STATE INTERFERENCE WITH LIBERTY: THE SCOPE AND ACCOUNTABILITY OF AUSTRALIAN POWERS TO DETAIN DURING A PANDEMIC

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ABSTRACT

The detention of citizens by the state during a public health crisis can be justified by the utilitarian need to protect society. The Commonwealth and States possess a variety of powers to achieve this objective, ranging from the criminal law to specialised quarantine and public health legislation. The proper exercise of discretionary powers in response to an emergency is discussed and the changing landscape of international and Australian public health laws is analysed using a novel framework of procedural fairness. Although a few State jurisdictions have adopted provisions which protect civil liberties, the Commonwealth and remaining states lack crucial safeguards. This paper argues that government intrusion on individual liberty to achieve public health objectives can only be acceptable when these powers are balanced by accountability and procedural fairness. On this basis, modernisation and standardisation of legislation around Australia is critically important in responding to a public health threat.

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I INTRODUCTION

> 'No age can safely delude itself with the belief that such dire visitations are things of the past, and that precautions may be disregarded.' [1]
>
> Sir Sherston Baker, 1879

Despite twentieth century scientific advances such as the discovery of antibiotics, the introduction of comprehensive vaccination regimens and improvements in public sanitation, the emergence of a novel or mutated disease threat to society is inevitable. Antibiotic resistance was observed within four years of the introduction of antibiotics and has escalated to the point where extensive bacterial resistance is common in Australian hospitals.[2] Over three hundred emerging infectious diseases have been catalogued since 1940, with high numbers appearing in south-eastern Australia[3] and in surrounding Pacific countries, forming a veritable northern 'ring of fire'.[4] Finally, the spectre of bioterrorism and intentional release of infectious diseases presents additional threats, whether by resurrecting fallen foes such as smallpox or by engineering diseases primed for virulence and effectiveness.[5] The difficulties in detecting a novel infectious disease and developing treatment protocols were illustrated during the severe acute respiratory syndrome (SARS) outbreak in 2003, which spread to 37 countries worldwide and killed 774 people before being contained. Lacking vaccination or treatment, public health authorities had no choice but to utilise coercive interventions such as isolation, quarantine and border closures during the public health crisis to

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1 Sir Sherston Baker, *The Laws Relating to Quarantine* (1879) viii.

2 Peter Collignon, 'Antibiotic resistance – what we need to do about it' (2007) 12(4) *Australian Infection Control* 116.

3 Kate Jones et al, 'Global Trends in Emerging Infectious Diseases' (2008) 451 *Nature* 990.

4 Dani Cooper, *Australia in Biosecurity 'Hotspot'* (2008) ABC News <www.abc.net.au/news> 16 September 2009; Liz Williams, 'Going Global: the Battle against Emerging Disease' (2008) *Australian Biosecurity Cooperative Research Centre for Emerging Infectious Disease* 7.

5 Christopher Davis, 'Nuclear Blindness: An Overview of the Biological Weapons Programs of the Former Soviet Union and Iraq' (1999) 5 *Emerging Infectious Diseases* 509.

control the spread of the unknown disease.[6] Similarly, the rapid escalation of human swine influenza in Australia was partially responsible for the World Health Organisation declaring a pandemic, with extensive screening, quarantine and social distancing efforts instituted by State and Federal governments in early 2009.[7]

The prospect of a new or mutated disease with limited treatment options poses a drastic threat in an interconnected world where nations can no longer afford to rely on geographical distance for protection. In this modern age of rapid travel and communications, the effectiveness and legal accountability of Australian public health emergency management powers has never been properly tested. The laws which enable Commonwealth and State governments to detain people for public health reasons are grounded in utilitarian rationale and for the most part, lacking in regard for human rights and procedural fairness. Since quarantine orders are utilised to confine people who are suspected of having a disease but currently asymptomatic, these powers are inherently discretionary, yet their intrusion upon civil liberties is considerable. The Commonwealth power to make laws with respect to quarantine will be examined in this paper, in addition to criminal sanctions and emergency management and public health powers in current and proposed State laws.

The exercise of executive powers which deprive people of liberty demands rigorous accountability in order to ensure decisions are reasonable and justified. Judicial review is evaluated as a process to achieve oversight by the courts, although the discretionary nature of public health powers and the need for rapid emergency response to preserve national security may pose significant obstacles. The writ of habeas corpus is examined as a historical means of obtaining judicial assessment of civil detention. Finally, the need for procedural fairness and proportionate exercise of powers to balance public health

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6 David Bell and the World Health Organisation Working Group on Prevention of International and Community Transmission of SARS, 'Public Health Interventions and SARS Spread, 2003' (2004) 10(11) *Emerging Infectious Diseases* 1900, 1905.

7 'Australia flu 'may tip pandemic'' *BBC News* (Asia Pacific) 10 June 2009; 'WHO declares first 21st century flu pandemic', *The Australian* (Sydney) 12 June 2009.

objectives with individual interests is discussed with reference to international public health practice and Australian administrative law. Increased consciousness of human rights protections and procedural fairness characterises the World Health Organisation's *International Health Regulations* and the United States *Model State Emergency Health Powers Act* ('*Model Act*') drafted by the Center for Law and the Public's Health, providing a useful modernised comparison with the Australian situation.[8]

II THE EMERGENCY POWERS FRAMEWORK

A *Liberty and Utilitarianism*

The governmental response to a communicable disease may range in scale from the management of infected individuals to mass quarantine and the closure of national borders. The utilitarian rationale for public health detention enables the interests of individuals to be sacrificed in order to safeguard the health, lives and happiness of the greatest number of people. The use of coercive means to protect the community from communicable disease threats has been prevalent throughout the history of Australian public health acts. During the smallpox outbreaks of 1913, the South Australian government ordered defiant citizens into quarantine on Torrens Island in order to protect the public from the risk of infectious disease.[9] Likewise, the need for coercive powers was a paramount concern during the parliamentary debates regarding detention of patients during the 1980s HIV-AIDs crisis.[10] These measures are legally justified, since while the right to

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[8] *International Health Regulations* (2005), opened for signature 23 May 2005, [2007] ATS 29 (entered into force 15 June 2007) henceforth cited as *International Health Regulations* (2005); Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities. *Model State Emergency Health Powers Act* (2001) <http://www.publichealthlaw.net> 3 June 2008. Henceforth cited as *Model State Emergency Health Powers Act* (2001).

[9] 'The Smallpox Epidemic: Protecting the State, Action by the Government' *The Advertiser* (Adelaide) Monday 21 July 1913, 15; see also, Peter Curson and Kevin McCracken, *Plague in Sydney* (1989) and Peter Curson, *Times of Crisis* (1985).

[10] South Australia, *Parliamentary Debates,* Legislative Council, 1 April 1987, 3695 (Robert Lucas) regarding the *Public and Environmental Health Bill*.

personal liberty is among the most fundamental of all common law rights and is protected by the Commonwealth Constitution, it is subject to restrictions based on the safety of the public.[11] The quarantine power was contemplated as a specific exception to an implied constitutional freedom of movement in *Kruger v The Commonwealth*,[12] since public health powers exercised for the welfare and safety of the public are prioritised above the protection of the individual's right to freedom.[13]

Public health interventions tend to be justified on utilitarian principles, where decisions should promote 'good consequences'[14] by preventing pain or unhappiness.[15] Ideally, utilitarian government actions should promote security, predictability and efficiency, by providing the greatest happiness to the greatest number of people.[16] Where collective, coordinated action is required, such as for provision of healthcare, control of borders and management of the population, utilitarianism condones state action.[17] The possibility of benefit to both the individual and society is the ideal conclusion of a public health intervention,[18] as exemplified by the introduction of legislation to encourage the use of seatbelts which provided increased safety to individuals and lessened the burden on the public health and welfare system.[19] In order to achieve this ideal outcome, people who are

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11 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

12 *Kruger v The Commonwealth* (1997) 190 CLR 1, 115-16; upheld in *Al-Kateb v Godwin* (2004) 219 CLR 562.

13 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

14 Adam Kuper and Jessica Kuper, *The Social Science Encyclopaedia* (2nd edition, 1996) 893.

15 Jeremy Bentham, *An Introduction to Principles of Morals and Legislation* (first published in 1789, 2006 edition) 11, 35.

16 John Stuart Mill, Jeremy Bentham and Alan Ryan (ed), *Utilitarianism and Other Essays* (first published in 1861, 1987 edition) 295.

17 Robert Goodin, *Utilitarianism as a Public Philosophy* (1995) 37.

18 Janet Dolgin and Lois Shepherd, *Bioethics and the Law* (2005) 16; Anne Maclean, *Elimination of Morality: Reflections on Utilitarianism and Bioethics* (1993) 88.

19 Criminal sanctions and reduction of damages for failure to wear a seatbelt is arguably a public health intervention. See the *Civil Liability Act* (SA) s49; *Froom v Butcher* [1975] 3 All ER 520; Lawrence Gostin, 'General Justifications for Public Health Regulation' (2007) 121 *Public Health* 829, 830.

deprived of liberty during a pandemic are owed a corresponding ethical obligation by society to provide treatment and adequate care.[20]

Utilitarian principles are fundamentally patriarchal, placing them in conflict with liberalism and autonomy.[21] Yet it is impossible to allow one person the absolute freedom to affect other people's health, well-being and lives without limitation by the state. Mill contemplated that interference in the liberty of an individual should only occur for 'self-protection' in order to 'prevent harm to others'.[22] In *Jacobson v Massachusetts,* the United States Supreme Court stated that principles of self-defence justified the state's intrusion onto individual rights in order to protect the community during a smallpox epidemic. The court determined that the exercise of liberty by an individual which enabled injury to be done to other people would result in disorder and anarchy.[23] In accordance with the argument in *Jacobson*, interference by the state via criminal sanctions, civil detention and other regulation can be justified when autonomous individuals with an infectious disease have the potential to cause harm to others. Additionally, the inability of private defensive remedies such as injunctions or tort to protect citizens from the harms of an infectious disease arguably necessitates government intervention.[24]

In the most extreme situations, government protection of the public might require the use of emergency powers. The declaration of an emergency by the state authorises the executive to exercise wide,

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[20] Lawrence Gostin, Jason Sapsin and Stephen Teret, 'The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases' (2002) 288(5) *Journal of the American Medical Association* 622, 626; *Model State Emergency Health Powers Act* (2001) s604(b).

[21] David Johnston, *The Idea of a Liberal Theory* (1994) 24-26.

[22] John Stuart Mill, *On Liberty* (1859) 22-23.

[23] *Jacobson v Massachusetts* 197 US 11 (1905)

[24] Richard Epstein, 'Let the Shoemaker Stick to His Last: A Defense of the 'Old' Public Health' (2003) 46 *Perspectives in Biology and Medicine* 5138, 5138; Lawrence Gostin, 'When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?' (2003) 55(5) *Florida Law Review* 1105, 1150; See *Andrea Williams v the Attorney-General of Canada* (2005) CanLII 29502 (ON S.C.) where tortious remedies were denied since there was no private law duty to protect class members from the dangers of SARS. Compare *Best v Stapp* (1872) 2 CPD 191 where a person who exposed the public to smallpox was held liable for damages.

discretionary powers in order to handle the crisis. Emergency laws originate from the temporary Roman dictatorships which invested the dictator with authoritarian powers to preserve order during a crisis, strictly governed by a system of constitutional checks and balances, since the purpose of the Roman dictatorship was to protect and preserve the rule of law, not to undermine it. [25] Emergency powers should only be invoked where ordinary powers and procedures are inadequate to cope with a threat and should derogate from the law to the minimum extent necessary to preserve the state.[26] The utilitarian rationale which allows invocation of extraordinary powers to manage an emergency and demands individuals sacrifice personal liberties can only be acceptable when used to preserve the democratic legal system and consequently, when it remains ultimately accountable to the people it was meant to serve.

B *The Scope of State Powers*

1 *The Emergency Management Acts*

Due to the absence of Constitutional provision for the declaration of a state of emergency, State and Territory statutes enable the proclamation of an emergency and subsequent exercise of emergency powers in event of an epidemic. Normally the Commonwealth plays a supportive role in event of a disaster as outlined in administrative agreements.[27] The emergency management acts equip the state governments to deal with large scale disasters of any nature and as a result, are generally not tailored to specifically cope with a public health emergency. Different legislative systems exist in each State and Territory; however the option to delegate a single coordinator across multiple jurisdictions facilitates cooperation.[28]

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[25] Bruce Ackerman, "The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029, 1046.

[26] William Twining, 'Emergency Powers and Criminal Process: The Diplock Report' [1973] *Criminal Law Review* 406, 408-409.

[27] The Commonwealth Attorney General's Department, *Preparing for Emergencies: Plans and Arrangements* (2009) Emergency Management Australia <www.ema.gov.au> 11 February 2009.

[28] *Emergency Management Act 2004* (SA) s18; *Emergency Management Act 1986* (Vic) s7; *State Emergency and Rescue Management Act 1989* (NSW) s15(p); *Emergencies Act 2004* (ACT) s176; *Emergency Management Act 2006* (Tas) s29; *Emergency Management Act* 2005 (WA) s12.

The emergency management acts define an emergency as events which threaten the health and safety of the public, including epidemics and acts of terrorism.[29] Generally, the acts provide for the establishment of emergency management committees which undertake leadership roles in preparing state emergency management plans.[30] The powers which could be utilised for a public health purpose by officials include the authority to remove or evacuate any person or animal to a designated place, direct or prohibit the movement of people, animals or vehicles and direct a person to submit to decontamination.[31] In New South Wales, Victoria and Tasmania, the emergency acts and public health acts make specific provision for powers to avert a risk of danger to the public's health, which include the removal of people by physical force and general provisions which could enable orders for isolation and quarantine.[32] Comparatively, a recent amendment to *Emergency Management Act 2004* (SA) includes specific powers for isolation, segregation, examination and treatment during an emergency.[33] The use of State emergency management acts during a pandemic is limited by the differing procedures and general nature of the criteria for declaring emergencies in each jurisdiction, possibly hampering effective response.

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[29] *Emergency Management Act 2004* (SA) s3 includes epidemics and acts of terrorism; *Disaster Management Act 2003* (Qld) s13; *Emergency Management Act 2006* (Tas) s40 and *Public Health Act 1997* (Tas) s14; *Emergency Management Act* 1986 (Vic) s23; *State Emergency and Rescue Management Act 1989* (NSW) s33; *Emergencies Act 2004* (ACT) s3 has protection of life as an object; *Emergency Management Act 2005* (WA) s50. The *Statutes Amendment (Public Health Incidents and Emergencies) Bill 2009* (SA) proposes to clarify the definition of emergency to include injury or damage to health and to distinguish between public health emergencies and incidents.

[30] *Emergency Management Act 2004* (SA) s9; *Disaster Management Act 2003* (Qld) s49; *Emergency Management Act 1986* (Vic) s10; *State Emergency and Rescue Management Act* 1989 (NSW) s15; *Emergencies Act 2004* (ACT) s143; *Emergency Management Act 2005* (WA) s14; *Emergency Management Act 2006* (Tas) s9.

[31] *Emergency Management Act 2004* (SA) s25 (e), (f) and (fa); *Emergencies Act 2004* (ACT) s163; *Disaster Management Act 2003* (Qld) s77; *Emergency Management Act 2006* (Tas) s44; *State Emergency and Rescue Management Act 1989* (NSW) s37; *Emergency Management Act 2005* (WA) s67.

[32] *Public Health Act 1997* (Tas) s17, *Public Health and Wellbeing Act 2008* (Vic) s199 and s200 and *Public Health Act 1991* (NSW) s4.

[33] *Emergency Management Act 2004* (SA) s25(2)(fb).

2 *Management of Isolated Incidents*

The introduction of effective treatment for most infectious diseases throughout the twentieth century resulted in state public health laws remaining largely unaltered until the emergence of drug-resistant tuberculosis and HIV-AIDs during the 1980s. Limited measures to prevent reckless conduct and intentional infection are available to the States under criminal laws, which enable governments to respond to isolated cases of harm caused by infection with a disease, but are not equipped to function on a large scale. Alternatively, public health legislation allows the states to enforce compulsory examination and detention using coercive powers, but the provisions vary between jurisdictions and not all provide for a staged restriction of freedom depending on the threat to the public.

3 *Criminal Law*

The criminal law has been used as a sanction against morally wrong conduct such as endangering life by deliberate or reckless infection with disease since the first public health statutes of England.[34] The *Crimes Act 1900* (NSW) includes 'causing a person to contract a grievous bodily disease' in the offence of causing grievous bodily harm.[35] Similarly, intentionally causing another person to be infected with a serious disease such as HIV is an offence punishable by 25 years imprisonment in Victoria.[36] Prosecutions for infecting others with HIV have also been brought under provisions for conduct endangering life under the general criminal law.[37] In *R v Parenzee,* the defendant was found guilty of three counts of recklessly endangering life after having unprotected sexual intercourse with three partners, while aware that he was infected with HIV/AIDs and that unprotected

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[34] A statute passed during the reign of James I allowed a person infected or exposed to plague who went amongst the public to be whipped if uninfectious or hung if discovered to have an infectious plague sore. James 1. C. 31 in Sir Sherston Baker, *The Laws Relating to Quarantine* (1879) 7.

[35] *Crime Act 1900* (NSW) s19 and s20.

[36] *Crimes Act 1958* (Vic) s19A. See also the previous *Health Act 1958* (Vic) s22 and s23 for provisions regarding reckless conduct.

[37] *Criminal Law Consolidation Act 1935* (SA) s29.

sexual intercourse would endanger their lives.[38] The Canadian courts have proceeded further, convicting a man of murder after two sexual partners who were unaware of his infectious state during their relationships died of AIDs-related causes.[39] However, convictions for intentionally infecting a person with a disease are rare, dogged by difficulties in proving the act which caused infection and whether real and substantial risk to life existed.[40] Furthermore the criminal law as a means of public health regulation has crucial limitations; namely that it can generally only respond to small scale incidents and will be utilised long after the dangerous behaviour has occurred. The criminal law has also been criticised by Gostin as inappropriate for achieving public health objectives, since it may discourage individuals from being tested and participating in treatment, in addition to the possibility of discrimination by law officials targeting marginalised populations.[41]

4 *State Public Health Acts*

State public health laws provide for notification, testing and notably, detention of people with infectious disease. The State public health acts originated in statutes focused on prevention of nuisance and unsanitary conditions, by measures such as inspection, notification and quarantine.[42] The modern acts intersect with environmental controls, occupational health and safety acts and other regulatory

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38 *R v Parenzee* [2008] SASC 245, *R* v *Parenzee* [2007] SASC 143.

39 See *R v Aziga* [2008] CanLII 60336 (ON S.C.); Barbara Brown, 'Guilty verdict in Hamilton HIV murder case' *The Star* (Hamilton) 4 April 2009. The reasoning adopted by the Ontario court is unlikely to be utilised by English or Australian courts, since it relied upon a previous judgment in *R v Cuerrier* [1998] 2 SCR 371 where fraud as to HIV-status abrogated consent, resulting in aggravated sexual assault.

40 *R v Parenzee* [2008] SASC 245 found sufficient risk of infection during unprotected sexual intercourse existed to uphold a conviction for endangering life; compare with *Mutemeri v Cheesman* (1998) 4 VR 484, 492 where it was held to expose the victim to only the 'mere possibility' of death.

41 Lawrence Gostin, *Public Health Law: Power, Duty, Restraint* (2000) 233-234

42 *Public Health Act 1876* (SA), 39 and 40 Vic., No. 56; *Public Health Act 1875* 38 & 39 Vic., No 55.

regimes.[43] The primary limitation of the State acts is their restriction to a list of controlled notifiable diseases and application to individuals, rather than to the extensive control of a pandemic. Furthermore, legislative reforms in the last three decades have focused on diseases such as HIV/AIDs which are not easily transmissible and therefore require different management compared with traditional communicable diseases spread by casual contact.

The State public health acts vest officials with the power to detain people who are infected with certain prescribed diseases, however the criteria for exercising these powers and the options available differs between jurisdictions. In South Australia, the Chief Executive of South Australian Department of Health may detain persons certified by a medical practitioner as suffering from controlled notifiable diseases, defined as being certain prescribed infectious diseases.[44] Additionally, the Chief Executive may direct a person suffering from a controlled notifiable disease to reside at a specified location, place themselves under the supervision of a medical practitioner or refrain from performing specified work.[45] Failure to comply with directions may result in detention in a place of quarantine.[46] The Western Australian Act currently has a low threshold requirement for exercising the power of quarantine; officials may isolate and quarantine as they 'think fit.'[47] In contrast, the *Public Health Bill 2008* (WA) imposes a test of 'reasonable grounds' for believing a person has a disease before health orders are made.[48] The *Public Health and Wellbeing Act 2008* (Vic) requires that the Chief Health Officer must 'believe' that there is a serious risk to public health posed by the individual, on the basis of certain listed factors such as the nature of the disease, the availability of treatment and the infected person's understanding of the risk to public health, before powers to detain may be exercised.[49] A reasonable attempt, if practicable, must have

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43 Christopher Reynolds, 'Public Health Law in the New Century' (2003) 10 *Journal of Law and Medicine* 435, 437.

44 *Public and Environmental Health Act 1987* (SA) s32.

45 *Public and Environmental Health Act 1987* (SA) s33. See also *Public Health Act 1991* (NSW) s23 and *Public Health Act 1993* (Tas) s42.

46 *Public and Environmental Health Act 1987* (SA) s33(7)(b).

47 *Health Act 1911* (WA) s251.

48 *Public Health Bill 2008* (WA) s84.

49 *Public Health and Wellbeing Act 2008* (Vic) s117 which entered into force on the 1 January 2010.

been made to provide the person with information about the effect of the infectious disease before detention orders may be made.[50] Under the draft *Public Health Bill 2010* (NSW), a medical practitioner must not only be satisfied a person has a specified infectious disease, but that the person constitutes a risk to public health on the basis of their behaviour, before an order is made.[51]

The balance between community health and safety and the civil liberties of people suffering from a disease was a central aspect of the debates during the enactment of the *Public and Environmental Health Act 1987* (SA).[52] The Bill's original power to arrest and quarantine on suspicion without giving reasons was removed in order to prevent abuse.[53] In other jurisdictions, this tension was resolved by requiring the exercise of coercive powers in a qualified and reasoned manner, as a last resort to less restrictive alternatives. The *Public Health Act 1991* (NSW) specifies that authorised medical practitioners must take into account the principle that restriction of liberty must only be imposed if it is the most effective way to protect the public from an individual who poses a threat.[54] In the Australian Capital Territory, Queensland and Victoria, the management and control of infectious diseases is governed by principles requiring that personal liberty is not unnecessarily restricted, privacy is respected, information about the social and medical consequences of a disease is given to affected individuals and appropriate treatment is granted.[55] Public health officials in Victoria must consider alternative interventions which are less restrictive on the rights of individuals before imposing quarantine or isolation.[56] However the 2009 swine influenza outbreak demonstrated the disparity between accepted practice and legislative powers, when health officials in South Australia informally requested

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50 *Public Health and Wellbeing Act 2008* (Vic) s17(1)(d).

51 *Public Health Bill 2010* (NSW) s59.

52 South Australia, *Parliamentary Debates,* Legislative Council, 1 April 1987, 3695 (Robert Lucas) and 3604 (Martin Cameron).

53 South Australia, *Parliamentary Debates,* Legislative Council, 1 April 1987, 3604 (Martin Cameron).

54 *Public Health Act 1991* (NSW) s3A (b); *Public Health Act 1991* (NSW) s23.

55 *Public Health and Wellbeing Act 2008* (Vic) s111; *Public Health Act 2005* (Qld) s66; *Public Health Act 1997* (ACT) s4; *Public Health Bill 2008* (WA) s67.

56 *Public Health and Wellbeing Act 2008* (Vic) s112. See also *Public Health Bill 2008* (WA) s67(2).

home detention for confirmed and suspected cases as a least restrictive alternative to quarantine.[57] Statutory principles which entrench resort to a least restrictive alternative when detaining patients are a relatively recent institution, and will be discussed further in terms of accountability.

C *The Scope of Commonwealth Powers*

1 *The Quarantine Act 1908 (Cth)*

Under section 51(ix) of the Constitution, the Commonwealth was granted power to make laws with respect to quarantine.[58] The *Quarantine Act 1908* (Cth) was enacted to prevent the introduction, establishment and spread of disease in Australia. Although extensively reformed with respect to animal and plant quarantine, the provisions relating to humans have remained largely unchanged since the turn of the century.

The drafters of the Constitution considered that the quarantine power was best exercised by one Parliament rather than many.[59] Federal quarantine powers were considered a necessary compromise between traditional state police laws protecting against impending dangers to health and agriculture and laws which could operate as a barrier to commerce and travel.[60] It was even suggested that the word 'quarantine' was replaced with 'public health in relation to infection or contagion from outside the Commonwealth', however preventing infection spreading within the Commonwealth was also an objective of the drafters. The protection of the 'whole Commonwealth' remained at the forefront of the debate at the conventions.[61] The

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[57] South Australia, *Parliamentary Debates,* House of Assembly, 12 May 2009, 2613 (Vickie Chapman, Deputy Leader of the Opposition) stating that 'people were complying and staying at home if they had been asked'.

[58] *Australian Constitution* s51(ix).

[59] Australasian Federal Convention, *Official Record of Debates* (Melbourne, 1890) 58.

[60] Australasian Federal Convention, *Official Record of Debates* (Sydney, 1897) 1615 (Richard O'Connor).

[61] Australasian Federal Convention, *Official Record of Debates* (Sydney, 1897) 1063-1073 (Richard O'Connor and Sir Issac Issaacs).

quarantine power was subsequently validated as a specialised public health provision in the *Pharmaceutical Benefit's Case*.[62] As a result, appropriately drafted Commonwealth legislation with respect to quarantine could potentially cover the field and override state laws due to the constitutional bar against inconsistency.

The powers granted by s51(ix) of the Constitution were exercised by the Federal Government in passing the *Quarantine Act 1908* (Cth). The Act proposed to comprehensively implement a system of quarantine which empowered the Commonwealth to 'follow the disease wherever it may be found.' [63] In contrast to the State Acts, the *Quarantine Act 1908* (Cth) deals with external quarantining at the border and internal quarantine arrangements within Australia, in addition to matters incidental to quarantine. The purpose of human quarantine in the Act is to protect the public through the identification, monitoring and management of people who have been potentially exposed or have symptoms of a quarantinable disease.[64] The list of prescribed quarantinable diseases includes influenza, plague, tuberculosis and viral haemorrhagic fever.[65] Since April 2009, human swine influenza with pandemic potential has been included in the list of prescribed diseases.[66] A disease or pest may be added to the list by proclamation of the Governor-General allowing flexibility in response to novel public health threats.[67] Prescribed periods of quarantine are mandated for only five of the notifiable diseases.[68]

The *Quarantine Act 1908* (Cth) provides for quarantine at the borders by empowering quarantine officials to detain passengers on board a vessel subject to quarantine or persons illegally arriving in

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62 *Attorney-General (Vic); Ex rel Dale v Commonwealth* ('*Pharmaceutical Benefits Case*') (1945) 71 CLR 237. See Christopher Reynolds, 'Quarantine in times of emergency: See the scope of s51 (ix) of the Constitution' (2004) 12 *Journal of Law and Medicine* 166 for further discussion of the quarantine power.

63 Commonwealth*, Parliamentary Debates,* House of Representatives, 16 July 1907, 504 (William Lyne) and 515 (John Quick).

64 Council of Australian Governments: Working Group on Australian Influenza Pandemic Prevention and Preparedness, *National Action Plan for Human Influenza Pandemic* (2006) 11; *Quarantine Act 1908* (Cth) s4.

65 *Quarantine Regulations 2000* (Cth) s6.

66 *Quarantine Amendment Proclamation 2009* (No. 1) 28 April 2009.

67 *Quarantine Act 1908* (Cth) s13(1).

68 *Quarantine Regulations 2000* (Cth) s42.

Australia.[69] There are general powers to quarantine individuals who are exposed to a disease, infected or reasonably suspected by a quarantine officer of being infected or who have been in a quarantine area within a period of 21 days.[70] When imposing quarantine orders, an official may seek an opinion from a medical practitioner, but there is no positive requirement to do so before making orders.[71] A person is required to perform quarantine until a medical practitioner certifies that they are no longer capable of spreading the disease to other people.[72] An alternative to detention is the power to place people under 'quarantine surveillance' which allows some freedom of movement, subject to monitoring of health and activities by quarantine officials.[73] The surveillance power was utilised soon after enactment during the 1910 Melbourne smallpox outbreak, despite initial public concern about releasing contacts from detention.[74] After the closure of human quarantine stations around Australia following the global eradication of smallpox, surveillance is now the primary power exercised by authorities.[75]

The *Quarantine Act 1908* (Cth) provides extensive powers that can be used by the Commonwealth to control and eradicate a major disease outbreak. An epidemic may be declared by the Governor-General when satisfied that a quarantinable disease or pest exists or is in danger of existing in part of the Commonwealth.[76] Following this proclamation, the Minister may give directions to control an epidemic using quarantine measures or measures incidental to quarantine.[77] State and Territory laws pertaining to quarantine may be superseded during an epidemic, by declaration of the Governor-General.[78] The Act does not define an 'epidemic', leaving the Governor-General with

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69 *Quarantine Act 1908* (Cth) s18 (1)(a), (aa), (ab) and (e).
70 *Quarantine Act 1908* (Cth) s18(1) (b), (ba), (c), (d) and (f).
71 *Quarantine Act 1908* (Cth) s35(1) (1AAAA).
72 *Quarantine Regulations 2000* (Cth) s41(6).
73 *Quarantine Act 1908* (Cth) s34(3) and *Quarantine Regulations 2000* (Cth).
74 'Smallpox: Releasing Passengers' *The Advertiser* (Adelaide) Wednesday 6 April 1910, 9.
75 North Head Quarantine Station closed in 1984; Torrens Island Quarantine Station closed in 1979. The National Archives of Australia <www.naa.gov.au> 3 May 2009.
76 *Quarantine Act 1908* (Cth) s2B.
77 *Quarantine Act 1908* (Cth) s2B and s12B ministerial emergency directions; s12 and 20B declarations in relation to affected areas.
78 *Quarantine Act 1908* (Cth) s2A and s2B.

a broad discretion in identifying the appropriate circumstance, unlike the State emergency acts which have set criteria for emergency declarations. The Act also facilitates coordination between jurisdictions in a pandemic by enabling agreements with State governments.[79] Although State public health detention laws exist side by side without inconsistency with the Commonwealth legislation, the potential for suspension of state laws indicates an intention to cover the field during an emergency.[80]

Nevertheless, modern legislative amendments of the *Quarantine Act 1908* (Cth) have focused upon the provisions governing plants and animals, leaving regulation of human quarantine largely untouched from the time of enactment. Since public health detention is one of the few instances where personal liberty can be infringed by the executive, the proper exercise of these powers by the States and Commonwealth is of critical importance and will be examined in the next chapter.

III THE ACCOUNTABILITY OF EMERGENCY POWERS IN AUSTRALIA

A *Judicial Review*

The exercise of executive powers with drastic consequences for an individual's freedom can only be justified when carried out for the protection of the public. However the sacrifice of individual rights for the greater good is only acceptable in a democratic society when powers are exercised in a manner which is not capricious or unreasonable and executive bodies are held accountable by judicial review of decisions. The *Quarantine Act 1908* (Cth) was introduced partially to combat perceived difficulties in administering the colonial acts which led to arbitrary, discriminatory and ineffective use of power, where a 'well-groomed man' needed only to sit still while the

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79 *Quarantine Act 1908* (Cth) s11.

80 Christopher Reynolds, 'Quarantine in times of emergency: The scope of s51 (ix) of the Constitution' (2004) 12 *Journal of Law and Medicine* 166, 168; *Ex Parte Nelson (No 1)* (1928) 42 CLR 209, 217.

doctor examined the second-class passengers and crew.[81] In order to enforce the limitations on the exercise of executive powers and uphold the 'rule of law', bureaucratic decisions must be subject to judicial oversight.[82] This is critically important when coercive administrative powers deny an innocent individual their freedom, blurring the line between executive and judicial power due to the large impact on personal rights.[83] While quarantine powers are amongst the few acknowledged exceptions to the judicial insistence that deprivation of personal liberty is for the courts to determine,[84] this does not automatically place these decisions beyond judicial scrutiny.

1 *Justiciability*

Emergency powers exercised by the government during a pandemic may become subject to issues of justiciability, which renders some executive decisions unsuitable for evaluation by the judiciary. A major outbreak of an infectious disease could potentially result in drastic executive action such as the closure of borders, travel restrictions between certain international destinations and the deployment of the army to assist State governments in maintaining services and order.[85] Despite the possibility that significant numbers of people could be detained by public health officials in this situation,

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[81] Commonwealth, *Parliamentary Debates,* House of Representatives, 16 July 1907, 551 (William Wilks); see further Peter Curson and Kevin McCracken, *Plague in Sydney* (1989) 169-174 and Peter Curson, *Times of Crisis* (1985) 114 for examples of historical discriminatory use of health powers against Chinese immigrants and certain socio-economic classes.

[82] Albert Venn Dicey, 'The Development of Administrative Law in England' (1915) 31 *Law Quarterly Review* 148, 152; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

[83] William Alexander Robson, *Justice and Administrative Law* (3rd edition, 1951) 6.

[84] *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11 per Jacobs J.

[85] The Severe Acute Respiratory Syndrome (SARS) epidemic destabilised the economies of Hong Kong, Singapore and Taiwan and unprecedented travel restrictions were implemented around the world. See Theresa Ly, Michael Selgelid and Ian Kerridge 'Pandemic and Public Health Controls: Toward an Equitable Compensation System' (2007) 15 *Journal of Law and Medicine* 296, 298 and Lawrence Gostin, Ronald Bayer and Amy Fairchild, 'Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome' (2003) 290 (24) *Journal of the American Medical Association* 3229.

competing considerations of national security and international relations have traditionally made such decisions inappropriate for judicial review.[86]

In *Council of Civil Service Unions v Minister for the Civil Service,* the House of Lords reviewed a decision made by the Minister for Civil Service preventing staff at the Government Communications Headquarters from participating in an unapproved trade union.[87] Lords Diplock and Roskill concurred that the executive decision took precedence over the interests of individuals, since the executive was the sole judge equipped with information to make the determination of what national security requires.[88] The court concluded that if national security is the proven foundation of the decision, judicial investigation of individual grievance is precluded.[89] However Australian courts have not regarded the interests of national security as being automatically conclusive of non-justiciability. No matter the breadth of the discretion or the possible difficulty for the court in assessing a decision, in the *Australian Communist Party* case, Dixon J stipulated that the Constitution subjected the executive and parliament to the operation of the 'rule of law',[90] a concept which has been considered integral to Australian democratic society.[91] In *Choudry v Attorney-General* the court stated that a precise 'affidavit' in support of the public interest is required as the 'credibility of effective judicial supervision' depends on the public appreciation that the competing public interests are being balanced by an independent judiciary.[92]

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86 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *Minister for Arts, Heritage and Environment v Peko Wallsend Ltd* (1987) FCR 274.

87 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408-412, 417-423.

88 *The Zamora* [1916] 2 A.C. 77, 107; *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374, 408-412 and 417-423.

89 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408-412, 417-423.

90 *Australian Communist Party v The Commonwealth* (1950) 83 CLR 1, 60-61.

91 *McGraw-Hinds (Aust) Pty Ltd v Smith* 144 CLR 633, 670 as per Murphy J.

92 *Choudry v Attorney-General* [1999] 2 NZLR 582, 598; *Haj-Ismail v Madigan* (1982) 45 ALR 379; *Brightwell v Accident Compensation Commission* [1985] 1 NZLR 132; *Young v Quin* (1985) 59 ALR 225.

Furthermore, the argument that the executive is the sole judge of national security has been potentially undermined in *Thomas v Mowbray,* where orders imposing civil detention were considered amenable to judicial decision-making. The judiciary was considered to be no stranger to assessing whether infringement of individual liberty was reasonably necessary for the protection of the public. Although *Thomas v Mowbray* involved the detention of potential terrorists, Gleeson CJ drew an analogy between issues which predict a 'danger to the public' and the decisions made by public health authorities. The court's role in imposing, and arguably reviewing, civil detention orders was considered an 'essential commitment to impartiality' due to the 'focus on the justice of the individual case'.[93] The legislation in question validly required the courts to inquire whether the exercise of powers was 'reasonably necessary' for protecting the public.[94] The court noted the analogous standard adopted under the *Quarantine Act 1908* (Cth) that specifically defines 'quarantine' to include actions which are 'reasonably appropriate and adapted' to the control and eradication of an epidemic, indicating that executive actions based on this criterion could be reviewed by the judiciary.[95] However Hayne J in dissent criticized the need to balance the individual rights of the detainee against the protection of the public, since it would require the court to evaluate intelligence which was incomplete, conflicting or unavailable, echoing concerns raised in *Council of Civil Service Unions*.[96]

Consequently, if a disease was released in an act of terrorism or otherwise compromised national security, decisions to quarantine individuals might become subject to questions about justiciability. Despite historic judgments rendering these matters non-justiciable, it is contended that integral safeguards such as the rule of law and judicial willingness to assess questions of public protection might enable the courts to supervise areas previously reserved exclusively to the executive.

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93 *Thomas v Mowbray* (2007) 233 CLR 307, 335.
94 Ibid 332-333.
95 *Quarantine Act 1908* (Cth) s4(2); *Thomas v Mowbray* (2007) 233 CLR 307, 416.
96 *Thomas v Mowbray* (2007) 233 CLR 307, 479.

2 *Review of Discretionary Powers*

The *Quarantine Act 1908* (Cth) has no provision for appeal or review of the exercise of powers to detain, beyond the ability to request independent medical assessment in non-emergency situations. Upon the proclamation of an epidemic by the Governor-General, the Minister is empowered to 'give such directions and take such action as he or she thinks necessary to control and eradicate the epidemic' which implies a vast discretion in the exercise of the quarantine powers.[97] Discretionary powers allow the executive flexibility in controlling an epidemic, and yet these powers can be arbitrary, uncertain and leave open the possibility that decisions based on unacceptable criteria could be made, such as historical incidents where entire ethnic groups of people were quarantined during the Sydney plagues.[98]

However the broad discretionary provisions in the *Quarantine Act 1908* (Cth) are fettered by reasonableness requirements in the definition of quarantine, which require the actions taken by a minister to be 'reasonably appropriate and adapted' to the control and eradication of an epidemic.[99] The *Administrative Decisions (Judicial Review) Act 1977* (Cth) specifically mentions the invalid exercise of a discretion as a ground of judicial review.[100] In *Rooke's Case* the guiding principle in the exercise of discretion was for the decision-maker to discern between wrong and right and not to act according to their own 'wills' and 'private affectations.'[101] A decision-maker's conclusions must not be so 'unreasonable' that no 'reasonable authority' would have come to them, otherwise the courts can intervene.[102] Nevertheless, since qualified quarantine officers and medical staff are liable to be making the decision to quarantine individuals, it is probable that courts would defer to their expertise. Therefore the most practical method of review is assessment by an

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97 *Quarantine Act* 1908 (Cth) s2B(1) and (2).

98 Peter Curson and Kevin McCracken, *Plague in Sydney* (1989) 169-174; see also Peter Curson, *Times of Crisis* (1985) 114.

99 *Quarantine Act 1908* (Cth) s4B(2); *Coal and Allied Operations Pty Ltd v Australian Industrial Relationships Commission* (2000) 203 CLR 194.

100 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s5(2)(d) (e) (f).

101 *Rooke's Case* (1598) 77 ER 209 (CP).

102 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 228.

independent practitioner, which is currently unavailable in a time of crisis.[103]

The vast discretionary scope of the *Quarantine Act 1908* (Cth) was criticised in the judgment of the High Court in *Ex Parte Nelson.* The court was concerned that under the provisions of the Act, there was a possibility that an individual could be detained for an unspecified length of time.[104] That diseases and emergencies needed to be declared by proclamation and that stipulated conditions guided the exercise of discretion was considered immaterial by the court.[105] Since a quarantine officer need only 'reasonably' suspect a person is infected with a quarantinable disease,[106] the court emphasised that '[t]he actual existence of disease is not essential' for powers to be exercised by the executive, citing the example of a 'real or imaginary' disease which may or may not exist in a location in the state, authorising quarantine.[107] While the scope of discretion would be tempered by statutory requirements for reasonableness and the *Wednesbury* doctrine, abusive or disproportionate use of the power could become non-justiciable due to national security reasons as discussed above.[108]

Although the primary concern of the court in *Ex Parte Nelson* was Commonwealth interference with interstate trade and commerce, the criticisms of discretion, lack of accountability and procedural fairness still remain relevant since no reform has addressed these shortcomings with respect to human quarantine. Even recently implied provisions of natural justice or procedural fairness, which apply to any statutory power that affects the interests of an individual,[109] may be abrogated in situations of urgency or involving

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103 *Quarantine Act 1908* (Cth) s35C(3).

104 *Ex Parte Nelson (No 1)* (1928) 42 CLR 209, 222–223; *Quarantine Act 1908* (Cth) s45(1).

105 *Ex Parte Nelson (No 1)* (1928) 42 CLR 209, 223; *Quarantine Act 1908* (Cth) s13(1).

106 *Quarantine Act 1908* (Cth) 18(1)(ba).

107 *Ex Parte Nelson (No 1)* (1928) 42 CLR 209, 223.

108 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 228.

109 *Kioa v West* (1985) 159 CLR 550, 632.

national security.[110] It is contended that the broad discretionary provisions of the *Quarantine Act 1908* (Cth) fail to strike a balance between efficiency and fairness; it is also probable that the lack of procedures and guidelines would create confusion and uncertainty in a situation of crisis, in addition to manifest injustice.

3 *Review of the State Emergency Management Acts*

The declaration of a state of emergency under the State acts is a subjective decision which enables the use of extraordinary government powers. During an emergency, actions carried out in good faith by officials or volunteers are protected from civil or criminal liability[111] and may be subject to immunisation by retrospective legislation.[112] Formal procedures for review of human detention imposed during a state of emergency only exist in the new *Public Health and Wellbeing Act 2008* (Vic), with provision for 24-hourly assessment of public health detention in a state of emergency to determine whether continued detention was reasonably necessary to eliminate or reduce a serious risk to public health.[113] In other jurisdictions, the declaration and termination of a state of emergency is contended to be the critical limitation on the use of extraordinary powers which may intrude upon individual liberty.

The declaration of a state of emergency is the precursor to authorising the use of extraordinary powers. Under the State acts, this may occur by vice-regal or ministerial proclamation.[114] This is

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110 *South Australia v Slipper* (2004) 136 FCR 259, 284-5 [113]; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

111 *Emergency Management Act 2004* (SA) s32; *Disaster Management Act 2003* (Qld) s144; *Emergency Management Act 2006* (Tas) s55; *Emergency Management Act 1986* (Vic) s37; *State Emergency and Rescue Management Act* 1989 (NSW) s41; *Emergency Management Act 2005* (WA) s10; *Emergencies Act 2004* (ACT) s198.

112 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 validated retrospective legislation which allowed prosecution of war crimes for people who were not citizens of Australia during the Second World War.

113 *Public Health and Wellbeing Act 2008* (Vic) s200.

114 *Emergency Management Act 2004* (SA) s22-24; *Emergency Management Act 1986* (Vic) s23; *State Emergency and Rescue Management Act 1989* (NSW) s33; *Disaster Management Act 2003* (Qld) s 69; *Emergency Management Act 2005* (WA), s56(1); *Emergencies Act 2004* (ACT) s156; *Emergency Management Act 2006* (Tas) s42.

arguably problematic, since those who declare the emergency should not derive greater powers from the proclamation.[115] Furthermore, judicial review of a declaration of emergency, which is fundamentally a question of fact, is fraught with difficulties.[116] Where it is obvious that emergency powers should be utilised - such as in the midst of the outbreak of a disease - the courts are unlikely to question executive decisions.[117]

However even a declaration of emergency founded on the apprehension of a crisis, such as a WHO announcement of a public health emergency of international concern which had not yet affected Australia, might still be refused judicial review.[118] While the courts have discarded the doctrine of Crown immunity and eagerly embarked on the judicial review of most ministerial discretionary powers,[119] declarations of emergency often raise issues of justiciability due to national security, policy and expediency.[120] The courts could only hold a declaration of emergency to be void if the appropriate procedures for enacting the declaration were not followed or if the emergency legislation itself was constitutionally invalid.[121]

The termination of an emergency determines when the exercise of extraordinary powers ceases to be lawful.[122] Lord Wright in *Liversidge v Anderson* stated clearly that the 'powers cease with the emergency'.[123] The legal conclusion of the emergency will determine the duration of emergency powers, rather than the actual cessation of the disaster. The *Emergency Management Act 2004* (SA) requires declarations of disaster to be renewed after four days by both Houses of Parliament and allows revocation of declarations at any time by the

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115 Commonwealth, *Parliamentary Debates,* House of Representatives, 23 February 1978, 158-159 (William Hayden, Leader of the Opposition).

116 *Dean v Attorney-General of Queensland* [1971] Qd R 391, 404-5.

117 *King-Emperor v Benoari Lal Sarma* [1945] AC 14, 21.

118 *The State (Walsh) v Lennon* [1942] IR 112; the existence of a war outside of neutral Ireland was sufficient to constitute a state of war.

119 *R v Toohey* (1981) 38 ALR 439.

120 *Hutton v Attorney-General* [1927] 1 Ch 427, 439 (ChD).

121 *Liyange v The Queen* [1967] AC 259; legislation to facilitate rapid trials of people involved in a coup d'etat was unconstitutional and struck down.

122 See additionally, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 151; *R v Halliday* [1917] AC 260.

123 *Liversidge v Anderson* [1942] AC 206, 273.

Governor.[124] Declarations of emergency only remain in force for 48 hours and may be extended only with the approval of the Governor.[125]

In contrast, declarations of emergency made in New South Wales must not exceed thirty days[126] while declarations in Victoria must not exceed a month.[127] The Tasmanian legislation specifically mentions an emergency relating to disease in humans and animals and sets a limit of twelve weeks.[128] The Australian Capital Territory does not specify an expiration of emergency declarations.[129] Strict time limits and provisions for regular review by parliament are important safeguards in ensuring the state of emergency is not unduly prolonged.

In the absence of a formal termination, the courts have stated that the executive has the responsibility to periodically review the need for continuance or the courts might act. Lord Diplock suggested in *Teh Cheng Poh v Public Prosecutor* that the courts could act when a proclamation of emergency had failed to be revoked as an abuse of discretion.[130] Nevertheless this is undesirable and the current frequent parliamentary review and strict upper limits on the duration of the emergency in most jurisdictions is ideal. [131]

B *Recourse to Habeas Corpus*

The writ of habeas corpus is available in situations of emergency and is contended to be the primary avenue of accountability where acts lack formal procedures for review or questions of national security have arisen. The review of Chief Executive decisions by habeas corpus has been accepted in modern times, requiring prompt

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124 *Emergency Management Act 2004* (SA) s24.
125 *Emergency Management Act 2004* (SA) s23.
126 *State Emergency and Rescue Management Act 1989* (NSW) s35(2).
127 *Emergency Management Act 1986* (Vic) s23(6).
128 *Emergency Management Act 2006* (Tas) s42.
129 *Emergencies Act 2004* (ACT).
130 *Teh Cheng Poh v Public Prosecutor* [1980] AC 458, 473 (PC).
131 Commonwealth*, Parliamentary Debates,* House of Representatives, 23 February 1978, 158 -159 (William Hayden, Leader of the Opposition).

justification to the judiciary.[132] Even when decisions have been characterised as solely for the executive to determine, on the grounds of national security or in situations of emergency, the courts have emphasised the requirement for a 'reasonable' basis for a subjective decision to detain.

The *Quarantine Act 1908* (Cth) qualifies the power to detain individuals with the requirement that officials must reasonably believe or suspect the individual is infected with a disease.[133] Whether a court considering an application for habeas corpus will accept the detainer's subjective satisfaction that the detainee is a threat to public security or whether a 'reasonable basis for such a subjective state' is required is a central issue in contemporary habeas corpus applications.[134]

An application for habeas corpus in *Green v Secretary of State for Home Affairs* reviewed whether the power for ordering civil detention was exercised subjectively or objectively. The court presumed that the Secretary of State had 'what he considered reasonable cause for his belief'.[135] Similar to quarantine, internment orders involved civil rather than criminal detention. These wartime detentions were justified on the basis that in a time of grave national emergency it was imperative that 'ancient liberties' were 'placed in pawn for victory'.[136]

In *Liversidge v Anderson* the test of an official's 'reasonable belief' that a person was a danger to the public was considered to be largely subjective, justifying the detention of civilians with 'hostile associations' during the Second World War.[137] In recent times, the strongly-worded dissent of Lord Atkin in *Liversidge v Anderson* has gained acceptance as the appropriate test, especially in detention which does not involve national security. He stated that the court's role was to ensure that coercive action was justified by law and the

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132 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 632; *R v Toohey* (1981) 38 ALR 439.

133 *Quarantine Act 1908* (Cth) s18(1). Arguably a similar requirement for reasonable belief exists in the *Public Health and Wellbeing Act 2008* (Vic) s117, since it stipulates objective factors which must be taken into account.

134 David Clark and Gérard McCoy, *The most fundamental legal right: habeas corpus in the Commonwealth* (2000) 95.

135 *Green v Secretary of State for Home Affairs* [1942] AC 284, 295.

136 *Ex Parte Sullivan* [1941] 1 DLR 676, 682 per Hope J.

137 *Liversidge v Anderson* [1941] 3 All ER 338, 350.

courts were all that stood between the subject and attempted encroachments on liberty by the executive. [138] This line of authority indicates that the courts would no longer accept the subjective satisfaction of decision makers that an applicant should be quarantined, requiring reasonable grounds for the belief. Where the laws of quarantine lack procedural fairness, the writ of habeas corpus provides a viable recourse to the courts and mechanism of review in event of unwarranted or excessive violations of civil liberty.

C *Accountability of State Powers to Isolate and Quarantine*

State and Territory powers to isolate and quarantine individuals generally provide for regular review and the right to a hearing. The greatest weakness of the system is a lack of uniformity, which makes the prospect of enforcing cross-border orders legally complex. The Acts are also limited in scope by a list of notifiable diseases, which has been replaced in international health instruments by criteria designed to respond to diverse threats.

Under the *Public and Environmental Health Act 1987* (SA) the procedure for detaining a person is strictly defined in a series of stages. A magistrate must issue a warrant for detention, with reasons provided to the person in writing. The legislation requires review by a magistrate after 72 hours and limits detention periods to 6 months unless authorised by a Supreme Court judge. Examinations by medical practitioners are required every four weeks or less, as specified by a magistrate or judge, provided the person consents.[139] Review of Chief Executive directions which infringe on liberty is available by application to a magistrate.[140] Similarly, New South

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138 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 initially followed the 'no review of subjective satisfaction' doctrine. *IRC v Rossminster* [1980] AC 952 per Lord Diplock acknowledging that the dissenting speech of Lord Atkin was correct; *George v Rockett* (1990) 170 CLR 104; *DPP (Cth) v Toto-Martiner* (1993) 119 ALR 517, 529 cited with approval. See Clark and McCoy, above n 134, for more information.

139 *Public and Environmental Health Act 1987* (SA) s32.

140 *Public and Environmental Health Act 1987* (SA) s33(3) such as directions to reside at a specified place, refrain from specified work or place themselves under the supervision of a medical practitioner.

Wales legislation provides for the revocation, confirmation or varying of public health orders by a tribunal, as soon as is reasonably practicable.[141] The enforceable legal right to a hearing before a magistrate is a fundamental safeguard against improper use of detention powers and is one of the few protections currently integrated into legislation.

Under previous legislation in Victoria, officials exercising the power to make orders had to have a 'reasonable belief' that the person posed a risk to public safety, preventing the capricious exercise of power.[142] Comparatively, under the new *Public Health and Wellbeing Act 2008* (Vic), the Chief Executive must have regard to listed factors before making a public health order, including the nature of the disease, the availability and effectiveness of treatment, whether urgent action will significantly affect the public health outcome and whether the affected person understands the risk to the public.[143] Furthermore, the time limit placed on detention in the Victorian act ensures regular review by the courts.[144] Decisions are governed by principles requiring that personal liberty is not unnecessarily restricted under Australian Capital Territory, Queensland and Victorian legislation,[145] while the question of whether an individual poses a threat to society is relevant to imposing detention in New South Wales.[146] These modernised State acts generally provide procedural fairness due to principles guiding the exercise of powers and the right to a hearing; however the statutes have no apparent capacity to deal with mass detentions during an emergency.

Unlike the standard list of notifiable diseases in Australian State, Territory and Commonwealth legislation which narrowly determines

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141 *Public Health Act 1991* (NSW) s24-26. Decisions are also appealable under the *Administrative Decisions Tribunal Act 1997* (NSW).

142 *Health Act 1958* (Vic) s121.

143 *Public Health and Wellbeing Act 2008* (Vic) s117 and s113(2).

144 The *Public Health and Wellbeing Act 2008* (Vic) s121-122 requires review within 7 days by the Chief Health Officer and provides for appeal to VCAT.

145 *Health and Wellbeing Act 2008* (Vic) s112; *Public Health Act 2005* (Qld) s66; *Public Health Act 1997* (ACT) s4.

146 *Public Health Act 1991* (NSW) s3A (b) and s23.

the circumstances in which coercive powers can be exercised[147] international health instruments have taken a different approach which emphasises flexibility. The *International Health Regulations* utilised by the World Health Organisation require an assessment about whether a disease poses a 'public health risk'.[148] A public health risk includes unusual or unexpected diseases, diseases with an unknown cause and diseases which have a serious international public health impact.[149] The broad definition of a 'public health risk' in the *International Health Regulations* is quantified by extensive criteria which may increase accountability, in addition to providing increased effectiveness in combating a novel infectious disease.[150] Similarly, the *Model Act* drafted in the United States enables response to non-specific threats which constitute a 'public health emergency.'[151] The *International Health Regulations* and *Model Act* both anticipate public health risks posed by biological, chemical or nuclear agents, indicative of the widespread fear of sophisticated terrorist attacks in the early 21st century.[152] Yet while the listed model of diseases may be inefficient in addressing the diverse public health risks which arise in an interconnected world, the list of notifiable diseases determined by proclamation may limit abuse of discretion and promote accountability in the exercise of powers.

The powers designed to consider single cases are unsurprisingly fortified with provisions for accountability and review, while the legislative provisions for dealing with emergencies are the least amenable. The courts may review whether executive actions were 'reasonably necessary' for protecting the public and discretionary powers are subject to *Wednesbury* unreasonableness doctrines, although national security concerns may displace judicial review.

147 *Public and Environmental Health Act 1987* (SA) Schedule I; *Public Health Act 1991* (NSW) Schedule I; *Health (Infectious Diseases) Regulations 2001* (Vic) s5; *Public Health Regulations 2000* (ACT) Schedule I; *Public Health Act 1993* (Tas) s40; *Quarantine Regulations 2000* (Cth) s6.

148 *International Health Regulations* (2005) art 1.1.

149 *International Health Regulations* (2005) annex 2.

150 *International Health Regulations* (2005) annex 2.

151 *The Model State Emergency Health Powers Act* (2001) s401 and s103(m).

152 See Davis, above n 5; see also Gostin, above n 24, 1105; M. L. Grayson, 'The difference between biological warfare and bioterrorism: Australia finally makes a start towards real preparedness for bioterrorism' (2003) 33 *Internal Medicine Journal* 213.

Habeas corpus remains one of the primary mechanisms for allowing the courts to review a decision for detention, in the absence of explicit legislative provisions for judicial hearings or review. The balance between ensuring effective action when dealing with a pandemic and ensuring accountability in step with basic procedural fairness principles and modern approaches to public health will be discussed in the next chapter.

IV CHANGING APPROACHES TO PUBLIC HEALTH REGULATION

A *Necessity for Procedural Fairness*

The vast latitude granted to discretionary administrative decisions during situations of crisis demands adequate procedural fairness provisions to protect civil liberties. Lack of procedural fairness can undermine the efficacy of public health laws, with patients fleeing or being unable to question the validity of public health interventions. In the aftermath of the failure to prevent tuberculosis patient Andrew Speaker from travelling while he posed a possible health threat, the CDC focused upon strengthening due process provisions when seeking to restrict an individual's liberty.[153] An unclear or ambiguous system will not only leave public health officials uncertain about the ambit of their powers, but may result in widespread public panic. During the 2003 SARS epidemic in Beijing, arbitrary government actions and the threat of martial law resulted in millions of migrant workers fleeing the city in order to escape detention and quarantine.[154] Procedural fairness requires affected parties to receive reasonable and adequate notice of action intended by the government, the opportunity to be heard in a reasonable time, disclosure of relevant information, access to counsel and an independent, unbiased decision maker, the right to equality and the imposition of the least restrictive alternative

153 Department of Health and Human Services, 'Control of Communicable Diseases: Proposed Rule' (2005) 42 *The Federal Register* Parts 70 and 71, 71895.

154 Charles Hutzler, 'China Reverts to Top-down Rule with Heavy Hand to Fight SARS' *Wall Street Journal*, May 8 2003; Arthur Kleinman and James Watson (eds) *SARS in China: Prelude to Pandemic?* (2006) 56.

required to counter the threat. These basic principles have been generally adopted in the *International Health Regulations*, the *Model Act* and the *Public Health and Wellbeing Act 2008* (Vic) as an integral part of an effective and accountable public health response.

B *Right to a Hearing*

The right to a hearing prior to the enforcement of an order of public health detention has historically been considered impractical, due to the urgency inherent in containing a disease threat. In *R v Davey*, the court permitted the public authorities to order summary removal of infectious patients to a hospital, without a prior hearing, in order achieve the objects of the legislation. However the court emphasised that a means for detained patients to question these orders afterwards was necessary, whether by certiorari or habeas corpus.[155] This is consistent with the variable content of procedural fairness, depending on the circumstances. Where the urgency of quarantine requires immediate response, procedural fairness does not require decision makers to hear affected parties prior to making an order.[156] Therefore to enable public health officials to efficiently manage a disease threat while enabling proper scrutiny of decisions, the right to a hearing is generally provided in legislation only after detention orders have been utilised. However even the right to a timely post-detention hearing is not provided by the common law in Australia and is protected in only a handful of the State acts enabling public health detention. Generally a hearing must occur as soon as possible, except in South Australia where it must occur within 72 hours.[157] The *International Covenant on Civil and Political Rights* requires parties to protect civil liberty against arbitrary infringement, which can only be ensured by appropriate review and appeal provisions.[158] The *Model Act* subjects

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155 *R v Davey* ([1899] 2 QB 301.

156 *Kioa v West* (1985) 159 CLR 550; *Pacific Century Production Pty Ltd v Watson* (2001) 113 FCR 466, dealing specifically with hearings prior to orders made under the *Quarantine Act 1908* (Cth) pertaining to goods quarantined.

157 *Jago v District Court of NSW* (1989) 168 CLR 23; *Public and Environmental Health Act 1987* (SA) s32; *Public Health Act 1991* (NSW) s25; *Public Health and Wellbeing Act 2008* (Vic) s122.

158 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 13 November 1980) art 9(1).

orders for isolation or quarantine to judicial review, with court rulings required within 48 hours and hearings scheduled within 24 hours.[159] Only in extraordinary circumstances and for good cause may the public health authority request an extension of time.[160] The right to a hearing is a procedural prerequisite of the exercise of powers, as a key element of an accountable public health regime.

In addition to hearings for the appeal or extension of orders, it is argued that following the exercise of a coercive power there should be mandatory hearings to confirm a detention order. The Legal Working Party of the Intergovernmental Committee on AIDS recommended court confirmation of detention orders within three days.[161] Public health orders must be confirmed by a tribunal in New South Wales, but the requirement is absent in other Australian jurisdictions.[162] Similarly, best practice under the *Model Act* requires hearings to confirm a quarantine or isolation order within five days of filing a petition.[163] Since emergency powers need to be exercised and take effect immediately, confirmation and review of orders may require the establishment of a specialised court or administrative body that could address mass applications within short periods of time. Under the draft *Public Health Bill 2010* (NSW), the Administrative Decisions Tribunal, on inquiry, will confirm a public health order within seven days.[164]

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159 *Model State Emergency Health Powers Act* (2001) s605(c)(1)-(2); see also Gostin, Sapsin and Teret, above n 20, 626.

160 *Model State Emergency Health Powers Act* (2001) s605(c)(3).

161 Intergovernmental Committee on AIDs and the Commonwealth Department of Health, Housing and Community Services, *Final Report of the Legal Working Party of the Intergovernmental Committee on AIDS* (1992); National Public Health Partnership, *Principles to be Considered when Developing Best Practice Legislation for the Management of Infected Persons who Knowingly Place Others at Risk* (2003) The Department of Human Services <http://www.dhs.vic.gov.au> 22 March 2009.

162 *Public Health Act 1991* (NSW) s24-26.

163 *Model State Emergency Health Powers Act* (2001) s605(b).

164 *Public Health Bill 2010* (NSW) s61. However this review procedure applies only to Category 5 conditions, which under the schedule, is defined as AIDs or HIV. Category 4 diseases of pandemic potential are not included, such as human swine influenza, severe acute respiratory distress syndrome and avian influenza.

Nevertheless, the practical reality for a person detained under temporary quarantine order is that a non-specialised judicial or administrative officer may not provide the ideal mechanism for reviewing the shortcomings of medical specialists.[165] Instead it is possible that the existing provision under the *Quarantine Act 1908* (Cth) which enables a person to obtain independent medical assessment is of greater functional value.[166] General practitioners have been shown to be the preferred source of diagnosis and management for the Australian public in event of a smallpox bioterrorism event.[167] Unfortunately the scope of the provision is currently limited and would require amendment to apply to an emergency situation.

C *Right to Counsel*

The right to counsel during a judicial hearing regarding civil detention is not explicitly provided by Australian common law or by statute. Nevertheless, it is arguable that in an oral hearing, dealing with complex and serious matters, the court could not refuse the request for counsel without violating natural justice.[168] The necessity for legal representation for procedural fairness has been recognised in the *Public Health Bill 2008* (WA) which would require a person subject to a health order to be informed of their rights and advised to obtain legal advice.[169] Comparatively, the *Model Act* requires that counsel is appointed at state expense to represent individuals or groups who are currently or about to be isolated or quarantined.[170] This was notably adopted in the Virginia Code which provides all people access to state-provided counsel before and during a court review. [171] However the practical difficulty of providing legal counsel for large numbers of

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165 Department of Health and Human Services, 'Control of Communicable Diseases: Proposed Rule' (2005) 42 *The Federal Register* Parts 70, 71, 71895.

166 *Quarantine Act 1908* (Cth) s35C(3).

167 David Durrheim et al, 'Australian Public and Smallpox' (2005) 11(11) *Emerging Infectious Diseases* 1749, 1763-5.

168 *Cains v Jenkins* (1979) 28 ALR 219, 230.

169 *Public Health Bill 2008* (WA) s85(3).

170 *Model State Emergency Health Powers Act* (2001) s605(e).

171 *Health Act* 32.1 VA CODE ANN (Michie) §32.1-48.010 (2004).

people within a short timeframe has been acknowledged by the Virginia Health Department.[172]

D *Right to Equality*

Epidemic diseases and detention have historically been associated with discrimination and oppression. The English *Contagious Diseases Act 1864* enabled the compulsory examination of prostitutes until it was repealed under public pressure.[173] The arbitrary arrest, examination and detention of prostitutes did little to improve public health since rates of syphilis and gonorrhoea actually increased during the operation of the Acts.[174] Similar 'moral outrage' against victims occurred during the AIDs epidemic in the 1980s,[175] including suggestions that victims of the virus should be compulsorily tattooed and placed in quarantine facilities.[176] In order to exercise powers of detention effectively, public health officials must cultivate the trust of the community by non-discriminatory and equitable decision-making.[177] Gostin contends that respect for the dignity of individuals is central to a public health response, because of the protection it

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[172] Virginia Department of Health, *Quarantine and Isolation: Virginia's Approach* (2005) Centre for Disease Control <http://www.cdc.gov/> 14 January 2009.

[173] *Contagious Diseases Prevention Act 1864* 27 & 28 Vict c 85; *Contagious Diseases Act 1866* 29 & 30 Vict c 35; *Contagious Diseases Act 1869* 32 & 33 Vict c 96. The Acts were repealed in 1866: *Contagious Diseases Repeal Act 1886* 49 Vict c10.

[174] South Australia, *Parliamentary Debates*, House of Assembly, Thursday 14 November 1996, 561 (Stewart Leggett); Evidence to the Select Committee on the Contagious Diseases Acts, the House of Commons, 1866, 1292-1308 and 1507-1528 (Sir John Simon, Medical Officer to the Privy Council).

[175] South Australia, *Parliamentary Debates,* Legislative Council, 11 March 1987, 3312 (John Cornwall, Minister for Health) regarding the *Public and Environmental Health Bill*; see also George Palmer and Stephanie Short, *Health Care & Public Policy: An Australian Analysis* (3rd edition, 2003) 240 where almost a decade later it was 'noted that Australians have reacted largely with a high degree of tolerance' to the HIV/AIDs epidemic, however 'discrimination remained an important issue.'

[176] Laurie Garrett, *The Coming Plague* (2nd edition, 1994) 466. See also Panos Dossier, *The Third Epidemic: Repercussions of the Fear of AIDS* (1990).

[177] Department of Health and Ageing, *Australian Health Management Plan for Pandemic Influenza* (2008) 27.

affords against abusive practices.[178] Australian administrative law has no express protection against discriminatory interventions, beyond the procedural fairness requirement for an unbiased decision-maker, the rule against taking into account irrelevant considerations[179] and the *Wednesbury* prohibition on conspicuously unequal or discriminatory treatment.[180] The need for efficient and rapid decision-making during a pandemic and the inherent problems in proving bias or conspicuously unequal treatment arguably make standard administrative procedures inappropriate. Instead, statements of principle in public health legislation that enshrine a right to equality and the operation of separate anti-discrimination statutes are considered an acceptable safeguard.

Statements of principle which prohibit unlawful discrimination exist in the Queensland and Australian Capital Territory public health acts.[181] The *Public Health and Wellbeing Act 2008* (Vic) has a specific principle of accountability which demands transparent, systematic and appropriate decision-making, which arguably should prevent discriminatory factors being taken into account.[182] Notably, the *Public Health Bill 2008* (WA) envisages that a person should be protected from 'unlawful discrimination' provided their rights do not infringe on the wellbeing of others, placing a reciprocal duty on the state to ensure they are safe from harm.[183] The equity principle in the draft South Australian *Public Health Bill 2009* stipulates that public health decisions should not unduly or unfairly disadvantage individuals or communities, specifically requiring that strategies must be intended to alleviate health disparities for disadvantaged groups.[184] Internationally, similar principles have been adopted in public health

178 Lawrence Gostin, James Hodge, Helena Nygren-Krug and Nicole Valentine 'The Domains of Health Responsiveness: A Human Rights Analysis' (2003) EIP Discussion Paper No. 53, 5; see Gostin, above n 24, 1158; Department of Health and Ageing, above n 177.

179 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s5(2)(a).

180 *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121, 131 where an 'inconsistent' decision was made in granting broadcasting permissions; *Dilatte v MacTiernan* [2002] WASCA 100 where unequal treatment of similar applicants constituted arbitrary and inconsistent decision-making.

181 *Public Health Act 2005* (Qld) s66; *Public Health Act 1997* (ACT) s4.

182 *Public Health and Wellbeing Act 2008* (Vic) s8.

183 *Public Health Bill 2008* (WA) s67 (6)(a).

184 *Draft Public Health Bill 2009* (SA) s14(5)(d) and s13.

instruments. Under the *International Health Regulations* health measures must be carried out in a 'transparent' and 'non-discriminatory' manner[185] while the *Model Act* emphasises principles of justice, fairness and tolerance.[186]

Furthermore the introduction of anti-discrimination legislation has arguably here,[187] as in the United States, changed the context in which we read coercive public health powers.[188] Anti-discrimination legislation was widely utilised during the SARS outbreak in Hong Kong, when the director of health extensively consulted with the Equal Opportunities Commission before taking public health measures. The Commission recommended territory-wide school closures instead of targeting specific areas and brought SARS-infected and exposed individuals under the protection of disability discrimination laws.[189] An advantage of anti-discrimination legislation as opposed to statements of principle and procedural fairness doctrines is it may also apply to employment contracts used to enforce unofficial quarantine. During the SARS outbreak in Canada, health care workers were subjected to extended isolation from family and friends through the operation of employment contracts rather than government direction.[190] It is contended that the right to equality can be preserved by statements of principle and standalone anti-discrimination legislation, which may provide more appropriate protection than standard administrative law safeguards.

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185 *International Health Regulations* (2005) art 42.

186 *Model State Emergency Health Powers Act* (2001) Preamble.

187 *Age Discrimination Act 2004* (Cth), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) in addition to state acts.

188 See Gostin, Sapsin and Teret, above n 20, 623.

189 Lesley Jacobs, 'Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto' (2007) 41(3) *Law and Society Review* 511, 530-531. Candidates for school examinations with fevers were not discriminatorily denied access to the exam, but sat the exam in another room nearby.

190 *Ontario Nurses' Assn. v. Sunnybrook and Women's College Health Sciences Centre* [2004] CanLII 35717 (ON LRB) [18-19].

E *Proportionality and the Least Restrictive Alternative*

An aspect of procedural fairness is a duty to act judicially, which excludes the right to decide irrationally or unreasonably. In *Australian Broadcasting Tribunal v Bond*, Deane J stated that this requires a minimum degree of 'proportionality' in exercising authority under legislation.[191] In England, this doctrine has been extended to invalidating executive action which is arbitrary or excessive in achieving an objective and which interferes with a recognised right.[192] The deprivation of personal liberty to a greater extent than is required to achieve genuine public health goals could be viewed as excessive, arbitrary and even illegitimate.[193] In order to avoid disproportionate and unwarranted action, a graded approach to public health interventions has reached the acceptable balance between preserving individual rights and protecting the community. Gostin emphasises the 'well-targeted' intervention, which relies on expert advice and accountability.[194] Not only have criminal sanctions, compulsory treatment and indefinite detention become an unacceptably disproportionate method of controlling infectious diseases, but the economic and social ramifications of mass quarantine also require consideration of alternative measures.[195] Therefore the obligation to impose the 'least restrictive alternative' which achieves the desired health outcome is either codified in statute or informally practised by Australian health officials.

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191 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 367. The doctrine of proportionality as independent grounds of judicial review is accepted in England. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 as per Lord Diplock, however in Australia it is a concept which is utilised in interpreting *Wednesbury* unreasonableness. Sir Anthony Mason, 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 21, 38.

192 *R v Shayler* [2003] 1 AC 247, 61; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547.

193 See Gostin, above n 24, 1138.

194 Ibid 1138-1139.

195 See Gostin, above n 24, 1128; Absenteeism during an influenza pandemic in Australia could reach fifty percent, representing a significant cost to the economy, Department of Health and Ageing, *Australian Health Management Plan for Pandemic Influenza* (2008) 16, 44.

The least restrictive alternative to coercive action by public health officials is voluntary acceptance of medical treatment and social distancing, which offers the greatest degree of personal freedom while simultaneously safeguarding the community. It is argued that encouraging voluntary compliance before restricting liberties would establish reasonable grounds for exercising discretion and imposing detention if it was eventually required. Voluntary compliance imposes reciprocal responsibilities on the community, such as the duty to obey public health orders in the *Model Act*.[196] The Victorian and Queensland public health acts include similar moral obligations, including the requirement to take reasonable precautions to avoid infection, undergo appropriate testing and prevent spreading the disease.[197] Education, support and counselling should be offered by public health authorities to encourage cooperation and behavioural changes.[198] The Australian government introduced television and print advertisements advocating cough etiquette during the swine influenza outbreak in 2009 and anticipates requesting the public to protect others by social distancing and the wearing of masks if required.[199] Cultural disparities may affect the measures which the public is willing to take, such as the failure to institute public mask wearing in Toronto during the SARS epidemic. Comparatively, the individual's responsibility to wear masks was accepted in Asia, indicating the need for appropriate and locally supported measures.[200] Although providing the opportunity to voluntarily comply before coercive measures are instituted may amount to proportionate exercise of powers, actions requested without formal orders may be exempt from other procedural fairness safeguards. For example, in Singapore the urgency and rapid action required during the SARS crisis resulted in primarily informal quarantine orders enforced by threats of coercion, placing decisions beyond formal judicial review.[201]

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196 *Model State Emergency Health Powers Act* (2001) s604(c).

197 *Public Health and Wellbeing Act 2008* (Vic)s111(b) and (c) and *Public Health Act 2005* (Qld) s66.

198 National Public Health Partnership, *Principles to be Considered when Developing Best Practice Legislation for the Management of Infected Persons who Knowingly Place Others at Risk* (2003) The Department of Human Services <http://www.dhs.vic.gov.au> 22 March 2009.

199 Department of Health and Ageing, *Australian Health Management Plan for Pandemic Influenza* (2008) 69.

200 See Jacobs, above n 189, 532.

201 Ibid 515.

Although voluntary measures generally constitute the majority of public health interventions, community safety requires the option of coercive powers in event of non-compliance.[202] The least restrictive alternative enables the achievement of an objective in proportion to the threat, based on the most current scientific information. Actions taken under the *Public Health and Wellbeing Act 2008* (Vic), including quarantine orders made in an emergency situation,[203] must be proportionate to the public health risk.[204] When making orders for the benefit of public health, the measure which is the least restrictive of the rights of the person should be selected.[205] Interventions which intrude on rights and freedoms should be a last resort in achieving a legitimate public health outcome.[206] The proportionate exercise of power also has another consideration; namely that the intervention should be equally effective in achieving the public health outcome, in addition to the least restrictive.[207]

The least restrictive alternative guides the exercise of coercive powers in the *Model Act* and the *International Health Regulations.* The *Model Act* requires that isolation or quarantine is by the least restrictive means necessary to prevent the spread of contagion, including confinement to private homes. For example, home isolation using monitoring bracelets and random phone calls was trialled successfully in Iowa during a measles outbreak, as an alternative to imposing detention.[208] Additionally, detained individuals must be released once they pose no substantial risk of infecting others. People who are detained must have basic needs addressed, taking cultural and

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202 See Gostin, Sapsin and Teret, above n 20, 624-6.

203 *Public Health and Wellbeing Act 2008* (Vic) s200.

204 *Public Health and Wellbeing Act 2008* (Vic) s9.

205 *Public Health and Wellbeing Act 2008* (Vic) s112; see also *Public Health and Wellbeing Act 2008* (Vic) s111(a), *Public Health Bill 2008* (WA) s67(2) and *Public Health Bill 2010* (NSW) s59(6)(a).

206 Public Health Group, Department of Human Services, *Review of the Health Act 1958: A New Legislative Framework for Public Health in Victoria* (2004) Department of Health, State Government of Victoria <www.health.vic.gov.au/healthactreview> 18 May 2009.

207 *Public Health and Wellbeing Act 2008* (Vic) s112.

208 McKeever et al, 'Postexposure Prophylaxis, Isolation, and Quarantine to Control an Import-Associated Measles Outbreak – Iowa 2004' (2004) 53(41) *Morbidity and Mortality Weekly Report* 969, 969.

religious beliefs into account.[209] Likewise under the *International Health Regulations,* detention must be no more intrusive or invasive than any reasonably available alternative that achieves the appropriate level of protection.[210] These principles were adopted in the Virginia Code, which requires that coercive powers are only utilised for a disease of public health threat. The Code differentiates between diseases of public health significance and of public health threat, providing differing staged approaches in each circumstance.[211] For example, a disease of public health significance such as tuberculosis or HIV requires an individual to fail to undergo treatment or display risky behaviour before being counselled, offered treatment or detained in the least restrictive facility.[212] Electronic devices may also be used to enforce quarantine.[213] The graded approach to threat and intervention in the Virginia Code has built upon the principles in the *Model Act* and *International Health Regulations*, illustrating effective laws which respect civil liberties.

Although the Australian common law has some limited provision for enforcing proportionate and reasonable decision-making, the integration of the least restrictive alternative in legislation clarifies the position. The deprivation of liberty is a significant intrusion on personal rights and it should only occur when it is a reasonable and necessary measure to protect the community. Quarantine is only one of several measures for combating a public health threat and due to the significant intrusion upon civil liberties, should be a last resort.

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209 *Model State Emergency Health Powers Act* (2001) s604(b).
210 *International Health Regulations* (2005) art 23.2, 31.2 and 43.1.
211 *Health Act* 32.1 VA code ann (Michie) §32.1-48.06 and § 32.1-48.08 (A) (2004).
212 *Health Act* 32.1 VA code ann (Michie) §32.1-48.02 (A) (2004).
213 *Health Act* 32.1 VA code ann (Michie) §32.1-48-08(C) (2004).

V CONCLUSION

The exercise of executive powers to detain people during a pandemic is only a justifiable intrusion on civil liberties when done in order to protect the community. State and Commonwealth emergency, criminal and public health legislation provides alternative powers of varying suitability for use in a crisis. The jurisdictions where public health legislation and emergency powers legislation are interlinked tend to have specific emergency powers for quarantine, however only the *Public Health and Wellbeing Act 2008* (Vic) actually requires regular review of detention during times of emergency. Furthermore, legislation is inconsistent across the country and cross-jurisdictional coordination is difficult at best. The quarantine power in the Constitution has a potentially vast scope, however the archaic *Quarantine Act 1908* (Cth) does not utilise this capacity beyond an authority to suspend modernised state acts, which might hinder efforts and abrogate civil liberties to a greater extent. The current regime of emergency public health powers could be held accountable by judicial review and even the broad discretionary provisions are fettered by reasonableness doctrines, provided such decisions are deemed justiciable. Where legislation fails to provide for judicial hearings as a procedural safeguard or national security is a factor, habeas corpus is a valuable means of obtaining judicial scrutiny of decisions.

Current powers to detain people are often lacking in procedural fairness and in many cases, provide officials with only the most restrictive options. Modern public health approaches focus on cooperation with individuals and communities, respect individual rights and favour proportionate exercise of powers, as demonstrated by recently amended legislation in Victoria. Basic safeguards such as the right to a hearing, the right to counsel, the right to be protected from discrimination and the proportionate exercise of powers have become fundamental to public health interventions which seek to reconcile individual rights with the safety of society. These protections encourage public trust in the health system, which is vital to ensuring citizens obtain treatment in event of an infectious disease outbreak. The population rightly expects that deprivation of freedom should only be carried out in the absence of any other viable approach.

By integrating procedural fairness provisions into public health legislation, these principles become enforceable and violations by public officials must be justified. These provisions not only provide guidance to officials and promote public confidence in their decision-making, but enable judicial review to ensure compliance.

Therefore it is contended that the majority of Australian public health detention powers are in dire need of reform consistent with these principles to increase accountability and protection of civil liberties, while balancing the need to allow rapid action. Reform cannot be carried out in the midst of a pandemic; consultation and collaboration between medical and public health professionals, State and Commonwealth departments and legislatures and the Australian public is critical to the formulation and implementation of effective and accountable public health laws.