratic country in the world to have locked down its citizens for the longest period. In Australia, the city of Melbourne, capital of the state of Victoria, was hitting the world record of being the most locked down city in the world.¹⁵ The six months of heavy-handed lockdowns have triggered a mental health disaster which is still unfolding. A 'shadow pandemic' has recently seen a spike in the presentation of children in Melbourne hospital emergency departments.¹⁶ The children in Melbourne have been banned from going to school and socialising with their peers for the duration of the lockdowns. They have suffered various mental health problems such as self-harm, eating disorders, suicide attempts, and anger issues.¹⁷ While Australians could enjoy the

¹¹ Elias Visontay, 'More than 45,000 Australians stranded overseas registered for government help', *The Guardian* (online, 21 September 2021) <<https://www.theguardian.com/business/2021/sep/21/more-than-45000-australians-stranded-overseas-registered-for-government-help>>; Dan Conifer, 'Data reveals more than 50 Australian citizens have died from COVID-19 while overseas', *ABC News* (online, 5 August 2021) <<https://www.abc.net.au/news/2021-08-05/over-50-australian-citizens-died-abroad-from-covid-19/100354220>>.

¹² Sahil Makkar, 'Most Australians stranded overseas are in India, only three repatriation flights planned in June', *SBS News* (online, 4 June 2021) <<https://www.sbs.com.au/language/english/most-australians-stranded-overseas-are-in-india-only-three-repatriation-flights-planned-in-june>>.

¹³ Dan Conifer, 'Data reveals more than 50 Australian citizens have died from COVID-19 while overseas', *ABC News* (online, 5 August 2021) <<https://www.abc.net.au/news/2021-08-05/over-50-australian-citizens-died-abroad-from-covid-19/100354220>>.

¹⁴ Jane McAdam, 'Should Aussies stranded overseas go to the United Nations for help to get home?', *ABC News* (online, 3 February 2021) <<https://www.abc.net.au/news/2021-02-03/should-aussies-stranded-overseas-go-united-nations-for-help/13113482>>.

¹⁵ Calla Wahlquist, 'How Melbourne's "short, sharp" Covid lockdowns became the longest in the world', *The Guardian* (online, 2 October 2021) <<https://www.theguardian.com/australia-news/2021/oct/02/how-melbournes-short-sharp-covid-lockdowns-became-the-longest-in-the-world>>.

¹⁶ Patrick Durkin, 'Spike in distressed children presenting to emergency', *Australian Financial Review* (online, 2 September 2021) <<https://www.afr.com/politics/daniel-andrews-acknowledges-victoria-is-not-ok-20210902-p58o55>>.

¹⁷ *Ibid.*

privilege of not experiencing floods of infection and death due to the virus, there were other issues perhaps more difficult to quantify than COVID-19 case numbers such as the importance of mental health that will remain a long-term concern for Australian communities.¹⁸

Australian states have also occasionally denied their own citizens the right to cross interstate borders and return home. The closure of interstate borders was dealt with a heavy hand; there were cases where even people who were terminally ill and needed to go back home to continue with their treatment were denied doing so.¹⁹ Due to the closure of interstate borders, Australian citizens within Australia reportedly felt exiled like refugees and internally displaced people in their own country. Some even made makeshift camps near the borders of Victoria and New South Wales. Mainly older people have been camping in their vans in “no man’s land” waiting to be allowed to return home or to see a dying family member.²⁰

There have been numerous heart wrenching stories of separation of family members during the COVID-19 pandemic. The most recent case of a three-year-old boy stranded with his grandparents in New South Wales who has been refused to reunite with his parents in Queensland is just one of the many cases that the media has written about.²¹ There have been more than 400 children stranded overseas indefinitely separated from their parents. More than 200 of these children have been stranded in India.²² The Chief Health Officer said that the refusal of the Queensland Government to provide exemption to the three-year-old boy to reunite with his parents was a ‘moral failure’.²³ Still, and

¹⁸ ‘COVID-19 experts and community leaders urge politicians to allow schools to open for face-to-face learning in open letter’, *ABC News* (online, 12 January 2022) <<https://www.abc.net.au/news/2022-01-12/keep-schools-open-despite-omicron-covid-surge-experts-say/100751796>>.

¹⁹ Sian Johnson, ‘Victorian couple “stunned” woman not allowed to return home for pancreatic cancer treatment’, *ABC News* (online, 3 September 2021) <<https://www.abc.net.au/news/2021-09-03/fully-vaccinated-victorians-stranded-in-nsw-covid-19/100429394>>.

²⁰ Caroline Schelle, ‘Sister’s mercy mission to be with terminally ill brother in Victoria’, *News.com.au* (online, 15 August 2021) <<https://www.news.com.au/travel/travel-updates/sisters-mercy-mission-to-be-with-terminally-ill-brother-in-victoria/news-story/c73e8a55c8b2592a7ae0c8bbe64f5b4f>>.

²¹ Ellen Ransley and Darren Cartwright, ‘The heartbreaking face of QLD premier’s iron fist approach to borders’, *The West Australian* (online, 2 September 2021) <<https://thewest.com.au/lifestyle/parents-grandparents-of-3yo-stuck-in-nsw-beg-qld-premier-to-let-him-come-home-c-3849972>>.

²² Tom Stayner, ‘More than 200 Australian children remain stuck in coronavirus-ravaged India’, *SBS News* (online, 3 June 2021) <<https://www.sbs.com.au/news/more-than-200-australian-children-remain-stuck-in-coronavirus-ravaged-india/5c9324a1-27f9-41e0-b27a-d1d81dac7006>>.

²³ Rebecca Masters and et al, ‘Three-year-old boy granted exemption to cross Queensland-NSW border, after health minister called rules “profound moral failure”’, *9 News* (online, 2 September 2021)

arguably one of the biggest moral failures was a ban to return from India under the threat of jail and monetary fines. The ban was controversial, in operation for two weeks in May 2021, and according to the government: 'targeted and temporary'.²⁴

This paper will focus on the Australian Government's decision to stop all flights from India due to its increasing rates of COVID-19 related deaths and infections. On 30 April 2021, the government threatened fines of \$66,000 or five years jail time (or both) for anyone trying to flee from India to Australia.²⁵ It has been estimated that out of more than 45,000 stranded citizens, approximately 9,000 of them were stranded in India at the time of the decision.²⁶ Although this was not the first heavy-handed measure that the Australian Government enforced during the pandemic, it is the one that sparked widespread public outrage. In a span of a few days, a multitude of media articles had been published criticising the decision, with many lawyers and academics writing about the potential unlawfulness and unconstitutionality of it. Such extraordinary measures caught many by surprise and left Australians with Indian heritage in despair, some of which were in life-threatening situations and eventually died from the virus.

First, I will briefly discuss the relevant provisions in international law. I will then turn to the India travel ban case and discuss how it affected the Indian communities in Australia and India. To conclude, I will suggest what needs to be done to compensate for the loss and abandonment of Australian citizens stranded in India and beyond. The research is a qualitative study drawing on secondary data. It is based on analyses of the government's public statements, legal documents, legal acts, articles, interviews, and legal debates published in the local and international media. I use a human rights-based approach as a

<<https://www.9news.com.au/national/coronavirus-update-border-queensland-new-south-wales-frydenberg-urges-states-to-open-up/4250dda8-b524-4b07-aaae-3222afbd0958>>.

²⁴ Georgia Hitch, 'Scott Morrison defends India COVID travel ban after criticism of jail time and fines for citizens who try and return', *ABC News* (online, 4 May 2021) <<https://www.abc.net.au/news/2021-05-04/scott-morrison-defends-india-covid-travel-ban-australia-jail/100113848>>; 'Is the India travel ban constitutional?', *RN Breakfast with Fran Kelly* (ABC Radio, 3 May 2021)

<<https://www.abc.net.au/radionational/programs/breakfast/is-the-india-travel-ban-constitutional/13326676>> ('Is the India travel ban constitutional?').

²⁵ Katharine Murphy, Paul Karp and Mostafa Rachwani, 'Covid crisis: Australians trying to return home from India face up to \$66,000 fine or five years jail', *The Guardian* (online, 1 May 2021) <<https://www.theguardian.com/australia-news/2021/apr/30/australian-government-may-make-it-a-for-citizens-to-return-from-covid-ravaged-countries>>.

²⁶ Lydia Feng and Tony Ibrahim, 'Australians trapped in India during COVID-19 crisis fear for their families' survival', *ABC News* (online, 28 April 2021) <<https://www.abc.net.au/news/2021-04-28/australians-stuck-in-india-fear-for-their-families-futures/100099416>>.

conceptual framework to analyse collected data and critique the Australian Government's controversial ban of flights to and from India.

A International Law

Measures that limit individual rights and civil liberties must be necessary, reasonable, proportionate, equitable, non-discriminatory, and in full compliance with national and international laws.²⁷ The right of return is a principle in international law which guarantees everyone's right of voluntary return to, or re-entry to, their country of origin or of citizenship. The right of return is part of the broader human rights concept of freedom of movement and is also related to the legal concept of nationality. Nationality is a legal identification of a person in international law, establishing the person as a subject, a national, of a sovereign state. It affords the state jurisdiction over the person and affords the person the protection of the state against other states.²⁸

In contrast to most Western democracies, where responses to the pandemic were arguably slower and perhaps more human rights oriented, the Chinese and Australian governments immediately introduced heavy-handed measures.²⁹ While other countries restricted freedom of movement and limited travel, Australia and New Zealand closed their borders indefinitely. As island countries it seemed appropriate and logical to do so. However, contrary to New Zealand, Australia also banned its own citizens from leaving the country without seeking government permission.

The right of return to one's country of citizenship is a principle enshrined in the 1948 *Universal Declaration of Human Rights* ('UDHR')³⁰, the 1966 *International Covenant on Civil and Political Rights* ('ICCPR'),³¹ and the 1948 Fourth Geneva Convention.³² The idea that a citizen has a fundamental right to return freely to their country has deep historical roots. Under common law, this stems from the *Magna Carta Project* which states, 'it shall

²⁷ Carl Coleman and Andreas Reis, 'Ethical considerations in developing a public health response to pandemic influenza', *World Health Organisation* (Web Page Publication, 2007) <https://www.who.int/csr/resources/publications/WHO_CDS_EPR_GIP_2007_2c.pdf>.

²⁸ Alfred Michael Boll, *Multiple Nationality and International Law* (Brill Publishing, 2007) 114.

²⁹ Conrad Nyamutata, 'Do Civil Liberties Really Matter During Pandemics?' (2020) 9(1) *International Human Rights Law Review* 62, 77.

³⁰ *Universal Declaration of Human Rights*, opened for signature 10 December 1948, GA Res 217A (III), art 13(2).

³¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4).

³² *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm...'.³³ The *Convention on the Rights of the Child* also creates obligations towards Australian children stranded overseas (ratified December 17, 1990).³⁴ Article 3 (1) makes it clear that 'the best interests of the child shall be a primary consideration' for administrative or legislative decision makers. This raises for consideration whether the rights of accompanied and unaccompanied Australian children in India denied entry to Australia have been taken into account.

Legal scholars have argued that one or more of these international human rights instruments have attained the status of customary international law and that the right of return is therefore binding on non-signatories to these conventions.³⁵ Article 12(4) of the *ICCPR* provides that 'no one shall be arbitrarily deprived of the right to enter their own country'. The Australian Government, however, rarely complies with its international human rights law obligations.³⁶ The limitations on the right to re-entry to the country of citizenship require serious justification. The UN 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'.³⁷ However, there is no UN Human Rights Committee jurisprudence regarding how a public health emergency interacts with the right of re-entry to the country of citizenship.³⁸

³³ Summerson (trans), 'The 1215 Magna Carta: Clause 42', *The Magna Carta Project* (Web Page) <https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_42>.

³⁴ 'The UN Children's Convention and Australia', *Australian Human Rights Commission* (Web Page, 1991) <<https://humanrights.gov.au/our-work/childrens-rights/publications/un-childrens-convention-and-australia-1991>>.

³⁵ Eric Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?' (1998) 19(4) *Michigan Journal of International Law* 1091.

³⁶ Susanna Dechent, Sharmin Tania and Jackie Mapulanga-Hulston, 'Asylum Seeker Children in Nauru: Australia's International Human Rights Obligations and Operational Realities' (2019) 31(1) *International Journal of Refugee Law* 83; Jennifer Luu, 'Australia is failing to meet its basic human rights obligations, report finds', *SBS News* (online, 25 June 2020) <<https://www.sbs.com.au/news/australia-is-failing-to-meet-its-basic-human-rights-obligations-report-finds/4cf3a866-edd4-49bc-88fc-de0009fcd2b1>>; Ben Saul, 'Indefinite security detention and refugee children and families in Australia: International human rights law dimensions' (2013) 20 *Australian International Law Journal* 55.

³⁷ 'Right to freedom of movement: Public sector guidance sheet', *Australian Government Attorney-General Department* (Web Page) <ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-movement>.

³⁸ Liz Hicks, 'Australia and the right of repatriation: Why have "stranded" Australian citizens brought a complaint against their government in the United Nations?', *Verfassungsblog* (online, 12 April 2021) <<https://verfassungsblog.de/australia-and-the-right-of-repatriation/>>.

The right to return to the country of citizenship is also declared in Australian jurisprudence. During the era of the Whitlam Government (1972–1975), the extraordinary case of Wilfred Burchett declared that Australians were entitled to return to the land of their citizenship.³⁹ A few years later, the Fraser Government (1975–1983) signed the *ICCPR* which gives specific rights to anyone to re-enter their native land.⁴⁰ The Department of Home Affairs' website says that Australian citizenship confers 'additional responsibilities and privileges', and that one of the privileges is to 'apply for an Australian passport and re-enter Australia freely'.⁴¹ The right to return should be a privilege of citizenship and in Australia it is not. This right to freely re-enter one's country of citizenship, which has been subject to debate and controversy in Australia since the pandemic began, has been suspended during the pandemic.

There is no codified right of return under Australian law. Australia is one of the only liberal democracies in the world without a Bill of Rights or Human Rights Act.⁴² As such, it stands alone as the only developed Western democracy in the world that fails to offer its citizens the protections afforded by these acts.⁴³ Successive Australian governments have failed to adequately incorporate their international human rights law obligations into domestic legislation.

A 1908 domestic case does suggest citizens may have a common law right to return to Australia, provided this has not been taken away by statute.⁴⁴ Australians ultimately have no constitutional or legislative guarantee of what it means to be Australian, no guaranteed rights and freedoms, and no guarantee that the Australian Government will protect those same human rights it has internationally agreed to uphold.⁴⁵

³⁹ Francis Galbally, 'Banning Citizens? Take a Flying Leap', *The Weekend Australian* (online, 7 May 2021) <<https://www.theaustralian.com.au/commentary/banning-citizens-take-a-flying-leap/news-story/8d7d2e95d7be44673bbb4f9307bde167>>.

⁴⁰ Annemarie Devereaux, 'Australia's Journey to Ratification of the ICESCR and ICCPR' (2019) 36(1) *The Australian Year Book of International Law Online* 163.

⁴¹ 'Learn about being an Australian citizen', *Australian Government Department of Home Affairs* (Web Page, 29 October 2020) <<https://immi.homeaffairs.gov.au/citizenship-subsite/Pages/Learn-about-being-an-Australian.aspx>>.

⁴² 'How are human rights protected in Australian law?', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>>.

⁴³ 'Charter or Bill of Rights: Questions and Answers', *Law Council of Australia* (Web Page) <<http://lca.lawcouncil.asn.au/lawcouncil/images/Factsheet-QA.pdf>>.

⁴⁴ *Potter v Minahan* [1908] HCA 63.

⁴⁵ 'India travel ban exposes gaping void in Australian human rights protections', *Australian Lawyers for Human Rights* (Web Page, 4 May 2021) [7] <<https://alhr.org.au/india-travel-ban-exposes-gaping-void>>.

The Federal Government has prevented many Australians from entering or exiting the country during the pandemic. The government achieved this by working with airlines to ensure very few flights land in Australia, and any flights that do land have limited capacity. Without available seats, there is no practical way for every Australian willing to return home to do so. The *Biosecurity Act 2015* (Cth) (*'Biosecurity Act'*) provides for the declaration of a human biosecurity emergency for up to three months.⁴⁶ The Federal Health Minister can determine 'any requirement' and make 'any direction' he feels is needed to control the disease.⁴⁷ These override other laws and cannot be disallowed by the Parliament of Australia. A person who fails to comply with directions is liable for a fine of up to \$66,000 and imprisonment of five years.⁴⁸ Australia declared a human biosecurity emergency on 25 March 2020, when it became clear the pandemic posed a severe threat to the community.

The emergency has since been renewed several times and will remain in force until at least 17 December 2021.⁴⁹ A range of measures have been imposed using such powers. For example, passengers on international flights must wear face masks and report a negative COVID-19 test before boarding. While these measures do not raise constitutional issues, the power to ban citizens returning to Australia does. The only possible legal check on these powers is the Australian Constitution. To do so, it would need to establish that citizens have a right to re-enter Australia. However, the Constitution does not express any such right. It does not even mention Australian citizenship. The only mention of citizenship at all is in section 44, which establishes that a 'citizen of a foreign power' cannot sit in the Parliament.⁵⁰

australian-human-rights-protections/> ('India travel ban exposes gaping void in Australian human rights protections').

⁴⁶ *Biosecurity Act 2015* (Cth) (*'Biosecurity Act'*) s 61(1)(h).

⁴⁷ *Ibid* s 478(1).

⁴⁸ *Ibid* s 107.

⁴⁹ Greg Hunt MP, 'COVID-19 emergency measures extended for a further three months', *Australian Government Department of Health* (Web Page, 2 September 2021)

<<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/extension-of-the-human-biosecurity-emergency-period>>.

⁵⁰ *Australian Constitution* s 44.

Australia's Constitution remarkably lacks an express Bill of Rights, meaning there is limited protection of citizenship and the right of repatriation domestically.⁵¹ Nor does it have any explicit citizenship rights protection. As a result, citizens stranded abroad have limited avenues of legal recourse domestically.⁵² While some scholars such as Professor 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.⁵³ For these reasons, a group of stranded Australian citizens have brought a complaint against Australia in the UN Human Rights Committee.⁵⁴ The outcome of the Australian complaint before the Committee may provide guidance for other states and in future pandemics.

Apart from its international legal obligations, it may be argued that the Australian Government has a duty of care to take reasonable steps to not cause foreseeable harm to its citizens. A duty of care is breached when someone is injured because of the action (or in some cases, the lack of action) of another person when it was reasonably foreseeable that the action could cause injury, and a reasonable person in the same position would not have acted that way.⁵⁵ In a recent landmark judgment, the Federal Court of Australia ruled that Environment Minister Sussan Ley has 'a novel duty of care' to safeguard Australian children and vulnerable people against the traumatic and predicted consequences of climate change. Such 'duty' precludes the Minister in acting in a way that causes harm or future harm.⁵⁶ It has been declared that the Minister must consider the 'avoidance of personal injury' when making decisions about approving future mining

⁵¹ Liz Hicks, 'Australia and the right of repatriation: Why have "stranded" Australian citizens brought a complaint against their government in the United Nations?', *Verfassungsblog* (online, 12 April 2021) <<https://verfassungsblog.de/australia-and-the-right-of-repatriation/>>.

⁵² *Ibid.*

⁵³ Karen Middleton, 'As more than 25,000 Australians wait for the chance to return home, at least one legal expert says the travel restrictions may breach the constitutional rights of citizens', *The Saturday Paper* (online, 19 September 2020) <<https://www.thesaturdaypaper.com.au/news/politics/2020/09/19/australians-stranded-overseas/160043760010443#hrd>>.

⁵⁴ Daniel Hurst, 'UN urges Australia to act quickly to bring stranded Australians home', *The Guardian* (online, 16 April 2021) <<https://www.theguardian.com/australia-news/2021/apr/16/un-urges-australia-to-act-quickly-to-bring-stranded-australians-home>>.

⁵⁵ 'What is Duty of Care?', *Slater and Gordon Lawyers* (Web Page) <<https://www.slatergordon.com.au/personal-injury/public-liability/what-is-duty-of-care>>.

⁵⁶ *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [415]. See also *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. In this case the Federal Court of Australia also establishes that the Minister for Immigration and Border Protection had to "exercise reasonable care" towards vulnerable people and refugees [14].

projects.⁵⁷ It is the first time that such a “novel duty of care” has been recognised, especially in a common-law country.⁵⁸

Since it is a new idea in common law, it could be enhanced further jurisprudentially by analogy from this landmark case.⁵⁹ The case could be potentially harnessed to establish a duty of care for citizens stranded in India (and perhaps beyond) if it can be proved that there is a sufficient ‘nexus’ between them and the government authorities to trigger that duty.⁶⁰ Regarding the travel ban, the Australian Government has arguably breached its ‘novel duty of care’. Due to the novel circumstances surrounding the pandemic, citizens were not permitted to simply leave Australia — they required permission granted by the state authorities to travel to India and beyond. All citizens stranded in India received this permission. While they accepted responsibility that they may be stranded temporarily due to uncertainty and frequent cancelation of flights,⁶¹ they were not informed, nor could they have imagined, at the time of leaving the country that they could be threatened with fines or jail-time for returning to their homeland. The threat was unprecedented.

In the following section, I discuss the India travel ban that potentially infringes upon four universally recognised fundamental human rights: freedom of movement (specifically the right to enter one’s own country); the right to life, liberty, and security; the right to healthcare; and freedom from discrimination on the grounds of race, national or social origin. Australia has taken on binding international obligations to protect these rights by ratifying core international human rights law treaties such as the *UDHR* (of which Australia was one of 8 nations involved in drafting)⁶² and the *ICCPR* (ratified 1980).⁶³

⁵⁷ *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [398].

⁵⁸ Madeleine Keck, ‘Australian Court Rules the Government Has ‘Duty of Care’ to Protect Young People From Climate Change’, *Global Citizen* (online, 2 June 2021) <<https://www.globalcitizen.org/en/content/australian-court-duty-of-care-environment/>>.

⁵⁹ *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [139].

⁶⁰ *Ibid* [295].

⁶¹ ‘COVID-19 and the border: leaving Australia’, *Australian Government Department of Home Affairs* (Web Page, 5 October 2021) <<https://covid19.homeaffairs.gov.au/leaving-australia#toc-3>>.

⁶² ‘Australia and the Universal Declaration on Human Rights’, *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/publications/australia-and-universal-declaration-human-rights>>.

⁶³ ‘Chart of Australian Treaty Ratifications as of May 2012’, *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/commission-general/chart-australian-treaty-ratifications-may-2012-human-rights-your>>.

B India Travel Ban

In April 2021, India was battling a second wave of COVID-19, coupled with oxygen and vaccine shortages. India had recorded more than 400,000 COVID-19 cases during this time — a global record up to that point.⁶⁴ Deaths from COVID-19 jumped by 3,523 per day, taking the total toll in India to 211,853 according to federal health ministry data.⁶⁵ The health system in the country, already in a dire situation, was on the brink of collapse. Most Indian cities were experiencing an ultimate crash of an inadequate health system. Hospitals were overwhelmed with the amount of people in need of care, along with a severe shortage in oxygen supply and life-saving equipment.⁶⁶ India's health system was reported to be at capacity and people had no access to healthcare (public or private) in those few weeks of the worse surge of COVID-19 related deaths and infections. Australian Health Minister Greg Hunt stated at the time that 'India is literally gasping for oxygen'.⁶⁷ Yet, in such a dire situation, instead of sending repatriation flights and helping stranded Australian citizens, the Australian Government's response was to announce a blanket travel ban and even criminalise the return of its citizens from India.

On 27 April 2021, in response to a rising number of positive cases in hotel quarantine from people returning from India during its second wave, the Australian Government suspended direct flights from India to Australia. On 1 May 2021, the Health Minister Greg Hunt issued a 'determination' under the *Biosecurity Act* which temporarily halted all direct and indirect air travel from India and introduced criminal penalties of five years imprisonment, fines of up to \$66,000, or both. Australians exercising their right to return home could be jailed for an offence that the Parliament of Australia had never debated nor agreed upon.⁶⁸ For the first time ever, the sole act of Australians returning home from

⁶⁴ 'Delhi COVID lockdown extended as India becomes first country to record 400,000 new cases in a day', *ABC News* (online, 1 May 2021) <<https://www.abc.net.au/news/2021-05-01/india-records-400-thousand-new-coronavirus-cases/100109938>>.

⁶⁵ *Ibid.*

⁶⁶ Rashmi Rangarajan, "'Unethical and immoral': Travel bans, COVID-19, and the disregard for human dignity', *Lens by Monash University* (online, 7 May 2021) <<https://lens.monash.edu/@politics-society/2021/05/07/1383185/travel-bans-covid-19-and-the-disregard-for-human-dignity>>.

⁶⁷ Akshaya Kumar, 'Indian Coronavirus Outbreak Shows Australia is on the Wrong Side of the Global Fight Over Vaccine Access', *ABC News* (online, 2 May 2021) <<https://www.abc.net.au/news/2021-05-02/india-coronavirus-outbreak-vaccine-trips-waiver/100107824>>.

⁶⁸ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (Cth).

India was regarded as a criminal offence.⁶⁹ Western Australian Premier Mark McGowan, who called for 'Australia to seriously consider possible ban on all travellers from India', publicly stated that since 'India is an epicentre of death and destruction as we speak...I don't think there is any need to go to India'.⁷⁰ While many Australians would not have any reason to travel to India during those times, some Australian Indians had travelled to India before the outbreak to visit or bury their loved ones. Indians are the second-largest group of migrants in Australia; its diaspora numbers reach approximately 700,000 and many Australians have families and loved ones in India.⁷¹

Indian Australians who found themselves stranded and affected by the ban all received an exemption from the government to travel for compassionate reasons to their country of heritage. Some of those stranded were granted permission to travel to care for sick relatives or attend funerals. Others travelled there pre-pandemic and have since been unable to return to Australia due to travel caps and limited flights.⁷² The ability to return home during the COVID-19 pandemic was already compromised with flight disruptions and flight prohibitions but the critical point in the India travel ban case was the criminalisation issue. Despite having done nothing wrong, these Australians have been left unprotected by a government that has failed to assist its citizens in times of peril.

The ban was put in place for an initial two weeks with the possibility of it being reviewed after this period. At the time of announcing this decision, there were about 9,000

⁶⁹ ABC News (Australia), 'Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship | ABC News' (YouTube, 4 May 2021) <https://www.youtube.com/watch?v=LEjnc_fX7E4> ('Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship').

⁷⁰ Jacob Kagi 'Critics blast Federal Government's "immoral and un-Australian" ban on citizens returning from India', *ABC News* (online, 2 May 2021) <<https://www.abc.net.au/news/2021-05-02/india-return-policy-labelled-immoral-and-un-australian/100109898>>; Pete Law, 'Mark McGowan calls for possible ban on all travellers from India after virus jumps between Mercure Hotel rooms', *The West Australian* (online, 21 April 2021) <<https://thewest.com.au/news/coronavirus/coronavirus-mark-mcgowan-considers-ban-on-all-travellers-from-india-after-covid-19-spread-in-mercure-hotel-ng-b881852661z>>; Angie Raphael, 'West Australian Premier Mark McGowan among those calling for a temporary ban on travellers from India', *News.com.au* (online, 22 April 2021) <<https://www.news.com.au/travel/travel-updates/warnings/west-australian-premier-mark-mcgowan-among-those-calling-for-a-temporary-ban-on-travellers-from-india/news-story/df12eb576be31bc7f3a3c34a6f6349>>.

⁷¹ Aarti Betigeri, 'Indians are becoming visible in Australia like never before', *The Interpreter by the Lowy Institute* (online, 28 May 2021) <<https://www.loyyinstitute.org/the-interpreter/indians-are-becoming-visible-australia-never>>; 'The Role of the Diaspora: An India Economic Strategy to 2035', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/geo/india/ies/chapter-18.html>>.

⁷² Sangeetha Pillai, 'Australia's decision to ban its citizens from returning from India: Is it legal? Is it moral? Is it just?', *ABC News* (online, 7 May 2021) <<https://www.abc.net.au/religion/is-australias-india-travel-ban-legal-moral-just/13335360>>.

Australians stranded in India who were registered as seeking assistance to come home. Around 650 of whom the Department of Foreign Affairs and Trade recognised as vulnerable.⁷³ The Department of Foreign Affairs and Trade has not said precisely how it defines who is “vulnerable”, but it factors in both the health conditions and financial circumstances of those who are stranded.⁷⁴

Foreign Minister Marise Payne said that the government was ‘just following the health advice’, while acknowledging the ‘very, very difficult circumstances in India...for so many families... And indeed, here in Australia, for Indian Australians who are so worried about their families overseas’.⁷⁵ The decision, which has been made under the *Biosecurity Act* on the basis of the advice of the Chief Medical Officer was, according to the government, ‘a temporary pause on returns’.⁷⁶ Treasurer Josh Frydenberg admitted that the government had taken a ‘drastic action to keep Australians safe’, relying on expert medical advice.⁷⁷ This statement is contradictory in its terms since Australian Indian citizens have been far from ‘safe’ but left in a life-threatening situation. Nonetheless, Frydenberg did not perceive those citizens left stranded and abandoned in India as those in need of safety. His mind was presumably fixed on the Australians onshore. Through these actions, the government produced two distinct layers of Australian citizens that were to be treated differently: those overseas and those onshore.

Allegedly, the pause in flights from India to Australia was warranted to manage the risk associated with large numbers of infectious people entering the state’s inadequate hotel quarantine system.⁷⁸ Instead of building purpose-built quarantine facilities and/or allowing people to quarantine at their homes, the states have chosen to simply halt its

⁷³ Stephen Dziedzic, ‘About 900 Australians stuck in COVID-hit India and wanting to return now listed as “vulnerable”, High Commissioner says’, *ABC News* (online, 5 May 2021) <<https://www.abc.net.au/news/2021-05-05/australians-health-high-commission-india-supplies-covid-19/100117620>>.

⁷⁴ *Ibid.*

⁷⁵ Michael McGowan, ‘Marise Payne denies racism motivated ban on Australian citizens returning from Covid-ravaged India’, *The Guardian* (online, 2 May 2021) <<https://www.theguardian.com/australia-news/2021/may/02/marise-payne-denies-racism-motivated-ban-on-australian-citizens-returning-from-covid-ravaged-india>>.

⁷⁶ *Ibid.*

⁷⁷ Kagi (n 70).

⁷⁸ ‘Reverse fines for Australians in India and bring them home safely’, *Australian Medical Association* (Web Page, 4 May 2021) <<https://www.ama.com.au/media/reverse-fines-australians-india-and-bring-them-home-safely>>.

citizens from returning home.⁷⁹ Still, even without enough hotel quarantine facilities or the lack of options to allow citizens to quarantine at home, it is difficult to understand how returned travellers from India could pose any risk to the community when the Morrison Government insisted that all Australians who were to be repatriated must first test negative to two different COVID-19 tests — both a COVID-19 Polymerase Chain Reaction (PCR) test and a Rapid Antigen test.⁸⁰ Those Australian citizens who were sick at the time did not have any chance to fly back home and receive healthcare but were left stranded to seek help in India's overburdened health system.⁸¹ They were literally forced to remain there and those citizens who happened to catch COVID-19 were in real danger of losing their life due to India's overwhelmed health system. If they were allowed to return to Australia, which should be their right as citizens, they would stand a chance of surviving if they became seriously ill.

Not only were stranded citizens required to have two negative tests to be able to board a repatriation flight, but they were also escorted to two weeks of mandatory state-run quarantine as soon as they landed. With such strict conditions put in place, Australians stranded in India were exposed to the high risk of dying. By stopping all flights from India to Australia, the risk has exacerbated. A government-chartered Qantas flight did eventually depart for India after the ban was set in force carrying more than 1,000 ventilators and dozens of oxygen concentrators which were meant to help health authorities in India fighting to contain the spread of COVID-19.⁸² However, it inevitably returned passenger-free to Australia.

Although other countries have also faced a high volume of cases and deaths, the flights to Australia from these countries have never been banned. The issue of racism was raised by some commentators because the same kind of rule was not imposed on people of

⁷⁹ Lachlan Gilbert, 'Quarantine quandary: the case for building dedicated facilities', *UNSW Newsroom* (online, 4 June 2021) <<https://newsroom.unsw.edu.au/news/art-architecture-design/quarantine-quandary-case-building-dedicated-facilities>>.

⁸⁰ Sarah Martin, "People will die": Indian-Australian community leaders call on government to evacuate vulnerable Australians', *The Guardian* (online, 5 May 2021) <<https://www.theguardian.com/world/2021/may/04/coalition-to-hold-talks-with-indian-australian-community-leaders-as-anger-mounts-over-travel-ban>>.

⁸¹ *Ibid.*

⁸² Stephen Dziedzic, 'About 900 Australians stuck in COVID-hit India and wanting to return now listed as "vulnerable", High Commissioner says', *ABC News* (online, 5 May 2021) <<https://www.abc.net.au/news/2021-05-05/australians-health-high-commission-india-supplies-covid-19/100117620>>.

Anglo-Saxon heritage from the UK or the US, both of which saw hundreds of thousands of cases and deaths in the second wave of COVID-19.⁸³ Flights from these countries have never been banned nor have Australian citizens from them been threatened by criminalisation if they did try to return home. Evidently, different standards have been applied to those stranded in India. The government was widely criticised by the Australian Human Rights Commission and human rights experts raised 'serious human rights concerns'.⁸⁴ The Australian Human Rights Commission issued a briefing paper on the travel ban and stated:

Naturalized Australians who were born in India chose to give up Indian citizenship to be Australian. In doing so they undertook obligations to Australia under the Citizenship Act 2007 but now the lack of any mutuality to that oath has been exposed. The preamble to that Act, which makes a promise of common bond, involving reciprocal rights and obligations and respect for rights and liberties is meaningless when the Federal Government excludes citizens from Australia and leaves them to fend for themselves.⁸⁵

The government was fully aware of the dire situation it left its citizens in. The Chief Medical Officer, Professor Paul Kelly, publicly accepted that some Australian citizens stranded in India in a 'worst case scenario will die' since they won't be rescued.⁸⁶ Contrary to Australia, Taiwan sent a mercy flight to pick up their citizens who were in India.⁸⁷ Why then would Australia, which has developed a reputation of coming to the aid of its citizens in peril during terrorist attacks, natural disasters, civil strife, or armed conflict,⁸⁸ now abandon some of their citizens and practically leave them to die? The government has previously demonstrated a capacity to repatriate citizens in times of

⁸³ 'Covid-19 in the UK: How many coronavirus cases are there in my area?', *BBC News* (online, 18 October 2021) <<https://www.bbc.com/news/uk-51768274>>; 'Coronavirus in the U.S.: Latest Map and Case Count', *The New York Times* (online, 17 October 2021) <<https://www.nytimes.com/interactive/2021/us/covid-cases.html>>.

⁸⁴ McGowan (n 75).

⁸⁵ 'India travel ban exposes gaping void in Australian human rights protections' (n 45).

⁸⁶ Sarah Martin, 'Australians could die from Covid in India under travel ban, medical chief warns', *The Guardian* (online, 3 May 2021) <<https://www.theguardian.com/australia-news/2021/may/03/australians-could-die-from-covid-in-india-under-flight-ban-medical-chief-warns>>.

⁸⁷ Matthew Strong, 'JAL flies 41 Taiwanese, 3 Indians from India to Taiwan', *Taiwan News* (online, 8 May 2021) <<https://www.taiwannews.com.tw/en/news/4198309>>.

⁸⁸ Donald R Rothwell, 'When border control goes over the line', *The Interpreter by the Lowy Institute* (online, 19 May 2021) <<https://www.loyyinstitute.org/the-interpreter/when-border-control-goes-over-line>>.

emergency and medevac the critically ill.⁸⁹ It had set a precedent by organising repatriation flights for Australians stuck in Wuhan, South America, and India earlier in the COVID-19 pandemic. Helen Irving, a professor of constitutional law, stated that ‘the government has recognised in this way that it’s got a duty of protection towards Australian citizens’.⁹⁰ Don Rothwell, a professor of international law, argues: ‘I cannot think of any previous example where an Australian legally being in another country is now being told that if they physically cross the border, they are breaching Australian law through having committed no offence while they’ve been in a foreign country or having committed no offence under Australian law while they’ve been in that foreign country’.⁹¹

Renowned human rights lawyer Geoffrey Robertson stated that it was ‘outrageous to condemn innocent citizens for five years...because it’s never been debated or considered by Parliament’. According to Robertson, it was ‘unconstitutional’ to stop Australians from returning home from India.⁹² Some public figures, such as ex-cricketer Michal Slater said that Prime Minister Scott Morrison has ‘blood on his hands’ and that the government’s policy of temporarily preventing Australians from returning home was a ‘disgrace’.⁹³ Australian cricketers, approximately 38 players and officials who were on tournament in India at the time after the ban to return to Australia was enforced, took a charter flight and went to the Maldives.⁹⁴ They spent two weeks on the resort island while waiting for Australia to lift the two week ban on flights from India.⁹⁵ The rest of the stranded Australian citizens could not afford such luxury and stayed stranded in India.

⁸⁹ Ibid.

⁹⁰ Daniel Hurst and Elias Visontay, ‘Constitutional question: is it legal to limit how many Australian citizens can fly home each week?’, *The Guardian* (online, 26 August 2020) [22] <<https://www.theguardian.com/australia-news/2020/aug/26/constitutional-question-is-it-legal-to-limit-how-many-australian-citizens-can-fly-home-each-week>>.

⁹¹ ‘Is the India travel ban constitutional?’ (n 24).

⁹² Sheri Mimis, ‘Human rights lawyers “outraged” by “unconstitutional” India travel ban’, *9 Now A Current Affair* (online, 20 May 2021) <<https://9now.nine.com.au/a-current-affair/coronavirus-human-rights-lawyer-geoffrey-robertson-outraged-over-australias-india-travel-ban/5b91d2f2-4b36-4352-a71f-9b6e61153701>>.

⁹³ ‘Former cricketer Michael Slater says Scott Morrison has “blood on his hands” over India travel ban’, *The Guardian* (online, 4 May 2021) <<https://www.theguardian.com/sport/2021/may/04/former-cricketer-michael-slater-says-scott-morrison-has-blood-on-his-hands-over-india-travel-ban>>.

⁹⁴ Carly Waters, ‘Australian cricketers and staff touch down in Sydney after leaving coronavirus-stricken India’, *9 News* (online, 17 May 2021) <<https://www.9news.com.au/national/australian-cricket-players-to-arrive-in-sydney-after-india-evacuation/71e88d72-c7e2-41eb-b5bc-442a528ed267>>.

⁹⁵ Rob Forsaith and Glenn Valencich, ‘COVID-positive Aussie cricket great in limbo as Maldives BANS travellers from India’, *7 News* (online, 14 May 2021) <<https://7news.com.au/sport/cricket/australian-ipl-stars-hoping-to-return-soon-c-2838534>>.

C An Avenue for Administrative Appeal

The Minister has relied upon section 477 of the *Biosecurity Act* which has been the principal basis on which the Commonwealth has been seeking to implement the whole raft of health measures in the pandemic. Section 479 of the *Biosecurity Act* allows the Minister for Health the virtual sweeping power to declare a law and have Australian citizens incriminated by it, which according to Robertson contradicts the idea of democracy set up by the Australian Constitution.⁹⁶ The question remains whether the Health Minister exceeded his lawful authority. The *Biosecurity Act* requires that the measures must be 'appropriate and no more restrictive and intrusive than is required in the circumstances'.⁹⁷

This is a question of proportionality and Ministerial discretion. It is also a matter subject to judicial review regarding whether the Minister acted *ultra vires* and succeeded the authority and secretion they had to operate under the Act. The Ministerial decision was subject before the courts in the case that sought to challenge the Ministerial order. The challenge was lodged in the Federal Court on the grounds it was unconstitutional and illegal.⁹⁸ It set the precedent of how far Ministerial power in decision making can go. Melbourne citizen Gary Newman, 73, who had been stuck in India since March 2020, told the court his common law right to return home had been contravened by the biosecurity order preventing people from returning to Australia if they had been in India for the past 14 days.⁹⁹ His main argument was that he and 9000 other Australians had travelled there with the government's permission that was granted in most of the cases on compassionate grounds.¹⁰⁰ There was an expedite hearing because if it was not overturned, Australians could be banned from returning from another place tomorrow.

⁹⁶ 'Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship' (n 69).

⁹⁷ *Biosecurity Act* (n 46) s 477(4)(c).

⁹⁸ Stuart Marsh, 'Legal challenge against India travel ban rejected in the Federal Court', *9 News* (online, 10 May 2021) <<https://www.9news.com.au/national/australia-india-travel-ban-rejected-by-federal-court/f49670d3-c45d-44cc-8572-3d1747294bf8>>.

⁹⁹ Elizabeth Byrne, 'Federal Court throws out part of challenge to Federal Government's India travel ban', *ABC News* (online, 10 May 2021) <<https://www.abc.net.au/news/2021-05-10/federal-court-judge-throws-out-part-of-india-travel-ban/100129520>>.

¹⁰⁰ Hannah Ryan and Tiffanie Turnbull, "'WE ARE NOTHING': Over 9000 Australians stranded in India amid worsening COVID-19 crisis', *7 News* (online, 3 May 2021) <<https://7news.com.au/lifestyle/health-wellbeing/we-are-nothing-aussie-stranded-in-india-c-2732378>>.

The government lawyers told the court the Act prevailed over such rights if it was needed to protect the national interest, stating ‘there’s nothing in the statute to suggest that precise matters identified by my opponents needed to be taken into account for an emergency power directed to the national interest’.¹⁰¹ On 10 May 2021, a bid to overturn Australia’s ban on travellers returning from India was rejected. The precedent was significant, as the ban had a disturbing effect by effectively criminalising the right to return to Australia even in life threatening situations. Many stranded Australians overseas and their families in Australia were outraged by this decision. As Satinder Pal, one of the stranded Australians of Indian heritage stated: ‘...I didn’t come here for a holiday. I didn’t come here by choice. My father was dying’.¹⁰² The Association of Australian Medical professionals issued a public statement on their position regarding the travel ban:

Rapid escalation of community transmission of COVID-19 in India is exposing Australians to a risk of avoidable illness and death, because of poor access to vaccination, poor or no access to healthcare, and the ban on travel to Australia. The order to imprison or fine those who might breach the current ban is seen by the medical profession as mean-spirited at a time when Australia should in fact be aiding India by bringing Australians home in order to avoid further burden on their collapsing health system.¹⁰³

Although there was public outrage when the ban was effective, many have remained silent. Maybe the most surprising was that churches and church leaders did not speak up about what was also an ethical issue. Geoffrey Robertson, discussing the India travel ban wondered whether the parable of the good Samaritan has any resonance in the Australian community today.¹⁰⁴ How was such a move by the government possibly morally and

¹⁰¹ Elizabeth Byrne, ‘Federal Court throws out part of challenge to Federal Government’s India travel ban’, *ABC News* (online, 10 May 2021) [11] <<https://www.abc.net.au/news/2021-05-10/federal-court-judge-throws-out-part-of-india-travel-ban/100129520>>; *Newman v Minister for Health and Aged Care* [2021] FCA 517.

¹⁰² Ryan and Turnbull (n 100).

¹⁰³ ‘Reverse fines for Australians in India and bring them home safely’, *Australian Medical Association* (Web Page, 4 May 2021) <<https://www.ama.com.au/media/reverse-fines-australians-india-and-bring-them-home-safely>>.

¹⁰⁴ (‘Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship’) (n 69).

ethically acceptable and why have progressives stayed silent on the undermining of democratic commitments?¹⁰⁵

II CONCLUSION

This paper has argued that while Australia has been very successful at curtailing the spread of the COVID-19 virus, it has also left thousands of people in distress at being separated from their loved ones across borders — some in life threatening situations. Those who were already marginalised individuals and groups, such as refugees and migrants, have been made even more at risk of death or serious health consequences because they are unable to rely on the healthcare systems in the countries they have been stranded on.

The closure of international borders and occasional closures of interstate borders has brought suffering to many Australian citizens who are unable to return to their loved ones even in the last hours of their lives.¹⁰⁶ Migrants who have overseas family members have been indefinitely separated for the past 19 months. Citizens who have family members spread across different states in Australia have been cut off from their families for prolonged periods of time. The difference between these two categories of citizens is that the international borders have not been re-opened even once during the past 19 months, whilst state borders have had periods when they were fully open so that people could travel and unite with their families.

Under the *ICCPR*, citizens have a clear right to enter their country of citizenship. If this right is squashed or allowed to some citizens and denied to others, then what is the point of citizenship and passports when citizens cannot enter their own country?¹⁰⁷ The right to enter one's own country should not be arbitrarily denied, and in the case of the India travel ban, a complete, blanket exercise of the common law instrument denying all Australians in India the right of entry no matter the circumstances is unacceptable. The

¹⁰⁵ Tim Soutphommasane and Marc Stears, 'Government responses to COVID-19 are undermining our democratic commitments: why have progressives remained silent?', *ABC News* (online, 1 September 2021) <<https://www.abc.net.au/religion/tim-soutphommasane-and-marc-stears-covid-why-are-progressives-s/13521952>>.

¹⁰⁶ Simon Atkinson, 'Covid: The lives upended by Australia's sealed border', *BBC News* (online, 15 September 2021) <<https://www.bbc.com/news/world-australia-58540905>>.

¹⁰⁷ Kim Rubenstein, 'Why MPs are unwilling to do more for Australians trapped by COVID travel bans?', *The Sydney Morning Herald* (online, 21 April 2021) <<https://www.smh.com.au/national/why-mps-are-unwilling-to-do-more-for-australians-trapped-by-covid-travel-bans-20210419-p57kkm.html>>.

failure of the Australian Government to return citizens and permanent residents to their country of citizenship arguably amounts to an Australian policy failure and a breach of international law.¹⁰⁸

There is a state duty to protect and help its citizens, not to leave them in the lurch. Indian Australians have disproportionately harmed by egregious human rights violations — in particular, their right to life and healthcare. The Australian Government needs to provide symbolic and material reparations to Australian citizens stranded and left behind in India. An apology and financial compensation to the families who lost their loved ones during those times should ensue. As nationals of Australia, Indian Australians stranded in India had every right to expect protection from their government and not abandonment and the endangerment of their lives in times of peril. The Australian Government could have sent rescue missions as other countries have done and repatriate its citizens. Further, it could have aided the vaccination of Australian citizens in India. The case of the India travel ban raises legal, moral, and ethical questions raised by the (in)action of the Australian Government towards its citizens stranded in India who wished to return home.

Australia lacks an express Bill of Rights. Its constitution is one of the world's oldest operating; however, unlike other old constitutions, it has not been amended to incorporate rights catalogues.¹⁰⁹ Although the ban lasted for two weeks only, it may have felt like an eternity to those individuals stranded and at risk of dying. The Australian Government, once it resumed flights from India, did not rush to bring home as many stranded citizens as possible but kept all the strict protocols to repatriate stranded citizens. Potential passengers had to have two negative tests and the first repatriation flight brought only 80 out of 9000 stranded citizens back home.¹¹⁰

Immediately upon landing, the passengers were escorted to two weeks of state-run quarantine at their own expense. The feeling of abandonment and disappointment among

¹⁰⁸ Rothwell (n 88).

¹⁰⁹ Liz Hicks, 'Australia and the right of repatriation: Why have "stranded" Australian citizens brought a complaint against their government in the United Nations?', *Verfassungsblog* (online, 12 April 2021) <<https://verfassungsblog.de/australia-and-the-right-of-repatriation/>>.

¹¹⁰ Stephen Dziedzic and Tom Lowrey, 'First repatriation flight from India arrives in Darwin following end of COVID-19 travel ban', *ABC News* (online, 15 May 2021) <<https://www.abc.net.au/news/2021-05-15/india-repatriation-flight-lands-in-darwin/100141594>>.

Australians of Indian heritage still revibrates.¹¹¹ And while open wounds still have not healed, oddly and most recently the Queensland Premier Annastacia Palaszczuk sarcastically told a reporter, ‘Well, where are you going to go? Are you going to go to India?’ when asked about opening international travel.¹¹² Rachita Narula, an Australian of Indian heritage, wants to know why the Premier singled out India. She and the Indian community were perplexed by Palaszczuk’s comments and want to know ‘why only India?’¹¹³ They have not received an answer to their questions nor an apology for singling out this community yet again.

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¹¹¹ Antoun Issa, ‘Have Australians in India been abandoned because people of colour are seen as “less” Australian?’, *The Guardian* (online, 7 May 2021) <<https://www.theguardian.com/australia-news/commentisfree/2021/may/07/have-australians-in-india-been-abandoned-because-people-of-colour-are-seen-as-less-australian>>.

¹¹² Elizabeth Cramsie, ‘Annastacia Palaszczuk’s comments about COVID-19 travel overseas perplexes Queensland’s Indian community’, *ABC News* (online, 25 September 2021) <<https://www.abc.net.au/news/2021-09-25/qld-coronavirus-covid-19-overseas-travel-palaszczuk-india/100487030>>.

¹¹³ Ibid, Rashida Yosufzai, ‘Australian Indians slam Queensland premier’s “sarcastic” comment’, *SBS News* (online, 25 September 2021) <<https://www.sbs.com.au/news/australian-indians-slam-queensland-premier-s-sarcastic-comment/6c6cafa9-8039-445b-9e25-2fe2563d11b7>>.

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