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A Right to Come Home?

Repatriation Rights & Policy in Australia

15 April 2021 | Elizabeth Hicks

Summary

Key Points

This Policy Brief makes the following key points:

- (a) Australian citizens stranded abroad have brought a complaint against Australia before the United Nations Human Rights Committee. Although this avenue of recourse faces obstacles, it has raised questions about current Australian policy on border closures and repatriation.
- (b) A key part of Australia's successful response to the COVID-19 pandemic has been its closure of international borders. The burden of that success has largely fallen on those affected by restrictions on international travel: citizens and residents stranded abroad; including citizens and residents whose compassionate or other circumstances have not been approved for an exemption by the Department of Home Affairs.
- (c) Australia's quarantine program is largely administered by the states. Caps on the number of arrivals have been consistently lower than demand and notoriously volatile, reduced in response to repeated system failures in hotel quarantine programs.
- (d) In the absence of an express bill of rights, Australia largely relies on political mechanisms to hold the government to account, including with regard to the proportionality of COVID-19 related international border restrictions. Political mechanisms have failed to prioritise the right of citizens to return ahead of other political and economic concerns relevant to government business. Repatriation policy has also operated in a vacuum of political accountability: border closures have been the government's most popular restriction.

Recommendations

This Policy Brief makes the following recommendations:

- (a) **Medium-term planning for larger-scale quarantine:** Systems and infrastructure should be developed to facilitate essential travel to and from Australia in the short- and medium-term without relying on a national vaccination rollout as a 'silver bullet'. This might include dedicated quarantine facilities, or electronic systems for home quarantine, as used in Singapore and Taiwan, where fewer 'leaks' and community outbreaks have been experienced, compared to Australia.
- (b) **Addressing quarantine systems deficiencies:** As well as drawing on updated health advice (e.g. the aerosol mechanism of COVID-19 transmission), lessons from New Zealand include addressing 'leaks' by addressing defects in infection control protocols, rather than reducing arrival caps, and establishing a booking system for hotel quarantine to provide a 'queue' for returnees and prevent airlines prioritising higher paying passengers for return.
- (c) **Reforming risk assessment:** National Cabinet should consider the recommendations of the Halton Report and shift from a 'one size fits all' approach to a more tailored assessment of risk.
- (d) **Rights-based assessments of priority and proportionality:** Citizens and residents should be prioritised for places in quarantine programs ahead of 'economic cohorts', in light of the importance of the right to return.

A Right to Come Home?

Repatriation Rights and Policy in Australia

1. Introduction

A key pillar of Australia's success in responding to the COVID-19 pandemic has been its closure of international borders. On 20 March 2020 Australia sealed its borders to everyone except its citizens, residents and temporary visa holders in a confined number of circumstances. Those who return from abroad are also required to quarantine in dedicated hotels for 14 days and undergo a rigorous testing regime. This quarantine system substantially reduces the number of COVID-19 cases that can be imported into Australia.

Despite Australia outsourcing its response to prolonged border closures, it has not invested in facilities at a scale that can accommodate the demand for its quarantine programs. While over 200,000 people have returned through the hotel quarantine system, at the time of writing, over 36,000 citizens are registered with the Department of Foreign Affairs and Trade (DFAT) as requiring assistance to return home. Nearly 5000 of these are classified as vulnerable. The true figure is estimated to be far higher, as citizens cannot register until they have attempted to return home of their own accord.

Australia has taken the additional step of restricting its citizens and residents from leaving Australia without permission of the Department of Home Affairs. This is designed to reduce pressure on the hotel quarantine system. As the number of citizens and residents leaving on essential exemptions is only slightly lower than the number

returning, and Australia has a large diaspora abroad, demand for places in the hotel quarantine program continues to outpace supply. A 'loophole' allowing Australian citizens and residents to depart Australia without permission has now been created through a travel bubble with New Zealand. With no intention of increasing places in hotel quarantine, the number of citizens stranded abroad may increase exponentially.

This Policy Brief addresses the principal issues concerning repatriation policy and sets out recommendations to address deficiencies.

2. Arrival Caps for Hotel Quarantine Places

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

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

At the time of writing, over 36,000 citizens are registered with the Department of Foreign Affairs and Trade (DFAT) as requiring assistance to return home.

The lack of stability in caps means that prospective arrivals are usually given limited notice that they have been ‘bumped’ off a flight, often after terminating employment and leases.

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

State arrival caps have consistently been lower than demand. They have also been volatile. Victoria, for instance, suspended its hotel quarantine program for the duration of its second wave. It suspended its program a second time in response to a leak in February 2021 that resulted in a state-wide five day ‘snap lockdown’. Queensland temporarily halved its intake in response to a leak in March 2021.

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

3. ‘Quarantine Federalism’

Who is responsible for assisting Australians to return home? Quarantine is a concurrent legislative power under the Australian Constitution. This means the Federal government may choose to exercise it, or it may not — in which case it can fall to the states. The Federal and state governments meet regularly through ‘National Cabinet’, which decided at an early stage that the states would assume responsibility for managing hotel quarantine.

National Cabinet’s deliberations remain secret. It is therefore unclear why the states assumed

responsibility for hotel quarantine. The Federal Liberal National government insists that the primary responsibility for repatriating Australians lies with the states; it has committed to expanding its repatriation program, but only in a supporting role and not enough to address demand. The Federal Labor opposition (along with some Labor state governments) has argued that the Commonwealth is ‘constitutionally responsible’ for quarantine.

The opacity surrounding National Cabinet’s decision for the states to assume responsibility aggravates this. If voters cannot clearly identify which governments are responsible for stranded Australians’ circumstances, it becomes more difficult to agitate for change. Amidst a troubled vaccination program, Australia has not prepared a plan or provided transparency regarding its decisions to reopen the border. The federal government has referred responsibility for plans to open international borders to National Cabinet, again blurring lines of accountability for voters.

4. No Right of Return?

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

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

State governments have also given little regard to the right of citizens and residents to re-enter when ‘filling’ places in their hotel quarantine programs. In the absence of a booking system, the decision of who flies lies with airlines and is based on market mechanisms, as earlier described. The number of non-citizens occupying places in hotel quarantine programs has steadily increased: in February 2021 only 44 percent of arrivals in Australia were citizens.

6. Arrival Cap Reductions & ‘Economic Cohorts’

Repeated cap reductions following hotel quarantine failures present a case study of this effect. Many of the ‘leaks’ have been avoidable. Leaks that caused Victoria’s second wave were largely propelled by outsourcing to private contractors and poor departmental coordination, resulting from successive cuts to public health.

Citizens stranded abroad have limited avenues of legal recourse domestically. Australia lacks an express bill of rights. There is limited protection of citizenship and the rights that flow from it under the Australian constitution.

5. Political Mechanisms & Proportionality Review

Citizens stranded abroad have limited avenues of legal recourse domestically. Australia lacks an express bill of rights. While some academics such as Kim Rubenstein have argued that citizens may have a non-express right to re-enter Australia, proving this right exists would be lengthy, complex and not guaranteed. Apart from this, there is limited protection of citizenship and the rights that flow from it under the Australian Constitution. This should not surprise us: the Constitution was drafted at a time when Australians were, and remained, British subjects. Minority rights were explicitly rejected during the constitutional conventions — due to the view that minorities “must trust to the sense of justice of the majority”.

Australia’s reliance on ‘the sense of justice of the majority’ poses unique problems in times of crisis. Crises reorient decision-making toward utilitarianism and the collective — majorities — toward which Australia’s system is already tilted. They create an atmosphere of urgency and fear that deflects concern away from rapidly constituted minorities ‘caught under the wheels’ of measures benefitting the majority. This undermines dispassionate analysis of whether alternative measures exist that could achieve the same ends — which a judicially supervised proportionality analysis would determine.

Subsequent leaks in other states have resulted through poor systems of ventilation and protocol for personal protective equipment, connected with Australia’s delayed recognition of the aerosol mechanism for COVID-19 transmission. When leaks have occurred, arrival caps have been the ‘moving part’. Australia therefore continues to take less than half of the arrivals relative to its population than neighbouring New Zealand.

In a system where accountability mechanisms rise and fall on the back of political majorities, there is little political pressure on government to ensure a measure is proportionate where that measure is popular. Border closures have been the government’s most popular restriction. An Ipsos poll in December 2020 reported that 83% of Australians supported sealing international borders completely — allowing no one in or out regardless of the reason. Whether alternatives exist that would allow more citizens to safely return home at large scale, as in Taiwan and Singapore, is a question that government is relatively free to ignore.

Aspects of the decision-making surrounding caps at both federal and state level reflect that vacuum of accountability. For instance, Victoria recently reduced its cap after the Federal government refused to approve an additional stream for ‘economic cohorts’. It did not then offer those additional places for repatriation. Understandably, a political assessment of proportionality will consider broader factors within its calculus of risk

— in this case, the economic contribution that other arrivals would make. Yet this speaks to the advantages of a judicially supervised, rights-based proportionality assessment: it introduces rigour into that calculus and focusses the inquiry on the right being restricted, with priority accorded to rights because of their importance.

7. International Law as a Last Resort

Australians stranded abroad have turned to the United Nations Human Rights Committee (HRC) as a last resort. While the individual complaints procedure under the United Nations requires that domestic remedies be exhausted, as discussed above, it is unlikely that domestic remedies exist.

Article 12(4) of the International Covenant on Civil and Political Rights provides that no one shall be arbitrarily deprived of the right to enter their own country. Limitations of the right to re-entry require far greater justification than other rights of movement flowing from article 12,. The HRC has stated that there are “few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable”.

The question, then, is whether Australians are being arbitrarily restricted from returning. There are strong arguments in favour of limiting arrivals. Research has found a correlation between high volume of international arrivals and COVID-19 deaths. Current caps do not fully prevent Australians returning — they merely delay that return, make it extremely difficult and default it to market-based mechanisms.

Yet it is clear, when viewing systems in Taiwan and Singapore, that safe repatriation is possible at far greater scale than the Australian system permits. The HRC, a body of 18 experts, will consider the reasonableness, necessity and proportionality of the current system, including whether less draconian alternatives could achieve the same end and whether restrictions are based on clear and predictable legal criteria. As Jane McAdam and Ben Saul argue, this will include assessing whether Australia is allocating sufficient resources to maximise the number of returns.

The United Nations’ complaints procedure has limitations. Australia has a record of disregarding the United Nations’ findings — particularly regarding its treatment of its First Nations and

people seeking asylum. It may also be years before a resolution is reached.

8. Conclusion

The Covid crisis has effectively created a new and temporary minority — the tens of thousands of Australian citizens stranded outside Australia’s international borders. Their plight and rights are not receiving adequate attention under current repatriation policy.

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

Systems in Taiwan and Singapore suggest that safe repatriation is possible at far greater scale than the Australian system permits. The Human Rights Committee will consider whether less draconian alternatives could achieve the same end and whether restrictions are based on clear and predictable legal criteria.

Turning to the United Nations

Australians stranded abroad have turned to the United Nations as a last resort, by submitting an individual complaint under the International Covenant on Civil and Political Rights (ICCPR) to the Human Rights Committee: this is a body of 18 human rights experts, not to be confused with the Human Rights Council comprised of state representatives. Importantly, the individual complaints procedure to the Committee requires that domestic remedies be exhausted. As discussed above, it is unlikely that domestic remedies exist. Article 12(4) of the ICCPR provides that no one shall be arbitrarily deprived of the right to enter their own country. Unlike other rights of movement that flow from article 12, limitations on the right to re-entry require far greater justification. The Human Rights Committee has stated that there are “few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable”. The question, then, is whether Australians are being arbitrarily restricted from returning.



References

Note: A variety of references in this text are provided as hyperlinks within the text. This references section lists selected texts.

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Text based on a blog post for Verfassungsblog, 'Australia and the right of repatriation' (12 April 2021).

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