

All eyes on state as case tests the limits of emergency powers

South Australians affected by vaccine mandates are taking legal action

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All our knowledge, experience and sensible scepticism teaches us to be wary of the power exerted by government. It is a breach of the natural order of the universe, not to mention the principles of democracy, for us to place unconditional faith in authority.

Yet this is what we have done during this pandemic. For almost two years now, with an array of emergency powers enacted in all states and territories, we have allowed normal decision-making and review processes to be suspended while our political masters dictate an unprecedented array of rules, restrictions, and coercive enforcement.

It is unwise to allow power to be exercised unfettered. Even before Australia was settled by Europeans, the oracle of conservative thinking, Edmund Burke, said: "Power in whatever hands is rarely guilty of too strict limitations on itself."

Paul D'Assumpcao, and former Federal Circuit Court judge Stuart Lindsay advising as a special counsel. The case is being funded by public donations.

The plaintiffs are seeking a judicial review of the state governor's approval of emergency declarations and specific orders under those powers that mandate vaccines for education, healthcare and law enforcement workers. They want the emergency orders deemed invalid which, of course, would allow them to return to their jobs, vaccinated or not, and provide a resolution for thousands of others.

Some aspects of the case relate only to the SA legislation. But if the rationale for vaccine mandates is overturned, the precedent could flow across the country.

SA's Emergency Management Act dates from 2004 and was designed to update arrangements in the wake of terrorist attacks, with the then minister's second reading speech citing 9/11 and Bali. The act places the police commissioner in charge during a declared emergency, and while the focus of the law and its original





Our federation, across the past two years, provides a case study in the relentless expansion of power. Along with a reluctance to relinquish it.

Post-pandemic, we need a royal commission to examine our performance and to consider whether the state government powers need refinement, to provide more accountability to parliament, and perhaps to ensure uniformity across the states. The other crucial question is whether the federal government needs greater power to ensure a national approach – instituting some sort of official national cabinet, with teeth – or whether it had sufficient power under the Biosecurity Act and chose not to exercise it.

In the meantime, government overreach needs to be tackled through existing mechanisms. We have seen protests – and the way they have been quashed has tended only to underscore concerns about authoritarianism – and there have been some legal challenges, mainly about the constitutionality of closing state borders, while in Victoria there was heated political debate about revised state laws.

Now a major legal intervention in South Australia is set to test the legitimacy of that state's emergency declarations, the proportionality of the government's response and the legal and medical basis for vaccine mandates. It should spark a national debate about these vital issues, and will see key figures such as SA chief public health officer Nicola Spurrier and Police Commissioner Grant Stevens cross-examined, and it



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explanation centred on natural disasters such as fires, floods and earthquakes, as well as terrorism, there was mention of "human disease, including pandemic or epidemic".

Yet the law seems ill-equipped for such an emergency, as illustrated by the fact it places all the power in the police commissioner. Also, it allows for the emergency powers to be declared for a maximum of only 30 days – yet repeated new declarations have stretched the Covid-19 emergency out for 22 months.

While there are important differences between the laws under which the pandemic powers are being exercised in each of the states and territories, some of the principles and arguments are universal. The plaintiffs will claim the constant extensions, approved by the governor repeatedly across almost two full years, "subsumes the power" of the parliament in a way that the original legislation did not intend.

This is a crucial point about transparency and accountability: how long can parliament, and therefore democracy, be sidelined during a health





might fatally undermine the rationale for the vaccine mandates imposed in workplaces nationally.

The action is being taken on behalf of people directly affected by the orders and mandates: nurse and Adelaide Crows AFLW player Deni Varnhagen, who has lost both jobs because she is unwilling to be vaccinated; nurse Courtney Millington; childcare worker Kylie Dudson and teacher Grant Bowyer; and police officers Zac Cook and Rosalyn Smith, whose unvaccinated status has seen them barred from work, too.

The complex challenge is being run by a high-powered legal team led by solicitor Lorretta Polson, with leading silk Simon Ower QC, assisted by

sidelined during a health emergency? We saw these arguments play out robustly, and unsatisfactorily, when Victoria reformed its emergency laws last year.

The legislature is also improperly sidelined, goes the argument, because new rules mandating vaccines are being imposed under the emergency orders rather than through new legislation. These rules could be permanent, and they are certainly significant and controversial, and have a direct impact on individual rights, yet they have been made at the behest of Stevens and merely approved by the governor without parliamentary debate or oversight.

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Testing the limits of emergency powers

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Steven Marshall's Coalition government passed a special Covid-19 Response Act in 2020 to supplement the Emergency Management Act. Without it, the police commissioner had power only to make orders for individuals, not classes of individuals (that is, teachers or nurses).

These supplementary powers lapsed last December, with the government claiming they were no longer necessary.

But political observers suggest it is more about defections from the Liberal Party that have cost Marshall his parliamentary majority – perhaps he dared not risk a vote on the floor to pass the required extension of what were always contentious powers.

This raises the question of whether vaccine mandate orders for classes of individuals in SA are still enforceable. If they are, what

was the point of the additional legislation in the first place?

Vaccine mandates are also attacked head-on in this action as being ineffectual and even counter-productive, and therefore failing the test of appropriate use of emergency powers.

"An infected person who has received one of the three Covid-19 vaccines ... has only a small, if not negligible, and transient reduction the risk of transmitting (the virus) compared to the risk of an infected unvaccinated person," the submission argues.

This medical argument should bring to light a fundamental debate so often ignored in the public square – the relative transmissibility of Covid-19 from vaccinated and unvaccinated individuals. It goes to the heart of whether the unvaccinated pose a risk to anybody but themselves.

The plaintiffs will rely on Flinders University professor Nikolai



Adelaide AFLW player Deni Varnhagen at a protest

Petrovski to lead this medical advice. He is no anti-vaxxer but, rather, a pre-eminent specialist in the field who has produced a Covid-19 vaccine that is being used overseas and awaits Australian approval.

The prospect of the brilliant and practical Petrovski being pitted against the emotive and uber-cautious Spurrier is tantalising. It could be exactly the interrogation of facts the pandemic debate

needs in this country. The lawyers for the plaintiffs want to test the medical advice on which Spurrier has relied.

Perhaps we will finally discover whether there was any official advice about contaminated footballs or pizza box transmissions – some of the nuttier postulations that Spurrier has cast into our Covid considerations.

Ventilation of these issues will go to the latest medical advice

about the extent to which vaccines do or do not prevent infection and transmission of Covid-19 variants; quite apart from their proven role in minimising the consequences of infection.

Thorough examination of the medical advice relied on by governments is exactly the sort of sunlight the public has deserved all along – pity it takes legal action to even hold out that prospect.

The submissions also will argue that while the purpose of the vaccine mandates is to keep crucial workers on the job, they have the opposite effect.

Rather than losing staff to the disease, health, education and law enforcement services have ended up shunning staff because of their vaccination status, without even considering practical work-arounds such as finding specific duties for the unvaccinated or demanding they wear adequate protective equipment.

This all goes to the point of counter-productivity – the emergency orders on vaccine mandates are characterised as a self-defeating farce.

"One of the stated purposes ...

is to maintain and minimise disruption to relevant services from person becoming infected ... (yet) the giving of the directions has caused and will cause an equivalent disruption."

As if these issues are not pressing enough, consider a secondary matter being contested before this case goes to trial. The plaintiffs argue that all existing Supreme Court judges in SA ought to be recused from the case in favour of a retired or interstate judge.

This is because the SA Courts Administration Authority is effectively presided over by the chief justices of the courts. And CAA has imposed a vaccine mandate on court staff.

The argument goes that all SA Supreme Court judges could, in the eyes of a reasonable person, be mindful of the Chief Justice's implicit endorsement of the vaccine mandate, thereby presenting an apprehension of bias. So, better to appoint someone from outside the system.

With any luck the case will be heard in open court before SA's election in March. It should be mandatory viewing.