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COVID-19 AND THE FUTURE OF AUSTRALIAN PUBLIC HEALTH LAW

Abstract

This article discusses how public health laws have enabled and shaped responses to the COVID-19 pandemic. It examines how COVID-19 has illuminated the nature of Australian governments' powers to respond to public health emergencies and the heightened importance of transparency and accountability of government decision-making during such a crisis. It also analyses the importance of domestic measures — especially border closures and quarantine — in addressing risks that will continue to be posed by infectious diseases. The article then considers how these developments might influence Australian public health law in the future. It identifies that COVID-19 has raised the profile of public health law by highlighting the crucial protective role that it can play during a public health emergency. It also explores matters that the COVID-19 pandemic has highlighted which should inform public health decision-making during future health emergencies, including social justice and human rights considerations, data and evidence from medical science, and the likely importance of a 'One Health' approach to addressing challenges posed by further zoonotic diseases. This article argues that the increased prominence of public health law during the COVID-19 pandemic will have a lasting impact on public health and health law more generally.

I Introduction

On 30 January 2020, the World Health Organization ('WHO') declared the global spread of a novel coronavirus, now known as COVID-19, to be a public health emergency of international concern ('PHEIC').[1] On 11 March 2020,

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1 'Listings of WHO's Response to Covid-19', *World Health Organization* (Web Page, 29 January 2021) <www.who.int/news-room/detail/29-06-2020-covidtimeline>.

WHO declared COVID-19 to be a pandemic.[2] With rising numbers of infections and deaths from this virus, public health laws have played a central role in responses to the COVID-19 crisis. The *International Health Regulations (2005)* ('*IHR (2005)*')[3] enabled WHO's PHEIC declaration, while in Australia, national, state, territory and local government laws, regulations, directions and orders enforced a range of public health measures, including border closures, quarantine, isolation and lockdowns. As we begin to emerge from the health crisis and start to contemplate the 'new normal', it is already clear that COVID-19 will have a lasting effect on our understanding of the role of law in supporting public health. This article examines some major ways in which public health laws have enabled and shaped responses to the COVID-19 pandemic and considers the likely impact of these developments on Australian public health law in the future.

Part II of this article discusses some of the many ways in which international and domestic public health laws were relied upon to respond to the COVID-19 pandemic. Part II(A) explores the global dimensions of public health law that have been relevant to managing this health crisis. Part II(B) explores how, during the COVID-19 pandemic, it has been necessary for Australian governments to rely on emergency powers to tackle this major threat to public health. This has highlighted the importance of checks and limits on government authority, and of transparency and accountability of government decision-making, particularly given its engagement of human rights. Part II(C) considers how Australia's domestic laws relating to enforcing quarantine and preventing people from crossing borders have been crucial protective mechanisms in tackling this public health emergency, though the laws raise a range of complex legal issues, including those related to civil liberties and Australian federalism.

Part III examines ways in which the responses to the COVID-19 pandemic are likely to influence Australian public health law in the future. Part III(A) considers how the COVID-19 pandemic has raised the profile of public and global health law within health law scholarship and health law generally by expanding understanding of their nature, scope, relevance, importance and, especially, the protective function they can play in a public health emergency. Part III(B) discusses the need for public health laws to balance community and individual rights and focus on social justice considerations during public health emergencies. In addition, Part III(B) discusses the importance of instituting a 'whole-of-government' response to such crises. Part III(C) argues that the COVID-19 pandemic has underscored that accurate and contemporaneous data, and evidence from medical science, should inform public health decision-making during a health emergency to ensure that the decisions are efficacious and justifiable, and that the community can be persuaded to adhere to public health measures. Part III(D) considers how COVID-19 has alerted us to the rising incidence of zoonotic diseases and the need for domestic and international public health surveillance, regulation and laws to address effectively the risks they

2 Ibid.

3 World Health Organization, *International Health Regulations (2005)* (3rd ed, 2016) ('*IHR (2005)*').

pose to human health. Part IV concludes that the COVID-19 pandemic will result in Australians' increased appreciation of the importance of public health law and the legal aspects of responding to public health emergencies.

II Australian Public Health Law and the COVID-19 Pandemic

The COVID-19 pandemic has drawn attention to public health law at both the global and domestic levels. This Part explores the important role played by law and regulation in enabling responses to the pandemic in Australia.[4] As discussed in Part II(A) below, the spread of COVID-19 across the globe has highlighted the role and application of existing international laws such as the *IHR (2005)* and, recently, there have been proposals for a new international pandemic treaty. The impact of the pandemic on the Australian community and economy has also required significant legal and policy responses by Australian governments at the national, and state and territory levels. Part II(B) analyses the emergency powers which Australian governments have drawn on to respond to the COVID-19 pandemic, and the complex issues raised by their exercise. Part II(C) analyses these issues further in the context of the use of quarantine laws and border closures.

A *Global Public Health Law and Australia*

COVID-19 has heightened awareness of the global dimensions of public health law. As discussed below, over the past two centuries, international legal developments have significantly influenced international and domestic public health law. The COVID-19 pandemic, with its global impact, has accelerated this trend by drawing attention to: Australia's international legal obligations during public health crises; the potential effectiveness of international health law and policy in tackling global health emergencies; and the prospect for Australian lawmakers to learn from overseas legal and policy responses to them.

International sanitary conventions in the 19th century instigated the growth of international responses to the global spread of infectious disease.[5] These conventions led to the adoption of the *International Sanitary Regulations* in 1951,[6] their replacement with the *International Health Regulations* in 1969,[7] and then the revised

4 For further discussion see Belinda Bennett, Ian Freckelton and Gabrielle Wolf, *COVID-19, Law, and Regulation: Rights, Freedoms, and Obligations in a Pandemic* (Oxford University Press, 2022).

5 Lawrence O Gostin, *Global Health Law* (Harvard University Press, 2014) 175–204; David P Fidler, *SARS, Governance and the Globalization of Disease* (Palgrave Macmillan, 2004) 21–41; Lawrence O Gostin, *Global Health Security: A Blueprint for the Future* (Harvard University Press, 2021) ('*Global Health Security*').

6 United Nations, *WHO Regulations No 2: International Sanitary Regulations*, WHO Doc A4/60 (25 May 1951).

7 World Health Organization, *International Health Regulations (1969)*, WHA Res 22.46 (25 July 1969).

IHR (2005).[8] While COVID-19 sent shockwaves around the world, it is not the first time that WHO has declared a PHEIC since revisions to the *IHR (2005)* came into force in 2007. Five earlier declarations were made between 2009 and 2019 in relation to H1N1 influenza (2009), polio (2014), Ebola (2014 and 2019), and Zika (2016).[9] A detailed analysis of the *IHR (2005)* and the history of WHO's responses to pandemics is beyond the scope of this article. However, it is notable that the COVID-19 pandemic has brought new attention to steps that can be taken at an international level to prevent global health emergencies, and the potential role of global health governance in managing infectious diseases.

A growing body of legal scholarship internationally addressing issues related to public health has led to the emergence of 'global health law' as a recognised component of health law scholarship.[10] Issues such as increasing rates of non-communicable diseases ('NCDs'), as well as the role of law in shaping efforts to limit the international spread of disease, have become important areas of scholarship and debate.[11] Simultaneously, increased recognition of the intersections between health and human rights has resulted in human rights law influencing global health law.[12] This has sometimes emanated from litigation that has concerned the alleged engagement of rights to life, dignity and the highest attainable standard of health — which in some jurisdictions are constitutionally or otherwise legally recognised — and necessitated courts' application of international human rights law.[13] International

8 *IHR (2005)* (n 3) 1. For a discussion of the *IHR (2005)* see Lawrence O Gostin, Mary C DeBartolo and Eric A Friedman, 'The International Health Regulations 10 Years On: The Governing Framework for Global Health Security' (2015) 386(10009) *Lancet* 2222.

9 For a discussion of previous declarations see Lucia Mullen et al, 'An Analysis of International Health Regulations Emergency Committees and Public Health Emergency of International Concern Designations' (2020) 5(6) *BMJ Global Health* e002502:1–10.

10 See, eg: Gostin, *Global Health Law* (n 5); Michael Freeman, Sarah Hawkes and Belinda Bennett (eds), *Law and Global Health: Current Legal Issues* (Oxford University Press, 2014) vol 16.

11 See, eg: Gostin, *Global Health Law* (n 5); Gostin, *Global Health Security* (n 5); Fidler (n 5); Belinda Bennett and Belinda Reeve, 'Global Health' in Ian Freckelton and Kerry Petersen (eds), *Tensions and Traumas in Health Law* (Federation Press, 2017) 147.

12 See, eg: Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7(3) *International Journal of Law in Context* 285; Sara E Davies and Belinda Bennett, 'A Gendered Human Rights Analysis of Ebola and Zika: Locating Gender in Public Health Emergencies' (2016) 92(5) *International Affairs* 1041; Lawrence O Gostin et al, '70 Years of Human Rights in Global Health: Drawing on a Contentious Past to Secure a Hopeful Future' (2018) 392(10165) *Lancet* 2731; Jonathan M Mann et al, 'Health and Human Rights' (1994) 1(1) *Health and Human Rights* 6.

13 See generally Ian Freckelton, 'The Rights to Life, Dignity and the Highest Attainable Standard of Health: Internationally Influential African Jurisprudence' (2020) 28(1) *Journal of Law and Medicine* 9 ('The Rights to Life, Dignity and the Highest Attainable Standard of Health').

treaties have helped to shape global health law in areas such as tobacco control,[14] and thus also influenced domestic health laws.[15] The external affairs power in s 51(xxix) of the *Australian Constitution* provides the Commonwealth Government with power to implement its international obligations. For example, the objects of the *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*') include: 'to give effect to Australia's international rights and obligations, including under the *International Health Regulations*, the *SPS Agreement*, the *Ballast Water Convention*, the *United Nations Convention on the Law of the Sea* and the *Biodiversity Convention*'.[16] In December 2021, the World Health Assembly agreed to start a process for the development of a new international convention or agreement focused on prevention, preparedness and response to pandemics.[17] The new treaty may, if adopted by Australia, lead to new international obligations in this area for Australia. In addition, the international health-related goals and targets of the United Nations' *Millennium Development Goals* and, more recently, *Sustainable Development Goals*,[18] have focused attention on global health outcomes.

During the COVID-19 pandemic, there has also been review of the relationship between international legal obligations, such as those arising under the *IHR (2005)*, and domestic health laws.[19] In addition, the global nature of the pandemic has

14 Cabrera and Gostin (n 12).

15 Crawford Moodie et al, 'Plain Packaging: Legislative Differences in Australia, France, the UK, New Zealand and Norway, and Options for Strengthening Regulations' (2019) 28(5) *Tobacco Control* 485.

16 *Biosecurity Act 2015* (Cth) s 4(b) ('*Biosecurity Act*'). See also Peta Stephenson, Ian Freckelton and Belinda Bennett, 'Public Health Emergencies in Australia' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 69, 71–2.

17 World Health Organization, 'World Health Assembly Agrees to Launch Process to Develop Historic Global Accord on Pandemic Prevention, Preparedness and Response' (Media Release, 1 December 2021) <https://www.who.int/news/item/01-12-2021-world-health-assembly-agrees-to-launch-process-to-develop-historic-global-accord-on-pandemic-prevention-preparedness-and-response>. See also: Thomas R Frieden and Marine Buissonniére, 'Will a Global Preparedness Treaty Help or Hinder Pandemic Preparedness?' (2021) 6(1) *BMJ Global Health* e006297:1–3; Ronald Labonté et al, 'A Pandemic Treaty, Revised International Health Regulations, or Both?' (2021) 17(1) *Globalization and Health* 128:1–4; John Zarocostas, 'Countries Prepare for Pandemic Treaty Decision' (2021) 398(10315) *Lancet* 1951; Lawrence O Gostin, Sam F Halabi and Kevin A Klock, 'An International Agreement on Pandemic Prevention and Preparedness' (2021) 326(13) *Journal of the American Medical Association* 1257.

18 World Health Organization, *Health in 2015: From MDGs, Millennium Development Goals to SDGs, Sustainable Development Goals* (Report, 2015).

19 Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28(2) *Journal of Law and Medicine* 346; Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19' (Research Paper No 2, Parliamentary Library and Information Service, Parliament of

created international interest in comparative approaches and opportunities to learn from countries' varied legal and policy responses.[20] These developments have increased the prominence of the global dimensions of health law, highlighting the importance of international laws and comparative perspectives for the development of Australian public health law. Part II(B) discusses the powers which Australian Governments have drawn upon to respond to the pandemic.

B *Australian Governments' Powers to Respond to COVID-19*

As argued above, the prominence of public health law generally has grown during COVID-19 and the pandemic has highlighted its global dimensions. Yet this pandemic has also brought attention to Australian legal frameworks for declaring an emergency, the nature of government decision-making in Australia during an emergency, and the role of federalism in shaping Australian governments' responses to emergencies.

Australian legislatures have granted powers to the executive government to respond to emergencies.[21] During emergencies, governments' usual powers may be supplemented by those under emergency management legislation, allowing for a larger-scale response and coordination across multiple agencies if required.[22] During the COVID-19 pandemic, powers under emergency management legislation were the means by which Australian governments attempted to meet their responsibilities to safeguard public health.[23] Inevitably, the exercise of some of those powers engaged human rights, such as freedom of assembly and movement, which are recognised in international and domestic legal instruments (for example, the

Victoria, August 2020). For an earlier analysis see Belinda Bennett, Terry Carney and Richard Bailey, 'Emergency Powers and Pandemics: Federalism and the Management of Public Health Emergencies in Australia' (2012) 31(1) *University of Tasmania Law Review* 37; Belinda Bennett and Terry Carney, 'Public Health Emergencies of International Concern: Global, Regional, and Local Responses to Risk' (2017) 25(2) *Medical Law Review* 223.

20 See, eg, Bonavero Institute of Human Rights, *A Human Rights and Rule of Law Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 27 Jurisdictions* (Report No 7/2020, 30 October 2020).

21 See generally: O'Brien and Waters (n 19); Mclean and Huf (n 19) 4; Nicholas Aroney and Michael Boyce, 'The Australian Federal Response to the Covid-19 Crisis' in Nico Steytler (ed), *Comparative Federalism and Covid-19: Combating the Pandemic* (Routledge, 2021) 298; Bennett, Carney and Bailey (n 19); Stephenson, Freckelton and Bennett (n 16).

22 See generally: Bennett, Carney and Bailey (n 19); O'Brien and Waters (n 19); Stephenson, Freckelton and Bennett (n 16).

23 *Loielo v Giles* (2020) 63 VR 1, 15–16 [31]–[36] ('*Loielo*'); Howard Maclean and Karen Elphick, 'COVID-19 Legislative Response: Human Biosecurity Emergency Declaration Explainer' (FlagPost, Parliamentary Library, Parliament of Australia, 27 March 2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/March/COVID-19_Biosecurity_Emergency_Declaration>; Kylie Diwell, 'Responding to

Charter of Human Rights and Responsibilities Act 2006 (Vic) ('*Charter*')).[24] Yet like courts in other countries, Australian courts were reticent to constrain governments' use of their powers to institute public health measures in this emergency situation despite their incursion on civil liberties. Justice Lewis relevantly observed in an English judgment that, while such freedoms are important in a democratic society, the context of restrictions imposed on people during COVID-19 was

> a global pandemic where a novel, highly infectious disease capable of causing death was spreading and was transmissible between humans. There was no known cure and no vaccine. There was a legal duty to review the restrictions periodically and to end the restrictions if they were no longer necessary to achieve the aim of reducing the spread and the incidence of coronavirus … In those, possible [sic] unique, circumstances, there is no realistic prospect that a court would find that regulations adopted to reduce the opportunity for transmission by limiting contact between individuals was disproportionate.[25]

The COVID-19 pandemic has nonetheless highlighted that, while governments (including Australian governments) need emergency powers to respond effectively to public health emergencies, their exercise of this authority must be open to robust scrutiny. Indeed, governments' reliance on these extraordinary powers in response to COVID-19 was controversial because they facilitated governments' largely unchecked imposition of restrictive measures, albeit temporarily.[26]

In Australia, in response to the COVID-19 pandemic, the Governor-General declared the existence of a human biosecurity emergency under the *Biosecurity Act*, activating the power of the federal Minister for Health to make regulations without parliamentary scrutiny.[27] State and territory governments have also relied on their emergency statutory powers to take action to slow the transmission of COVID-19, similarly bypassing usual deliberation, oversight and approval processes for implementing

COVID-19: How Will Australia's Public Health Emergency Powers Affect You?', *MinterEllison* (Blog Post, 19 November 2020) 3 <https://www.minterellison.com/articles/covid-19-how-will-australias-public-health-emergency-powers-affect-you>.

24 See below Part III(B).

25 *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin) [117], cited in *Loielo* (n 23) 39 [123].

26 See: Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020* (Parliamentary Paper No 192, December 2020) <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-detention-and-treatment-of-public-housing-residents-arising-from-a-covid-19-hard-lockdown-in-july-2020/>; Mclean and Huf (n 19) 4, 50–2; Stephenson, Freckelton and Bennett (n 16) 80–8.

27 Mclean and Huf (n 19) 39; Maclean and Elphick (n 23); Stephenson, Freckelton and Bennett (n 16) 74–6.

public health measures.[28] Relying on these emergency powers, governments of several states and territories introduced a number of measures to respond to the pandemic. These included measures that: confined citizens to their homes from which they were permitted to leave only for specified purposes; prevented non-essential businesses from operating; required mask-wearing in public; imposed curfews; limited the number of people who could congregate; compelled people with COVID-19 to isolate; required people who had or may have been exposed to COVID-19 to quarantine; and closed their borders to the inhabitants of other states with high numbers of COVID-19 cases.[29]

Public health legislation constrains decision-makers' exercise of their powers to some extent by requiring that they follow specified principles or take into account particular matters. For instance, the *Public Health and Wellbeing Act 2008* (Vic) lists principles to guide those administering this statute, including the precautionary principle and the principle of proportionality.[30] Nevertheless, such principles can be more applicable to making decisions that concern individuals rather than populations. Yet the *Biosecurity Act* does impose requirements on decision-makers to take into account guiding matters irrespective of whether they are exercising a power in relation to an individual or the public generally. For instance, in 'making a decision to exercise a power in relation to, or impose a biosecurity measure on, an individual … to manage the risk of … contagion of a listed disease',[31] and in determining emergency requirements that are necessary to prevent the spread of a disease, a person or the Minister, respectively, must be satisfied that the power, measure or requirement 'is no more restrictive or intrusive than is required in the circumstances'.[32]

COVID-19 has focused Australians' attention on the scope of their governments' responsibility to protect public health and human rights pertaining to health. From early in the pandemic, it was clear that the virus was highly contagious and severe, and that action was essential to combat the threat it posed to health.[33] Individuals' efforts alone could not tackle COVID-19 effectively, but governments, elected to strive to achieve the highest possible level of population health on their behalf, could

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28 Mclean and Huf (n 19) 6–8; Leanne Minshull and Bill Browne, *Parliamentary Scrutiny during the COVID-19 Crisis in Tasmania* (Discussion Paper, Australia Institute, 8 April 2020) 2 <https://apo.org.au/sites/default/files/resource-files/2020-04/apo-nid303163.pdf>; Andrew Edgar, 'Law-making in a Crisis: Commonwealth and NSW Coronavirus Regulations', *Australian Public Law* (Blog Post, 3 March 2020) <https://auspublaw.org/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/>; Stephenson, Freckelton and Bennett (n 16).

29 See, eg: Mclean and Huf (n 19) 30–2, 50–60; O'Brien and Waters (n 19).

30 *Public Health and Wellbeing Act 2008* (Vic) ss 6, 9.

31 *Biosecurity Act* (n 16) s 34(1)(a).

32 Ibid s 34(2)(d). See also: *Biosecurity Act* (n 16) ss 477(1), 477(4)(c); *Newman v Minister for Health and Aged Care* (2021) 173 ALD 88, 110–11 [93]–[94]; *LibertyWorks Inc v Commonwealth* (2021) 286 FCR 131, 135 [11], 140 [44]–[46], 141 [52].

33 David L Heymann and Nahoko Shindo, 'COVID-19: What is Next for Public Health?' (2020) 395(10224) *Lancet* 542, 543–4.

implement public health measures.[34] By taking these actions, Australian governments met their obligation to protect the human 'right to life', which is recognised in the *International Covenant on Civil and Political Rights*,[35] and human rights statutes in the Australian Capital Territory, Queensland and Victoria.[36] They also constituted 'steps' towards realising people's 'right … to the enjoyment of the highest attainable standard of … health', which is recognised by the *International Covenant on Economic, Social and Cultural Rights*,[37] as well as the *Convention on the Elimination of All Forms of Discrimination against Women*[38] and, with respect to children, the *Convention on the Rights of the Child*.[39]

The gravity of the risks posed by COVID-19 and the speed with which it spread highlighted that it was imperative for governments to be empowered to fulfil their public health responsibilities by taking urgent action to curb its dissemination.[40] As some courts appreciated in adjudicating legal challenges to governments' public health measures, emergency powers proved an effective and crucial mechanism for facilitating their swift implementation.[41] Yet this experience also illustrated the importance of governments remaining accountable when responding to a health crisis.[42]

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34 For discussion of the role of government in protecting the public's health see Lawrence O Gostin and Lindsay F Wiley, *Public Health Law: Power, Duty, Restraint* (University of California Press, 3rd ed, 2016) ch 1.

35 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1) ('*ICCPR*'). See also Ashleigh Barnes and Emilie McDonnell, 'An Overview of Emerging International Human Rights Law Guidance: Promoting Human Rights Compatibility of Government COVID-19 Responses' (Report No 5/2020, Bonavero Institute of Human Rights, 17 August 2020) 2.

36 *Human Rights Act 2004* (ACT) s 9; *Human Rights Act 2019* (Qld) s 16; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9 ('*Charter*'). See also Kylie Evans and Nicholas Petrie, 'COVID-19 and the Australian Human Rights Acts' (2020) 45(3) *Alternative Law Journal* 175.

37 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

38 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 11(1)(f), 12(1), 14(2)(b).

39 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24. See generally Freckelton, 'The Rights to Life, Dignity and the Highest Attainable Standard of Health' (n 13).

40 Barnes and McDonnell (n 35) 2–3; Peta Stephenson and Jonathan Crowe, 'Queensland Public Health Laws and COVID-19: A Challenge to the Rule of Law?', *Australian Public Law* (Blog Post, 21 August 2020) <https://auspublaw.org/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-of-law/>.

41 See, eg: *Loielo* (n 23) 10–11 [21], 15 [34], 67–8 [249]–[253]; *Palmer v Western Australia [No 4]* [2020] FCA 1221, [366] ('*Palmer (FCA)*').

42 Barnes and McDonnell (n 35) 3–4; Janina Boughey, 'Executive Power in Emergencies: Where is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168.

For judges, scholars and citizens, the COVID-19 pandemic has underlined that it is critical that the exercise of emergency powers is open to challenge, given its potential to curtail citizens' liberties substantially without parliamentary scrutiny.[43] As many contests to the public health measures taken in response to COVID-19 concerned their engagement of human rights, they shone a spotlight on perennial tensions in public health law. Governments may be unable to fulfil their obligations to protect public health, reduce risks to the population generally and protect the human rights pertaining to health, without to some extent restricting people's freedoms.[44] At the heart of public health law is the dilemma of how to achieve a fair balance between the competing interests of public health, which the state has a duty to protect, and civil rights.[45] As Lawrence Gostin and Lindsay Wiley note, 'a tension exists between the community's claim to reduce obvious health risks and individuals' claim to be free from government interference'.[46]

Responses to these dilemmas have turned partly on assessments of the nature and seriousness of the risks to public health posed by people enjoying their rights at this time. For instance, in *Commissioner of Police (NSW) v Gibson*,[47] Ierace J granted an order prohibiting the holding of a public protest in Sydney's central business district in light of 'the current rating of the risk of transmission of the COVID-19 virus at public assemblies as being "*medium*"', and the 'particular phase of the pandemic'.[48] New South Wales was considered as 'being on the knife-edge of a further escalation in community transmission of the virus'.[49] The Minister of Health had given a direction under the *Public Health Act 2010* (NSW) banning public gatherings of more than 20 people. The defendant, who organised the protest, argued that the Supreme Court was 'obliged to exercise its powers in conformity with the implied freedom [of political communication]'.[50] In reaching his decision, Ierace J balanced

43 See: Evans and Petrie (n 36); Vanessa MacDonnell, 'Ensuring Executive and Legislative Accountability in a Pandemic' in Colleen M Flood et al (eds), *Vulnerable: The Law, Policy and Ethics of COVID-19* (University of Ottawa Press, 2020) 141; Colleen M Flood, Bryan Thomas and Kumanan Wilson, 'Civil Liberties vs. Public Health' in Colleen M Flood et al (eds), *Vulnerable: The Law, Policy and Ethics of COVID-19* (University of Ottawa Press, 2020) 249, 256.

44 Gostin and Wiley (n 34) 9–12. For the United States see: *Barnes v Ahlman*, 140 S Ct 2620 (2020); *Roman Catholic Diocese of Brooklyn, New York v Cuomo*, 141 S Ct 63 (2020) ('*Roman Catholic Diocese of Brooklyn, New York v Cuomo*'), requiring restrictions on liberty to be 'narrowly tailored' to serve a 'compelling' state interest: at 67. See generally Wendy E Parmet, '*Roman Catholic Diocese of Brooklyn v Cuomo*: The Supreme Court and Pandemic Controls' (2021) 384(3) *New England Journal of Medicine* 199 ('The Supreme Court and Pandemic Controls').

45 Gostin and Wiley (n 34) 11.

46 Ibid.

47 [2020] NSWSC 953 ('*Gibson*').

48 Ibid [84] (emphasis in original).

49 Ibid [82]. See also Ian Freckelton, 'COVID-19: Criminal Law, Public Assemblies and Human Rights Litigation' (2020) 27(4) *Journal of Law and Medicine* 790.

50 *Gibson* (n 47) [14].

'the competing concerns of the right to free speech and to demonstrate … against the safety of the community at large'.[51]

The experience of COVID-19 also illuminated that it is important that governments specify the individuals to whom they propose to delegate the exercise of their emergency powers, and only allow people with appropriate expertise and accountability to fulfil this public health responsibility on their behalf. In *Loielo v Giles* ('*Loielo*'), Ginnane J expressed concern that the *Public Health and Wellbeing Act 2008* (Vic) permitted the Victorian Government, following its declaration of a state of emergency, to enable 'authorised officers', who were 'not accountable to Parliament' and thus to the public, and who were not necessarily 'senior administrative officer[s]', to exercise emergency powers restricting individuals' liberties, and potentially without considering the social and economic implications of doing so.[52] Also troubling for Ginnane J was that it was unclear how those officers were selected.[53] This issue also arose in the federal jurisdiction. The federal government's determination to ban Australian citizens and permanent residents from leaving Australia permitted an Australian Public Service employee, in the Australian Border Force, to grant exemptions to this rule in exceptional circumstances.[54] Yet neither the decision-maker nor the criteria on which they could provide these exemptions were articulated.[55]

Notwithstanding the apparent autonomy of decision-makers, a distinctive characteristic of the response to the COVID-19 pandemic in Australia has been the unparalleled review of government officials' decision-making after it has occurred.[56] This scrutiny has taken the form of challenges to decisions through litigation, as already identified, but also an extensive series of detailed reports during the first year of the pandemic. These included: independent assessments of the handling of the Tasmanian North-West hospital crisis;[57] reports into the responses to the unfolding tragedy by four New South Wales and Victorian residential facilities

51 Ibid [84]. See also: *Commissioner of Police (NSW) v Bassi* [2020] NSWSC 710, [17]; *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727, [6], [40].

52 *Loielo* (n 23) 9 [13], 15 [33], 40–1 [131]–[132]. For a detailed discussion of this case and this issue, see Rosalind Croucher, 'Lockdowns, Curfews and Human Rights: Unscrambling Hyperbole' (2021) 28(3) *Australian Journal of Administrative Law* 137.

53 *Loielo* (n 23) 41 [132].

54 Edgar (n 28).

55 Ibid.

56 See Ian Freckelton, 'Government Inquiries, Investigations and Reports during the COVID-19 Pandemic' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) ('Government Inquiries, Investigations and Reports').

57 Department of Health (Tas), *COVID-19 North West Regional Hospital Outbreak* (Interim Report, 29 April 2020) <https://www.health.tas.gov.au/__data/assets/pdf_file/0006/401010/North_West_Regional_Hospital_Outbreak_-_Interim_Report.pdf>.

including Newmarch;[58] Dorothy Henderson Lodge;[59] St Basil's and Epping Gardens;[60] the New South Wales *Special Commission of Inquiry into the Ruby Princess*;[61] the Board of Inquiry into Victoria's Hotel Quarantine program;[62] the *National Review of Hotel Quarantine*;[63] the Victorian Ombudsman's inquiry into a lockdown in inner-city public housing tower blocks;[64] parliamentary committee reports in Western Australia,[65] and Victoria;[66] and reports by the Queensland

58 Lyn Gilbert and Alan Lilly, *Newmarch House COVID-19 Outbreak [April-June 2020]* (Final Report, 20 August 2020) <https://www.health.gov.au/sites/default/files/documents/2020/08/coronavirus-covid-19-newmarch-house-covid-19-outbreak-independent-review-newmarch-house-covid-19-outbreak-independent-review-final-report.pdf>.

59 Lyn Gilbert, *Review of Dorothy Henderson Lodge (DHL) COVID-19 Outbreak* (Report, 25 August 2020) <https://www.health.gov.au/sites/default/files/documents/2020/08/coronavirus-covid-19-review-of-dorothy-henderson-lodge-covid-19-outbreak-review-of-dorothy-henderson-lodge-covid-19-outbreak.pdf>.

60 Lyn Gilbert and Alan Lilly, *Independent Review of COVID-19 Outbreaks at: St Basil's Home for the Aged in Fawkner, Victoria and Heritage Care Epping Gardens in Epping, Victoria* (Report, 30 November 2020) <https://www.health.gov.au/sites/default/files/documents/2020/12/coronavirus-covid-19-independent-review-of-covid-19-outbreaks-at-st-basil-s-and-epping-gardens-aged-care-facilities.pdf>.

61 *Special Commission of Inquiry into the Ruby Princess* (Report, 14 August 2020) <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Special-Commission-of-Inquiry-into-the-Ruby-Princess-Listing-1628/Report-of-the-Special-Commission-of-Inquiry-into-the-Ruby-Princess.pdf>.

62 *COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations Volume 1* (Parliamentary Paper No 191, December 2020) <https://www.parliament.vic.gov.au/file_uploads/0387_RC_Covid-19_Final_Report_Volume_1_v21_Digital_77QpLQH8.pdf>.

63 Department of Health (Cth), *National Review of Hotel Quarantine* (Report, 23 October 2020) <https://www.health.gov.au/sites/default/files/documents/2020/10/national-review-of-hotel-quarantine.pdf> ('*National Review of Hotel Quarantine*').

64 Victorian Ombudsman (n 26).

65 Procedure and Privileges Committee, Parliament of Western Australia, *The Legislative Assembly's Response to the COVID-19 Pandemic* (Report No 8, 17 November 2020).

66 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into the Victorian Government's COVID-19 Contact Tracing System and Testing Regime* (Parliamentary Paper No 193, December 2020) <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_Victorian_Governments_COVID19_Contact_Tracing_System_and_Testing_Regime_/report/LCLSIC_59-05_Vic_Gov_COVID-19_contact_tracing_testing.pdf>; Public Accounts and Estimates Committee, Parliament of Victoria, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Parliamentary Paper No 203, February 2021) <https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Report/PAEC_59-08_Vic_Gov_response_to_COVID-19_pandemic.pdf>.

Audit Office,[67] and the City of Melbourne.[68] As a corpus, these reports constitute a remarkable and comprehensive overview of government public health action, which has included a wide array of responses to the pandemic. The reports have made recommendations for responding to the current pandemic and managing future public health crises. Significantly, they have set a precedent and expectation for probing review of the sufficiency and appropriateness of the deployment of public health measures.[69] It is likely that in the future similar external monitoring of the exercise of public health powers will be required of governments.

The scale of the crisis posed by COVID-19 has also generated discussion about whether a national approach is required to tackle emergencies. Yet federalism can pose challenges for the development of national approaches to managing emergencies where the federal government does not have jurisdiction over all health matters.[70] Indeed, although the National Cabinet has provided a forum for intergovernmental cooperation, due to the Australian federal government's limited powers in relation to health, many of the public health measures instituted in response to COVID-19 have been authorised under state and territory legislation. There have been renewed calls for the creation of an Australian Centre for Disease Control to coordinate a national response to emergencies that threaten the whole country.[71] The next Part analyses the use of border controls and quarantine laws during the COVID-19 pandemic.

67 Queensland Audit Office, *Queensland Government Response to COVID-19* (Report No 3, 22 September 2020) <https://www.qao.qld.gov.au/reports-resources/reports-parliament/queensland-government-response-covid-19>.

68 City of Melbourne, *Economic Impacts of COVID-19 on the City of Melbourne* (Final Report, 20 August 2020) <https://www.melbourne.vic.gov.au/sitecollectiondocuments/economic-impacts-covid-19-report.pdf>.

69 See Freckelton, 'Government Inquiries, Investigations and Reports' (n 56).

70 See: Nico Steytler (ed), *Comparative Federalism and Covid-19: Combating the Pandemic* (Routledge, 2021); Belinda Bennett, 'Legal Rights during Pandemics: Federalism, Rights and Public Health Laws: A View from Australia' (2009) 123(3) *Public Health* 232 ('Legal Rights during Pandemics'); Kumanan Wilson et al, 'Strategies for Implementing the New International Health Regulations in Federal Countries' (2008) 86(3) *Bulletin of the World Health Organization* 215; Bennett, Carney and Bailey (n 19).

71 See, eg: Bradley J McCall et al, 'The Time Has Come for an Australian Centre for Disease Control' (2013) 37(3) *Australian Health Review* 300; Tom Burton, 'Medicos Renew Call for National Disease Control Agency', *Australian Financial Review* (online, 12 March 2020) <https://www.afr.com/policy/health-and-education/medicos-renew-call-for-national-disease-control-agency-20200310-p548j1>; Rob Moodie, Tamsyn Soller and Mike Daube, 'Reimagining Public Health in Australia' in Emma Dawson and Janet McCalman (eds), *What Happens Next? Reconstructing Australia after COVID-19* (Melbourne University Publishing, 2020) 200, 201.

C *Borders, Quarantine Laws, and Public Health*

Although all countries have faced the threat of COVID-19 and it has spread rapidly across the globe, legal and regulatory responses to this pandemic in Australia (and many other countries) have involved enforcing national and domestic borders. On this point, David Fidler notes that, '[a]lthough germs do not recognize borders, boundaries between countries remain central to the process of structuring political responses to infectious disease threats'.[72] Indeed, the pandemic has demonstrated that laws enforcing and preventing people from crossing national, state, territory and local borders can play a crucial role in responding effectively to global health challenges.

Under the *IHR (2005)*, WHO is able to make recommendations in relation to international travel. Countries can only implement measures that exceed WHO recommendations if they do so on the basis of scientific evidence, and they have notified WHO of the proposed measures.[73] Countries have imposed travel restrictions that exceeded WHO recommendations in past public health emergencies,[74] highlighting the role of national sovereignty and 'disease diplomacy' in the development of responses to global public health emergencies.[75] During the COVID-19 pandemic, WHO initially refrained from recommending travel restrictions.[76] However, in the face of growing numbers of cases internationally, many countries, including Australia, implemented such measures.[77]

In 2020, Australian governments introduced a series of border control and quarantine measures in an attempt to limit imported cases of COVID-19. While some of these measures were introduced under federal legislation, others were implemented under relevant state or territory public health legislation. From 27 March 2020, there was a mandatory 14-day quarantine period for travellers arriving in Australia from overseas.[78] The federal government also placed a ban

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72 Fidler (n 5) 18.

73 *IHR (2005)* (n 3) art 43.

74 Gostin, *Global Health Law* (n 5) 197–8.

75 Sara E Davies, Adam Kamradt-Scott and Simon Rushton, *Disease Diplomacy: International Norms and Global Health Security* (Johns Hopkins University Press, 2015).

76 'Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak', *World Health Organization* (Web Page, 29 February 2020) <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>. See also Roojin Habibi et al, 'Do Not Violate the International Health Regulations during the COVID-19 Outbreak' (2020) 395(10225) *Lancet* 664.

77 Habibi et al (n 76).

78 Kelsey Campbell and Emma Vines, 'COVID-19: A Chronology of Australian Government Announcements (up until 30 June 2020)' (Research Paper, Parliamentary Library, Parliament of Australia, 23 June 2021) 26.

on international travel for Australians,[79] and closed Australia's international borders to all non-citizens and non-residents unless an exemption was granted.[80] Limits were placed on the entry of cruise ships into Australian territorial waters, and foreign vessels were required to depart from Australian waters.[81] Restrictions were also imposed on entry into remote Indigenous communities in order to limit the spread of COVID-19 to them.[82]

While border closures and quarantine have been important features of Australia's response to COVID-19, they are longstanding Australian public health law measures, having played a key role in protecting Australia from imported disease. Quarantine laws were enacted and quarantine stations were established to house arrivals by ship, as means of preventing the introduction of infectious diseases into the colonies.[83] The earliest of such legislation was passed in New South Wales in 1832, with other colonies enacting similar statutes throughout the 1800s.[84] By the late 19th century, agreement on the need for quarantine to be a Commonwealth responsibility had grown,[85] though the scope of Commonwealth powers remained the subject of debate.[86] With Federation, quarantine became a federal power under s 51(ix) of the *Australian Constitution*, and the *Quarantine Act 1908* (Cth) ('*Quarantine Act*')

79 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth). See also Stephenson, Freckelton and Bennett (n 16). Note that the South Australian Government had already made temporary orders on 18 March 2020, pursuant to the *Public Health Act 2011* (SA), that required everyone arriving into Adelaide Airport from a flight outside Australia to self-isolate at home for 14 days: Steven Marshall, 'Stronger Powers to Enforce COVID-19 Self Isolation' (Media Release, Premier of South Australia, 18 March 2020).

80 Prime Minister of Australia, 'Border Restrictions' (Media Release, 19 March 2020) <www.pm.gov.au/media/border-restrictions>.

81 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020* (Cth).

82 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth). See also: Aryati Yashadhana et al, 'Indigenous Australians at Increased Risk of COVID-19 Due to Existing Health and Socioeconomic Inequities' (2020) 1(1) *Lancet Regional Health* 100007:1–3; Kristy Crooks, Dawn Casey and James S Ward, 'First Nations People Leading the Way in COVID-19 Pandemic Planning, Response and Management' (2020) 213(4) *Medical Journal of Australia* 151.

83 Krista Maglen, 'A World Apart: Geography, Australian Quarantine, and the Mother Country' (2005) 60(2) *Journal of the History of Medicine and Allied Sciences* 196, 200–1. For discussion see Bennett, 'Legal Rights during Pandemics' (n 70) 233.

84 Helen Kelsall, Priscilla Robinson and Genevieve Howse, 'Public Health Law and Quarantine in a Federal System' (1999) 7(1) *Journal of Law and Medicine* 87, 89.

85 Ibid.

86 Ibid 89–90.

was enacted early in the 20th century concerning its use.[87] In fact, quarantine was the only health power originally expressly granted to the federal government in the *Australian Constitution*.[88]

Australian quarantine laws and border closures played an important role in responding to disease during the century after the *Quarantine Act* commenced operation. For instance, from 1918 to 1919, Spanish flu swept across the world, wreaking a devastating death toll.[89] Australia and a number of Pacific nations enforced maritime quarantine, which reportedly succeeded in delaying the spread of Spanish flu to those countries.[90] Within Australia, states closed their borders to each other,[91] a phenomenon that re-emerged on multiple occasions a century

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87 Ibid 90; *Quarantine Act 1908* (Cth), as enacted ('*Quarantine Act*'); Christopher Reynolds, 'Quarantine in Times of Emergency: The Scope of s 51(ix) of the Constitution' (2004) 12(2) *Journal of Law and Medicine* 166; Bennett, 'Legal Rights during Pandemics' (n 70) 233–4.

88 See *National Review of Hotel Quarantine* (n 63) 15; Peta Longhurst, 'Quarantine Matters: Colonial Quarantine at North Head, Sydney and Its Material and Ideological Ruins' (2016) 20(3) *International Journal of Historical Archaeology* 589, 591 ('Quarantine Matters'). Note, however, that s 51(xxiiiA) of the *Australian Constitution* was inserted by the *Constitution Alteration (Social Services) Act 1946* (Cth). Section 51(xxiiiA) provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Medical Services (Dying with Dignity) Exposure Draft Bill 2014* (Report, 10 November 2014) 16.

89 See generally: John M Barry, *The Great Influenza: The Epic Story of the Deadliest Plague in History* (Viking Press, 2004); Mark Honigsbaum, *The Pandemic Century: A History of Global Contagion from the Spanish Flu to Covid-19* (Penguin, 2020); Laura Spinney, *Pale Rider: The Spanish Flu of 1918 and How It Changed the World* (Public Affairs, 2017).

90 Melissa A McLeod et al, 'Protective Effect of Maritime Quarantine in South Pacific Jurisdictions, 1918–19 Influenza Pandemic' (2008) 14(3) *Emerging Infectious Diseases* 468.

91 Kelsall, Robinson and Howse (n 84) 91; Mclean and Huf (n 19) 36. In 1920, the *Quarantine Act* was amended to give the commonwealth an express power to override the states during an emergency: Kelsall, Robinson and Howse (n 84) 91. See *Quarantine Act* (n 87) s 2A, as inserted by *Quarantine Act (No 47) 1920* (Cth). For discussion of Spanish flu in Australia see Gabrielle Wolf, 'COVID-19 in Historical Context: Australian Legal and Regulatory Responses to Past Influenza Pandemics' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 34.

later during COVID-19.[92] In the decades following Spanish flu, the use of human quarantine waned, and Australia's quarantine stations were closed in the late 20th century.[93] Nevertheless, certain diseases were still listed as quarantinable under the *Quarantine Act*.[94]

The re-emergence of quarantine as an important public health tool in Australia during the COVID-19 pandemic has provided a clear reminder of the importance of locality and geography in public health law. According to Peta Longhurst, quarantine is both a practice ('characterized by processes of inspection, of decontamination, of inoculation, of detention, and of exclusion') and a location ('a particular location both geographical and imagined at which the processes and practices of quarantine are enacted').[95] In its locational understandings, both places and bodies can be conceptualised as diseased,[96] with quarantine serving to demarcate healthy from unhealthy spaces, not only between the quarantine area and broader society, but also within the quarantine space itself. Furthermore, demarcating 'quarantine' of those who may have been exposed to an infectious disease, and 'isolation' of those who are symptomatic or have been diagnosed with the disease, remain important aspects of locational understandings of public health law.[97]

Australian laws regarding internal borders have also assumed new significance during the COVID-19 pandemic as state and territory governments have closed and reopened interstate borders, and imposed and lifted domestic quarantine requirements.[98] Given the distribution of powers under the *Australian Constitution* which leaves most health-related powers to the states, federalism has shaped Australian health law since federation. Even before COVID-19, the importance of clarifying the respective powers of different jurisdictions within Australia's federal legal

92 See below nn 96–109 and accompanying text.

93 For the closure of New South Wales' North Head Quarantine Station, see 'Historic Quarantine Station: Our Story', *Q Station* (Web Page, 2019) <https://www.qstation.com.au/our-story.html>. For the closure of Victoria's Point Nepean Quarantine Station, see 'Quarantine Station: Point Nepean National Park', *Parks Victoria* (Web Page) <https://www.parks.vic.gov.au/places-to-see/parks/point-nepean-national-park/attractions/quarantine-station>.

94 The *Quarantine Act*, now repealed, defined a 'quarantinable disease' as 'any disease declared by the Governor-General, by proclamation, to be a quarantinable disease': *Quarantine Act* (n 87) s 5, as repealed by *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015* (Cth) sch 1 item 1.

95 Longhurst, 'Quarantine Matters' (n 88) 591. See also Peta Longhurst, 'Contagious Objects: Artefacts of Disease Transmission and Control at North Head Quarantine Station, Australia' (2018) 50(3) *World Archaeology* 512.

96 Longhurst, 'Quarantine Matters' (n 88) 592.

97 Ibid 593.

98 Anne Twomey, 'States are Shutting Their Borders to Stop Coronavirus. Is That Actually Allowed?', *The Conversation* (online, 22 March 2020) <https://theconversation.com/states-are-shutting-their-borders-to-stop-coronavirus-is-that-actually-allowed-134354>.

system during pandemics was recognised.[99] However, this issue attracted particular attention during the COVID-19 pandemic, as the closure of domestic borders generated controversy. States and territories imposed restrictions on the entry of travellers from other jurisdictions in Australia,[100] leading to 'border wars' between the states over when domestic border restrictions should be lifted,[101] questions about the constitutionality of such restrictions,[102] and concerns regarding the impact of such restrictions on domestic travel and tourism, particularly as distancing requirements were eased.[103] This also highlighted geographical aspects of public health regulation as certain areas (states, cities, and local government areas) were designated as 'hotspots' and residents living in or visitors to them were subject to exclusion or quarantine.

The significance of and tensions surrounding laws implementing domestic border closures were highlighted during the COVID-19 pandemic when the High Court of Australia adjudicated a challenge to them in the case of *Palmer v Western Australia* ('*Palmer (HCA)*').[104] Clauses 4 and 27 of the *Quarantine (Closing the Border) Directions* (WA) prohibited people who did not fall within specified categories of 'exempt travellers' from entering Western Australia, and ss 56 and 67 of the *Emergency Management Act 2005* (WA) authorised, respectively, the Minister to declare a state of emergency, and a hazard management or authorised officer, during a state of emergency, to prohibit people's movement into an emergency area.[105] Clive Palmer submitted that Western Australia's border closures impermissibly infringed s 92 of the *Australian Constitution*, which provides that 'trade, commerce, and intercourse among the States … shall be absolutely free'.[106] He argued that the Minister's directions contravened that freedom by imposing an 'effective burden' on it through 'prohibiting cross-border movement of persons', or alternatively 'an effective discriminatory burden with protectionist effect'.[107] The High Court unanimously dismissed Palmer's action, determining that while

99 Bennett, 'Legal Rights during Pandemics' (n 70).

100 Twomey (n 98).

101 Matt Coughlan and Rebecca Gredley, 'Border Wars: Premiers Clash Over Interstate Travel', *Australian Financial Review* (online, 18 May 2020) <https://www.afr.com/politics/federal/border-wars-premiers-clash-over-interstate-travel-20200518-p54u40>.

102 See Twomey (n 98). See also Benjamen Franklen Gussen, 'South Australia Will Re-Open Its Borders to Some States, But Not Others. Is That Constitutional?', *The Conversation* (online, 17 June 2020) <https://theconversation.com/south-australia-will-re-open-its-borders-to-some-states-but-not-others-is-that-constitutional-140934>. See below nn 104–8 and accompanying text.

103 Aaron Smith, '"We're Losing $6m a Day": Queensland's Tourism Industry Pleads for More Attention', *The Guardian* (online, 30 October 2020) <https://www.theguardian.com/australia-news/2020/oct/30/were-losing-6m-a-day-queenslands-tourism-industry-pleads-for-more-attention>.

104 (2021) 388 ALR 180 ('*Palmer (HCA)*').

105 Ibid 183–4 [1]–[7].

106 Ibid 183 [1], 184–5 [9]–[13].

107 Ibid 185 [13].

s 67 of the *Emergency Management Act 2005* (WA) could impose a burden on interstate trade, commerce or intercourse, it was justified, not discriminatory and did not infringe s 92 of the *Australian Constitution*. Its object of managing a state of emergency was legitimate and the burden was reasonably necessary where an emergency was constituted by the hazard of an epidemic to manage its adverse effects and protect health and life.[108]

The debates over closure of Australian borders during the COVID-19 pandemic reveal the potential for challenges to arise within a federal legal system. However, they also serve as a clear reminder of the continued utility of traditional public health tools, such as quarantine, and the relevance of geography to public health and public health laws.

III The Future of Public Health Law

While the COVID-19 pandemic has focused attention on the scope and application of government powers in an emergency, it has also highlighted the importance of some of the broader issues related to public health. These broader issues will help to shape and inform the future of public health law in Australia (and elsewhere). As a starting point, the pandemic has highlighted the importance of public health law,

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108 Ibid 197–8 [72], [81] (Kiefel CJ and Keane J), 216 [153], 218–9 [166] (Gageler J), 230 [205], 230–1 [208]–[209] (Gordon J), 255 [291] (Edelman J). Similarly, in *Gerner v Victoria* (2020) 385 ALR 394 ('*Gerner*'), the High Court rejected the argument that the exercise of emergency powers constitutes an impermissible impediment to interstate movement including the contention that intrastate movement is a necessary incident in interstate intercourse: at 401 [22], 402 [27] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ). The High Court in *Palmer (HCA)* (n 104) also held that: ss 56 and 67 of the *Emergency Management Act 2005* (WA) 'comply with the constitutional limitation of s 92 of the *Constitution*'; '[t]he exercise of the power given by those provisions to make paras 4 and 5 of the *Quarantine (Closing the Border) Directions* (WA) does not raise a constitutional question'; and '[n]o issue is taken as to whether the *Quarantine (Closing the Border) Directions* (WA) were validly authorised by the statutory provisions': at 187 [25]. Chief Justice Kiefel and Keane J in their joint judgment, and Edelman J, applied the test of 'structured proportionality' to determine if these laws could be justified and found that it was satisfied. Justice Edelman explained the test of structured proportionality in stages:

> The first requires the identification of a legitimate purpose. The second requires assessment of the extent to which the means of achieving that legitimate purpose … The third assesses whether, despite the reasonable necessity of the means adopted to achieve the legitimate purpose, the purpose nevertheless cannot justify the burden upon the constitutional freedom.

Palmer (HCA) (n 104) 248 [266] (Edleman J). See also at: 194 [54], 194 [56], 195 [58]–[60], 196 [62], 197 [77], 199 [81] (Kiefel CJ and Keane J), 247–8 [264]–[265] (Edelman J). By contrast, Gageler and Gordon JJ in separate judgments rejected the need to apply the structured proportionality test, preferring only to apply 'the standard of reasonable necessity': at 202 [94] (Gageler J), 213–4 [143]–[146], 228–9 [198]–[199] (Gordon J).

moving it to a more prominent role within health law and the law more generally, which it may continue to occupy. The COVID-19 pandemic has provided a clear illustration of the importance of public health law in supporting the health of the Australian community. However, the exercise of public health laws can sometimes involve difficult choices, particularly when decisions made to protect the health of the community (potentially) infringe on individual rights. In addition, as this pandemic has highlighted, there is a need to ensure that existing disadvantage is not exacerbated during a public health crisis and that broader social and economic needs are addressed in response to it. Part III(B) discusses the balancing of rights during a pandemic and analyses the consideration of these issues by Australian courts. These broader social and economic dimensions of the pandemic have been key to appreciating its impact. As a result, there is now greater awareness and understanding of the social and economic dimensions of health that will help to inform the development of public health law into the future. The availability of accurate data has also been essential to the development of policy responses during the pandemic. Part III(C) considers how the role played by data and medical science in informing responses to the pandemic may influence responses to future public health crises, while Part III(D) analyses the importance of recognising the zoonotic origins of many diseases and the implications of this for future public health law.

A *Moving Public Health Law to the Centre of Health Law*

Public health law has played an important role in influencing the health of individuals, communities and populations for a long time, but at times it has been marginalised within health law and health law scholarship.[109] Nevertheless, the COVID-19 pandemic appears to have accelerated a more recent trend towards acknowledging its significance by highlighting its protective function during a public health emergency. As Géraldine Marks-Sultan et al have observed:

> A health emergency tests how effectively regulatory strategies, social contract principles and human rights norms have been embodied in the written laws of a country, and how closely, in turn, those legal embodiments guide action. Disease outbreaks, for example, require a wide range of actions (e.g. disease reporting, surveillance, quarantine, social distancing, curfews, import of medical supplies and personnel, and vector control), all of which are effected through, or subject to, national laws.[110]

The use of a curfew (fire-cover: couvre-feu), marked by a ringing of a bell at dusk to reduce the risk of nocturnal fires, was an early example of public health

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109 See, eg, Michelle M Mello et al, 'Critical Opportunities for Public Health Law: A Call for Action' (2013) 103(11) *American Journal of Public Health* 1979.

110 Géraldine Marks-Sultan et al, 'National Public Health Law: A Role for WHO in Capacity-Building and Promoting Transparency' (2016) 94(7) *Bulletin of the World Health Organization* 534, 534.

regulation.[111] Throughout the 19th century, public health laws at a national level focused on improving the sanitary conditions of urban environments. The enactment of the *Public Health Act 1848* (UK)[112] is an example of such English legislation on which early Australian public health laws were modelled.[113] For instance, *An Act for Promoting the Public Health in Populous Places in the Colony of Victoria 1854* (Vic) created a Central Board of Health and local health boards, which were responsible for monitoring the sanitary conditions of public spaces, private homes and commercial practices.[114] In the period since these early laws were enacted, public health law has evolved in response to increasing recognition of the potential for law to support population health in areas such as NCDs, infectious diseases, occupational health and safety, food safety, and environmental protection.[115]

Despite the importance of public health law for the health of populations, it has often received relatively little attention in legal education[116] and legal scholarship, compared to the legal and ethical issues raised by 'high-tech' health care.[117] However, even before the COVID-19 pandemic, this trend had begun to shift. While there has been debate about the scope and breadth of public health law,[118] as Sonia Allen notes, contemporary public health law 'is a field that considers how the law may be used as a tool to improve public health, and conversely how current laws may impact negatively on the public's health'.[119] Importantly, public health law

111 See Ian Freckelton, 'COVID-19 Curfews: Kenyan and Australian Litigation and Pandemic Protection' (2020) 28(1) *Journal of Law and Medicine* 117, 119 ('COVID-19 Curfews').

112 See Elizabeth Fee and Theodore M Brown, 'The Public Health Act of 1848' (2005) 83(11) *Bulletin of the World Health Organization* 866. Fee and Brown describe the *Public Health Act 1848* (UK) as 'one of the great milestones in public health history, … [f]or the first time, the state became the guarantor of standards of health and environmental quality and provided resources to local units of government to make the necessary changes to achieve those standards': at 866.

113 See Christopher Reynolds, *Public Health Law and Regulation* (Federation Press, 2004) 70–3 ('*Public Health Law*').

114 See, eg, *An Act for Promoting the Public Health in Populous Places in the Colony of Victoria 1854* (Vic) ss 2, 4, 8, 10, 16, 18.

115 Reynolds, *Public Health Law* (n 113) 7. See also Sonia Allen, 'Public Health Law' in Ian Freckelton and Kerry Petersen (eds), *Tensions and Traumas in Health Law* (Federation Press, 2017) 167, 168.

116 In his 2004 book, Reynolds lamented: 'Public health law is not an established category of law in the sense that it is rarely (if ever) taught in Australian law schools as a subject in its own right': Reynolds, *Public Health Law* (n 113) 6.

117 A similar point has been made about bioethics scholarship, see Margaret P Battin et al, *The Patient as Victim and Vector: Ethics and Infectious Disease* (Oxford University Press, 2nd ed, 2021) ch 4; Michael J Selgelid, 'Ethics and Infectious Disease' (2005) 19(3) *Bioethics* 272.

118 See Allen (n 115) 169–71.

119 Ibid 186. See also Gostin and Wiley (n 34).

'provides the powers and creates the structures that assist the task of preventing disease and allowing the opportunities for longer and healthier lives'.[120] Both domestically and globally, law provides the 'architecture' for good health,[121] with recent scholarship describing law as 'a key determinant of health'.[122] In recent years, there has been a growing awareness of the importance of the legal dimensions of public health, and an increasing body of scholarship on legal issues related to NCDs,[123] obesity,[124] tobacco control,[125] and alcohol use.[126] Also contributing to the expansion of public health law has been the development of a new, allied field of 'legal epidemiology', primarily in United States' health law scholarship, which seeks to provide empirical evidence bases for the effectiveness of legal interventions.[127]

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120 Reynolds, *Public Health Law* (n 113) 5. For a United States perspective, see Scott Burris and Evan Anderson, 'Legal Regulation of Health-Related Behavior: A Half Century of Public Health Law Research' (2013) 9(1) *Annual Review of Law and Social Science* 95.

121 Lawrence O Gostin et al, 'The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development' (2019) 393(10183) *Lancet* 1857, 1893 ('The Legal Determinants of Health'). For an overview, see Belinda Bennett, 'Law, Global Health and Sustainable Development: The Lancet Commission of the Legal Determinants of Health' (2020) 27(3) *Journal of Law and Medicine* 505.

122 Gostin et al, 'The Legal Determinants of Health' (n 121) 1859.

123 See, eg: Kate Mulvany, 'Prevention of Non-Communicable Diseases in Australia: What Role Should Public Health Law Play?' (2015) 23(1) *Journal of Law and Medicine* 83; Roger S Magnusson et al, 'Legal Capacities Required for Prevention and Control of Noncommunicable Diseases' (2018) 97(2) *Bulletin of the World Health Organization* 108; Andrew Mitchell and Tania Voon, 'Implications of the World Trade Organization in Combating Non-Communicable Diseases' (2011) 125(1) *Public Health* 832.

124 Caroline Mills, 'Planning Law and Public Health at an Impasse in Australia: The Need for Targeted Law Reforms to Improve Local Food Environments to Reduce Overweight and Obesity' (2014) 22(1) *Journal of Law and Medicine* 179; Benjamin Brooks, 'Personal Responsibility or Shared Responsibility: What is the Appropriate Role of the Law in Obesity Prevention?' (2015) 23(1) *Journal of Law and Medicine* 106; Jacqueline Lau, Elizabeth Handsley and Christopher Reynolds, 'Obesity Prevention Laws and the Australian Constitution' (2017) 25(1) *Journal of Law and Medicine* 248.

125 Tania Voon et al (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar Publishing, 2012).

126 See, eg: Tony Brown, 'Public Health Versus Alcohol Industry Compliance Laws: A Case of Industry Capture?' (2020) 27(4) *Journal of Law and Medicine* 1047; Paula O'Brien, 'Warning Labels About Alcohol Consumption and Pregnancy: Moving from Industry Self-regulation to Law' (2019) 27(2) *Journal of Law and Medicine* 259.

127 Scott Burris, Lindsay K Cloud and Matthew Penn, 'The Growing Field of Legal Epidemiology' (2020) 26(2) *Journal of Public Health Management and Practice* S4. '"Legal epidemiology" is the scientific study and deployment of law as a factor in the cause, distribution, and prevention of disease and injury in a population.': at S4. See also Scott Burris et al, 'A Transdisciplinary Approach of Public Health Law: The Emerging Practice of Legal Epidemiology' (2016) 37(1) *Annual Review of Public Health* 135.

The COVID-19 pandemic has advanced this trajectory further, giving public health law a new prominence within health law. As discussed further below, public health law has played a crucial role in supporting the response to the pandemic by protecting individual, community and population health.

B *Balancing Rights and Public Health*

Unlike many other areas of health law that focus on the decisions of individuals or families,[128] usually in the context of clinical decision-making, public health laws have a broader focus on the community.[129] In the context of infectious diseases, for example, quarantine laws provide a stark example of the ways in which the interests of the broader community can take precedence over the interests of the individual to liberty and freedom of movement. A pandemic highlights the limits of traditional autonomy-based understandings of individual rights and the importance of understanding rights within a relational context. As Margaret Battin et al point out, '[i]nfectiousness is an especially direct reminder of how misleading the paradigms of individualism can be'.[130] As they note, in the context of infectious diseases, the patient may be both 'victim and vector',[131] making it important to understand autonomy as 'embedded' in our relationships to others, including to people whom we may not know.[132] The COVID-19 pandemic has also highlighted the importance of focusing on the interests of society's most vulnerable in a public health crisis.

International commentators have argued that challenges to governments' public health measures during this pandemic have exposed inconsistencies between the 'assumptions about the burden of proof' for establishing their legitimacy in civil rights and public health discourses respectively.[133] The former require governments to produce evidence to demonstrate that the preconditions for limiting human rights, which are set out in international and domestic legal instruments and discussed below,

128 Decision-making in the context of genetics may have implications for family members as well as individuals. See, eg: Margaret Otlowski, 'Australian Reforms Enabling Disclosure of Genetic Information to Genetic Relatives by Health Practitioners' (2013) 21(1) *Journal of Law and Medicine* 217; Ellen Wright Clayton et al, 'The Law of Genetic Privacy: Applications, Implications, and Limitations' (2019) 6(1) *Journal of Law and the Biosciences* 1; Edward S Dove et al, 'Familial Genetic Risks: How Can We Better Navigate Patient Confidentiality and Appropriate Risk Disclosure to Relatives?' (2019) 45(8) *Journal of Medical Ethics* 504; Graeme Laurie, *Genetic Privacy: A Challenge to Medico-Legal Norms* (Cambridge University Press, 2002).

129 Lisa Lee notes that 'clinical medicine has at its core the patient-provider relationship, while public health has at its core the responsibility for the health of the community': Lisa M Lee, 'Public Health Ethics Theory: Review and Path to Convergence' (2012) 40(1) *Journal of Law, Medicine and Ethics* 85, 85.

130 Battin et al (n 117) 78.

131 Ibid.

132 Ibid 77–9.

133 Flood, Thomas and Wilson (n 43) 252.

have been met.[134] Conversely, according to the latter, which rely on the so-called 'precautionary principle', those who oppose the measures bear the onus of proving that they are unjustified.[135] This principle provides that 'measures should be taken to protect against a risk even if there is uncertainty over the benefit of the measures or the level of risk' and, the greater the risk to public health, the lower the evidentiary threshold to substantiate precautionary measures.[136] The precautionary principle recognises that when a new disease, such as COVID-19, becomes a pandemic, governments may need to act to safeguard the population in ways that engage human rights in the context where there is not yet 'conclusive scientific evidence' regarding the disease, the nature of the risks it poses, and/or the effectiveness of public health measures in lowering any risks.[137] In *Loielo*, Ginnane J exemplified courts' pragmatic reconciliation of these discourses in adjudicating contests to public health measures adopted by Australian governments during COVID-19.[138] That approach recognised that, in an emergency, it may be appropriate to apply the precautionary principle,[139] provided that, in determining which public health measures to implement, any available scientific evidence and relevant data, as well as the implications of those measures for human rights, are taken into account.[140]

According to Australian and international legislative instruments, for a successful defence of health measures that limit human rights, governments may need to establish, amongst other things, that: the measures were 'necessary' to protect public health; they were 'reasonable' (which could be established by showing that their 'purpose' was to minimise risks to public health and this was vital due to the gravity of those risks, the limitations on people's liberties were short-term and maintained only while the risks remained high, and they were the least restrictive 'reasonably available' measures to reduce the risks); and the limitations were proportionate to the public health interests to be protected.[141] *Loielo* exemplified courts' application of these tests. Justice Ginnane found that the curfew direction engaged the human

134 Ibid.

135 Ibid 253.

136 Ibid. The principle is explicitly articulated in s 6 of the *Public Health and Wellbeing Act 2008* (Vic).

137 Flood, Thomas and Wilson (n 43) 252–3; Wendy E Parmet, *Populations, Public Health, and the Law* (Georgetown University Press, 2009) 69–70.

138 *Loielo* (n 23) 51 [183].

139 Section 6 of the *Public Health and Wellbeing Act 2008* (Vic) provides that '[i]f a public health risk poses a serious threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk'.

140 *Loielo* (n 23) 18 [40], 30–1 [90]–[91], 33 [102]–[103], 34 [105], 34–5 [107]–[108], 52 [185], 55 [202], 69 [260].

141 See, eg: *Human Rights Act 2004* (ACT) s 28; *Human Rights Act 2019* (Qld) s 13; *Charter* (n 36) s 7(2); *ICCPR* (n 35) art 12(3); Human Rights Committee, *CCPR General Comment No 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [11]–[14]; Human Rights Committee, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, UN Doc CCPR/C/128/2 (30 April 2020).

right to freedom of movement, which is recognised in the *Charter*, because it constrained the rights of people in certain areas of Victoria to move freely within, enter and leave the state.[142] As required by the *Charter*, Ginnane J assessed whether this human right was subject to 'reasonable limits as can be demonstrably justified in a free and democratic society', and concluded that the restrictions were lawful.[143] His Honour found that the object of the Victorian Government's restriction of the right to freedom of movement was to safeguard public health.[144] A number of factors were considered, including: Victoria's state of emergency; the impact of measures that had been implemented; the curfew's 'temporary duration'; and 'the urgency of the situation and the risks if infection rates surged again'.[145] Justice Ginnane found that there were no 'less restrictive means reasonably available to achieve the purpose'.[146] Further, his Honour considered that the curfew was 'reasonably necessary to protect public health' because 'it reduced the movement of people' and 'thereby contributed to a reduction in the spread of COVID-19', and the 'limitations were reasonably proportionate to the objective of protecting public health'.[147]

However, balancing rights and public health at a time of crisis such as COVID-19 can generate different approaches. For instance, in *Roman Catholic Diocese of Brooklyn, New York v Cuomo*, the plurality of the United States Supreme Court, when called upon to grapple with the legitimacy of executive orders imposing restrictions on attendance at religious services in New York, observed that

> even in a pandemic, the *Constitution* cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.[148]

During the COVID-19 pandemic, Australian courts needed to balance individuals' rights and the community's health interests in various contexts. These cases involved challenges to: detention in a prison environment by a man with particular health vulnerabilities;[149] detention in an immigration centre during the pandemic;[150]

142 *Loielo* (n 23) 58 [217]; *Charter* (n 36) s 12.

143 *Charter* (n 36) s 7(2); *Loielo* (n 23) 10–11 [21].

144 *Loielo* (n 23) 56 [203].

145 Ibid 10–11 [21], 65 [243], 67–8 [251]–[253].

146 Ibid 66 [244], 67–8 [251]–[253]. See also Freckelton, 'COVID-19 Curfews' (n 111).

147 *Loielo* (n 23) 10–11 [21], 52 [185]–[186], 68 [253].

148 *Roman Catholic Diocese of Brooklyn, New York v Cuomo* (n 44) [68]. See also Parmet, 'The Supreme Court and Pandemic Controls' (n 44).

149 See *Rowson v Department of Justice & Community Safety* (2020) 60 VR 410.

150 *BNL20 v Minister for Home Affairs* [2020] FCA 1180. See Sara Dehm, Claire Loughnan and Linda Steele, 'COVID-19 and Sites of Confinement: Public Health, Disposable Lives and Legal Accountability in Immigration Detention and Aged Care' (2021) 44(1) *University of New South Wales Law Journal* 60.

the government's imposition of a curfew by a restaurant owner adversely affected by it;[151] infringements on the constitutionally recognised freedom of movement, both personally and in respect of trade, commerce and intercourse, imposed through the exercise of Victorian and Western Australian emergency powers;[152] and requirements that persons be vaccinated against COVID-19 before being permitted to work.[153]

The way in which the Victorian Government balanced public health with individuals' rights came under scrutiny in the context of a lockdown of 3,000 residents of nine inner-city public housing towers in Melbourne. The residents received no advance notice or explanation of a direction by the Deputy Chief Health Officer to stay in their often crowded high-rise homes that lacked outdoor space. Images of the residents' distress were broadcast around the world, prompting the Ombudsman to conclude that the lockdown was incompatible with residents' human rights, including their right to humane treatment when deprived of liberty. The Ombudsman identified:

> the early days of the lockdown were chaotic: people found themselves without food, medication and other essential supports. Information was confused, incomprehensible, or simply lacking. On the ground few seemed to know who was in charge. No access to fresh air and outdoor exercise was provided for over a week. In a particularly unfortunate act, temporary fencing for an exercise area was erected one night, surrounded by police, and although quickly taken down, reinforced the residents' sense of being imprisoned.[154]

The Ombudsman noted that the Deputy Chief Health Officer who signed the lockdown directions did not give advice on the timeframe for their implementation and that she was given fewer than 15 minutes to consider the terms of several lengthy documents and their human rights implications.[155] The Ombudsman found that proper consideration of human rights would have allowed for time to communicate with residents and, at least to some degree, better plan the public health response, putting health, not security, front and centre and thereby reducing or eliminating much of the distress that ensued. The Ombudsman commented:

> neglecting human rights comes at a deep human cost … We may be tempted, during a crisis, to view human rights as expendable in the pursuit of saving human lives. This thinking can lead to dangerous territory. It is not unlawful to curtail fundamental rights and freedoms when there are compelling reasons

151 *Loielo* (n 23).

152 *Gerner* (n 108); *Palmer (HCA)* (n 104).

153 See, eg: *Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015; *Kassam v Hazzard* (2021) 393 ALR 664; *Brasell-Dellow v Queensland* (2021) 310 IR 212.

154 Victorian Ombudsman (n 26) 4. See also Freckelton, 'Government Inquiries, Investigations and Reports' (n 56).

155 Victorian Ombudsman (n 26) 5.

> for doing so; human rights are inherently and inseparably a consideration of human lives.[156]

These concerns should be taken into account in future public health emergencies.

In addition, the pandemic has highlighted that, when attempting to safeguard public health, Australian governments are bound to protect the human rights of all people, regardless of their citizenship. In relation to international travellers, art 3 of the *IHR (2005)* requires that '[t]he implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons'.[157] Furthermore, art 32 specifies requirements for treatment of travellers who are subject to health measures implemented under the *IHR (2005)*:

> ***Article 32 Treatment of travellers***
>
> In implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by:
>
> (a) treating all travellers with courtesy and respect;
>
> (b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travellers; and
>
> (c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for travellers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.

As noted above, the use of quarantine during COVID-19 highlights its continued relevance as a public health tool, particularly in response to infectious diseases for which there is no known treatment. This in turn underscores the need for ongoing analysis of its legal and ethical implications for, as Mark Rothstein has noted, quarantine 'raises in the starkest possible terms the fundamental ethical conflict of public health — the clash between individual and population rights and interests'.[158]

The experience of COVID-19 has also focused attention on the importance of pursuing social justice in public health law and understanding governments' responsibility especially in a health emergency to assist, in particular, those who

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156 Ibid.

157 *IHR (2005)* (n 3) art 3(1). For discussion see Andraž Zidar, 'WHO International Health Regulations and Human Rights: From Allusions to Inclusion' (2015) 19(4) *International Journal of Human Rights* 505.

158 Mark A Rothstein, 'From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine' (2015) 12(1) *Indiana Health Law Review* 227, 278.

are vulnerable to experiencing poor health, social and economic outcomes.[159] Governments have taken various steps to protect disadvantaged Australians during this pandemic. For instance, the federal government introduced social security measures to respond to the economic impact of COVID-19 and public health measures that limited people's work opportunities, and thus their earning capacity.[160] In addition, recognising that Indigenous Australians were especially at risk from COVID-19,[161] as mentioned above, federal and state governments made determinations preventing people from entering remote Indigenous communities in the Northern Territory, Queensland, South Australia and Western Australia to reduce the risk of COVID-19 spreading to them.[162]

The pandemic has highlighted social and economic vulnerabilities in the community, the need to consider the impact of measures that respond to public health crises, and the potential for some of those measures to affect parts of the community more adversely than others. In some instances, governments' public health measures have had a harsher impact on those who were already disadvantaged than on other Australians. Distributive justice in public health law envisages sharing of advantages, but also fair distribution of 'burdens'.[163] The lockdowns also heightened the risks of domestic violence and the obstacles to victims obtaining help and protection.[164] As discussed above, the imposition of a 'hard lockdown'

159 Nigel Stobbs, Belinda Bennett and Ian Freckelton, 'Compassion, Law and COVID-19' (2020) 27(4) *Journal of Law and Medicine* 865. See also Belinda Bennett and Terry Carney, 'Planning for Pandemics: Lessons from the Past Decade' (2015) 12(3) *Journal of Bioethical Inquiry* 419, 425.

160 Michael Klapdor, 'Changes to the COVID-19 Social Security Measures: A Brief Assessment' (Research Paper, Parliamentary Library, Parliament of Australia, 30 July 2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/ChangesCOVID-19SocialSecurity>. See also Terry Carney, 'Economic Hardship Payments in Health Emergencies' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 182.

161 Bonavero Institute of Human Rights, *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions* (Report No 3/2020, 6 May 2020) 22, 28.

162 See above n 82. See, eg: Mclean and Huf (n 19) 22; Fiona Stanley et al, 'First Nations Health during COVID-19 Pandemic: Reversing the Gap' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 294.

163 Gostin and Wiley (n 34) 19.

164 Kate Fitz-Gibbon, Jacqui True and Naomi Pfitzner, 'More Help Required: The Crisis in Family Violence during the Coronavirus Pandemic', *The Conversation* (online, 18 August 2020) <https://theconversation.com/more-help-required-the-crisis-in-family-violence-during-the-coronavirus-pandemic-144126>; Hayley Boxall, Anthony Morgan and Rick Brown, 'The Prevalence of Domestic Violence Among Women during the COVID-19 Pandemic' (Statistical Bulletin No 28, Australian Institute of Criminology, July 2020). For further discussion of the impact of the pandemic on Australian women see Belinda Bennett and Claire E Brolan, 'Gender and COVID-19:

on nine public housing towers in Melbourne after outbreaks of COVID-19 in them was particularly contentious[165] and brought to public awareness governments' responsibilities to apply public health measures in a non-discriminatory manner. The United Nations has noted in relation to COVID-19 that '[n]ever before has the importance of the responsibility of governments to protect people, by guaranteeing their economic and social rights, been so clearly demonstrated'.[166] The COVID-19 pandemic has thus provided a clear illustration of the relevance of social equity for public health and public health law.

As discussed in the Parts above, the COVID-19 pandemic has had a broad-reaching impact and affected all aspects of Australian society. This pandemic has thus highlighted that health law is not simply about protecting individuals' physical and mental health. Responding to a public health emergency may involve taking a wide range of measures to address its social and economic impact too. Consequently, providing the necessary legal frameworks to support public health requires a broader approach than one focused on health, defined narrowly. Further, it may require engagement with all sectors of government.[167] This observation also pertains to emergencies and disasters more generally. Indeed, the *Royal Commission into National Natural Disaster Arrangements* recognised the need for a '"whole-of-nation," "whole-of-government" and "whole-of-society" cooperation and effort' in responding to natural disasters.[168]

The next Part considers how COVID-19 has highlighted the importance of accurate data and up-to-date findings from medical science informing public health decision-making during a health emergency.

C *Reliance on Data and Medical Science in Public Health Decision-Making*

The COVID-19 pandemic has highlighted that, during a public health crisis, it is vital that governments' public health responses are informed by accurate and contemporaneous health data, which are grounded in population-based information,[169] and have been subjected to detailed epidemiological analysis, which permits

An Australian Perspective' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 278.

165 Victorian Ombudsman (n 26); Mclean and Huf (n 19) 42.

166 United Nations, *COVID-19 and Human Rights: We Are All in This Together* (Policy Brief, April 2020) 9.

167 See Jenny Firman, Stephanie A Williams and Chris Baggoley, 'From Plague to MERS: Coordinating Australia's Response to Emerging Infectious Diseases' (2016) 26(5) *Public Health Research and Practice* e2651654:1–5.

168 *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 23.

169 Ian Freckelton and Vera Lúcia Raposo, 'International Access to Public Health Data: An Important Brazilian Legal Precedent' (2020) 27(4) *Journal of Law and Medicine* 895.

identification of patterns, trends and adjustment of public health strategies.[170] The Organisation for Economic Co-operation and Development has argued in favour of adopting open science policies to remove obstacles to the free flow of research and ideas during global health emergencies, so as to accelerate the pace of research critical to combatting the disease.[171]

Access to accurate data is crucial for identifying the effects of, and trends during, a pandemic and especially whether and, if so, where it has had a disproportionate impact. During the COVID-19 pandemic,[172] and in previous public health emergencies,[173] the need for data to be disaggregated on the basis of sex has been identified as essential to monitoring the gendered impact of these emergencies. Disaggregation of data on the basis of age, race and ethnicity is similarly important to determining the varied effects of a public health crisis on different segments of the community.[174]

While data have always been relevant to public health, generally health law and public health law have not focused closely on data. However, COVID-19 and the growing interest in 'legal epidemiology'[175] may herald a change in this approach. By highlighting the importance of data for public health, and the relevance of government powers and privacy rights in relation to the collection and use of such data, the COVID-19 pandemic has contributed to the evolution of public health law. In a context where data are increasingly important to health law,[176] this growing focus on data is likely to be reflected in the future development of Australian public health law.

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170 See Rositsa Zaimova, 'How Data Can Help Fight a Health Crisis like the Coronavirus', *World Economic Forum* (Forum Post, 31 March 2020) <https://www.weforum.org/agenda/2020/03/role-data-fight-coronavirus-epidemic/>.

171 'OECD Policy Responses to Coronavirus (COVID 19): Why Open Science is Critical to Combatting COVID-19', *OECD* (Web Page, 12 May 2020) <http://www.oecd.org/coronavirus/policy-responses/why-open-science-is-critical-to-combatting-covid-19-cd6ab2f9/>.

172 Clare Wenham, Julia Smith and Rosemary Morgan, 'COVID-19: The Gendered Impacts of the Outbreak' (2020) 395(10227) *Lancet* 846.

173 Davies and Bennett (n 12).

174 United Nations, *The Impact of COVID-19 on Older Persons* (Policy Brief, May 2020) 15. For discussion of racial and ethnic disparities in COVID-19 see Monica Webb Hooper, Anna María Nápoles and Eliseo J Pérez-Stable, 'COVID-19 and Racial/Ethnic Disparities' (2020) 323(24) *Journal of American Medical Association* 2466.

175 Burris, Cloud and Penn (n 127).

176 For discussion of data and health law see: Moira Paterson and Norman Witzleb, 'The Privacy-Related Challenges Facing Medical Research in an Era of Big Data Analytics: A Critical Analysis of Australian Legal and Regulatory Frameworks' (2018) 26(1) *Journal of Law and Medicine* 188; Marie M Bismark et al, 'A Step Towards Evidence-Based Regulation of Health Practitioners' (2015) 39(4) *Australian Health Review* 483; Marie M Bismark and David M Studdert, 'Realising the Research Power of Complaints Data' (2010) 123(1314) *New Zealand Medical Journal* 12.

Additionally, during the COVID-19 pandemic, Australian courts have tended to defer explicitly to health professionals' expertise and scientific evidence, as well as to public health, epidemiological and demographic data, in assessing whether governments have met preconditions for legitimately curtailing enjoyment of human rights through their public health measures. Before reaching its decision in *Palmer (HCA)*, for instance, the High Court had remitted to the Federal Court of Australia for determination factual matters that were pertinent to the respondent's argument that the border restrictions were justified because they were: 'reasonably necessary for the protection of the Western Australian community against the health risks of COVID-19'; 'reasonably appropriate and adapted to advance that object or purpose'; and there were 'no other equally effective means, which would impose a lesser burden on interstate trade, commerce and intercourse, available to achieve that object or purpose'.[177] At this hearing, the parties presented evidence from health professionals with expertise in relevant areas, including epidemiology and microbiology, about the comparative efficacy of border restrictions and other possible measures in preventing COVID-19 from being introduced to Western Australia and spreading.[178] Based on the expert evidence, Rangiah J concluded that the border restrictions were 'effective to a very substantial extent to reduce the probability of COVID-19 being imported into Western Australia'.[179] Further, if people entered Western Australia's 'community while infectious, there would be a high probability that the virus would be transmitted into the Western Australian population' and a 'moderate probability' of 'uncontrolled outbreaks' where 'health consequences could be catastrophic'.[180] Justice Rangiah also found that other measures 'would be less effective … in preventing the importation of COVID-19'.[181]

COVID-19 has demonstrated that governments' provision to the community of coherent, accurate evidence and data about an infectious disease and the efficacy of interventions to minimise the risks it poses to public health may encourage sufficient compliance with health measures to reduce its transmission. Victoria exemplifies the success of such communication. During the period in which Victorians experienced the most restrictive public health measures, the Premier held daily press briefings, often with the Chief Health Officer, which discussed relevant evidence and data, and regular media releases provided updates on the spread of the disease.[182] The Victorian Government, like others during the pandemic, needed also to navigate disagreements among epidemiologists about the necessity for and efficacy of certain

177 *Palmer (FCA)* (n 41) [5], [11].

178 Ibid [34], [43], [48], [54], [56], [58], [61].

179 Ibid [366].

180 Ibid.

181 Ibid.

182 See, eg: Department of Health and Human Services (Vic), 'Updates about the Outbreak of the Coronavirus Disease (COVID-19)', *Updates Archive* (Web Page, 30 April 2020) <https://www.dhhs.vic.gov.au/coronavirus/updates/202004>; 'Daniel Andrews is Finally Taking a Day Off: Is This a Sign Things are Looking up for Victoria?', *ABC News* (online, 30 October 2020) <https://www.abc.net.au/news/2020-10-30/daniel-andrews-takes-day-off-after-120-covid-media-briefings/12831460>.

public health measures and differences in their modelling.[183] This will likely be an issue in future public health emergencies.

D *From Human Health to One-Health*

COVID-19 has alerted us to the rising incidence of zoonotic diseases and the need for Australian, and also international, public health law to address the risks they pose to humans.[184] WHO defines a 'zoonosis' as

> an infectious disease that has jumped from a non-human animal to humans. Zoonotic pathogens may be bacterial, viral or parasitic, or may involve unconventional agents and can spread to humans through direct contact or through food, water or the environment. They represent a major public health problem around the world due to our close relationship with animals in agriculture, as companions and in the natural environment.[185]

Severe Acute Respiratory Syndrome, Middle East Respiratory Syndrome, Ebola, and influenza are but a few examples of diseases with a zoonotic origin that have affected humanity recently.[186] Given that up to 75% of emerging infectious diseases have a zoonotic origin,[187] there has been increased recognition of the importance of a One

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183 See, eg, 'Epidemiologists React to Victoria's Road Map out of Stage Four Lockdown', *The Age* (online, 7 September 2020) <https://www.theage.com.au/national/victoria/epidemiologists-react-to-victoria-s-road-map-out-of-stage-four-lockdown-20200907-p55tam.html>.

184 See Polly Hayes, 'Here's How Scientists Know the Coronavirus Came from Bats and Wasn't Made in a Lab', *The Conversation* (online, 13 July 2020) <https://theconversation.com/heres-how-scientists-know-the-coronavirus-came-from-bats-and-wasnt-made-in-a-lab-141850>.

185 'Zoonoses', *World Health Organization* (Web Page, 29 July 2020) <https://www.who.int/news-room/fact-sheets/detail/zoonoses>.

186 See Michael Greger, *How to Survive a Pandemic* (Bluebird Books, 2020); Marc-Alain Widdowson, Joseph S Bresee and Daniel B Jernigan, 'The Global Threat of Animal Influenza Viruses of Zoonotic Concern: Then and Now' (2017) 216(4 Supp) *Journal of Infectious* Diseases S493; Clement Meseko, Binod Kumar and Melvin Sanicas, 'Preventing Zoonotic Influenza' in Shailendra K Saxena (ed), *Influenza: Therapeutics and Challenges* (IntechOpen, 2018); 'Preventing the Next Pandemic: Zoonotic Diseases and How to Break the Chain of Transmission', *United Nations Environment Programme* (Statement, 6 July 2020) <https://www.unenvironment.org/news-and-stories/statements/preventing-next-pandemic-zoonotic-diseases-and-how-break-chain>; 'Zoonoses of Australian Native Mammals', *Wildlife Health Australia* (Web Page, August 2017) <https://wildlifehealthaustralia.com.au/FactSheets.aspx>.

187 See Isabella Johnson, Alana Hansen and Peng Bi, 'The Challenges of Implementing an Integrated One Health Surveillance System in Australia' (2018) 65(1) *Zoonoses and Public Health* e229, e229–e230. A joint WHO-China study observed that

> [m]ost emerging viruses originate from animals. Understanding the process that may lead to a cross-species transmission event, also known as a 'spillover', and global spread requires a deep understanding of both the virus diversity and

Health approach to disease surveillance in Australia.[188] One Health has been described as 'a holistic approach that emphasizes, but is not restricted to, the need to understand and regulate the environmental context (human-animal-ecosystem interface) of disease emergence and expression'.[189] As Rupert Woods et al have observed, '[a] greater emphasis on wildlife disease surveillance to assist in the detection of emerging infectious diseases and integration of wildlife health into One Health policy will be critical in better preparing Australia and other countries in their efforts to recognize and manage the adverse impacts of zoonotic diseases on human health'.[190]

In 1990, the National Notifiable Diseases Surveillance System was established under the auspices of the Communicable Diseases Network Australia.[191] This system co-ordinates national surveillance of more than 50 communicable diseases or disease groups with notifications being made to state and territory health authorities along with computerised, de-identified records being provided to the federal Department of Health.[192] The federal government has also announced funding for research on zoonotic diseases.[193] At an international level, WHO has fostered the One Health approach, under which WHO collaborates with the United Nations' Food and Agriculture Organization and the World Organisation for Animal Health on the Global Early Warning System for Major Animal Diseases,[194] which aims to assist in early warning, prevention and control of zoonotic threats.[195]

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evolution in an animal reservoir, the interactions between animals, their environment and humans, and the factors contributing to efficient human to human transmission.

WHO-convened Global Study of Origins of SARS-CoV-2: China Part (Joint Report, 10 February 2021) 58 ('WHO-China SARS-CoV-2 Report').

188 Johnson, Hansen and Bi (n 187) e229–30.

189 Chris Degeling et al, 'Implementing a One Health Approach to Emerging Infectious Disease: Reflections on the Socio-Political, Ethical and Legal Dimensions' (2015) 15(1) *BMC Public Health* 1307:1–11, 3.

190 Rupert Woods et al, 'The Importance of Wildlife Disease Monitoring as Part of Global Surveillance for Zoonotic Diseases: The Role of Australia' (2019) 4(1) *Tropical Medicine and Infectious Disease* 29, 29.

191 Department of Health (Cth), 'Communicable Diseases Network Australia (CDNA)', *Australian Government* (Web Page, 26 October 2020) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/cda-cdna-index.htm>.

192 See Department of Health (Cth), 'Australian National Notifiable Diseases and Case Definitions', *Australian Government* (Web Page, 19 December 2021) <https://www1.health.gov.au/internet/main/publishing.nsf/Content/cdna-casedefinitions.htm>.

193 Marise Payne and David Littleproud, 'Combatting Zoonotic Diseases in Our Region' (Media Release, 17 July 2020) <https://www.foreignminister.gov.au/minister/marise-payne/media-release/combating-zoonotic-diseases-our-region>.

194 'Zoonoses' (n 185).

195 'Objectives', *Global Early Warning System* (Web Page) <http://www.glews.net/?page_id=34>.

It has been noted that zoonoses have natural reservoirs: the animals or combinations of animals and ecosystems in which the infectious agents customarily live and multiply, and on which they rely for their survival.[196] The principal causes of the emergence of zoonotic diseases are associated with human activities including land use, animal habitat degradation, pollution, agriculture, urbanisation, and international travel and trade.[197] The emergence of COVID-19 highlighted the urgency of the need to acknowledge these connections and seek to take steps to minimise them.[198] However, while there has been renewed interest in a One Health approach, Chris Degeling et al have argued that there are challenges with implementing it.[199] These include: the difficulties with applying the precautionary principle and finding the right balance between a conservative and excessive response to emerging infectious diseases;[200] ethical challenges including differences in public values and beliefs;[201] and legal challenges, which include the jurisdictional and regulatory complexity of implementing a One Health approach.[202]

IV Conclusion

This article has outlined some major ways in which public health laws enabled and shaped responses to the COVID-19 pandemic, and the likely effects of this impact on Australian public health law in the future. We have argued that this pandemic will lead to Australians' increased recognition of the importance of public health law and the legal aspects of responding to public health crises.

As a consequence of COVID-19, we predict that public health law will play a more prominent role in health law generally and scholarship pertaining to it. It joins other developments in public health law in recent years — particularly in areas relating to NCDs — that have led to a greater focus on the role of law in supporting public health.[203] This pandemic has illuminated the international aspects of and influences on Australian public health law. We have become more attuned to the need for evidence-based and, in particular, data-based legal responses to health issues. COVID-19 has reinforced that Australian public health law will need to continue to address the many challenges posed by zoonotic diseases. We have learned that geography is relevant to public health law and that complex issues can arise around

196 David Waltner-Toews, *On Pandemics: Deadly Diseases from Bubonic Plague to Coronavirus* (Black, 2020) 19.

197 See John S Mackenzie and Martyn Jeggo, 'The One Health Approach: Why Is It So Important?' (2019) 4(2) *Tropical Medicine and Infectious Disease* 88.

198 On the origins of COVID-19: see *WHO-China SARS-CoV-2 Report* (n 187).

199 Degeling et al (n 189).

200 Ibid 4.

201 Ibid 5.

202 Ibid.

203 See above Part III(A).

using borders — both international and domestic — to curb the spread of infectious disease, given their implications for individuals' freedom of movement.

COVID-19 has focused the attention of judges, scholars and the public on governments' role in a public health emergency. Debates surrounding the nature of governments' obligations and the extent to which they fulfilled their obligations will have a significant impact on public health law. COVID-19 has highlighted the importance of emergency powers that facilitate governments' prompt responses to threats to public health, but also that maintain their accountability in managing risks, especially where they engage human rights. Indeed, this article argues that, as a consequence of the response to this pandemic, greater accountability, transparency and oversight of public health action will be expected.

Further, it is likely that governments will draw valuable lessons from this pandemic that evidence from medical science and data have the potential to assist in implementing public health measures in an emergency that respect people's rights and elicit community support. The COVID-19 pandemic has heightened awareness of the role of public health law in supporting the health of the public and especially in addressing the needs of the most vulnerable in Australia. This role includes, but also extends beyond, implementing public health measures to protect people's physical health. It is important that reflections on the responses to the COVID-19 pandemic lead to improvements in the capacity of Australian public health law to address challenges posed by future health emergencies.