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Introduction:

Protecting Fundamental Rights in the Age of Covid-19

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The Covid-19 pandemic is a turning point in history. Its impact will be felt for many years both domestically and internationally. Certain measures to fight Covid-19 have profoundly affected fundamental rights, particularly freedom of movement, expression, privacy and association, potentially for a very long time. Further, these measures have caused many people to endure deeply stressful and traumatic situations, including home confinement, job losses, financial ruin, drug and alcohol problems, domestic violence and family breakdown, and a host of mental and physical illnesses.

This special edition of *The Western Australian Jurist* is dedicated to the important topic of 'Protecting Fundamental Rights in the Age of Covid-19'. We are proud to have gathered an impressive list of contributors to address the dramatic impact of government measures on our fundamental rights and freedoms. We are also proud to be working in partnership with Connor Court to produce this special edition of our law journal as a book. We hope this work becomes a major reference on the subject, and help promote *The Western Australian Jurist* as a leading publication in the field of legal theory and jurisprudential thought.

As to our contributors, Professor Rex Ahdar critically reflects upon the serious cost of lockdowns. His chapter shows that the mitigation strategy, ultimately ignored by New Zealand's government was and is a preferable strategy once the indirect and long-term costs and benefits of more radical measures are considered.

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Professor James Allan explains how the Australian government mishandled its response to the coronavirus, significantly infringing civil liberties and dramatically expanding the government's role with no palatable route out of this situation. After exposing the over-reaction by most governments, he goes on to predict that such measures will be seen in the future as one of the worst public policy fiascos of the century.

Morgan Begg critically analyses of Victoria's public health emergency laws. First, he explores the history of these laws in Victoria, highlighting how modern emergency powers are ahistorical and atypical. He then proceeds to an examination of the heavy costs of policy responses, indicating that Victoria's modern public health legislation gives too much scope to ministers and the Chief Health Officer. These policy responses not only expose serious structural flaws in the legislation but also have not achieved a desirable balance between protecting public health and maintaining the freedoms of Victorians.

Professor David Flint AM argues that the Australian government's response to the coronavirus was based on an overreaction that failed to pay due regard to the best available evidence. There was no guarantee of minimal restrictions on the exercise of fundamental rights. To the contrary, the response of Australia's political authorities was disastrous, proving costly to millions of Australians. Since so much of what has been done by our political authorities was unnecessary and counterproductive, Professor Flint concludes his article by recommending an in-depth review by the people of the nation's constitutional arrangements.

Professor Anthony Gray considers whether Western Australia's border restrictions in response to Covid-19 are consistent with section 92 of the *Australian Constitution*, which provides that trade, commerce and intercourse among the States shall be absolutely free. Professor Gray argues explores a number of tests that the High Court has used when applying s 92. He concludes that there is a strong chance that Western Australia's border restrictions are constitutionally invalid

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because they are not proportionate to a legitimate objective, and because they cannot be shown to be reasonably necessary.

Doctor Weronika Kudła and Dr Grzegorz Jan Blicharz undertake a comparative analysis of the impact of public health measures on religious freedom in Italy and Poland. They analyse the impact of safety measures by civil authorities of these two countries on religious liberty, particularly in light of the right to religious gatherings in situations of health emergency. According to them, an assessment of restrictions imposed on religious worship in these countries can offer an instructive lesson with regards to adequacy and proportionality of measures aimed at fighting and co-existing with the virus.

Doctor Rocco Loiacono provides an exposure of the ‘dictatorship of the health bureaucracy’ whereby Covid-19 has been used to undermine our fundamental rights and freedoms with the stroke of a pen. As he points out, recent events have revealed the potential for health officials to enact oppressive policies that exert unreasonable control over our lives. This could have, according to him, very serious implications for important principles such as the right to informed consent, which is fundamental in the administration of any medical treatment.

Professor Gabriël A Moens AM examines the disrupting effects of Covid-19 in Australia. First, he briefly describes the restrictions imposed on people to allegedly combat the virus. Professor Moens then characterises such restrictions as deeply paternalistic in nature, having an enormous and deleterious effect on the rights of people, including unintended consequences for the protection of their own health. Professor Moens also assesses the constitutionality of Covid-19 laws and regulations, highlighting the perceived weaknesses of government actions.

Bill Muehlenberg argues that government overreactions to Covid-19 has led to individual liberties being infringed far too much and governments expanding much too far. He examines various issues concerning the Covid-19 crisis, including whether just revolution is warranted should government overreach become too onerous.

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Doctor Monika Nagel, who argues that globalisation may have worked well both economically and politically since the early 1980s, but now has failed to respond to health crisis. She notes the decline of moral values along with the rise of identity politics, and argues that the focus of human rights should shift towards protecting fundamental rights.

Doctor Johnny M Sakr discusses the implications of Molinism to explain how God exercises sovereign control over his world while honouring the genuine freedom he has bestowed upon his creatures. He explains how Molinism, a concept coined after Roman Catholic Jesuit Luis de Molina, not only provides a reconciliation between God's sovereignty and human freedom, but also promotes human efforts to prevent epidemics, cope with them, and change our ways of life to lower their impact.

Professor Steven Samson examines the role of interposition in protecting against tyranny. Citing historical political and religious examples, Professor Samson notes that freedoms have emerged from the contest of powerful stakeholders, including those who interpose, that is, use their power to shield others against the tyrannical exercise of power by others. He considers the role of interpositions in the age of the "administrative state" and Covid-19.

Professor William Wagner argues that certain State Governors in the United States have seen Covid-19 as an opportunity to expand powers and ignore constitutional constraints, autocratically issuing edicts that violate our liberty and undermine the rule of law. He further argues that such actions from these State Governors threaten to destroy the foundations of good governance under the rule of law. Professor Wagner concludes that the Federal Government of the United States might have to exercise its constitutional power under the Commerce Clause in order to re-establish order and enact pre-emptive legislation

Professor Augusto Zimmermann explains the legal and moral consequences of government measures to fight the coronavirus. These measures are arbitrary and ultimately constitute a gross violation of fundamental rights. There is nothing that could possibly justify the

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use of such extreme measures. Relying on a few “experts”, political authorities have used their recently acquired “emergency powers” to impose oppressive lockdowns and other ill-conceived measures that have destroyed jobs and much of the productive sector, while leaving the bloated public sector completely intact. Professor Zimmermann appeals to our classical liberal tradition of civil resistance to political tyranny, reminding the readers of their right to demand the lifting of draconian measures that infringe fundamental rights and freedoms.

Finally, Lorraine Finlay reviews Professor Moens’s book *A Twisted Choice*, a novel concerning the origins of the Covid-19 pandemic. She comments that this thought-provoking book raises some critical questions about human nature, government power and individual choice. The novel investigates the origins of the pandemic, and weaves a tapestry of intrigue with the threads of many factual events happening around the globe. It follows the exploits of a Chinese virologist, studying at an American university where he meets an American lawyer, who follows him back to Wuhan in China.

There is a final point we would like to make. We have used Covid-19 in this introduction. However, we have left it to the authors to refer to SARS-CoV-2 using their own terms. Hence, you will see terms like ‘coronavirus’ and ‘Wuhan virus’ used throughout this volume. Certain terms used to refer to SARS-CoV-2 are themselves controversial. However, in this volume we have adopted an approach consistent with the fundamental right to freedom of expression, that is, recognising that the authors are free to call the virus whatever they like.

To conclude, it is beyond any doubt that certain government actions in response to Covid-19 threaten fundamental rights. And since it is rightly said that the price of liberty is eternal vigilance, we call upon those who value fundamental rights to be more vigilant than ever in the Covid-19 era.

