



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

BRIEFING NOTE

*Australian Government's
Indian Travel Ban*



4 MAY 2021

What has the Australian government done?

The Australian Government has announced new travel restrictions to and from India for a period, at least initially, of 3 weeks ([The Age link](#)) (however, the determinations restricting inbound travel so far apply from 3 May to 15 May 2021).

Incoming restrictions

On 30 April 2021, the Commonwealth Minister for Health made a determination under s 477(1) of the *Biosecurity Act 2015* (Cth): the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021* (“the Indian Travel Ban”).

The Indian Travel Ban commences 3 May 2021.

Clause 6 of the Indian Travel Ban requires a passenger on an international flight departing after 12.01 am on 3 May 2021 (local time) not to enter Australia if the passenger had been in India within 14 days before the flight commenced, unless an exemption applies.

The exemptions (clause 7) are limited to:

- aircraft crew, maintenance or freight workers;
- persons travelling on official government business and their families;
- diplomatic and foreign officials and their families; and
- Australian Medical Assistance Team members

The Indian Travel Ban lasts until 15 May 2021 (clause 5), unless extended or a new determination is issued.

This means that, not only has the Australian government suspended commercial and private flights from India to Australia (other than for medical emergencies), but persons are prohibited entry to Australia by air if they have recently been in India:

- even if they are travelling from a third country;
- regardless of their COVID-19 test status or vaccination;
- whether or not they are an Australian citizen or permanent resident.

The government has announced criminal penalties may be applied to Australians entering Australia in contravention of this determination. ([DFAT Smart Traveller link](#))

Outgoing restrictions

Since 25 March 2020, all Australian citizens and permanent residents have been subject to an overseas travel ban under the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* which prohibits overseas travel for Australians (by air or sea) unless subject to an exception or granted an exemption by application to the Department of Home Affairs (“DHA”).

The exceptions to the general ban on travel by Australian citizens and permanent residents are:

- Australians ordinarily resident in another country (ie if international movement records show the person has spent more time outside Australia than inside for the last 12 to 24 months);
- aircraft crew or ships’ crew, including those travelling as passengers;
- freight workers;
- workers travelling to essential off-shore facilities such as oil rigs;
- Australians travelling on official government business;
- Australians travelling to New Zealand (under new ‘travel bubble’ arrangements).

Exemptions may be granted by Australian Border Force for “compelling reasons”. These may include:

- travel as part of the response to the COVID-19 outbreak, including the provision of aid;
- travel for business/work;
- travel to receive urgent medical treatment that is not available in Australia;
- travelling outside Australia for a compelling reason for three months or longer;
- travelling on compassionate or humanitarian grounds;
- travel in the national interest.

The Federal government asked the Chief Medical Officer to create a list of “high-risk countries” ([CMO interview 3 May](#)). DHA will now limit the grounds on which an exemption may be granted for travel to a “high-risk country”. India is currently the only country on that list. The effect is to immediately limit the grounds on which an exemption may be granted for travel to India (and to cancel any exemption previously granted). DHA has advised that travel exemptions for any travel from Australia to India “will be limited to very urgent circumstances only” and will only be approved for:

- critical workers providing assistance to India’s COVID-19 response;

- persons undertaking travel in Australia's national interest;
- persons seeking urgent medical treatment for a critical illness that is unable to be treated in Australia. ([DHA link](#))

That is, travel to India will not be approved for compassionate reasons to visit or care for an ill or dying relative or attend a family funeral, for example.

The DHA website also says that the "exceptional circumstances" exemption will currently only be approved for travel to Papua New Guinea in "extremely limited circumstances". However, PNG has not been placed on the high-risk countries list.

What is the legislative basis for these restrictions?

Under ss 477 and 478 of the *Biosecurity Act 2015 (Cth)*, the Commonwealth Health Minister may make requirements and directions, relevantly, to prevent or control the entry into Australia of a listed human disease in the event of a declared human biosecurity emergency.

Such a determination overrides any other Australian law (s 477(5)).

Covid-19 became a listed disease on 21 January 2020.

A human biosecurity emergency was declared in respect of COVID-19 on 18 March 2020 and has been extended, currently, to 17 June 2021 (declarations last for up to three months but may be extended by further declaration (s 476)).

The Health Minister must exercise the powers personally (s 474). Before making a determination under s 477, the Minister must be satisfied of all of the following:

- the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined;
- the requirement is appropriate and adapted to achieve the purpose for which it is to be determined;
- the requirement is no more restrictive or intrusive than is required in the circumstances;
- the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances;
- the period during which the requirement is to apply is only as long as is necessary.

Criminal offences for a breach of a requirement or direction are created by s 479: a person commits an offence if a requirement determined under s 477 applies to the person and the person engages in conduct contravening the requirement. The maximum penalty is 5 years or 300 penalty units or both. (Penalty units are currently \$222 each meaning the maximum fine is \$66,600.)

Who is affected?

The incoming travel ban immediately affects about 9,000 Australians registered with DFAT as currently being in India and requiring Australian government assistance to return home. DFAT has advised that about 650 of these Australians are considered vulnerable. ([The Age link](#)) The effect of the ban will also have flow-on effects to the families and friends of those Australians.

The outgoing travel ban particularly affects the more than 600,000 Australians of Indian descent, especially those who may have an urgent family reason to travel to India to care for loved ones, but it applies to all Australians.

The principles underlying these bans could affect any Australian if further bans are made. There are currently about 34,500 Australians waiting overseas who are registered for government assistance to return, including many Australians who cannot get a commercial flight or a place in hotel quarantine despite waiting months and booking and re-booking flights. ([The Age link](#)) On 2 May 2021 a DFAT spokesperson announced that 46 Australians registered overseas had died from COVID-19 infection in the past year. ([SMH link](#)) The death toll at home is 910 deaths and there are currently about 272 active cases. ([Dept Health link](#))

What are the issues raised?

The existing and new travel bans raise at least the following issues:

- does an Australian citizen or permanent resident have a right to enter Australia?
- does an Australian citizen or permanent resident have a right to leave Australia?
- should the Australian government expose Australians to continued peril overseas if they want to come home (and, if so, for how long)?
- should the Australian government cause Australians to potentially burden the health system of a neighbour if that system is already overstretched?
- how should the Australian government balance the needs of Australians to come

home with the needs of Australians at home to be protected from the risk of incoming virus?

- is an outgoing travel ban justified/justifiable at all?
- is the ban on travel to/from India racially or nationally discriminatory?

Rights of entry and exit

The Australian Constitution does not define Australian citizenship nor explicitly prescribe any rights attendant on citizenship. It may be arguable that there are some basic rights of citizenship implicit in the Constitution but this issue has not been determined by the High Court. It is unlikely that the High Court would find such a right overrides the explicit powers of the Commonwealth to make laws (for quarantine (s 51 (ix)), for example), at least if such laws are reasonably adapted and appropriate to their legislative purpose and do not unreasonably burden an implied right, if any exists.

The preamble to the *Australian Citizenship Act 2007* (Cth) provides:

The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.

The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

- (a) by pledging loyalty to Australia and its people; and*
- (b) by sharing their democratic beliefs; and*
- (c) by respecting their rights and liberties; and*
- (d) by upholding and obeying the laws of Australia.*

but that Act does not provide for any particular rights attending citizenship.

Section 7 of the *Australian Passports Act 2005* (Cth) provides that an Australian citizen is entitled to be issued an Australian passport. However, holding an Australian passport does not itself guarantee a right of exit from or entry to Australia. It does not override a determination made under a human biosecurity emergency declaration (s 477(5) *Biosecurity Act 2005* (Cth)).

What human rights may be infringed?

The travel bans raise possible infringement of three important human rights:

- freedom of movement, specifically the right to enter and exit one's own country;
- life, liberty and security;
- freedom from discrimination on the grounds of race, national or social origin.

Australia was one of eight country members of the UN Commission on Human Rights that in 1947 drafted the Universal Declaration of Human Rights ("UDHR") (United Nations General Assembly, Paris 10 December 1948 General Assembly resolution 217 A). The UDHR has 4 provisions of particular relevance:

- Article 13: Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country.
- Article 3: Everyone has the right to life, liberty and security of person.
- Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.
- Article 29: In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The human rights described in the UDHR are further described in the International Covenant on Civil and Political Rights (ICCPR).

Australia signed the ICCPR in 1972 and ratified it in 1980, undertaking to implement the articles of the ICCPR throughout Australia by "Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise". However, the ICCPR has not been adopted into domestic Commonwealth law.

The ICCPR has four provisions of particular relevance:

- article 12 (2, 3, 4): Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order

(*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. No one shall be arbitrarily deprived of the right to enter his own country.

- article 9 (1, 2, 3): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- article 2 (1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- article 4 (1, 3): In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

That is, under international law to which Australia subscribes, the rights of individual Australians to freedom of movement, liberty and security and freedom from discrimination are fundamental but subject to the protection of the rights of others and to national security and public health.

Protection of the rights of others and of national security and public health certainly may justify stringent quarantine requirements and, in order to allow quarantine facilities not to be overwhelmed, some orderly process of repatriation. However, it is difficult to see that it can justify indefinite and prolonged exclusion of Australians from Australia, especially where they are in peril.

The continuing outward travel bans are even less justifiable. This is particularly so when many non-Australians and non-resident Australians have apparently continued to come and go with relative freedom and for a range of non-essential purposes such as entertainment and political lobbying. No adequate explanation has been given for preventing Australians travelling to India to care for family during the current crisis, for example.

Discrimination?

India is undoubtedly having an extremely serious public health crisis with a second wave of COVID-19. The daily reported new case rate in India is more than 360,000 with more than 3,000 daily deaths, although it is acknowledged that there is very substantial underreporting of both cases and deaths as the testing system and healthcare have been overwhelmed. The true number has been estimated as between two and five times more (Bhramar Mukherjee, epidemiologist at the University of Michigan – The Age 28/04/2021 per Rachel Clun). ([The Age link](#))

In the US, daily cases peaked at 300,000 and deaths peaked at more than 3360 in early January and in the UK daily cases peaked at over 76,000 and deaths peaked at just over 1300 in late January (The Age 28/04/2021 per Rachel Clun). Despite those concerning statistics, the Australian government did not ban all flights from and to those countries or impose the same level of stringency now applied to India.

A 'high-risk country' list, with additional restrictions on travel by Australians to and from such countries, was not deemed necessary when China, the UK, USA and Europe were at the height of COVID-19 waves. Nor was such a list created for places where particular virus variants of concern have been identified such as Brazil, South Africa or, again, the UK. So far as has been announced, only India is on that list.

The Australian government initially sought to justify the new restrictions as necessary so that the Northern Territory health system and the Commonwealth quarantine facility at Howard Springs in Darwin (currently with 48 cases of COVID-19, 47 being Australians returning from India) are not overwhelmed. ([The Age link](#)) However, unlike differential arrival caps previously applied between states due to differing domestic public health conditions and available volumes for hotel quarantine facilities (eg during Victorian lock-down), the new restrictions apply to every air entry port, not just the Northern Territory.

It can be recognised that it may be necessary to take some additional emergency measures as new circumstances emerge to ensure that domestic health systems are not overwhelmed and, certainly, to address quarantine provision. Australians at home have rights to have their safety protected too. However, the Commonwealth government has now had more than a year to address the need for sufficient robust quarantine facilities to bring home all Australians wanting to return. The Prime Minister has said that the state-run hotel quarantine facilities are more than 99% effective. Yet these are apparently not deemed sufficient to accommodate Australians returning from India. The reason for this has not been explained.

The difference in treatment of Australians in India, or who are wanting to travel to India, raises the concern of racial or national discrimination if not explained by medical

evidence.

Further, the lack of clear explanation or a published plan for the safety of Australians caught up in the incoming travel bans (new and old) raises the question whether such measures are now genuinely necessary for public health reasons or whether they are for a domestic political agenda at a time when the Federal vaccine roll-out has been much criticised and in which recent electoral results have suggested broad public approbation of tough public health measures by State governments. If the incoming travel restrictions are genuinely necessary, the question remains whether the Commonwealth has acted with sufficient dispatch to appropriately protect all Australians equally and what more it should now do.

How can Australians protect and enforce their human rights?

Australia does not have a national Bill of Rights. Except for the very limited concept of implied constitutional rights that might restrain an exercise of Commonwealth power, there is no domestic right to sue the Commonwealth government for an infringement of human rights as such. Australia remains the only democracy in the world not to have passed a national law directly implementing the ICCPR.

Commonwealth law does address human rights in some limited respects: for example, providing for complaints to be heard about racial, sexual or disability discrimination and for applications for asylum in Australia to be made by refugees.

However, Australia does not have a national forum to adjudicate complaints about infringement of human rights that are not provided for in domestic law. The Australian Human Rights Commission (AHRC) may investigate alleged breaches of human rights, including the ICCPR, report its findings and advise the government about such breaches but cannot compel the government to take any action or impose any penalties for human rights breaches. On 1 May 2021, the AHRC released a statement of deep concern, calling on the Australian government to review its announced restrictions and sanctions on travel from India and to publicly justify the measures. The Commission called on the government to “show that these measures are not discriminatory and [are] the only suitable way of dealing with the threat to public health” and urged the Senate Select Committee on COVID-19 to review the matter immediately. ([AHRC link](#))

Australians affected by the determinations can sue in the Federal Court of Australia for judicial review of the determinations as to whether the Minister was legally satisfied of the matters set out in s 477(4), for example on the grounds that the decision was so unreasonable that no reasonable person could have made that decision. It is often very difficult to establish that a Ministerial decision was legally unreasonable or otherwise invalid. It is not enough to show that a reasonable person would probably have made a

different decision. Such a court case can be heard relatively quickly in urgent circumstances but legal representation is expensive and, whether or not the claimant themselves is represented, if the case is lost the claimant will usually be ordered to pay the Commonwealth's legal costs.

A determination of a requirement under s 477 is a legislative instrument, but s 42 of the Legislation Act 2003 does not apply to it. This means that the Senate cannot pass a disallowance motion to rescind the determination.

Australians can sue the Commonwealth in an international forum by making a complaint to the UN Human Rights Committee. However, this process is often very protracted and may not result in a practical benefit. The travel restrictions and quotas applying to incoming travel before the India Travel Ban have been the subject of three complaints by Australians, filed together on 29 March 2021. The UNHRC has not yet finally adjudicated these complaints but on 15 April 2021 it wrote to the Australian government requesting that the complainants' return to Australia be facilitated while the case proceeds and that this interim measure be implemented immediately. The Australian government has eight months to file its observations (submissions) in the case. ([Rubenstein op ed SMH](#)) ([Rubenstein op ed The Age](#))([UNHRC letter](#))

Urgent need for national human rights legislation

This crisis has exposed Australians' urgent need for national human rights legislation to

- define and protect in law the heart of what it means to be Australian;
- give Australians a clear, affordable path to protection of our fundamental rights and freedoms;
- make the preamble to the Citizenship Act meaningful.



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Australian Lawyers for Human Rights Inc (ALHR) is an association of legal professionals active in practising and promoting awareness of international human rights standards in Australia. We have a national membership of Australian lawyers, barristers, judicial officers, legal academics and law students, with active national, state and territory committees and specialist thematic committees.

Two of the main functions of ALHR are to:

- seek to use its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to promote federal and state laws that comply with the principles of international human rights law; and
- engage internationally to promote human rights and the rule of law.

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