Times of Pestilence: Would a Bill of Rights Assist Australian Citizens Who Are Quarantined in the Event of an Avian Influenza (Bird Flu) Pandemic?

Introduction

The World Health Organisation has 'warned that in the twenty-first century, infectious diseases pose a more deadly threat to humankind than war' (cited in Moore 2001:2). It has been further predicted that with the onset of the 'rogue diseases of the twenty-first century' we may, indeed, 'be standing on the brink of an unprecedented and devastating combination of the two biological warfare' (Moore 2001:6). Concerns regarding avian influenza, in particular, have raised the spectre of a re-occurrence of the influenza epidemic to rival those epidemics which took place in 1918, 1957, and 1968. While fears of the threat surfaced only periodically during the deliberations over the terrorist threats to Australia, the recent efforts on the part of then federal Health Minister, Tony Abbott, have finally galvanised attention as to the likelihood of a pandemic in Australia and the most appropriate responses to the threat and produced the Pandemic Disease Management Plan in 2005. There has been a series of major disease outbreaks in recent years and these have ranged from severe acute respiratory syndrome (SARS) in Canada, Hong Kong and China to the animal-only foot-and-mouth disease in the United Kingdom (Matthews & Woolhouse 2005:536). Of these, indeed, it is arguable that SARS would seem to provide the closest approximation or parallel to the avian flu pandemic (although there are some key differences in terms of the transmissibility of the two diseases which would seem to affect or impact on the development of appropriate legal responses).

Why are New Diseases Emerging?

It should first be emphasised that there are diseases which are inevitably emerging and will, indeed, emerge or arise from animals specifically, these (diseases) are zoonotic diseases whose inherent or intrinsic 'basic biology' constitutes a serious threat itself (Holmes et al 2005:989). According to Tony McMichael:

> As human numbers have grown over recent millenniums, as trade and travel have extended, as cities have formed and as economic activity has intensified, so the emergence and spread of infectious diseases within and between populations have increased (McMichael 2005:11).

In this respect, the recent emergence of SARS (and other newly transmissible diseases) needs to placed or situated in the broader context of environmental and ecological change which has been prompted by pervasive human impacts. As Robin Weiss and Angela McLean declare:

> ... the pace of ecological and environmental change that brings about new animal-human interfaces, often where humans live densely and hence may provide conditions for onward transmission (Weiss & McLean 2004:1137).

It is, therefore, not surprising that it is from South-East Asia and China that the great majority of warnings regarding the onset of the avian flu virus are emanating. In this context, a 'rapidly expanding popularity' of specific animal foods (particularly civet cats)

and the dramatic increase in the processes of urbanisation and economic development have been advanced as partial explanations for the outbreak of SARS in China at this (particular) time in the twenty-first century (Weiss & McLean 2004:1137).

The Bioethics Perspectives

In documenting the historical development or evolution of bioethics perspectives, David Healy suggests that:

> Bioethics began within healthcare, when philosophers in the 1960s were called out of the ivory towers in which they had previously been debating moral theory to get involved in real moral dilemmas (Healy 2002:47).

The moral dilemmas confronting legal and social policy makers range across these new genetic and reproductive technologies, but the related or associated discipline of bioethics tends (according to one view) to focus on the first world dilemmas of abortion, euthanasia and genetics (Hocking & Guy 2005:144; Selgelid 2005:272). These preoccupations (we would argue) have been problematic since they have led, indeed, to an almost complete neglect of the dilemmas posed by emerging infectious diseases, such as avian flu although these infectious diseases would seem to increasingly be becoming the subject of growing scientific concern (Daszak 2004:1; Binder et al 2004:1311).

A Comparative Precedent: Canada and SARS

Canada, a federal state possessing a similar legal and constitutional framework to that of Australia's, recently confronted a threatened disease pandemic which crossed the boundaries of the developed and developing world. This pandemic occurred, in particular, in the cities of Vancouver and Toronto with the latter city proving less capable of being able to effectively respond to the outbreak (Flood & Williams 2004:229). The SARS outbreak, in this respect, 'posed a challenge to traditional disease-control mechanisms, as information about the emerging infection was scant and public concern was high' (Samaan et al 2004:220).

With the outbreak of SARS, Canada had to confront and respond to the very real threat posed by its own political and administrative neglect of important public health issues and confront them as a developed nation with the capacity to effectively deal with such threats according to the principle of the rule of law. Accordingly, then, we would suggest that the public health and administrative (as well as legal) challenges faced by Canada in managing SARS provide some insight, indeed, into responding to an avian flu pandemic. In this Canadian context, SARS 'transpired to be controllable through careful containment of cases' and it did not have the consequence of resulting in extensive resort to mandatory quarantine (Weiss & McLean 2004:113). As Robin Weiss and Linda McLean observe:

> Although the *Health Protection and Promotion Act* gives officials the power to force non-compliant individuals into quarantine, this was used only once during the outbreak (Weiss & McLean 2004:113).

In some respects, the SARS emergence in Canada resulted in a heightened awareness of the need for renewing the public health apparatus in the country and introducing or implementing effective policies related to infectious disease management. At the very least, the SARS crisis enabled Canada to indicate or illustrate to the world that emerging infectious diseases know no federal or State boundaries and that prevention of such diseases are essentially matters of national concern one that requires federal legislation and an administrative and political framework involving national collaboration and coordination.

Bird Flu in South-East Asia and Australia

While precise numbers and exact occurrences of avian flu remain unknown, it is now acknowledged that this infectious disease has recently broken out in South East Asian countries resulting in the death or, indeed, slaughter of more than 100 million chickens, ducks and other birds. By September 2005, the virus H5N1 a strand of bird flu had killed 57 people in Asia since the beginning of 2004 (Eccleston 2005:15). It should be emphasised, in this respect, that this disease is also essentially zoonotic that is, it emerges from animals. While there is as yet no confirmed cases of human-to-human infection, the 'genetic plasticity' of the virus (with its 'high rates of mutation and a ready capacity for reassortment') mean that it could rapidly evolve into one that is ripe for human to human transmission although there is no evidence as yet that it has, indeed, done so (Eccleston 2005:15).

The concern for Australia, then, is that avian flu could be brought here through the mechanism of migratory birds although (again) this is not our greatest public health risk. The principle risk for Australia is that of (what is called) the recombination of strain. The recombination (or swapping of the genotype) could take place outside Australia probably in Asia and then the problem which arises is (consequently) that influenza is at its peak transmissibility before it is diagnosable.

Bird flu experts, in this respect, have ceased to talk of eradicating the disease and have begun to discuss proposals in relation to controlling the disease before it mutates into a form that could pass between humans and thus precipitate a pandemic that could kill millions (Schuettler 2005:16). Their dire predications are that as a result of virus recombination following concomitant infection of one individual by both avian flu and human flu, as many as 200 million human deaths might result. Given the rapidity of flu transmission, control contingency has therefore become imperative.

Public Health Responses

Any consideration of appropriate responses to such a public health crisis as an avian flu epidemic would provoke in Australia would need to consider a range of restrictions on movement, as well as restrictions on borders, surveillance mechanisms and compulsory notification, treatment, testing and vaccination. A range of responses needs to be considered, then, as part of the background as to uses of detention and of quarantine the obvious responses in this particular context. Related contingency planning could also include inflatable mortuaries, quarantine facilities and the evacuation of cities (Schuettler 2005:16). The full range of potential governmental responses needs to be considered so that our focus, that is detention, can put into its proper context. It is, then, particularly important to consider whether detention will form a part of that contingency, and if so, what form of detention might be appropriate. This will, of course, be most likely to be contingent upon the form of transmission of the disease in question. Voluntary isolation, as was requested by the Canadian authorities in the SARS crisis, may be a key aspect to the contingency planning given that large-scale detention may not be logistically possible. An enhanced capacity for national disease surveillance is widely recommended by scientists as one particular means of improving the culpability of recognising emerging wildlife diseases (Bunn & Woods 2005:53). This has, indeed, implications for the reinvigoration of the Biological Weapons Convention given that:

> Disease surveillance was an important measure in the failed BWC verification protocol against infectious diseases and against bioterrorism (Atlas & Reppy 2005:56).

The Quarantine and Detention Options for Australia

Perhaps the most controversial or contentious response on the part of Australian governmental authorities will be the exact uses of quarantine and detention. We would suggest, in this context, that there are compelling scientific reasons as to why the legal and ethical imperatives for detention or quarantine will certainly differ between an avian flu pandemic and a SARS outbreak. With a SARS outbreak, the period of infectiousness is known to occur after it is diagnosable, whereas with an avian flu outbreak the period of infectiousness occurs after it is diagnosable (White 2005:13). The fear here is that this new pandemic would spread, indeed, like normal flu where SARS would, in fact, be one which gradually spreads and would not (therefore) be extremely infectious. Given that vaccines need to be developed for each strain of flu, quarantine will be a necessary response in this particular bird flu context (White 2005:13).

Here the constitutional regimes of different jurisdictions will be of extreme legal significance, and will affect the relevant detention or quarantine orders, although the extent to which they will do so in the case of infectious diseases remains to be clarified. For example, in the UK, Article 5 (1) of the ECHR (European Convention of Human Rights) states that everyone has the right to liberty and security of person. Section 7 of the Canadian Charter states that no person shall be deprived of life, liberty and the security of the person except in accordance with the principles of fundamental justice. Any United Kingdom law, then, has to be 'read in light of their 1998 Human Rights Act, which sets out the basic standards of liberty that are needed for a democracy' (Williams 2002:19). These yardsticks are essentially inapplicable in Australia as we have no real 'bill of charter of rights' counterpart to measure the extent to which the federal government can restrict freedom of speech and movement in Australia. In the context of a response to an emerging infectious disease pandemic, then, the absence of a federal Bill of Rights will again mean that we have no formal mechanism that will provide protection against infringements of rights and liberties.

The potential effect or impact of a Bill of Rights on the process of involuntary detention and how it can be utilised to minimise the possibility of rights abuses and discrimination on the part of public officials can be illustrated, to a certain extent, by examining the recently enacted *Human Rights Act 2004* in the Australian Capital Territory. This essentially *legislative* Bill of Rights contains (and seeks to protect) a range of civil and political rights and freedoms. Significantly, these include an explicit right to freedom of movement (s13). It would seem that such a legislative right could be invoked by individuals who were subject to involuntary detention (because of a belief on the part of public officials that they had an infectious disease) and whose detention was later found to be unlawful and unjustifiable. The rights, however, listed in the *Human Rights Act* are unenforceable that is, they cannot be enforced by the public in a court of law. Hence, it would seem that the ACT legislation is of limited benefit in guarding against the danger of rights abuses that could be potentially committed by public officials. Nevertheless, it does indicate the potential that is present for a judicially enforceable (or justiciable) Bill of Rights which contains an explicit right to freedom of movement to assist in minimising the possibility for rights abuses to take place and to provide citizens with legal redress when their rights have been trenched on or infringed.

The Australian regulatory or legislative framework which provides for detention in the case of outbreaks of infectious diseases can be found in the federal *Quarantine Act 1908* (Cth). The human quarantine provisions of the Act apply a (relatively) short list of 'high profile' quarantinable diseases (any disease declared by the Governor-General, by

proclamation, to be a quarantinable disease: cholera, plague rabies, smallpox, viral haemorrhagic fever, yellow fever and, most recently, SARS). Addition can be made to this list to include a new disease whenever it is believed to be necessary. In addition to detention powers, the Act also allows persons to be placed under 'quarantine surveillance', which allows their freedom of movement to be monitored.' Under s45 a person may be ordered into quarantine and, in particular, may:

a) be detained on board the vessel or installation;

b) be detained upon the premises upon which they are found;

c) be removed to and detained in a quarantine station; or

d) be removed to and detained in any suitable place or building approved by a quarantine officer (which place or building shall, for the purposes of this Act be deemed to be a quarantine station.

While detained, such persons are subject to regulations relating to 'the performance of quarantine and the government of quarantine stations' (s45 (i)). Furthermore, the Act gives the Minister broad powers to deal with an epidemic caused by a quarantinable disease. Section 2B (1) allows for a declaration that an epidemic or danger of an epidemic exists and, once declared, the Minister may 'during the period that the proclamation remains in force, give such directions and take such action as he or she thinks necessary to control and eradicate, or to remove the danger of the epidemic, by quarantine measures or measures incidental to quarantine' (s2B (2)). The Act also confers on the Minister additional broad powers in those situations of 'emergency.' Where the Minister considers that an 'emergency' situation exists, he or she 'may take such quarantine measures, or measures incidental to quarantine, as he or she thinks necessary or desirable' for containing it (s12A). The Act, in this respect, can override quarantine controls that might, indeed, be exercised by the States (s2A).

The term 'quarantine' was initially defined in s4 of the *Quarantine Act 1908* (Cth). According to the original (unamended) section:

> In this Act, Quarantine has relation to measures for the inspection, exclusion, detention, observation, segregation, isolation, protection treatment, sanitary regulation and disinfection of vessels, installations, persons, goods, things, animals or plants and having as their object the prevention of the introduction, establishment or spread of diseases or pests affecting human beings.

Through the insertion of a new amendment in 2002 the scope of quarantine was significantly expanded to include:

> (i) the examination, exclusion, detention, observation, segregation, isolation, protection, treatment and regulation of vessels, installations, human beings, animals, plants or other goods or things;
>
> (ii) the seizure and destruction of animals, plants or other goods or things; or
>
> (iii) the destruction of premises comprising buildings or other structures when treatment of these premises is not practicable.
>
> (b) having as their object the prevention of control of the introduction, establishment or spread of diseases or pests that will or could cause significant damage to human beings, animals, plants, other aspects of the environment or economic activities (s4 (1)).

This definition would seem to be consistent with the concept of 'quarantine' in other international jurisdictions. For example, the New Zealand *Public Health Act 1956* (NZ) provides for quarantine and its powers extend to limiting persons on ships and aircraft

arriving in the country (s96). Similarly, the Canadian *Quarantine Act 1985* (Can.) does not provide a definition though the powers would seem to clearly embrace the traditional ideas of detention and enforcement.

The above provisions would appear to envisage the *detaining* of individuals for indefinite periods in order, for example, to combat an outbreak of avian flu epidemic. This interpretation is reinforced by the fact that the Act defines the concept or notion of 'quarantine' in terms of 'exclusion, detention, segregation, isolation, protection, treatment and regulation of vessels, humans, animals, plants, or other goods or things' (s4).

The *Quarantine Act* also affords the Minister with broad and general powers to quarantine or isolate particular places or localities. For example, s12 provides that:

> The Minister may, by note published in the *Gazette*, declare that a place beyond or in Australia is infected with a quarantinable disease or quarantinable pest, or that a quarantinable pest may be brought or carried from or through that place.

As well as in this context of seizure and detainment of persons (or animals or things) on 'arrival' in Australia, the concept of 'quarantine' has also been used in the further context of 'detention' in matters relating to the purely domestic or internal context of Australia. This is evident in the public health legislation which has been enacted by the States. For example, the South Australian *Public and Environmental Health Act 1987* (SA) provides for where:

> (a) a medical practitioner has certified that a person is suffering from a controlled notifiable disease; and
>
> (b) the Commission is of the opinion that in the interests of public health that person should be kept at a suitable place of quarantine (ss 30–33).

This notion of 'quarantine' in the Australian constitutional and legislative framework would seem to indicate that the power of quarantine essentially embraces an unrestrained ability or capacity on the part of the government to impose any restraint on liberty and movement in the interests of public health. According to Christopher Reynolds:

> This notion of domestic quarantine may strengthen an argument that the power is wide enough to encompass any restraint on liberty and movement in the interests of public health, though it could also be argued that the term is not correctly applied in this domestic context (Reynolds 2004:171).

In this respect, Reynolds argues that the term 'quarantine' in an Australian legal context essentially connotes four ideas or aspects which include:

> (i) The process is in aid of human health;
>
> (ii) It involves isolation for a medically determinable period;
>
> (iii) A person has or might have an infectious disease which could be transmitted to others; and
>
> (iv) 'the general context in which it has been applied has been in relation to persons arriving from elsewhere (usually overseas) in relation to the need to protect the community from infection emanating from beyond its borders' (Reynolds 2004:171).

If the relevant federal legislation embraces each of these four elements, then the legislation according to Reynolds would seem, in fact, to fall within the federal quarantine power.

Despite this, it needs to be emphasised that the Court is the ultimate arbiter of what precisely constitutes 'quarantine' and whether a law can be appropriately classified as one with respect to the concept of quarantine and the quarantine provision in the federal

Constitution. In short, the relevant 'quarantine' law must have relevance to, or connection with, quarantine as defined and limited by the High Court. In this respect, then, the Commonwealth cannot use the power as a basis or foundation for any legislation by simply claiming that the law is one which relates to 'quarantine' (see *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 a case on the scope of the corporations power but the general principle also applies to quarantine). For example, any set of controls cannot simply be called 'quarantine' and the relevant law must have a real or substantial connection with the scope and area of quarantine as defined and limited by s51(ix).

In addition to the core aspect of 'quarantine' namely, a public health need to detain or isolate a particular individual (for example) for a specified period on the basis that a person might have a particular disease there would also appear to be an incidental aspect of the power where in order to implement or effectuate quarantine measures the Commonwealth has the power to create offences, require the provision of information and regulate or operate places of quarantine. The federal *Quarantine Act* would seem to illustrate or reflect this point with the statute envisaging an incidental or extended scope of the core definition of 'quarantine' which it subsequently seeks to limit by requiring that the actions taken under it be 'appropriate and adapted' (or proportionate) to the control of the epidemic (s4(2)).

An interesting question, in this regard, relates to the precise constitutional scope of the power and whether it can, in fact, be broadened to sustain a national emergency public health response to pandemics or bioterrorism. There is some evidence to suggest that, originally, at the time of Federation, the framers did not intend that the quarantine power would support the federal regulation of infectious diseases or epidemics and that this was a matter that was to be exclusively regulated by the States. A prominent physician in his day, Dr JHL Cumpston, who was the Director of Quarantine (at the time), cites Josiah Symon, the Attorney-General for 1904–5 who gave an opinion that 'the measure of Commonwealth quarantine will be the area occupied by quarantine at the time of the federal union as distinguished from the area of the State laws of health and police regulations as to disease' (Cumpston 1928:410). Despite this view, in their seminal text, the *Annotated Constitution of the Australian Commonwealth*, John Quick and Robert Garran (who participated in the Convention Debates) considered the quarantine power as having a potentially wide scope in the area of plant and animal diseases. They also made the point, however, that the quarantine power was to *complement*, and not act as a replacement for or substitute to, 'the ordinary sanitary laws, institutions and authorities in operation within the respective States': (Quick & Garran 1901:567). Furthermore, it should be pointed out that during the parliamentary debates on the (Quarantine) Bill, John Quick also emphasised this particular point. When commenting on the general definition of 'quarantine' Quick remarked that:

> It covers measures for the walling out of diseases or the keeping within specified areas diseased persons, goods, animals or plants which have obtained admission (Commonwealth Parliamentary Debates, House of Representatives, 16 July, 1907, 514).

More recent commentators, however, have argued that the term may potentially cover wider or more expansive federal regulation. Administrative law scholar, John McMillan, argues that the quarantine power might, in fact, 'extend to measures of a preventive or protective nature to halt the spread of disease within a country' (McMillan 1998:108). He asserts that the quarantine power is 'potentially a colossus so far as the expansion of Commonwealth legislative authority in the field of public health is concerned' (McMillan 1998:108). Similarly, Christopher Reynolds considers that the possibility exists for an 'expansive use of the power' which 'would lead towards a single national disease control law' (Reynolds 2004:174).

In an emergency situation where (for example) there is an avian flu pandemic there would clearly need to be a distinctively national and uniform approach on the part of the Commonwealth and the States. As previously indicated this may, indeed, be achievable under the 'emergency' powers of the federal *Quarantine Act* where s2B(1) allows for a declaration that an epidemic or danger of an epidemic exists and where the Minister may (during the period of the epidemic) 'give such directions and take such action as he or she thinks necessary to control and eradicate the epidemic ...'.

In addition to this federal legislation, there are various *State* enactments which, while not dealing specifically with the issue of quarantine, nevertheless seek to regulate public health and the health management of communicable diseases. They contain emergency powers to respond to infectious disease epidemics. For example, in New South Wales, s4 of the *Public Health Act 1991* (NSW) provides that where a 'state of emergency' has been declared under the *State Emergency and Rescue Management Act 1989* (NSW) and the Minister for Health (in consultation with the Minister for Emergence Services) decides on 'reasonable grounds that an emergency could result' in a situation where the health of the public is, or is likely to be at risk, the Minister can direct that certain actions be taken to deal with the risk and the Minister may take action to avert the risk. This could, in fact, include directing persons in a specified area or group to submit to medical examinations (Reynolds 2004:174). Section 5 further provides that in cases falling short of an emergency, but where the Minister considers 'on reasonable grounds that a situation has arisen in which the health of the public is at risk, or is likely to be at risk', the Minister may take action and give directions to deal with the risk and its possible consequences. In particular, action may be taken which includes any measures the Minister considers necessary to reduce and remove the risk in an area, to segregate or isolate inhabitants and to prevent or restrict access to an area (Reynolds 2004:174).

In addition to these emergency (State) constitutional powers, public health legislation in each State and Territory also mandates the reporting of certain diseases by medical practitioners, hospitals, and/or laboratories to the relevant State or Territory 'Communicable Diseases Unit'. Notifications, in this respect, are collected at the State or Territory level and computerised. De-identified records are then sent to the Australian Government Department of Health and Ageing for collation into the National Notifiable Diseases Surveillance System (NNDSS) for analysis at a national level. The various State (and Territory) enactments providing for this mandatory reporting includes the *Public Health Act 1997* (ACT); *Notification of Infectious Diseases under the Public Health Act 1991* (NSW); as well as associated public health legislation in South Australia, Tasmania, Queensland and South Australia. The State of Victoria has also enacted legislation relating to the surveillance and the mandatory reporting of infectious diseases. Despite this State legislation, however, the major responsibility for matters relating to quarantine and detention still rests with the Commonwealth, and it is to the Commonwealth that we will need to look for detention decisions.

While primary attention here has been devoted to the potential scope and the operation of the quarantine power, it may be that in significant or dire emergencies (such as in the case of a bird flue epidemic), other constitutional powers accorded to the Commonwealth by s51 could be used to promote or support an emergency response. In particular, if the emergency is of such a nature as to imperil the nation, it may be that s51(vi) (the defence power) could sustain laws to protect the nation and to counter or respond to an infectious diseases epidemic. There is some further potential for the nationhood power to support federal emergency measures (see, for example, *Victoria v Commonwealth (Australian Assistance Plan Case)* (1975) 134 CLR 338 at 397 per Mason J). But, it needs to be pointed out here

that legislation enacted on the basis of this must be in conformity with s51(xxix) (the incidental power) which is a purposive power and thus is also subject to a test of proportionality. According to Reynolds:

> To date, the 'nationhood power' does not support laws which impact substantially on persons' activities and, more generally, cannot be used to sustain ambit claims to widen Commonwealth jurisdiction, merely on the grounds that the powers asked for are claimed to be in the 'national interest' (Reynolds 2004:174).

The issue of civil detention has arisen or been implicated in other non-criminal contexts. For example, cases have arisen where individuals have been detained on the basis that they are carrying the HIV/AIDS virus. The detention provisions of the various (State) public health statutes can also, in this respect, be triggered in those instances where individuals have typhoid, tuberculosis and hepatitis A and B. According to Bernadette McSherry:

> HIV/AIDS is not the only infectious disease that may give rise to the civil detention power. Some of the infectious diseases that may bring public health legislation into play include typhoid, tuberculosis, hepatitis A and B, salmonella infection and even measles. One suspects, however, that the power to detain is being used more readily in relation to HIV/AIDS because it is the sexual conduct of the person concerned in conjunction with the disease, rather than the disease itself, that has been brought to the attention of the authorities and is seen as 'dangerous' (McSherry 1998:277).

While detention in these other non-criminal contexts has generated considerable debate in Australia recently, there is a relative lack of discussion as to the appropriate uses of detention or quarantine in the emerging infectious disease context (Hocking 2004). If we seek to measure public health detention against the background of those other uses of detention, we confront an established exception to the general rule that involuntary detention should only be a consequence of a finding of guilt. Those exceptions are clearly articulated by the High Court in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26 and include, besides the 'administrative' detention of immigrants seeking refugee status to enable inquiry and status determination, also the civil detention of those with infectious disease for treatment and to stop the disease spreading.

In this context, there is a real possibility for human rights abuses to occur or take place in matters regarding involuntary detention. Detention orders in the various federal and State enactments are essentially conceived as administrative orders which can be made by the relevant public official. Yet, it is arguable that orders for detention are, indeed, punitive in character they deprive people of their liberty and, in this respect, should only be made or given by the judiciary. The power, in other words, to order an involuntary detention is essentially part of the judicial power of the Commonwealth and does not form part of its administrative or executive function or role. This principle was firmly established in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28 and is a fundamental principle on which the common law has developed. Blackstone, for example, in his *Commentaries* declared that:

> The confinement of the person, in any wise, is an imprisonment. So that the keeping [of] a man against his will ... is an imprisonment ... To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison (Blackstone, Book 4, para [298] cited from McSherry 1998:278).

Hence, there is a need to strike a more effective balance between promoting the public interest and wider public safety (on the one hand) and implementing safeguards to prevent the possibility of human rights abuses. This could include, for example, ensuring that

involuntary detention orders are ultimately approved by the judiciary; that detention orders are only made in cases of 'last resort'; and that time limits and review or appeal procedures are incorporated into any such order. As Bernadette McSherry declares:

> Balancing human rights and the protection of the public is usually problematic. To avoid the potential for abuse, legislation relating to involuntary detention on the basis of the protection of public health must not depend on arbitrary administrative power, must be a last resort, and must provide 'due process' in the sense of time limits and appeal and review procedures (McSherry 1998:277).

These safeguards are best understood or conceptualised in terms of the requirements of 'form', 'necessity' and 'proportionality.' As McSherry explains:

> In derogating from individual human rights, heed must generally be paid to the requirements of form, necessity and proportionality. The requirement of form relates to legislation not depending on arbitrary administrative power. In this regard, only courts should be able to order the involuntary detention of a person with an infectious disease. The requirement of necessity means that derogation from human rights where it is absolutely necessary to achieve a pressing social need. In this regard, the power of involuntary detention should only be used as a last resort after consideration of clear criteria. Finally, the requirement of proportionality aims at 'ensuring only the minimum necessary legal intervention where human rights...may be interfered with in order to result in the desired social outcome. Again, this requires that involuntary detention be used and that there be time limits and appeal and review processes clearly outlined in the relevant legislation. While the exercise of powers of civil detention is seemingly rare in Australia, the potential for indeterminate detention and discrimination still remain. There is a danger that the failure to provide adequate checks and balances on powers of civil detention will prevent those with infectious diseases presenting for treatment for fear that they may detained indefinitely (McSherry 1998:277).

Clearly, then, an appropriate balance has not been effectively reached in the Australian legislative and administrative framework and people are, generally, unaware of the significant powers that can potentially be exercised by public officials under the various federal and State quarantine and public health enactments. As we have shown, further attention needs to be accorded to the introduction of 'due process' and human rights safeguards in these frameworks. These arguments were advanced persuasively by McSherry nearly a decade ago (McSherry 1998), and that persuasive criticism of our existing legislation remains current — and has gained currency -- today.

There are considerable quarantine and detention options which are available under Australian law in the event of an avian flu pandemic. There is little doubt as to their constitutionality and given the constitutionality of preventive detention in other, less clear, contexts little capacity exists to challenge preventive disease detention on human rights grounds. However, the nature of the spread of the disease must inevitably affect the detention and quarantine options that are ultimately employed. In the light of the controversies surrounding other uses of detention in non-criminal contexts as well as in some criminal contexts, thought must be given now to the bases on which disease detention and quarantine, whether individual, local or large-scale, would proceed.

Potential Compensation Claims

The extremely wide detention powers that would seem to be contained in the *Quarantine Act* raises the possibility of tortious (and other legal) remedies for individuals who have, in essence, been wrongfully detained or imprisoned under the provisions of the Act. One action that would seem to be available to those who have been forcibly detained or isolated

by government officials is the action of wrongful imprisonment. To be successful in this action, it would need to be shown that the (wrongful) detention or imprisonment was a direct result of, or a direct contribution to, the claimant's detention. Actions in tort in Queensland, in this respect, are governed by the *Civil Liability Act (2003)* Qld (Cockburn & Carver 2004:15). Sections 11 and 12 in Chapter 2 outline the principle of causation and provide for a two limbed test which would (seemingly) need to be satisfied if an action in false imprisonment was to be successful were an individual detained under the provisions of the *Quarantine Act.* Section 11 of the *Civil Liability Act* states that in order for a breach of duty to cause a particular harm it needs to be shown that '... the breach of duty was a necessary condition of the occurrence of the harm ('factual causation')' and that 'it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused' ('scope of liability'). Section 11(2) further provides that when determining issues of multiple causation it is relevant to consider whether and why responsibility for harm should be imposed. As Tina Cokburn and Tracey Carver argue, this test in the Act would appear to embrace both a factual or empirical, as well as a normative, element (Cockburn & Carver 2004:15).

This test would seem to codify fundamental common law principles in tort and has been outlined, for example, in recent High Court decisions on the *Migration Act 1958* (Cth). These decisions would appear to have relevance for an action in unlawful imprisonment in regard to the *Quarantine Act.* In particular, if an action can be pursued for unlawful imprisonment on the basis of decisions made by the Minister for Immigration under the *Migration Act* then there is no reason why similar actions could not also be promoted under the *Quarantine Act.* In *Ruddock v Taylor* (2005) HCA 48 the High Court set aside a decision by the New South Wales Court of Appeal which found in favour of a plaintiff who claimed false imprisonment as a result of the wrongful cancellation of a visa on two occasions. In this decision the appellant, Taylor, had pleaded guilty to eight sexual offences against children and was sentenced to a term of imprisonment. Following each decision to cancel his visa, the appellant was held in immigration detention in accordance with s 189 of the *Migration Act 1958* (Cth). Section 189 of the Act states that:

> If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

Section 5 of the Act further declares that an 'unlawful non-citizen' has the meaning given to it by s14 which declares that:

> A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

After his release, Taylor brought an action in the District Court of New South Wales claiming damages for false imprisonment and suing the Ministers who had made the two decisions. Taylor claimed that his detention was an inevitable consequence of the (invalid) decision to cancel his visa. Significantly, the New South Wales Court of Appeal held that Taylor's detention was, indeed, a direct or inevitable consequence of the decision to cancel his visa and that an action in tort on the basis of wrongful imprisonment was permissible. Their Honours' decision would seem to provide strong support for our contention that an action in tort for false imprisonment for detention on the basis of the *Quarantine Act* would be permissible if the detention was found to be unreasonable or unlawful. There would seem to be no reason why the tort of unlawful detention could not also be raised in the similar context of the *Quarantine Act 1908* (Cth) where (for example) a federal authority declares, under s45(c), that an individual 'be removed to and detained in a quarantine station' or:

> ...be removed to and detained in any suitable place or building approved by a quarantine officer (which place or building shall, for the purposes of this Act be deemed to be a quarantine station (s45(d)).

If it could be shown that there was no reasonable basis for the belief, on the part of the federal authority, that an epidemic or the danger of an epidemic was, in fact, present or that an 'emergency' situation was present then we would argue that an action in tort for trespass (in the form of unlawful imprisonment) could be legitimately raised.

In the subsequent High Court judgment in *Ruddock v Taylor* (2005) HCA 48 the New South Wales Court of Appeal's decision (in favour of Taylor's action for unlawful imprisonment) was overturned because it was found that the executive's determination that Taylor was 'an unlawful non-citizen' was reasonable at the time and that the refusal to grant the visa was, in fact, a legitimate and lawful one, the High Court cited the previous decision in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 and *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391. The Court declared that:

> The short answer to the contention is that what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time ((2005) HCA at [40]).

Nevertheless, in spite of this, the majority accepted in *Ruddock v Taylor* that an action in tort for false imprisonment could still be legitimately raised by Taylor. They held, however, that there was insufficient evidence to establish that the federal authorities (in refusing to grant the visa) had acted unreasonably or without sufficient basis or cause. Thus, the High Court's decision in *Ruddock v Taylor* does not have the effect of precluding or preventing an action in tort (for false imprisonment) against federal authorities for unlawful detention in cases involving, for example, matters of quarantine. Furthermore, it should be pointed out that McHugh J's (dissenting) decision in *Ruddock v Taylor* did find that the federal authorities had false imprisoned Taylor. According to McHugh J:

> By their conduct in signing the cancellation order with its inevitable consequences for Mr Taylor, the appellants caused him to be detained. That detention constituted the tort of false imprisonment unless those responsible for detaining Mr Taylor had lawful authority to detain him. In the absence of a statutory command, a good faith exercise of power is not a defence to the tort of false imprisonment ((2005) HCA 48 at [122]).

The decision in *Ruddock v Taylor* would, therefore, seem to suggest that an action in tort for false imprisonment could, indeed, be pursued against federal authorities in cases where they have unreasonably (and unlawfully) exercised their powers in matters, for example, involving issues of quarantine where there is no evidence to suggest that an epidemic (or the danger of an epidemic) is present.

An earlier and essentially similar decision, in the context of the *Migration Act 1958* (Cth), can be found in the case of *Ahmed Ali-Kateb v Minister for Immigration* (2004) HCA 37 in which there was also a refusal by federal authorities to grant a visa to the appellant who was stateless and who had arrived in Australia without a visa. According to the Court, the refusal to grant a visa was not, in the circumstances, reasonable and lawful and thus amounted to unlawful detention or illegal imprisonment. In finding for the appellant, the High Court was also influenced by the fact that a consequence of the refusal to grant the visa was one involving *indefinite* detention. According to Gleeson CJ:

> In a case of uncertainty, I would find it difficult to discern a legislative intention to confer a power of indefinite administrative detention if the power were coupled with a discretion enabling its operation to be related to the circumstances of individual cases, including, in particular, danger to the community and likelihood of absconding ((2004) HCA 37 at [22]).

Again, it should be pointed out that the provisions in the *Quarantine Act 1908* (Cth) also provide for *indefinite* detention in cases where it is necessary 'to remove the danger of the epidemic' (ss 2B and 45). Thus, it might be expected that the Court would emphasise the

need that actions (relating to detention) on the part of federal authorities given under the *Quarantine Act* would need to be first reasonably grounded or based before it finds an order for detention or isolation to be legally valid under the provisions of the Act.

There have been cases, in this respect, where actions in tort *have* been applied in the context of quarantine and the *Quarantine Act 1908* (Cth). This could well indicate that an action in false imprisonment may succeed were one ever pursued by an applicant who had been indefinitely detained by federal authorities on the basis of the *Quarantine Act 1908*. Although not directly related to the issue of false imprisonment or unlawful detention, one case that involved the action (in tort) of negligence in the context of quarantine is the High Court decision in *Dovuro v Wilkins* (2003) HCA 51. In this case, an Australian importer and distributor of canola was sued by purchasers or growers of this product because they failed to conform to the requirements and regulations provided in the *Quarantine Act 1908* (Cth). The High Court considered the issue as to whether there was a breach of the duty of care on the part of the appellants to growers and found that there was no resultant breach of their duty. As previously noted, this decision was not concerned with the issue of detention or isolation nor the topic of infectious diseases and, in this respect, has little relevance to the issues being canvassed here in relation to the *Quarantine Act*. However, it does indicate a preparedness on the part of the Court to consider generally the use of actions in tort in the context of the *Quarantine Act 1908*. It remains to be seen, however, whether the High Court will entertain actions for false imprisonment where the plaintiff has been subject to indefinite detention in a case of a perceived danger of a pandemic where there is no reasonable basis or grounds for believing such a danger is likely to be present. The legal parameters to compensation for wrongful detention are currently still unfolding in Australia, and the High Court will soon confront claims by a man accused of war crimes in the Balkans as to his illegal detention in Sydney jails since his arrest in January following a provisional extradition request from Croatia; this may also prompt a civil case for damages (Courier Mail 2006).

Another recent (Federal Court) decision that concerned the issue of quarantine and the *Quarantine Act 1908* (Cth) was the case of *Director of Animal and Plant Quarantine v Australian Pork Limited* (2005) FCAFC 206 (16 September 2005). Although this decision was also not related to the issue of false imprisonment, it did touch on the amount (and cogency) of the evidence that would be required (on the part of federal quarantine officials) to support the quarantining of animals or livestock. In this case, the Director of Animal and Plant Quarantine granted a permit for the importation of pig meat from the United States for a period of two years. Legislation required the Director to consider the 'level of quarantine risk' and what conditions would be necessary to limit the level of that risk to one that was 'acceptably low'. In this context, 'quarantine risk' referred to the probability of a disease being introduced, established or spread in Australia and causing harm. One of the matters the delegate took into account in deciding to grant a permit was a Policy Determination made by a panel of scientific experts who assessed the quarantine risk for the importation of pig meat and the conditions which might limit that risk in relation to a number of diseases found in pigs. One of these diseases was post-weaning multi-systemic wasting syndrome ('PMWS').

In the particular facts of the case, the Panel declared that a permit should be granted to Australian Pork Limited, an importer of meat from the United States. The Federal Court, under Wilcox J upheld a challenge to the validity of the Determination and the permit. It was argued that the permit should *not* have been granted, on the basis of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), because (on the evidence before the Panel), the decision was so unreasonable that no reasonable decision-maker could have made it.

Wilcox J agreed with this contention and found that the Panel's reasoning was not appropriate according to the available evidence and that no reasonable decision-maker could have found that the granting of the permit was legitimate or justified on the evidence.

The Full Court of the Federal Court overturned this decision by Wilcox J emphasising that decisions on the part of federal authorities in relation to quarantine do not need to be based on conclusive or determinative evidence with respect to quarantine. The judgment of the Full Court would appear to suggest that future decisions on the part of federal authorities with respect to quarantine and detention/isolation of animals or, indeed, people, would be evaluated or judged in a lenient manner. For example, at one point in the judgment, the Full Court of the Federal Court declared that:

> The legislation [in the *Quarantine Act*] does not suggest that quarantine decisions are to be made on an assumption that every scientific fact is known about every conceivable disease or pest that might be introduced into Australia, or that such decisions are to be delayed until all such facts are discovered and accepted. On the contrary, quarantine decisions have to be made in the existing state of knowledge. Imponderables have to be weighed and value judgements made. No specific criteria are laid down, other than the conditions to be established must limit the level of quarantine risk to one which is 'acceptably low' which necessarily assumes there will be some risk ((2005) FCAFC 206 (16 September 2005) at para. [61]).

The Full Court further stated that:

> In this setting, we think his Honour erred in applying, in effect, to each step in the pathway taken by the Panel a legal requirement for hard scientific data ((2005) FCAFC 206 (16 September 2005) at para. [61]).

It concluded that:

> In our view, there was no legal invalidity in the process, including the IRA Report and the Determination, which led up to the decision to grant the Permit. That process involved fact finding and the making of value judgements and risk assessments in a complex scientific setting. The good faith and scientific competence of those engaged in the task is not in question. While there is room for debate as to some aspects of the IRA Report, the Panel did not carry out its task irrationally or unreasonably. The Court is not empowered to adjudicate on the factual correctness or otherwise of the IRA Report ((2005) FCAFC 206 (16 September 2005) at para. [62]).

On the basis of this decision, it would appear that, in future, if decisions are made by federal authorities to isolate or quarantine livestock or humans as part of strategy to contain (for example) an infectious disease pandemic, then the (Federal) Court will seemingly apply lenient or liberal criteria as a basis on which to evaluate and test the reasonableness and legality of the decision.

Other Diseases

It may be that the strict quarantine regime under which Australia has kept itself free of many diseases that have been prevalent in America and Europe will provide some protection from bird flu, but it is worth recalling that emerging wildlife diseases have already occurred in Australia, and that while they have not led to major outbreaks, they have had an enormous impact on tourism and trade, just as the SARS virus did for Australia (Buns & Woods 2005:53). The most important scientific matter that will translate into law and require a framework for detention-related responses concerns transmissibility prior to diagnosis and predictions as to disease spread. One lesson comes from the United Kingdom, where the UK foot-and-mouth outbreak was exceptionally closely monitored, producing the analysis

of the markets as 'super-spreaders', with over one third of infections arising during the period of animal movements between farms and livestock markets (Matthews & Woodhouse 2005:536). This is a pathogen not yet known in Australia and which would cause considerable economic damage if it were to arrive, but the nature of the response is one that Australia could strategise for now.

Conclusion

In this article we have sought to canvass the capacity for Australia to respond to an avian influenza (or bird flu) pandemic through the uses of quarantine. We have suggested that significant legal powers are available to the Australian Government to deal promptly with the onset of a potential bird flu pandemic through quarantine: drawing upon the significant powers of the *Quarantine Act 1908* (Cth). As was seen, the powers invested in the executive are extremely wide-ranging and discretionary, and may lead to an abuse of individual rights and freedoms. In this context, considerable focus was thus accorded to the potential actions in tort (for false imprisonment) which could be pursued by an individual who has been isolated or quarantined where there was no reasonable basis or grounds for believing that an infectious disease pandemic was (or might potentially be) present. As was shown, actions in tort for false imprisonment have already been used quite extensively in the context of migration law where the refusal on the part of the executive to grant visas to applicants have led to their detention and isolation. It was emphasised, in this particular respect, that one of the underlying rationales, on the part of the Court, for upholding these actions was to provide a safeguard against executive abuse of power and (executive) interference with, and encroachment on, individual rights and liberties. Given this emphasis, it was argued that actions in tort (for unlawful imprisonment) might also be entertained by the Court in the context of a avian flu pandemic where the executive uses the powers vested in it by the *Quarantine Act 1908* (Cth), without reasonable grounds or bases, in order to (unlawfully) detain and quarantine individuals who are thought to be infected.

We also argued in this article that there is a pressing need for an appropriate balance to be reached between, on the one hand, the protection of the public interest and a commitment to ensuring public safety and, on the other hand, a concern to safeguard against human rights abuses and to minimise the potential for public officials to arbitrarily trench on the rights and freedoms of individuals. As we have shown, there is insufficient attention paid by the various federal and State quarantine and public health legislative enactments to incorporating checks to prevent public officials misusing involuntary detention powers. Reforms that could be introduced, for example, to afford greater human rights protection (we suggested) could include ensuring that involuntary detention orders are ultimately approved by the judiciary; making detention orders ones that are only issued as a 'last resort' measure; and requiring that time limits and review or appeal procedures are incorporated into detention orders. As we argued, incorporating these types of procedures would bring a greater degree of 'due process' into the current legislative framework.

In short, there is a lack of public awareness regarding the significant 'involuntary detention' powers contained in the federal and State legislative frameworks. The objective of this article has been to draw attention to these extensive powers and to emphasise the dangers regarding possible human rights abuses that exist in relation to these powers. As we have argued, remedies may be present in the current tortious legal framework in which individuals can gain some protection and compensatory redress for involuntary detention which is subsequently found to be unlawful and unjustifiable.

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