

Public health is one thing — basic freedoms another

[Henry Ergas](#) 12:00AM August 28, 2020



The Morrison government should move to restore transparency and assess whether its measures are necessary and proportionate, starting with the travel bans. Picture: Gary Ramage

Enshrined in article 13 (2) of the 1948 Universal Declaration of Human Rights, and reaffirmed in article 12 (2) of the International Covenant on Civil and Political Rights, the principle that “everyone has the right to leave any country, including his own and to return to his country” has always been regarded as foundational to a free society.

Yet it is a right of which Australians have now been deprived.

To say that is not to suggest that the Morrison government’s decision to renew the overseas travel restrictions is necessarily incorrect. After all, for so long as the states drastically restrict inbound international travel, removing the restrictions might simply worsen the already heart-

wrenching problem of Australians stranded overseas.

What is unacceptable, however, is the absence of any careful, publicly available justification for the restrictions and the manner in which they operate. Despite the renewal, their purpose is unclear, no assessment has been made of their impact, and their practical implementation remains shrouded in secrecy, fuelling concerns over perceived unfairness.

It is difficult, if not impossible, to square those facts with our longstanding commitment to Australians' freedom of movement. As long ago as 1888, the "perfect liberty of locomotion" was described as "one of the dearest rights of citizens" in the Victorian state parliament.

And during the drafting of the 1948 Declaration, it was the Australian delegation — which well knew the role restrictions on the right to leave had played in facilitating the crimes of Hitler and Stalin — that strongly resisted the Soviet bloc's efforts to qualify the right. "The freedom of movement was unquestionably one of the fundamental rights of man," Australia's representative forcefully argued; "subjecting it to reservations would be to deprive the Declaration of all its force".

Despite the right's importance, there may, of course, be circumstances in which it is appropriate to limit its application.

However, as Judge Jose D. Ingles put it in a landmark 1963 report which underpins the right's interpretation in international law, restrictions can only be legitimate if they are demonstrably "reasonable and necessary to protect national security, public order, health, or morals, or the rights and freedoms of others." Additionally, regardless of the reasons for the restrictions, "everyone denied permission to leave the country is entitled to a fair hearing", as well as "the right to appeal to an independent and impartial tribunal".

Overall, as later jurisprudence determined, any limitations on the freedom “must be the least intrusive instrument among those which might achieve the desired result and must be proportionate to the interest being protected”. Moreover, “be it for temporary visits or expatriation”, that requirement “has to be respected not only in the restrictions on the right to leave, but also by the administrative authorities in applying them”.

None of that would come as news to the government and its advisers; and they would also know that any government which restricts the right bears a moral responsibility to show, first and foremost to its own citizens, that the limitations scrupulously meet those criteria.

To say that has not been done would be to state the obvious. Rather, thanks to a prime ministerial exemption issued on March 18, the travel bans, along with all the other measures taken in response to COVID-19, have been exempted from regulatory review, which would otherwise have tested their necessity in the light of their goals and of the harms they impose.

Of course, the commonwealth is hardly alone in failing to ensure transparency and accountability. With the partial exception of Western Australia’s border closure — which was only scrutinised by the Federal Court (and even then, solely with respect to its impacts on public health) because Clive Palmer bore the costs of challenging it — not a single coercive measure adopted by the states has been subject to a rigorous assessment of whether it is “proportionate”.

Instead, like the commonwealth, the states have repeatedly argued that their actions reflect expert medical opinion. However, that defence completely misses the point. It may well be that the restrictions are imposed by public health officials or on the basis of their advice; but that in no way alters the crucial question, which is whether the health objective is being pursued in the manner that is “least intrusive” on basic freedoms, taking account of the full suite of the restrictions’ effects.

Nor is it acceptable to simply equate the goal of public health with that of preserving basic freedoms, as if the two were somehow synonymous.

Rather, as Isaiah Berlin put it in his famous lecture on Two Concepts of Liberty: "Everything is what it is: liberty is liberty, not equality, fairness or human happiness"; and "if I lose my freedom" in society's attempt to achieve another purpose, it is "merely a confusion to say that although my freedom may go by the board, some other kind of freedom is increased".

These decisions, in other words, involve a balancing of fundamental values which, far from being a medical issue, is an inescapably political exercise — and which, precisely because it goes to the heart of politics, needs to be made in the clear light of day.

However, that obligation — to carefully establish, and not just cavalierly assert, that restrictions are necessary and proportionate — has been completely swept aside since the pandemic got under way.

Little wonder then that the restrictions' public legitimacy is being eroded, forcing governments to rely on coercion rather than consent to secure compliance; and little wonder that excesses, such as Daniel Andrews's attempt to perpetuate powers which ought to be strictly temporary, are becoming widespread.

It is therefore high time that the Morrison government moved to restore the transparency and accountability Australians expect and can properly demand. To that end, it should require the states, as a condition for receiving federal assistance, to comply fully and promptly with well-established processes of regulatory review.

Moreover, it should set the example by rescinding the prime ministerial exemption and beginning the task of systematically assessing whether its measures are necessary and proportionate, both in their substance and

in their implementation — with the travel bans being an excellent place from which to start.

Ultimately, democracy is government by explanation. Conducted in the dark, public decision-making stumbles into error and festers into abuse; it is only the incessant need to cogently justify choices that allows voters to hold power in check — and the greater the power, the stronger that imperative must be.

The virus has shattered enough lives; with no end in sight to the draconian powers governments have claimed for themselves, it would turn tragedy into disaster if we allowed it to destroy our freedoms as well.