

WARS, PANDEMICS AND EMERGENCIES: WHAT CAN HISTORY TELL US ABOUT EXECUTIVE POWER AND SURVEILLANCE IN TIMES OF CRISIS?

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In the fight against coronavirus, the Australian government has enacted a series of measures that represent an expansion of executive powers. These include the use of smartphone contact-tracing technology, mandatory isolation arrangements, and the closure of businesses. Critics have expressed concerns about the long-term implications of these measures upon individual rights. This article will analyse the validity of such concerns in the context of other historical uses of executive power in Australia in times of crisis: during the Spanish Flu pandemic of 1918, the First and Second World Wars, and the ‘War on Terror’ post-September 2001. Drawing its conclusions from these historical precedents, the article argues that clear legislative safeguards are a minimum necessary step both to prevent police and governmental abuse of privacy, and to foster and maintain trust in the government’s ability to manage their ‘emergency’ powers in a manner consistent with human rights.

I INTRODUCTION

Both in democratic theory and in state practice, it is a well understood if often controversial proposition that in times of crisis the ordinary mechanisms of parliamentary democracy can be partially or perhaps even fully suspended.¹ The usual deliberations of parliament can be sidelined, with responsibility devolved to a national cabinet or some other executive body; emergency powers relating to defence or public health can be invoked; and citizens expected to accept infringements on civil liberties that would normally be unacceptable or even unlawful in a democracy. From a theoretical perspective this may be accomplished through legislation, or by the executive in a manner consistent with existing constitutional norms, or in other models in an extra-constitutional or perhaps even

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1 ‘In vibrant democracies, where the rule of law prevails, the invocation of exceptional powers poses a significant conundrum of how to balance the preservation of public safety with the maintenance of the rule of law’: Hoong Phun Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 3.

extra-legal fashion.² While there is an obvious paradox in the notion of suspending democratic norms to protect the state, this is the practice in Australia as much as in other countries that have inherited and adapted the English common law:

The very notion of emergency powers is contradictory ... [it] contradicts the Rule of Law because it posits that, in times of national crisis, the state may act outside constitutional norms. The idea is that whenever the existence of the state is imperilled, it may take extraordinary steps in order to save itself.³

In the fight against the coronavirus pandemic, therefore, the measures taken by Australian governments at federal and state level seem unexceptional at first sight. We have enforced social distancing, adopted mandatory isolation arrangements, and mandated the closure of businesses.⁴ All of these measures, adopted in the early stage of the pandemic, were taken with little or no parliamentary debate, with the full support of the Opposition, and by a swiftly-established national cabinet which operated by a kind of executive fiat.⁵ A little later, in April 2020, federal Parliament passed legislation facilitating and purporting to define the conditions surrounding the use of surveillance technology first used in Singapore, the COVIDSafe tracking app.⁶ Again, this legislation was passed with little debate, and in an atmosphere of broad bipartisanship, with little of the parliamentary or senate committee scrutiny that would ordinarily be expected of legislation with such broad-reaching implications for privacy and human rights.

In this atmosphere of public health crisis, and with the constant reminders in the media of the rolling toll of the pandemic overseas, several features have arguably been overlooked. The first is the necessity to ensure that ‘emergency’

2 Oren Gross and Fionnuala Ní Aoláin developed broad conceptual models to categorise states of emergency, including a model whereby formal legal arrangements exist for the use of emergency powers; a ‘business as usual’ model whereby no deviation from ordinary norms is permitted in an emergency; and an ‘extra-legal’ model permitting public officials a broad discretion to protect the public and the nation in times of crisis: see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006) 17, 17–85. See also Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113(5) *Yale Law Journal* 1029; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006); Ralf Salam, ‘The Relationship between States of Emergency, Politics and the Rule of Law’ (2017) 23 *Canterbury Law Review* 15. For recent discussions applying these and related models to the COVID-19 pandemic, see Julian R Murphy, ‘Stopping the Unstoppable: Executive Accountability in a Time of Pandemic’, *Admin Law Blog* (Blog Post, 21 April 2020) <<https://adminlawblog.org/2020/04/21/julian-r-murphy-stopping-the-unstoppable-executive-accountability-in-a-time-of-pandemic/>>.

3 Robert Martin, ‘Notes on Emergency Powers in Canada’ (2005) 54 *University of New Brunswick Law Journal* 161, 162.

4 See, eg, *Public Health and Wellbeing Act 2008* (Vic), and further discussion of state legislation below, text at nn 176–80. See also discussion in Maria O’Sullivan, ‘Coronavirus: the COVIDSafe Tracing App, Your Privacy and the Role of Law’, *Monash Lens* (Blog Post, 29 April 2020) <<https://lens.monash.edu/@politics-society/2020/04/29/1380222/coronavirus-the-covidsafe-tracing-app-your-privacy-and-the-role-of-law>>:

For instance, Victoria’s state of emergency declaration gives state authorities wide powers under its *Public Health and Wellbeing Act 2008* to issue directions to restrict people’s movement and regulate public behaviour. This is important, because officially declaring a state of emergency allows exceptional powers to be used in exceptional circumstances.

5 For further detail on the operation of Parliament during this period, see discussion below, text at nn 205–8.

6 *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth).

executive or legislative measures are temporary, to be discontinued or repealed once that emergency has passed. Secondly, the abrogation or curtailment of normal parliamentary process that is acceptable in an emergency ought not to be allowed to set a precedent for the operation of democratic processes in that emergency's aftermath.⁷ Thirdly, the existence of an emergency ought not to form a cover for the smuggling through parliament of other, more or less related, legislation that curtails civil liberties.⁸

This article will argue that while some of the recent Australian government 'emergency' measures are acceptable in the circumstances, others either already exhibit some of these characteristics, or are insufficiently proofed against them. The article will advance this argument through a discussion of the Australian government's responses to the events with the greater historical similarity to the current pandemic: the First and Second World Wars, the War on Terror post-September 2001, and the Spanish Flu pandemic of 1918. Although it may be contended that wartime and counter-terrorism powers are distinct from public health powers, this article argues that the distinction between the two is not as sharp as may first appear, and the potential for abuse of public health powers is much greater than would appear at first blush.⁹ In any case, commentators have drawn parallels between wars, terrorism and pandemics, in terms of the threat of an unseen enemy and the 'fear and sense of crisis that it engenders'.¹⁰ These events represent major global crises that have required large-scale national governmental intervention in order to ensure the survival of the nation and human population; thus necessitating the extensive use of executive powers. This article will show that the Australian response to each of these events exhibits sufficient similarities to give cause for real concern, that the response displays excessive reliance on executive power, the abrogation or curtailment of parliamentary process, and perhaps most importantly, the tendency to 'mission creep', that is, the continuation of the measures at times or in contexts that were not originally envisioned.

Following this, this article will consider the applicability of these criticisms to the current pandemic. It will consider firstly the biosecurity measures themselves, noting the dangers even in justifiable or necessary measures, including breaches of human rights particularly of the most vulnerable, as well as a more general cultural change towards accepting breaches of democratic practice. It will then

7 On this issue in the context of anti-terrorism legislation, see eg, Michael McHugh, 'Constitutional Implications of Terrorism Legislation' (2007) 8(2) *The Judicial Review* 189, 213; see also discussion in Lee et al (n 1) 163–5.

8 See Australian Security Intelligence Organisation Amendment Bill 2020 (Cth); Daniel Hurst, 'ASIO could Question Children and More Easily Use More Tracking Devices under New Powers', *The Guardian* (online, 13 May 2020) <<https://www.theguardian.com/australia-news/2020/may/13/asio-could-question-children-and-more-easily-use-more-tracking-devices-under-new-powers>>. See further discussion of this issue below, text at nn 203–4.

9 For discussion of a recent example of breach of human rights in the context of the COVID-19 crisis in Victoria, see Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020* (Report, December 2020).

10 Felice Batlan, 'Law in the Time of Cholera: Disease, State Power and Quarantines Past and Future' (2007) 80(1) *Temple Law Review* 53, 55; see also Wendy K Mariner, George J Annas and Wendy E Parmet 'Pandemic Preparedness: A Return to the Rule of Law' (2009) 1(2) *Drexel Law Review* 341, 352–3.

focus on the potential for pandemic-related surveillance measures, particularly the COVIDSafe app, to be extended beyond their original purpose, despite extensive and seemingly genuine government guarantees to the contrary. Finally, it will consider the issue of ‘mission creep’, or unrelated surveillance measures being smuggled through under cover of the health emergency. The article will conclude with a consideration of the implication of these issues for current measures, arguing that at the very least, clear legislative safeguards are needed to protect human rights.

As this article will show, there are multiple historical and contemporary precedents for the erosion of democratic freedoms and human rights during times of crisis. According to political scientist John Keane, real or confected emergencies have provided the perfect cover for a ‘new despotism’ he considers to be in increasing ascendancy world-wide:

Democracies everywhere were gripped by dragnet surveillance, militarized policing, rising rates of incarceration, and state clampdowns on public assembly. The unending war on terrorism compounded the pressures on civil liberties by strengthening the hand of the garrison state. Dawn police raids, red alerts, tear gas and pepper spray, and security checks were bad for democracy.¹¹

Although we are not suggesting that a ‘new despotism’ exists in Australia, or even necessarily that we have taken significant steps towards that state, we do suggest that the existence of an ‘emergency’ is very far from permitting the relaxation of vigilance about democratic norms and processes. Rather, as history tells us, it is cause for heightened vigilance about such matters.¹²

II EXECUTIVE AND LEGISLATIVE RESPONSES TO WARS

A World War I: 1914–18

On 28 October 1914, less than two months after Britain’s declaration of war on Germany on 4 August 1914, W M ‘Billy’ Hughes as Attorney-General secured the passage of the *War Precautions Act* through the Australian House of Representatives and the Senate.¹³ Based on British models including the *Official Secrets Act 1911* (UK), and the *Aliens Act 1905* (UK),¹⁴ as well as the *Defence of*

11 John Keane, *The New Despotism* (Harvard University Press, 2020) 8.

12 Indeed, it is arguable that this is particularly the case for a pandemic as opposed to a war. Such an argument is put by Ginsburg and Versteeg, who contend that ‘in crises like a pandemic – in which information is dispersed, the crisis is slow-moving, and local governments are needed to implement the crisis response – the executive is structurally more bound than in national security crises’: see Tom Ginsburg and Mila Versteeg, ‘The Bound Executive: Emergency Powers During the Pandemic’ (Research Paper No 2020-52, Virginia Public Law and Legal Theory, 26 July 2020) 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608974#>. See text below at nn 222–4.

13 See Stephen Gray, ‘Protest Law and the First World War: The Case of the Industrial Workers of the World (IWW)’ (2018) 44(2) *Monash University Law Review* 402, 403 (‘Protest Law and the First World War’).

14 Peter McDermott, ‘Internment during the Great War: A Challenge to the Rule of Law’ (2005) 28(2) *University of New South Wales Law Journal* 330, 336–7.

the Realm Act 1914 (UK),¹⁵ the legislation was passed pursuant to the defence power in section 51(vi) of the *Constitution*.¹⁶ It enabled the Governor-General to make regulations and orders for ‘securing the public safety and the defence of the Commonwealth’.¹⁷

From the beginning, concerns were expressed about the lack of parliamentary scrutiny of such far-reaching legislation. At Prime Minister Andrew Fisher’s insistence, the Standing Orders of the House of Representatives had been suspended to allow the Bill to progress unimpeded through the necessary stages.¹⁸ As McDermott points out, a former Prime Minister (Joseph Cook) protested that this was ‘premature’, and set a ‘dangerous precedent’, since the contents of the Bill being dealt with in this fashion were not actually ‘known to honorable members.’¹⁹ Another member, Sir William Irvine, protested that ‘it is desirable that honorable members should understand fully the immense range of the Executive power which [the Bill] confers on the Governor-General in Council’.²⁰

Nevertheless the legislation passed unimpeded, the result of a ‘pervasive sense among federal parliamentarians’, as historian Joan Beaumont puts it, ‘that the war would be the greatest’ of the century, if not of world history, and that ‘[e]xtraordinary measures seemed necessary to protect the interests of Australia’.²¹ The perceived needs of national security trumped the rights of citizens, in other words. This was so, even where the effect of the legislation was to invest the executive with ‘authority which Parliament would not think of entrusting to it in ordinary times’,²² or allow the government to proclaim ‘something like martial law’.²³

Responsible high officials understood very clearly that this was the case. Sir Robert Garran, the Commonwealth Solicitor-General who drafted the legislation, wrote later that it gave ‘almost unlimited powers to the Executive to frame regulations for covering the defence of the country ... To all intents and purposes Magna Carta was suspended and [Hughes] and I had full and unquestionable power over the liberties of every subject’.²⁴ Hughes himself later commented that

15 Frank Cain, ‘Australian Intelligence Organisations and the Law: A Brief History’ (2004) 27(2) *University of New South Wales Law Journal* 296, 297.

16 Section 51(vi) of the *Constitution* gives the Commonwealth power to make laws concerning ‘the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth’.

17 *War Precautions Act 1914* (Cth) s 4, quoted in Gray, ‘Protest Law and the First World War’ (n 13) 403.

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 369 (Andrew Fisher, Prime Minister), cited in McDermott (n 14) 350.

19 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 369 (Joseph Cook), quoted in McDermott (n 14) 350.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 371 (William Irvine), quoted in McDermott (n 14) 350.

21 Joan Beaumont, *Broken Nation: Australians in the Great War* (Allen & Unwin, 2013) 45.

22 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 1914, 371 (William Irvine), quoted in McDermott (n 14) 350.

23 Beaumont (n 21) 45.

24 Sir Robert Randolph Garran, *Prosper the Commonwealth* (Angus & Robertson, 1958) 220–1, quoted in Gray, ‘Protest Law and the First World War’ (n 13) 403.

‘he and Robert Garran’s fountain pens had governed Australia during the war years’.²⁵

Thus, the government issued a ‘constant stream’ of regulations under the *War Precautions Act*, controlling many areas of civilian life and suppressing civil liberties in the process. Regulations banned the sale of gold to anyone other than the Commonwealth; banned the display of red flags as a symbol of anti-war socialism; and suppressed dissenting voices.²⁶ A Military Intelligence branch of the Australian Army was established, censoring newspapers and the post, tapping telephones, and making reports on activists.²⁷ When occasional challenges were made to the extent of the government’s powers, courts invariably adopted interpretations most generous to the Commonwealth; for example, in *Farey v Burvett*,²⁸ a challenge to the Commonwealth’s power to regulate the price of bread under the defence power was dismissed, with the High Court commenting that ‘[h]istory as well as common sense tells us how infinitely various the means may be of securing efficiency in war’.²⁹

A major purpose of the legislation in its original form was to root out subversives – that is, the ‘enemy within the gates’, or Australians of German, Austro-Hungarian or other enemy descent. In 1911, there were 33,000 Australian residents who had been born in Germany, as well as nearly 75,000 Lutherans of mainly German descent.³⁰ As soon as war broke out, all people of German descent had been required to register their personal details with the police, as well as sign declarations promising they would not take part in any actions prejudicial to the British Empire.³¹ Such people were placed under surveillance regardless of whether they had been naturalised as British subjects (there being no such thing at the time as Australian citizenship),³² on the arguably flimsy basis that under German law they might have been able (or indeed, in the event of German invasion, forced) to re-apply for German citizenship.³³ Over 6,890 people were also detained under the *War Precautions Act*, under a provision enabling the Governor-General to apply to all naturalised persons, with or without modifications, all of the provisions of any order relating to aliens.³⁴

In addition to the internment of suspected German loyalists, the *War Precautions Act* was also directed, in its early stages, at the spreading of enemy propaganda. This was done initially by way of regulation 17, passed in provisional form on 30 October 1914, which provided that: ‘No person shall by word of mouth

25 Frank Cain, *The Origins of Political Surveillance in Australia* (Angus & Robertson, 1983) 22, quoted in Cain, ‘Australian Intelligence Organisations and the Law: A Brief History’ (n 15) 297.

26 Cain, ‘Australian Intelligence Organisations and the Law: A Brief History’ (n 15) 297.

27 Ibid.

28 (1916) 21 CLR 433.

29 *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).

30 Beaumont (n 21) 46.

31 Ibid.

32 McDermott (n 14) 350.

33 Ibid 352.

34 See *War Precautions Act 1914* (Cth) s 5(f); McDermott (n 14) 351; see generally discussion of anti-German propaganda in Beaumont (n 21) 46–51.

or in writing spread reports likely to cause disaffection ... among any of His Majesty's Forces or the Commonwealth Forces or among the civilian population'.

Pursuant to this emphasis on spreading 'disaffection', state police forces did spend a great deal of time in the early stages of the war 'pursuing reports of enemy activity passed to them by a suspicious and excited population'.³⁵

However, this clearly legitimate target did not remain the focus of civil and military intelligence for long. Partly this was because most Australians of German descent were genuinely loyal to Australia, and there was not a great deal of enemy subversive activity to pursue. More powerful, however, was the incentive to use the provisions for domestic political advantage – an incentive which was exploited particularly powerfully, and effectively, by the mercurial, and Machiavellian, politician W M 'Billy' Hughes, who replaced Fisher as Prime Minister in October 1915.³⁶ Pro-War, and pro-British Empire, and later pro-conscription, Hughes sought to demonise the anti-war elements within the Labor Party by tarring them as disloyal subversives.

As part of this political program, civil and military intelligence began to watch 'people and groups who expressed opposition to the war and the Government's war policy'.³⁷ Thus, innocuous groups such as the Australian Peace Alliance and the No Conscription Fellowship ran the risk of prosecution under amended regulations to the *War Precautions Act*. From July 1915, these regulations prohibited the spreading not just of 'disaffection' or disloyalty, but also statements (true or false) likely to interfere with the success of His Majesty's forces, or to prejudice recruiting.³⁸ This meant, in theory at least, the potential prosecution and jailing of anybody who voiced the growing public concern about Australia's involvement in the War.³⁹

In practice, however, Hughes orchestrated the prosecution of radical anti-war groups such as the Industrial Workers of the World ('IWW'), or the 'Wobblies', one of whose leaders, Tom Barker, was prosecuted under the *War Precautions Act* in 1915.⁴⁰ Members of this organisation were also framed for more serious

35 Cain, *The Origins of Political Surveillance in Australia* (n 25) 45, quoted in Gray, 'Protest Law and the First World War' (n 13) 403. According to Joan Beaumont, such reports included an airship being 'spotted' over New South Wales, and raiders lurking in Bass Strait: see Beaumont (n 21) 47.

36 See Beaumont (n 21) 45–6.

37 Cain, *The Origins of Political Surveillance in Australia* (n 25) 47, quoted in Gray (n 13) 404.

38 Regulation 28 provided that:

No person shall, by word of mouth, or in writing, or in any newspaper, periodical, book, circular, or other printed publication –

(a) spread false reports or make false statements or reports, or statements likely to cause disaffection to His Majesty, or public alarm, or to interfere with the success of His Majesty's Forces by land or sea, or to prejudice His Majesty's relations with foreign powers; or

(b) spread reports or make statements likely to prejudice the recruiting, training, discipline, or administration of any of His Majesty's Forces;

and if any person contravenes this provision, he shall be guilty of an offence against the Act.

39 See Gray, 'Protest Law and the First World War' (n 13) 403–4.

40 See *ibid* 407–8. For another example of a left-wing printer being prosecuted in the Magistrates Court under the *War Precautions Act*, see *Holland v Jones* (1917) 23 CLR 149; Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (n 15) 297. For more on Barker's prosecution, see Frank

offences. In 1916, police suspected that IWW men may have been responsible for a series of factory fires that caused considerable property damage in Sydney – but when the suspects were arrested, they were charged not with arson, or even conspiracy to commit that offence, but with treason felony, or possibly even treason, for which the penalty was death.⁴¹ They were convicted ultimately of seditious conspiracy, and jailed for periods ranging between five and fifteen years.

These high-profile trials, conducted in the shadow of an extraordinarily bitter debate surrounding the conscription plebiscite of October 1916,⁴² formed the ideal cover for Hughes to introduce further legislation designed to suppress the civil liberties of his perceived political enemies. This came in the form of the *Unlawful Associations Act 1916* (Cth), which rendered illegal any organisation that advocated or encouraged the taking of life, or the destruction of property.⁴³

In introducing the Bill, Hughes was quite explicit that the legislation was aimed not at traitors or enemy spies, but at his anti-war political enemy, the IWW.⁴⁴ The IWW became an unlawful organisation, with most of its members being imprisoned or deported. The legislation was tightened in July 1917, with a new *Unlawful Associations Act 1917* (Cth), rendering any member of an unlawful association liable to six months' imprisonment, and placing the onus of proving non-membership of such an organisation on the defendant. As Lynch, McGarrity and Williams comment, this legislation 'marked a substantial departure from the ordinary criminal law' in that it criminalised not only the actual commission of acts of violence, but also 'the advocacy of doctrines open to being construed as calling for violent change to the existing economic and political order'.⁴⁵

In this way, the *War Precautions Act*, and by extension the defence power and the notion of national security itself, was used by politicians as a cover to smuggle in laws with only a tenuous connection to national security, and aimed far more clearly at suppressing political dissent. It is true that the *War Precautions Act* was repealed at the end of the war, as was the *Unlawful Associations Act*.⁴⁶ There was also significant political opposition to the jailing of anti-war activists on trumped-up charges, and the men known as the 'IWW Twelve' were released after a Royal

Cain, *The Wobblies at War: A History of the IWW and the Great War in Australia* (Spectrum Publications, 1993) 232–3.

41 See P J Rushton, 'The Trial of the Sydney Twelve: The Original Charge' [1973] (25)(1) *Labour History* 53, 53; Gray, 'Protest Law and the First World War' (n 13) 410–14.

42 Rowan Day, 'The Tottenham Rebels: Radical Labour Politics in a Small Mining Town during the Great War' (PhD Thesis, University of Western Sydney, 2014) 296. See also Gray, 'Protest Law and the First World War' (n 13) 414.

43 Andrew Lynch, Nicola McGarrity and George Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament' (2009) 13 *Legal History* 25, 28, quoting *Unlawful Associations Act 1916* (Cth) s 3(b).

44 'I say deliberately that this organisation holds a dagger at the heart of society, and we should be recreant to the social order if we did not accept the challenge it holds out to us. As it seeks to destroy us, we must in self-defence destroy it': Lynch, McGarrity and Williams (n 43) 29, quoted in Gray, 'Protest Law and the First World War' (n 13) 420.

45 Ibid 30.

46 See *War Precautions Act 1918* (Cth), as at 25 December 1918. This legislation in fact extended the operation of the *War Precautions Act 1914* (Cth) until 31 July 1919. See also generally Gray, 'Protest Law and the First World War' (n 13) 425.

Commission in 1920, when the war was safely over. By that time, of course, the political purpose of the prosecutions had been served.

However, the *Unlawful Associations Act* represented a powerful precedent: it was replicated in the unlawful associations provisions in Part IIA of the *Crimes Act 1926* (Cth).⁴⁷ Moreover, at the end of the war in 1918, the Government simply decided to continue the surveillance of left-wing radicals, establishing an Investigation Branch within the Attorney-General's Department for that purpose. This Branch had no legislative basis, but was established by 'administrative fiat, with its staff drawn from former Military Intelligence officers and its existence kept secret',⁴⁸ as Frank Cain observes. To bolster these measures, the Commonwealth amended the *Immigration Act 1901* (Cth) in 1920 to empower the Minister to deport aliens who were found to have advocated the violent overthrow or abolition of the government, as well as members of organisations that taught such doctrines.⁴⁹ In other words, measures originally intended as temporary, and for wartime national security purposes only, became permanent, albeit superficially slightly altered, features of the apparatus of the national security surveillance state.

Finally, towards the end of the War, the arrival of the Spanish Flu on Australia's shores led both the Commonwealth and the States to implement coercive measures under public health legislation. The extent to which these measures are susceptible to similar criticisms as those levelled at wartime security measures will be considered in Part III(A), below.

B World War II: 1939–45

On 3 September 1939 Prime Minister Robert Menzies declared that 'it was his melancholy duty to inform Australia that Britain had declared war on Germany and consequently this country was also at war'.⁵⁰ Within a week, on 9 September, the *National Security Act 1939* (Cth) received royal assent. Similar to the *War Precautions Act 1914* (Cth), this legislation gave the government a broad power to issue national security 'regulations for securing public safety and for the defence of the Commonwealth'.⁵¹

47 Lynch, McGarrity and Williams (n 43) 30; see generally Catherine Bond, *Law in War: Freedom and Restriction in Australia during the Great War* (NewSouth Publishing, 2020).

48 Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (n 15) 299.

49 Roger Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*' (2001) 22(2) *Adelaide Law Review* 259, 260.

50 Stuart MacIntyre, *Australia's Boldest Experiment: War and Reconstruction in the 1940s* (NewSouth Publishing, 2015) 2.

51 Lynch, McGarrity and Williams (n 43) 35. See also Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (n 15) 301.

In June, 1940, pursuant to this power, the government passed the *National Security (Subversive Associations) Regulations 1940* (Cth). These regulations gave the Governor-General the power to declare unlawful any corporate or unincorporated body that was in the Governor-General's opinion, 'prejudicial to the defence of the Commonwealth or the efficient prosecution of the war'.⁵²

These regulations were based upon, although more far-reaching than, the *Unlawful Associations Act 1917* (Cth), or indeed the *Crimes Act* provisions of 1926, which remained in force. The *National Security (Subversive Associations) Regulations* gave the executive the power to swiftly ban any organisation without having to show proof that it in fact constituted a threat to Australia or its war effort. The process for obtaining a ban was simpler than that existing under the *Crimes Act* provisions, and 'if a proscribed body were to reincarnate under a new name, it could promptly be re-proscribed'.⁵³ On 15 June 1940, the Communist Party of Australia ('CPA') was banned under these regulations.⁵⁴ A year later, in June 1941, the Soviet Union entered the war on the side of the Allies; however, the ban on the CPA was not lifted until December 1942.⁵⁵

Radical left-wing and communist parties were not the only entities banned under these regulations. Several fascist entities were banned after Italy entered the war;⁵⁶ and famously, the Commonwealth also banned several Jehovah's Witnesses organisations, giving rise to the successful High Court challenge to the validity of the regulations.⁵⁷ However, the Commonwealth's most sustained and consistent efforts under this legislation were clearly directed at left-wing parties. This represented the continuation of a policy which had begun during World War I, and which continued well after World War II.⁵⁸

52 *National Security (Subversive Associations) Regulations 1940* (Cth) reg 3.

Upon such a declaration being made, the following occurred: the body was automatically dissolved; any doctrines or principles advocated by that body, and the printing or publishing of those doctrines or principles, became unlawful; no person was permitted to hold or convene a meeting for the purpose of advocating such doctrines; a Minister could order a person to deliver up any property belonging to the body; and, any member of a police force of the Commonwealth, States or Territories could declare in writing that any person was a trustee for the body in relation to a bank account belonging to the body.

Lynch, McGarrity and Williams (n 43) 35, discussing regulations 4–8.

53 Roger Douglas, 'Law, War and Liberty: The World War II Subversion Prosecutions' (2003) 27(1) *Melbourne University Law Review* 65, 81 ('Law, War and Liberty').

54 According to Douglas, the decision to ban the CPA was probably the product of right-wing influence within the Australian government, particularly the influence of the Country Party, which had entered an alliance with the governing United Australia Party: *ibid* 81–2.

55 Lynch, McGarrity and Williams (n 43) 36.

56 Douglas, 'Law, War and Liberty' (n 53) 79.

57 The High Court held that the regulations exceeded the scope of the Commonwealth's defence power in section 51(vi) of the *Constitution: Adelaide Company of Jehovah's Witnesses Inc v Commonwealth ('Jehovah's Witnesses')* (1943) 67 CLR 116. For discussion of this case, see *ibid* 101–02.

58 Roger Douglas has collected evidence of the number of people arrested for offences under the anti-subversion regulations, and also collated the evidence gathered by others. He concludes that while '[i]t is difficult to know precisely how many people were prosecuted for offences under the regulations', the government approved the prosecution of at least 69 people for such offences. Of these, around 50 would appear to have been communists: Douglas, 'Law, War and Liberty' (n 53) 83. Thus, Douglas states, the 'vast majority of those prosecuted under the *General Regulations* and the *Subversive Association*

It is strange, at first sight, that the main targets of anti-subversion legislation were left-wing opposition groups, when Australia's main enemies were right-wing or fascist states in the form of Germany and Japan; and one of its major allies, at least from mid-1941, was the Soviet Union. A cynical answer to this might be the popularity of explicitly racist ideologies, and particularly ideas about eugenics, in respectable Australian political and public intellectual circles during the 1930s.⁵⁹ Such ideas linked conveniently with the White Australia Policy, with the policies of 'breeding out the colour' being enthusiastically pursued at the time against Aboriginal people, particularly in Australia's tropical north, as well as with scientific or pseudo-scientific discussion of whether white people could survive or thrive in the tropics.⁶⁰ Many of the most energetic proponents of eugenics were hostile to democracy, believing the spurious notion of 'equality' promoted the interests (and the numbers) of the weak and unfit at the expense of the 'strong',⁶¹ and that efficiency, or racial improvement, should drive national policy.⁶² Even

Regulations were leftist opponents of the war': at 86. He adds that more than 80% of 'leftist' defendants were communists, that is, either members of the CPA or prepared to treat CPA doctrine as authoritative: at 86 n 93.

- 59 Charles Darwin's cousin Francis Galton formed a Eugenics Society in Britain in the early 1900s, supporting policies that reduced the breeding rights of 'inferior' members of society: Sir Francis Galton, *Essays in Eugenics* (Eugenics Education Society, 1909). These ideas were enthusiastically adopted in Australia, and were particularly influential at the University of Melbourne, where Professor of Anatomy Richard Berry enthusiastically propounded his ideas about the links between craniometry and intelligence: see Richard J A Berry, A W D Robertson and L W G Büchner, 'The Craniometry of the Tasmanian Aboriginal' (1914) 44(1) *Journal of the Royal Anthropological Institute of Great Britain and Ireland* 122. In 1936, a Eugenics Society of Victoria was formed, its first president being Professor W E Agar of the Biology Department at the University of Melbourne: see Victor H Wallace, 'The Eugenics Society of Victoria (1936–1961)' (1962) 53(4) *The Eugenics Review* 215. Its members included a 'who's who of Melbourne's elite', including the (later) Chief Justice of the Supreme Court of Victoria, and the Vice Chancellor of the University of Melbourne: Ross L Jones, 'Eugenics in Australia: The Secret of Melbourne's Elite', *The Conversation* (online, 21 September 2011) <<https://theconversation.com/eugenics-in-australia-the-secret-of-melbournes-elite-3350>>. There is extensive literature on this issue: see for example Ross Jones, 'The Master Potter and the Rejected Pots: Eugenic Legislation in Victoria 1918–1939' (1999) 30(113) *Australian Historical Studies* 319.
- 60 On policies of 'breeding out the colour', see Robert Manne, 'Aboriginal Child Removal and the Question of Genocide, 1900–1940', in A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004) 217; and also Stephen Gray, *Brass Discs, Dog Tags and Finger Scanners: The Apology and Aboriginal Protection in the Northern Territory 1863–1972* (Charles Darwin University Press, 2011) 71. More generally on the issue of Europeans in the tropical north, see Warwick Anderson, *The Cultivation of Whiteness: Science, Health and Racial Destiny in Australia* (Melbourne University Press, 2002) 91–124.
- 61 Berry, for example, complained about democracy, saying it was like Sodom and Gomorrah, and there were not ten righteous persons within it: Anderson, *ibid* 154; and see also Warwick Anderson, *The Cultivation of Whiteness: Science, Health and Racial Destiny* (Melbourne University Publishing, 2005) 166.
- 62 See, eg, Ross Jones, *Humanity's Mirror: 150 Years of Anatomy in Melbourne* (Haddington Press, 2007) 110. Such ideas were propounded by powerful people, including media magnate Keith Murdoch, father of Rupert: see Tom D C Roberts, *Before Rupert: Keith Murdoch and the Birth of a Dynasty* (University of Queensland Press, 2015). Keith Murdoch was a supporter of White Australia and of the 'natural law of survival' (124), and promoted eugenic ideas in his newspapers (see, eg, 158–9). They were also advanced by an eclectic mix of writers, artists, and cranks. For a discussion of writers such as P R 'Inky' Stephenson and Xavier Herbert, see, eg, David S Bird, *Nazi Dreamtime: Australian Enthusiasts for*

serious political and intellectual figures such as Manning Clark saw much to admire in Hitler's Germany before the war, and Prime Minister Robert Menzies himself respectfully conveyed 'his generally favourable impressions of the new Germany', after a visit there in 1938.⁶³

It is debatable whether there was any relationship between the prevalence of these ideologies and the more general lack of attention given during World War II to radical right-wing ideas. It is clear, however, that persecution of left-wing associations and individuals had begun before the beginning of the War. Such prosecutions used the unlawful associations provisions of the *Crimes Act 1926* (Cth). Hal Devanny, the publisher of the Communist party paper *Workers' Weekly*, had been prosecuted under these provisions in the early 1930s, although his conviction was quashed by the High Court.⁶⁴ A Military Police Intelligence Section was established in NSW in 1938, and prepared dossiers on local communists and radicals.⁶⁵ After the Communist Party was banned under the *National Security (Subversive Associations) Regulations* in June 1940, the Party's presses, books, papers and documents were seized everywhere around Australia. Surveillance of communists continued even after June 1941, when the Soviet Union joined the War on the Allied side. In fact, somewhat counter-intuitively given the strong presence of communist sympathisers within the Labor Party, it was streamlined and accelerated with the election of a Labor Government in October 1941. At that time the structure of the Security Service was centralised, and that body became 'the central surveillance body for watching communists after [Labor Attorney-General] Evatt lifted the ban on the Party in December 1942'.⁶⁶

As to the response of the courts, while the *Jehovah's Witnesses* case discussed above⁶⁷ is well known, it is in fact exceptional amongst wartime prosecutions as an example of the courts upholding civil liberties in the face of overbearing executive behaviour. More usually, courts deferred to the executive. Roger Douglas, who has examined World War II subversion prosecutions in detail, concludes that, when it came to prosecutions, 'Australia's response to communist dissidents seems severe when compared to the response in the United Kingdom'.⁶⁸ Courts in Australia, as in Canada and New Zealand, adopted the view 'that, in wartime, executive powers were to be given a broad construction. The protection of liberties required their temporary subordination to national security'.⁶⁹

Hitler's Germany (Australian Scholarly Publishing, 2012); and for examples of the extensive general literature in this area, see John Bostock and L Jarvis Nye, *Whither Away? A Study of Race Psychology and the Factors Leading to Australia's National Decline* (Angus and Robertson, 1934) and Charles Wicksteed Armstrong, *The Survival of the Unfittest* (Daniel, 1927).

63 Bird (n 62) xvii. Menzies wrote that the 'abandonment by the Germans of individual liberty has something rather magnificent about it': see Joey Watson, 'A Brief History of Nazism in Australia', *ABC Radio National* (online, 17 January 2019) <<https://www.abc.net.au/news/2019-01-17/a-history-of-nazis-and-the-far-right-in-australia/10713514>>.

64 *R v Hush; Ex parte Devanny* (1932) 48 CLR 487. See Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (n 15) 300.

65 Cain (n 15) 300.

66 *Ibid* 301.

67 *Jehovah's Witnesses* (1943) 67 CLR 116.

68 Douglas, 'Law, War and Liberty' (n 53) 107.

69 *Ibid* 108.

Thus, similar criticisms may be made of government and executive actions during the Second World War as during the First. National security and emergency were used as a cover for the continuation of a policy of suppressing perceived political enemies, mainly the radical left. Such groups constituted, at best, a tenuous threat to national security: as Douglas points out, ‘the threat posed by dissident groups can easily be exaggerated ... there was no evidence to suggest that the major dissident groups possessed some mysterious capacity to seduce the populace’.⁷⁰ Moreover, while the anti-subversion regulations themselves were repealed at the end of the war, the security apparatus established to enforce those regulations was not. In November 1945 the Security Service became the Commonwealth Investigation Service, and then, in March 1949, the Australian Security Intelligence Organisation (‘ASIO’), with the main goal of watching the activities of the Soviet Union, and repressing communist groups and the CPA itself.⁷¹

Another significant feature during World War II is the aggressive centralisation of powers by the Commonwealth government at the expense of the States. To fund war efforts, the Commonwealth government forcibly wrested income tax from the States through a series of interlocking legislation that commandeered State income tax staff and apparatus, such as office accommodation, furniture and equipment, made it an offence to pay State income tax before federal income tax, raised the federal tax rate to the rate including the State income taxes, and provided for reimbursement to States for that amount if they did not levy income tax.⁷² In effect, this scheme caused States to lose 63% of their total tax revenue; and placed them in a ‘helpless financial position’.⁷³ The scheme was upheld as constitutionally valid by the High Court,⁷⁴ leading to the vertical fiscal imbalance that would pervade Commonwealth-State relations to this day. Robert Menzies declared that the decision marked ‘the end of the Federal era in this country’.⁷⁵ It cemented the financial dominance of the Commonwealth over the States.

C The War on Terror

In the immediate aftermath of the terrorist attacks in the United States (‘US’) on 11 September 2001, then US President George W Bush declared a ‘war on terror’. Any notion that Australia was insulated from such world events was dissipated in the Bali bombing of October 2002. By then, the Australian government had already followed the US lead, deploying war metaphors and apocalyptic rhetoric as a justification for the use of law as one of the ‘weapons’

70 Ibid 113.

71 See generally Cain, ‘Australian Intelligence Organisations and the Law: A Brief History’ (n 15) 301–3.

72 *Income Tax (War-time Arrangements) Act 1942* (Cth); *Income Tax Assessment Act 1942* (Cth); *States Grants (Income Tax Reimbursement) Act 1942* (Cth); *Income Tax Act 1942* (Cth).

73 *South Australia v Commonwealth* (1942) 65 CLR 373, 405 (Latham CJ) (‘First Uniform Tax Case’).

74 *South Australia v Commonwealth* (1942) 65 CLR 373; cf *Victoria v Commonwealth* (1957) 99 CLR 575 (‘Second Uniform Tax Case’).

75 Quoted in Chief Justice Robert French, ‘If They Could See Us Now: What Would the Founders Say?’ (Lecture, John Curtin Prime Ministerial Library 2013 Anniversary, 18 July 2013) 7.

against terrorism.⁷⁶ By 2004, this had led to what the editors of the *Criminal Law Journal* termed ‘a massive expansion of powers and functions by specialist investigative agencies such as ASIO and their inevitable targeting of members of specially vulnerable religious and ethnic minority groups in the community’.⁷⁷ In the years since, while the pace of change may have decelerated somewhat, the expansion of powers has continued, and the justification in terms of the overriding needs of national security remains.

Rather than any proposed measure being evaluated in terms of its consistency with civil liberties and human rights, the goal of national security is seen as *a priori*, an essential precondition for the enjoyment of other liberties – an inversion of the traditional stance of the common law, as well as the philosophy and practice of international human rights.⁷⁸ National security, and particularly the prevention of terrorist actions, has been used as a justification for a bewildering range of measures, some of which seem to have only a tenuous connection with the prevention of actual terrorist acts. However, many of these measures exhibit similar characteristics to those previously discussed; that is, the tendency for temporary measures to become permanent, lack of parliamentary scrutiny, the problem of executive over-reach, and the tendency for ‘mission creep’, or the smuggling of unrelated legislation curtailing civil liberties.⁷⁹

This was apparent in the early years of Australia’s anti-terrorism legislation,⁸⁰ particularly the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which was passed with little scrutiny, and with the ordinary processes of law reform ‘subverted’, as Bronitt and McSherry argue.⁸¹ It introduced new terrorism

76 On the use of apocalyptic rhetoric to justify additional police or security powers, see Mark Finnane, ‘The Public Rhetorics of Policing in Times of War and Violence: Countering Apocalyptic Visions’ (2008) 50(1) *Crime, Law and Social Change* 7; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Company, 4th ed, 2017) 1066–7.

77 Editorial, ‘Combating Terrorism’ (2004) 28 *Criminal Law Journal* 261, 261.

78 Note for example the Berlin Declaration issued by the International Commission of Jurists, which states that ‘[a] pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism’: see International Commission of Jurists, *The Berlin Declaration: The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (Declaration, 28 August 2004) <<https://www.icj.org/the-berlin-declaration-the-icj-declaration-on-upholding-human-rights-and-the-rule-of-law-in-combating-terrorism/>> 1 (‘Berlin Declaration’). On the common law and civil liberties, see, eg, *Liversidge v Anderson* [1942] AC 206, 244 (Atkin LJ) quoted in Editorial, ‘Combating Terrorism’ (n 77) 262.

79 Christopher Michaelsen, ‘Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?’ (2005) 28(4) *Studies in Conflict & Terrorism* 321.

80 Prior to September 2001, the only Australian jurisdiction to have enacted anti-terrorism offences was the Northern Territory: see *Criminal Code 1983* (NT) ss 50–5; Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2012) 200; see also Bronitt and McSherry (n 76) 1080–1.

81 ‘The perceived urgency of the situation confronting law-makers subverted the ordinary processes of law reform’: Bronitt and McSherry (n 76) 1081, and sources cited therein. In particular, there was no Model Criminal Code Officers Committee (‘MCCOC’) discussion paper prepared and the foundational work in the area of the MCCOC was ignored: see also Bernadette McSherry, ‘Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27(2) *University of New South Wales Law Journal* 354, 355–6.

offences into Chapter 5 of the *Criminal Code*, and included very broad definitions of ‘terrorist act’ and ‘terrorist organisation’.⁸²

As was noted at the time, these definitions gave the Attorney-General very broad powers to outlaw specific organisations without being subject to judicial review, a ‘worrisome elevation of executive power that resembles Prime Minister Robert Menzies’s Communist Party Dissolution Act 1950 in its banning of political organizations by executive decree’.⁸³ Concerns were expressed at the time about the potential for quite legitimate political or other organisations, including protest movements and political opponents, to be outlawed under these powers.⁸⁴

The offence of ‘providing support to a terrorist organisation’ under section 102.7 of the *Criminal Code* (Cth) is so broad that it could cover providing humanitarian assistance anywhere in the world, without that assistance itself having any sort of terrorist link.⁸⁵ In addition, the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* (Cth) gave ASIO new powers of arrest and detention, without the need for the person detained to be suspected of any offence, and with severe limits on the right to legal representation.⁸⁶ As Michaelsen commented in 2005:

What is ... concerning, however, is the fact that the legislative amendments are likely to persist beyond the present threat of terrorism, thus profoundly affecting the nature of Australia’s legal system and, as a consequence, Australia’s society itself. Chances that momentary emergency laws will be repealed in the future are slim ... Equally worrisome, the new antiterrorism laws appear to have set a trend to progressively extend emergency powers to other areas of investigation.⁸⁷

82 A ‘terrorist act’ is defined in the Commonwealth *Criminal Code* as:

an action or threat of action, where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

Criminal Code Act 1995 (Cth) s 100.1 (definition of ‘terrorist act’). Subsection (2) refers to acts causing death or serious harm, or damage to property. Offences relating to a person’s connections with a ‘terrorist organisation’ do not require any direct connection to a person engaged in an act of terrorism: see s 102. Under section 102.1, a ‘terrorist organisation’ means:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

At s 102.1 (definition of ‘terrorist organisation’).

83 Michaelsen (n 79) 325.

84 See, eg, discussion in *ibid* 324, arguing that Nelson Mandela’s ANC or the Free Papua Movement might be outlawed under the legislation.

85 See also Kushanthy Harasgama, *An Investigation of the Theoretical Justifications for Australia’s Laws against the Financing of Terrorism* (PhD Thesis, Monash University, 2010) 99–120; also John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef: Volume 1* (Report, November 2008) 256–60.

86 Michaelsen (n 79) 325–8.

87 *Ibid* 334.

These comments were prescient. As Bronitt and McSherry argue, the notion of ‘terrorism’ has been ‘stripped of its specific historical and geo-political context, permitting its deployment in a much wider range of situations than originally envisaged’.⁸⁸ Terrorism is seen as global and universal, and its spectre the excuse for a broad range of measures involving the surveillance and management of suspect populations. Admittedly, there have been few examples so far in Australia of legitimate protest groups being classed as terrorist organisations. However, that broad discretion and the disturbing possibility remains. In the UK, for example, in early 2020 the climate change protest group Extinction Rebellion was listed as an extremist organisation, although it appears that listing was withdrawn after protest that this was stifling legitimate freedom of speech.⁸⁹ The possibility of ‘incel violence’, or violence against women by ‘involuntarily celibate’ men, being classified as a form of terrorism has also been raised in Australia.⁹⁰

More disturbing than the direct deployment of anti-terror legislation, however, has been the prevalence of ‘mission creep’, or the use of anti-terror laws as a political and legal precedent to enact laws targeting other vulnerable groups. Concern about outlaw motorcycle clubs (more usually called bikie, or biker gangs) led to the passage of ‘anti-bikie’ laws in various states, including new offences prohibiting participation in a criminal organisation.⁹¹ Anti-terror laws provided the ‘template’ for laws such as these,⁹² representing the ‘migration of national security measures to the law and order context’⁹³ as Zedner argued in 2007.⁹⁴

Another arguably even more disturbing example of this tendency was the passage of legislation enabling an extensive form of surveillance and management of suspect individuals, in the form of the ‘control order’. This legislation, introduced following the Madrid and London bombings in 2005, is in fact a civil law measure bearing some similarity to a domestic violence prevention order.

88 Bronitt and McSherry (n 76) 1086.

89 Vikram Dodd and Jamie Grierson, ‘Terrorism Police List Extinction Rebellion as Extremist Ideology’, *The Guardian* (online, 11 January 2020) <<https://www.theguardian.com/uk-news/2020/jan/10/xr-extinction-rebellion-listed-extremist-ideology-police-prevent-scheme-guidance>>; Jamie Grierson, ‘UK Extremism Tsar Urges Rethink After Extinction Rebellion Listed as Terror Threat’, *The Guardian* (online, 21 January 2020) <<https://www.theguardian.com/uk-news/2020/jan/20/uk-extremism-tsar-urges-rethink-after-extinction-rebellion-listed-as-terror-threat>>.

90 See Sian Tomkinson, Katie Attwell and Tael Harper, ‘“Incel” Violence is a Form of Extremism. It’s Time We Treated it as a Security Threat’, *The Conversation* (online, 27 May 2020) <<https://theconversation.com/incel-violence-is-a-form-of-extremism-its-time-we-treated-it-as-a-security-threat-138536>>.

91 Anti-bikie laws were first enacted in South Australia in 2003, although these laws only targeted the fortification of bikie premises. More far-reaching laws were passed by NSW in 2006, with similar laws also being passed in the Northern Territory and WA: see Bronitt and McSherry (n 76) 1132–3. They have also been passed in Victoria: see *Criminal Organisations Control Act 2012* (Vic), which allows the Chief Commissioner of Police to apply for a declaration that a certain organisation is a ‘declared organisation’: see Naylor Kirchengast et al, *Waller and Williams Criminal Law: Text and Cases* (LexisNexis, 13th ed, 2016) 780.

92 Bronitt and McSherry (n 76) 1132.

93 Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38(2) *Melbourne University Law Review* 362, 375.

94 Lucia Zedner, ‘Seeking Security by Eroding Rights: The Side-Stepping of Due Process’ in Benjamin J Gould and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 257, 265.

Control orders are issued under Division 104 of the *Criminal Code* (Cth), and allow restrictions to be placed on the movement and activities of people considered to pose a threat to the community. They are preventative in nature: that is, they may be imposed on people not convicted or even charged with a criminal offence, and not necessarily even on the basis that the person is considered reasonably likely to commit serious offences in the future.⁹⁵ In 2007, a High Court challenge to the validity of the control order was rejected on the basis that the order was a valid exercise of the defence power.⁹⁶

Again, control orders have migrated outside the context of terrorism. In 2008, the South Australian Parliament enacted the *Serious and Organised Crime (Control) Act 2008* (SA) ('SOCCA'), expanding that State's already existing panoply of 'anti-bikie' legislation to allow control orders to be imposed on individuals once their membership of, or association with, a 'declared organisation' is established.⁹⁷ While a declaration under this scheme was successfully challenged in *South Australia v Totani*,⁹⁸ similar schemes have now been introduced in a number of other States and Territories, with each scheme supported by tough 'anti-bikie' rhetoric and drawing on the language of terror and terrorism.⁹⁹ Some of these schemes remain in force.¹⁰⁰

While such schemes are politically aimed at bikie gangs, the potential exists for a much broader reach. Organisations that might be 'declared' could conceivably (and depending on the precise form of the legislation in each jurisdiction) include child pornography rings, thieves who work in groups, people who use or sell drugs in groups, drag racers, or protest groups that orchestrate an unlawful assembly.¹⁰¹ Legislative schemes of this type may also permit the executive, not the judiciary, to make a unilateral declaration that an organisation was subject to the legislation. With its rejection of a constitutional challenge in

95 Ananian-Welsh and Williams (n 93) 369. Control orders were originally developed in the UK in the fight against football hooliganism (note particularly the Hillsborough disaster in 1989 in which 96 football fans were crushed to death). From these developed the 'anti-social behaviour order' ('ASBO'), as well as gang-related violence injunctions, knife crime prevention orders and others, all ways of criminalising people for engaging in non- or possibly pre-criminal activity. In the UK, anti-terrorism control orders were softened in 2010 with the election of a new government, as well as the impact of human rights concerns, particularly their compatibility with the European Convention on Human Rights. However, the Australian order is based on the original 2005 UK legislation. See generally, for comparison between the UK and Australia: Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37(1) *Melbourne University Law Review* 143.

96 *Thomas v Mowbray* (2007) 233 CLR 307; see Ananian-Welsh and Williams (n 93) 372–5; Bronitt and McSherry (n 76) 1076–8.

97 Ananian-Welsh and Williams (n 93) 376.

98 (2010) 242 CLR 1. See also Bronitt and McSherry (n 76) 1134.

99 See *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Serious Crime Control Act 2009* (NT); *Criminal Organisation Act 2009* (Qld); *Criminal Organisations Control Act 2012* (WA); *Criminal Organisations Control Act 2012* (Vic). See also Ananian-Welsh and Williams (n 93) 380.

100 The NSW scheme was successfully challenged in *Wainohu v State of New South Wales* (2011) 243 CLR 181. However, the Victorian and Northern Territory legislation remains in force.

101 Ananian-Welsh and Williams make this argument in respect of Queensland's *Vicious Lawless Association Disestablishment Act 2013* (Qld): Ananian-Welsh and Williams (n 93) 392. The Queensland legislation was repealed in 2016.

Kuczborski v Queensland,¹⁰² the High Court ‘gave constitutional legitimacy to schemes in which organisations are declared by the executive (as is the case under the federal anti-terrorism laws and the original *SOCCA*) by a secretive, unreviewable process’.¹⁰³

Interim control orders may be issued *ex parte* and without notice to the affected person. Police and intelligence agencies argue it is important that information prejudicial to national security not be disclosed; including, on occasion, disclosed to the person who is to be made subject to the order.¹⁰⁴ The corollary of this is the potential for a person to be subjected to a control order (or an interim order) both *in camera* and *ex parte*; that is, stripped of basic civil liberties without their knowledge or the potential (at least initially) to object.

A final significant development has been the use by Australia’s intelligence services of the powers granted to them in the shadow of the post-2001 ‘war on terror’ in contexts far removed from that original aim. For example, under section 39 of the *Intelligence Services Act 2001* (Cth), it is a ‘criminal offence for a person to communicate any information that was prepared by the Australian Secret Intelligence Service in pursuit of its functions’.¹⁰⁵ Under the *National Security Information Act 2004* (Cth), another piece of legislation introduced post-9-11 with the goal of protecting sensitive terrorism-related information, parts of trials involving classified or sensitive information may be held in secret.¹⁰⁶ These powers have been used to prosecute Australian lawyer Bernard Collaery, the whistle-blower who helped expose Australia’s bugging of Timor-Leste government offices in 2004 during negotiation over maritime boundaries and the division of lucrative oil and gas reserves in the Timor Sea.¹⁰⁷ The ACT Supreme Court ruled that parts of Collaery’s trial could be heard in secret, leading Christopher Flynn, a Gilbert and Tobin partner speaking on Collaery’s behalf, to warn that ‘laws designed to protect Australians from terrorism’ were being used to erode open justice.¹⁰⁸

Further, in 2019, the government had utilised national security laws to target journalists, with the Australian Federal Police raiding a News Corp journalist’s

102 (2014) 254 CLR 51.

103 Ananian-Walsh and Williams (n 93) 395.

104 See Aileen Kavanagh, ‘Special Advocates, Control Orders and the Right to a Fair Trial’ (2010) 73(5) *Modern Law Review* 836, 837 (discussing the United Kingdom).

105 Cited in Spencer Zifcak, ‘Why Bernard Collaery’s Case is One of the Gravest Threats to Freedom of Expression’, *The Conversation* (online, 3 July 2020) <<https://theconversation.com/why-bernard-collaerys-case-is-one-of-the-gravest-threats-to-freedom-of-expression-122463>>.

106 Christopher Knaus, ‘Court Rules Key Parts of Bernard Collaery Trial to be Held in Secret’, *The Guardian* (online, 26 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/26/court-rules-key-parts-of-bernard-collaery-trial-to-be-held-in-secret>>.

107 Christopher Knaus, ‘Witness K and the “Outrageous” Spy Scandal that Failed to Shame Australia’, *The Guardian* (online, 10 August 2019) <<https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>>.

108 Christopher Knaus, ‘Court Rules Key Parts of Bernard Collaery Trial to Be Held in Secret’, *The Guardian* (online, 26 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/26/court-rules-key-parts-of-bernard-collaery-trial-to-be-held-in-secret>>. See also Australian Federal Police, *AFP Statement on Activity in Canberra and Sydney* (2019) <<https://www.afp.gov.au/news-media/media-releases/afp-statement-activity-canberra-and-sydney>>; Zifcak (n 105).

residence and the ABC's Ultimo premises under a warrant.¹⁰⁹ Upon a legal challenge, the High Court held that the warrant authorising the raids was invalid.¹¹⁰ The utilisation of national security laws by government to attack journalists endangers press freedom, which is a fundamental tenet of a healthy democracy.

D Lessons from the Wars

Thus it can be seen that in situations of war-time, executive power expands to an extraordinary degree to enable coercive actions by government, including the possession of property and curtailment of individual rights and liberties. At the same time, the other branches of government reduce the rigour of their checks and balances: Parliament is stifled in its scrutiny, and the judiciary becomes quiescent in its decision-making. Coercive legislation enacted during times of war, which was seen to be temporary in a time of emergency, has endured long after the emergency is over; or has been replicated in similar forms in new legislation. In addition, particularly in World War II, the Commonwealth government has, due to the imperatives of war, adopted a policy of aggressive centralisation of power by wresting income tax from the States, and refused to reverse this following the end of the war. This expansion of federal fiscal power has resulted in a permanent weakening of the States' financial position, and has cemented the Commonwealth's dominance over the States.

Moreover, Australia has moved from external world wars waged against enemy combatants to one that is more amorphous and difficult to delineate: the War on Terror, leading to a permanent state of emergency that justifies the continual use of coercive legislation. This legislation has been strategically deployed by governments, during and after crises, to stifle debate by targeting journalists, whistle-blowers, and protestors; thus curtailing individual rights and liberties.

III PANDEMIC REGULATION IN AUSTRALIA

We will now consider how pandemic regulation has developed in Australia, focussing on the two largest scale global pandemics since federation: the Spanish Flu and COVID-19. Australia possesses natural geographic isolation as an island nation girt by sea; as a consequence, historically the entry of infectious diseases into Australia has been regulated through maritime quarantine arrangements. To this end, the then operative *Quarantine Act 1908* (Cth) provided for surveillance

109 The Australian Federal Police ('AFP') executed a search warrant at the residence of News Corp journalist Annika Smethurst and at the ABC's Ultimo premises. The AFP claimed both searches related to 'separate allegations of publishing classified material, contrary to provisions of the *Crimes Act 1914*, which is an extremely serious matter that has the potential to undermine Australia's national security': Australian Federal Police, 'AFP Statement on Activity in Canberra and Sydney' (Media Release, 5 June 2019).

110 The High Court found that the warrant was invalid as it misstated the substance of s 79(3) of the *Crimes Act* and failed to state the offence to which the warrant related with sufficient precision. However, the High Court did not make an order for the destruction of the documents seized: *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

and control over humans, animals and plants that entered Australia. It allowed for people to be ordered into quarantine, to be detained on board a vessel or installation or in premises upon which they are found, and to be removed to and detained in a quarantine station.¹¹¹ Quarantine stations were a major method for containing the infected and their close relations, within a legislative framework that permitted the forcible and mandatory detention of individuals. As Reynolds noted:

Of the public health powers, quarantine is the most coercive and perhaps the most frightening. Our most potent images of past epidemics are of people – sick and healthy alike – being forcibly taken from their homes and families to places of detention. Indeed, one of the most graphic memories of the plague epidemic in Sydney in 1900 was of the green-painted steam launches making their way across the harbour to the quarantine station at North Head.¹¹²

The power of quarantine is vested in the Commonwealth by virtue of section 51(ix) of the *Australian Constitution*, which is a shared power with the States,¹¹³ and public health matters are within the remit of the States, meaning that the handling of pandemics requires Commonwealth-State collaboration to a greater extent than that exhibited by wars.

A Spanish Flu Pandemic: 1918–19

Six months before the armistice that brought the end of World War I, the world was hit by a virulent and deadly global pandemic, known colloquially as the Spanish Flu, as Spain was one of the only countries that did not censor its reports of the disease and the King of Spain was one of its early victims.¹¹⁴ The Spanish Flu pandemic killed 50 to 100 million people worldwide in 18 months, or up to six per cent of the world's population at the time.¹¹⁵ The cramped quarters of wartime, 'military barracks, troopships, troop trains, prisoner-of-war camps, labour compounds, factories, mine-shafts, schools, mass meetings and processions', contributed to the worldwide transmission of the disease.¹¹⁶

The flu reached Australia's shores in 1918 through infected passengers arriving by sea. The *Sydney Morning Herald* proclaimed: 'Australia must now face the fact that the scourge which has taken so heavy a toll from the rest of the world has invaded her own frontiers'.¹¹⁷ The Spanish Flu struck Australia in two waves,

111 *Quarantine Act 1908* (Cth) s 45(1). See 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. The *Quarantine Act 1908* (Cth) was replaced by the *Biosecurity Act 2015* (Cth), which is discussed in further detail in Part III(B) below.

112 Reynolds (n 111) 166.

113 Section 52 of the *Constitution* enumerates the exclusive powers of the Commonwealth while section 51 of the *Constitution* enumerates powers that are shared by the Commonwealth with the States.

114 Humphrey McQueen, "'Spanish Flu': 1919" (1975) 1(18) *Medical Journal of Australia* 565; Greg Eghigian, 'The Spanish Flu Pandemic and Mental Health: A Historical Perspective' (2020) 37(5) *Psychiatric Times* 26.

115 Peter Bradley, 'Spanish Flu: 100th Anniversary Lessons and Warnings' (2018) 12(12) *British Journal of Healthcare Assistants* 578; John M Barry, *The Great Influenza: The Story of the Deadliest Pandemic in History* (Penguin Books, 2005).

116 Howard Phillips, 'Influenza Pandemic', *International Encyclopaedia of the First World War* (Web Page, 8 January 2017) <https://encyclopedia.1914-1918-online.net/article/influenza_pandemic>.

117 'Influenza', *Sydney Morning Herald* (Sydney, 28 January 1919) 6.

from mid-March and late May 1919, and a more virulent strain in June and July 1919 with a higher mortality rate.¹¹⁸ By the end of 1919, about 40 per cent of the Australian population was infected and around 15,000 died from the Spanish Flu, with the mortality rate of some Aboriginal communities being 50 per cent.¹¹⁹

As soon as the first infected vessels arrived at Australian shores in 1918, the Commonwealth government implemented maritime quarantine measures for all vessels arriving in Australian waters under the *Quarantine Act 1908* (Cth).¹²⁰ Over the next six months, the Australian Quarantine Service intercepted 323 vessels, with 174 vessels infected, and 1,102 out of 81,510 people infected.¹²¹ As part of Commonwealth quarantine measures between 1918–20, those detained in quarantine ‘had their temperature taken daily, underwent steam inhalation and were inoculated with an injection of vaccine made, in part, from the “organism of common *Coryza* (cold in the head)”’; practices that were of dubious medical effectiveness.¹²²

The Commonwealth’s second main response was based on interstate coordination. The Commonwealth called a national influenza planning conference attended by the State Ministers of Health, their Directors-General and the British Medical Association Branch Presidents, with the Commonwealth Minister for Trade and Customs and his Director of Quarantine.¹²³ The committee agreed that the Commonwealth would take responsibility for proclaiming which States were infected upon notification from its Chief Health Officer and that, until any neighbouring State was proclaimed as infected, their borders be closed to interstate travellers, alongside a prohibition on persons leaving an infected state without a permit issued by the Commonwealth government.¹²⁴ The power to revoke any proclamations regarding the States rested with the Commonwealth.¹²⁵ The States in turn were to be responsible for ‘emergency hospitals, vaccination depots, ambulance services, medical staff and public awareness measures’,¹²⁶ and were requested to ensure that they had in place sufficient power to effect public health measures.¹²⁷

118 Peter Curson and Kevin McCracken, ‘An Australian Perspective of the 1918–1919 Influenza Pandemic’ (2006) 17 (7–8) *NSW Public Health Bulletin* 103; Kevin McCracken and Peter Curson, ‘Flu Downunder: A Demographic and Geographic Analysis of the 1919 Epidemic in Sydney, Australia’ in David Killingray and Howard Phillips (eds), *The Spanish Influenza Pandemic of 1918–19: New Perspectives* (Routledge, 2003) 110, 121–2.

119 ‘Defining Moments: Influenza Pandemic’, *National Museum of Australia* (Web Page, 7 October 2020) <<https://www.nma.gov.au/defining-moments/resources/influenza-pandemic>>.

120 McQueen (n 114) 565; J H L Cumpston, *Influenza and Maritime Quarantine in Australia* (Commonwealth of Australia Quarantine Service Publication No 18, 1919) 38–9.

121 ‘Defining Moments: Influenza Pandemic’ (n 119).

122 Jean Foley, *In Quarantine: A History of Sydney’s Quarantine Station 1824–1984* (Kangaroo Press, 1995) 112.

123 McQueen (n 114) 566; Robyn Arrowsmith, *A Danger Greater than War: NSW and the 1918–1919 Influenza Pandemic* (Australian Homeland Security Research Centre, 2007) 3.

124 McQueen (n 114) 566.

125 *Ibid* 566; Cumpston (n 120) 63–5.

126 ‘Defining Moments: Influenza Pandemic’ (n 119).

127 See, eg, *Quarantine Act 1832* (NSW); *Health Act 1915* (Vic); *Health Act 1919* (Vic) amended existing legislation to give new powers to isolate localities where the flu developed; *Quarantine Act 1863* (Qld); *Influenza Regulation 1919* (Qld).

These fledging federalist efforts did not last very long. Following clashes between Victoria and New South Wales over Victoria's delay in notification of an infection, leading to it being spread to New South Wales, New South Wales unilaterally closed its borders despite both States being declared.¹²⁸ From that point, it was 'every State for itself'.¹²⁹ Although 'both the Prime Minister and the Leader of the Opposition publicly acknowledged that the epidemic demonstrated the necessity for augmented Commonwealth powers',¹³⁰ any such augmentation failed to eventuate, with continually amended interstate travel and quarantine arrangements. In the end, the Commonwealth Government annulled the national plan as States were not complying with it and withdrew from the national conference completely in response to its authority being 'treated with complete contempt'.¹³¹ Arrowsmith remarked that the 'lack of cohesion between the States and the Commonwealth made it apparent that Federation was indeed a fragile bond'.¹³²

State governments undertook significant coercive measures within the mandate of their public health legislation, which provided for significant statutory executive powers, combined with coercive enforcement mechanisms.¹³³ The States, by proclamation, enforced the closure of public venues (e.g. theatres, concert halls, racing events, billiard rooms, pubs, clubs, bottle shops) and schools, as well as imposed restrictions on the freedom movement and association and other coercive requirements on individuals, including isolation camps, social distancing regulations, compulsory mask-wearing, isolation orders, mandatory inoculation, and orders requiring compulsory medical examination.¹³⁴ These measures were enacted by executive decree without the involvement of Parliament. At any rate, State Parliaments were prorogued and did not sit for much of the period of the pandemic.¹³⁵ However, the federal Parliament continued to sit throughout the

128 Arrowsmith (n 123) 6.

129 McQueen (n 114) 566.

130 Ibid.

131 J H L Cumpston, *The Health of the People: A Study in Federation* (Canberra, 1978) 37.

132 Arrowsmith (n 123) 73.

133 For New South Wales, see Arrowsmith (n 123). For Queensland, see Patrick George Hodgson, 'Flu, Society and the State: The Political, Social and Economic Implications of the 1918–1920 Influenza Pandemic in Queensland' (PhD Thesis, James Cook University, 2017). For Western Australia, see Bev Blackwell, *Western Isolation: The Perth Experience of the 1918–1919 Influenza Pandemic* (Australian Homeland Security Research Centre, 2007). For Victoria, see Ben Huf and Holly Mclean, 'Epidemics and Pandemics in Victoria: Historical Perspectives' (Research Paper No 1, Parliamentary Library and Information Service, Parliament of Victoria, May 2020).

134 See, eg, New South Wales, *Government Gazette of the State of New South Wales*, No 13, 28 January 1919, 591, declaring that 'all libraries, schools, churches, theatres, public halls, and places of indoor resort for public entertainment' were to be closed until another order was made. The Victorian Government gazetted the closure of 'all theatres, picture theatres, music or concert halls, and all public buildings where persons assemble for purposes of entertainment or instruction', as well as all racing events, billiard rooms, saloons, bars, registered clubs and bottle shops: Victoria, *Victoria Government Gazette*, No 16, 28 January 1919, 207; Victoria, *Victoria Government Gazette*, No 18, 30 January 1919, 251–252; Victoria, *Victoria Government Gazette*, No 27, 7 February 1919, 579.

135 The Victorian Parliament was prorogued from late December 1918 to July 1919: Victoria, *Victoria Government Gazette*, No 16, 28 January 1919 207. See also Victoria, *Victoria Government Gazette*, No

pandemic, although the Federal Parliamentary Committee on Public Accounts temporarily ceased operations during the crisis.¹³⁶

The restrictions on individual movement and closures of businesses imposed due to the Spanish Flu were lifted as soon as possible by the State governments, and in fact were removed too early, leading to another wave of infections. For example, in New South Wales, restrictions were relaxed prematurely in March 1919 after about a month, leading to a second and more severe wave of the pandemic, which forced the NSW government to impose more rigorous restrictions.¹³⁷ In May 1919, restrictions were removed as the second wave of influenza receded, and finally the proclamation that pneumonic influenza was a notifiable disease was rescinded on 8 August 1919.¹³⁸ Similarly in Victoria, restrictions were imposed for a few weeks, and then relaxed, which led to a second outbreak.¹³⁹ Despite this, the Victorian government did not reimpose the whole array of restrictions.¹⁴⁰ The State governments' impatience to remove restrictions is understandable, given the social and economic consequences of a broad population lockdown. Nevertheless, the public health legislative framework remained in place, which authorised broad executive powers to curtail individual rights and freedoms.

In the aftermath of the crisis, there were deliberate attempts by the Commonwealth government to consolidate its powers in dealing with health emergencies. In 1920, the *Quarantine Act* was amended to give the Commonwealth power to override state legislation by proclamation in an emergency.¹⁴¹ In addition, in 1919, the acting Prime Minister, W A Watt, proposed that the States either transfer powers over health to the Commonwealth or accept Commonwealth co-ordination, which was met with reluctance by the States.¹⁴² It was only with public support by the British Medical Council in Australia and the Australian Medical Congress, as well as funding from the International Health Board of the Rockefeller Foundation,¹⁴³ that the Commonwealth Government established a new Department of Health in 1922, as a central coordinative mechanism, which was to be 'the focal point of future epidemics and quarantine measures'.¹⁴⁴

In the following decades, infectious disease control was on the backburner for the Commonwealth government, with the Nairn Review of quarantine in 1996 noting a long-standing disinterest in human quarantine,¹⁴⁵ while in 1977 the

35, 20 February 1919, 661; Huf and Mclean (n 133) 14. The Queensland Parliament did not sit at all during the pandemic: Hodgson (n 133) 302.

136 'News of the Day', *The Age* (Melbourne, 28 April 1919) 6.

137 Arrowsmith (n 122) 79–83.

138 Ibid.

139 Victoria, *Victoria Government Gazette*, No 42, 3 March 1919, 711.

140 Victoria, *Victoria Government Gazette*, No 59, 2 April 1919, 945.

141 *Quarantine Act 1908* (Cth) s 2A(1).

142 Nigel Brew and Kate Burton, 'Critical, but Stable: Australia's Capacity to Respond to an Infectious Disease Outbreak' (Research Paper No 3, Parliamentary Library, 16 November 2004).

143 Ibid.

144 Huf and Mclean (n 133) 13.

145 M E Nairn et al, *Australian Quarantine: A Shared Responsibility* (Report, 1996).

Department of Prime Minister and Cabinet found in a review that threats of disease had reduced to almost insignificant proportions, despite the enormous increases in personal mobility since World War II.¹⁴⁶ With the advent of several strains of infectious diseases in the early twenty first century, such as Severe Acute Respiratory Syndrome ('SARS'), Middle East Respiratory Syndrome ('MERS'), Ebola, Zika virus, with the most significant prior to COVID-19 being the 2009 H1N1 'Swine Flu' pandemic,¹⁴⁷ the Commonwealth and States developed national planning instruments for pandemics. Such plans included the Australian Health Management Plan for Pandemic Influenza and the National Action Plan for Human Influenza,¹⁴⁸ which represented strengthened federalist arrangements for dealing with infectious diseases.

It is difficult to assess at this distance what impact, if any, the measures imposed by government to combat Spanish Flu had upon civil liberties and human rights. The Spanish Flu came hard on the heels of the First World War, hitting populations already exhausted by war, and already well inured to the intrusions on civil liberties enacted by government in the name of wartime security. There is little, if any, literature discussing the specific impact of the Spanish Flu on civil liberties. However, there is evidence that the Australian government, along with other governments overseas, was intensely concerned by the close of the War with the risk of social unrest and even revolution, fomented by discontented returning soldiers and others influenced by radical ideas, and that the Spanish Flu pandemic significantly added to this fear.¹⁴⁹

B The COVID-19 Pandemic

In 2019, the highly infectious coronavirus virus ('COVID-19') swept through the world, with the first confirmed case in Australia in January 2020.¹⁵⁰ At the time of writing, there have been more than 112.6 million infections worldwide, leading

146 Department of Prime Minister and Cabinet, *Review of Australian Quarantine Arrangements* (Australian Government Publishing Service, 1977) 132.

147 Huf and Mclean (n 133) 23.

148 See Terry Carney, Richard Bailey and Belinda Bennett, 'Pandemic Planning as Risk Management: How Fared the Australian Federation?' (2012) 19(3) *Journal of Law and Medicine* 550, 553, 555. See also Kim Moloney and Susan Moloney, 'Australian Quarantine Policy: From Centralization to Coordination with Mid-Pandemic COVID-19 Shifts' (2020) 80(4) *Public Administration Review* 671, 674–6.

149 This argument is put in some detail by Humphrey McQueen, who argues that 'connections between Bolsheviks, the influenza and social unrest were not confined to a general sense of disquiet since containment of social revolution was the prime concern in 1919': Humphrey McQueen, 'The "Spanish" Influenza Pandemic in Australia, 1912–19' in Jill Roe (ed), *Social Policy in Australia: Some Perspectives, 1901–1975* (Cassell Australia, 1976); see also Humphrey McQueen, 'The "Spanish" Influenza Pandemic in Australia, 1912–19', *Australian Society for the Study of Labour History Canberra Region* (Web Page) <<https://labourhistorycanberra.org/2018/06/the-spanish-influenza-pandemic-in-australia-1912-19/>>.

150 'Coronavirus (COVID-19) Current Situation and Case Numbers', *Australian Government Department of Health* (Web Page, 27 February 2021) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>>.

to 2.5 million deaths,¹⁵¹ representing the biggest public health crisis since the Spanish Flu.

The following discussion will consider, first, biosecurity measures, and then surveillance measures imposed by the government to combat COVID-19. While these types of measures are clearly related, they will be discussed separately, as different human rights considerations arise. We will also consider parliamentary accountability during the COVID-19 pandemic.

1 *Biosecurity Measures*

The regulatory framework that the Commonwealth utilised to combat COVID-19 was the *Biosecurity Act 2015* (Cth), which was the successor of the *Quarantine Act 1908* (Cth). The *Biosecurity Act* was introduced to modernise the regulatory framework for protecting Australia against biosecurity risks, including the risk of communicable diseases.¹⁵²

By contrast to the Spanish Flu, where central coordinative capacity was weak in the fledgling federation in 1918, a century later, the tables have been turned due to the vertical fiscal imbalance between the Commonwealth and States that has persisted since World War II, as well as a federal legislative framework for quarantine and biosecurity that has been gradually strengthened over the years, for instance through the displacement of any contrary State legislation on the topic.¹⁵³ Nevertheless, several coordinative functions with the States are required under the *Biosecurity Act*. For one, the federal Director of Human Biosecurity (the Chief Medical Officer) must consult with the chief health officer for each state and territory before listing a disease under the Act.¹⁵⁴ In addition, the federal Health Minister may not give directions during a human biosecurity emergency period to an officer or employee of a State, Territory, or State/Territory body unless the direction is in accordance with an agreement between the Commonwealth and the State, Territory or body.¹⁵⁵

The Commonwealth has substantial coercive statutory powers under the *Biosecurity Act* to prevent the introduction and spread of listed diseases into

151 'Coronavirus Disease (COVID-19) Pandemic', *World Health Organisation* (Web Page, 27 February 2021) <<https://web.archive.org/web/20210226215806/https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

152 It was, however, envisioned that the human health provisions would rarely be used. The Minister in the second reading speech stated:

The human health provisions of the Quarantine Act, particularly those relating to isolation and treatment, have rarely been used in the last 20 years. It is expected that the human health provisions contained in the bill will be seldom used. However it is important that legislative powers are available to manage serious communicable diseases should they occur.

Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2014, 13429 (Barnaby Joyce, Minister for Agriculture).

153 The *Biosecurity Act 2015* (Cth) ss 477(5), 478(4) provides that a requirement determined under s 477(1), or a direction given under s 478(1) applies despite any provision of any other Australian law, including state laws.

154 *Biosecurity Act 2015* (Cth) s 42(2).

155 *Ibid* 478(5). There is such an agreement: Council of Australian Governments, *National Partnership on COVID-19 Response: An Agreement between the Commonwealth of Australia and the States and Territories* (13 March 2020).

Australia. The *Biosecurity Act* imposes a regime of both population-wide measures through executive decree and individual measures through control orders.¹⁵⁶ On 21 January 2020, COVID-19 was added as a ‘listed human disease’,¹⁵⁷ while on 18 March 2020, the Governor-General declared COVID-19 to be a ‘human biosecurity emergency’.¹⁵⁸ This enlivened broad-ranging population-wide powers for the federal Health Minister to determine any requirement that he/she was satisfied was necessary to prevent or control the emergence, establishment or spread of COVID-19 in Australia.¹⁵⁹ This provision has been used to impose overseas travel bans,¹⁶⁰ emergency requirements for remote communities,¹⁶¹ as well as to prohibit trading by retail outlets in international airports,¹⁶² cruise ships from entering Australian ports,¹⁶³ and price gouging in relation to essential goods.¹⁶⁴ These determinations were made by executive decree, without parliamentary input. A person who breaches a requirement or direction commits a criminal offence with a maximum penalty of imprisonment of five years and/or a fine of 300 penalty units (\$66,600).¹⁶⁵

Despite these broad ministerial powers and significant penalties, the Act does have regular reviews of the length of the emergency period. It requires that the human biosecurity emergency period last no longer than the Health Minister considers necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australia, or in any case, not longer than three months.¹⁶⁶ Nevertheless, the Governor-General may extend a declaration indefinitely (with each extension being for no longer than three months) if the Health Minister remains satisfied that the conditions that required a declaration of a human biosecurity emergency continue.¹⁶⁷ This presents a risk of an indefinite state of emergency.

Apart from population-wide measures, the *Biosecurity Act* provides for the power to issue individual-level ‘human biosecurity control orders’ that are

156 For a comparison between the quarantine and biosecurity legislation, see Anthony Gray, ‘The Australian Quarantine and Biosecurity Legislation: Constitutionality and Critique’ (2015) 22(4) *Journal of Law and Medicine* 788 (‘Constitutionality and Critique’).

157 *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth) sch 1 cl 1 (in effect until 22 January 2020).

158 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) s 4, as at 11 December 2020 (in effect until 17 March 2021).

159 *Biosecurity Act 2015* (Cth) s 477(1).

160 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth) s 5.

161 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth).

162 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – Retail Outlets at International Airports) Determination 2020* (Cth) s 5.

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

164 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020* (Cth).

165 *Biosecurity Act 2015* (Cth) s 140.

166 *Ibid* s 475(4).

167 *Ibid* s 476.

exercisable by biosecurity officials, rather than the Minister.¹⁶⁸ Human biosecurity officials can impose requirements restricting individuals to their place of residence for a specified period, or requiring individuals to avoid contact with certain classes of people, wear protective clothing or equipment, be decontaminated, undergo examinations, provide body samples, or receive vaccinations or medication.¹⁶⁹ The breadth of this power to biosecurity officials has been criticised as it includes power over persons who *may* have a listed disease, which represents an expansion of powers from the *Quarantine Act*.¹⁷⁰ A person may be involuntarily detained if an officer believes that detention is necessary to avoid a significant risk of contagion.¹⁷¹ Failure to comply with a human biosecurity order is an offence, punishable by up to five years' imprisonment and/or a fine of 300 penalty units (\$66,600).¹⁷²

Despite these sweeping coercive executive powers, there are certain protections built into the *Biosecurity Act* for consideration of personal rights and freedoms in human health biosecurity decision-making. Biosecurity officials have to make decisions according to the principle that exercises of power should be no more restrictive or intrusive than is required.¹⁷³ In addition, individuals have redress in terms of merits and judicial review of decisions made by biosecurity officials.¹⁷⁴ As an additional oversight mechanism, the Inspector-General of Biosecurity is able to review the performance of functions and exercise of powers by biosecurity officials.¹⁷⁵ Thus, the *Biosecurity Act* does provide additional legislative safeguards for individual rights and freedoms compared to its predecessor, the *Quarantine Act*.¹⁷⁶

The Commonwealth's quarantine and biosecurity powers are supplemented by the States' public health legislation.¹⁷⁷ Under this legislation, some States have declared states of emergencies,¹⁷⁸ and imposed a range of coercive measures, such as quarantine, the compulsory wearing of face coverings,¹⁷⁹ restrictions in

168 Ibid s 60. Biosecurity officials are defined as including the Director of Biosecurity (the Commonwealth Chief Medical Officer), biosecurity officers and biosecurity enforcement officers: *ibid* ss 9 (definitions of 'biosecurity official', 'Director of Biosecurity', 'biosecurity officer' and 'biosecurity enforcement officer'), 544(1), 545–6, 548. See also ss 82, 563.

169 *Ibid* ch 2, pt 3, div 3.

170 David J Carter, 'The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis' (2020) 43(1) *University of New South Wales Law Journal* 117, 127–8.

171 *Ibid* 128.

172 *Biosecurity Act 2015* (Cth) s 107.

173 *Ibid* ss 31–2. For an account of how this may operate, see discussion in Cristina Pelkas, 'State Interference with Liberty: The Scope and Accountability of Australian Powers to Detain during a Pandemic' (2010) 12(1) *Flinders Law Journal* 41, 76–9.

174 *Biosecurity Act 2015* (Cth) ss 74–81, ch 11 pt 1.

175 *Ibid* ss 567.

176 Gray, 'Constitutionality and Critique' (n 156).

177 See Katie Miller, 'Finding Law in a Time of Emergency: COVID-19' (2020) 27(2) *Australian Journal of Administrative Law* 66.

178 See, eg, *Public Health and Wellbeing Act 2008* (Vic) s 200; *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas), pursuant to *Public Health Act 1997* (Tas); *Emergency Management Act 2006* (Tas).

179 Stay at Home Directions (Restricted Areas) (No 12) pursuant to *Public Health and Wellbeing Act 2008* (Vic) s 200.

movements and assembly,¹⁸⁰ the closure of businesses, and border closures between States.¹⁸¹ Restrictions on individual movement and assembly have been enforced by the State police, aided by the Australian Defence Force.¹⁸² Concerns have been expressed that the police and militia have implemented these restrictions in a heavy-handed manner, without regard to proportionality, the lack of clarity inherent in the rules, or extenuating personal circumstances.¹⁸³ In addition, in jurisdictions such as New South Wales, appeals of penalty infringement notices are rarely successful under the ‘rigid administrative processes of Revenue NSW’, and an inability to pay the fine leads to an enforcement order, followed by a court attendance notice, which may be a ‘slippery slope into criminality’.¹⁸⁴ This phenomenon is particularly worrying, given the scale of the issue, with thousands of infringement notices amounting to \$5.2 million of fines issued across Australia to those who have breached restrictions since the beginning of the pandemic.¹⁸⁵

2 Surveillance Measures

In addition to biosecurity measures, the federal government has introduced a contact tracing app, the COVIDSafe app, which was given legislative basis through the *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth) (‘the COVIDSafe Act’).¹⁸⁶ The legislation was rushed through Parliament in three days.¹⁸⁷ There are safeguards in the Act, which sets up a consent-based framework rather than a mandatory requirement to download and use the app.¹⁸⁸

180 See, eg, *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW), pursuant to *Public Health Act 2010* (NSW); *Public Health Regulation 2012* (NSW); *Public Health Act 2005* (Qld); *South Australian Public Health Act 2011* (SA); *Health Act 1911* (WA); *Public Health Act 1997* (ACT); *Terrorism (Emergency Powers) Act 2003* (NT).

181 *Quarantine (Closing the Border) Directions 5 April 2020*, pursuant to *Emergency Management Act 2005* (WA), ss 61, 67, 70, 72A.

182 David Leece, ‘Recent Provision of Military Assistance to Civil Authorities in Australia’ (2020) 71(2) *United Service* 5, 8.

183 Eg in New South Wales, a man was issued with a thousand dollar fine for eating a pizza alone in his car, on the way home after being laid off from his job, while two women walking in a park carrying infants were charged for being in breach of the two-person gathering rule, with the Attorney-General later clarifying that infants were not counted under the rule: Kate Allman, ‘Police State or Safety Net? How NSW Entered a Strange “New Normal”’ [2020] (66) *Law Society Journal* 30, 34. See Clifford Stott, Owen West and Mark Harrison, ‘A Turning Point, Securitization, and Policing in the Context of Covid-19: Building a New Social Contract between State and Nation?’ (2020) 4(3) *Policing* 574.

184 Allman (n 183) 33–4.

185 Sophie Meixner, Alicia Nally and Jason Dasey, ‘Australian States Raise Millions from Coronavirus Fines’, *ABC News* (online, 3 August 2020) <<https://www.abc.net.au/news/2020-08-03/coronavirus-covid19-public-health-breach-fines-money-revenue/12498310>>.

186 The Act replaced the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – Public Health Contact Information) Determination 2020* (Cth), a determination under s 477(1) of the *Biosecurity Act 2015* (Cth).

187 The Bill for the Act was first introduced into the Parliament on 12 May 2020 and received royal assent on 15 May 2020: ‘Privacy Amendment (Public Health Contact Information) Bill 2020’, *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6556>.

188 See ‘COVIDSafe App’, Department of Health (Cth) (Web Page, 15 December 2020) <<https://www.health.gov.au/resources/apps-and-tools/covidsafe-app>>.

Further, there are legislative protections for individual choice to utilise the COVIDSafe app, which makes it an offence to coerce individuals to download or use the app,¹⁸⁹ to refuse to allow another person who refuses to use the app to participate in an activity, enter premises, or receive or provide goods or services,¹⁹⁰ and a prohibition against employers taking adverse action under the *Fair Work Act 2009* (Cth) against employees or contractors without the app.¹⁹¹ The Act also provides strong safeguards in terms of data retention as it requires the data store administrator, upon request by a COVIDSafe user, to delete any of their registration data that has been uploaded from the device to the National COVIDSafe Data Store.¹⁹² After the pandemic, users will be prompted to delete the app, and there is a legislative requirement that information contained in the National COVIDSafe Data Store will be destroyed at the end of the pandemic.¹⁹³ The COVIDSafe Act also protects individuals against their private information being shared with law enforcement agencies.¹⁹⁴

Nevertheless, there remain significant privacy risks in relation to the COVIDSafe app. For one, in terms of data storage, the government has appointed a private US-based company, Amazon Web Services ('AWS'), to provide cloud data storage. While the Act requires the data to remain located within Australia,¹⁹⁵

189 *Privacy Act 1988* (Cth) s 94H(1).

190 *Ibid* s 94H(2).

191 *Ibid* s 94H(2)(b).

192 *Ibid* s 94L.

193 'COVIDSafe App', Department of Health (Cth) (Web Page, 15 December 2020)

<<https://www.health.gov.au/resources/apps-and-tools/covidsafe-app#after-the-pandemic>>. The Health Minister must, by notifiable instrument, determine a day if the Health Minister is satisfied that, by that day, use of COVIDSafe is no longer required to prevent or control, or is no longer likely to be effective in preventing or controlling the entry, emergence, establishment or spread of COVID-19, following consultation with the Commonwealth Chief Medical Officer or the Australian Health Protection Principal Committee. The data store administrator must take all reasonable steps to ensure that COVID app data is not retained on a communication device for more than 21 days or if not possible the shortest practicable period. As soon as reasonably practicable after the end of the day determined by the Health Minister that the app was no longer necessary, the data store administrator must delete all COVID app data from the National COVIDSafe Data Store: *Privacy Act 1988* (Cth) ss 94Y, 94K, 94P.

194 Section 94D of the *Privacy Act 1988* (Cth) creates an offence for disclosures of COVIDSafe information other than for permitted purposes specifically mentioned in that section (law enforcement is not one of those permitted purposes). Section 94ZD provides that the COVIDSafe part of the *Privacy Act* overrides other laws permitting disclosure, which includes the law enforcement exception in the Australian Privacy Principle 6.2. The Explanatory Memorandum for the COVIDSafe Act provides that '[t]he effect of subsection 94ZD ensures that no powers in law enforcement or intelligence related legislation may override the protections in this Part', and that a disclosure in breach of a requirement of Part VIII A in relation to an individual to the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Australian Signals Directorate and the Office of National Intelligence will still constitute an interference with the privacy of that individual: Explanatory Memorandum, Privacy Amendment (Public Health Contact Information) Bill 2020 (Cth) 21 [78], 28 [124]. See also, Normann Witzleb and Moira Paterson, 'The Australian COVIDSafe App and Privacy: Lessons for the Future of Australian Privacy Regulation' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, forthcoming 2021).

195 *Privacy Act 1988* (Cth) s 94F.

it is possible that AWS, under US legislation, could be required to provide access to the US Government upon request.¹⁹⁶

Further, despite the significant privacy protections embedded in the legislation, there remain concerns that data collected by the government would be used for broader surveillance purposes unrelated to the pandemic. Such purposes could include the potential for law enforcement authorities to access data, for example in the course of anti-terrorism investigations, or other criminal investigations. While this may seem unlikely in the legislation's current form,¹⁹⁷ it remains possible the protections may be repealed or amended in the future, or simply ignored.

This possibility arises in part because the privacy protections in the COVIDSafe Act are considerably weakened by Australia's lack of an entrenched framework for privacy protection. In the European Union, for example, the General Data Protection Regulation ('GDPR') and the e-Privacy Directive provide strong protection, stemming ultimately from the EU Charter of Fundamental Rights, article 8 of which guarantees data protection.¹⁹⁸ As Australia lacks federal human rights legislation, let alone constitutional entrenchment of a right to privacy, the privacy protections surrounding COVIDSafe are embedded in the *COVIDSafe Act* and the *Privacy Act* itself.¹⁹⁹ They are thus susceptible to future legislative change. It is also unclear whether privacy protections in the legislation may be overridden or simply ignored, given Australia's international political and legal obligations to share information with other countries, particularly the US, pursuant to the 'Five Eyes' alliance.²⁰⁰

Debate about the potential for law enforcement authorities, in particular, to access private information stored by electronic means has some strong recent parallels. For example, it has become apparent in recent years that police have a broad and vaguely defined power to access the mobile phone data of criminal suspects; or that, in any case, even if police lack any clear power, they access this data anyway as a matter of practice, and evidence obtained in this manner is unlikely to be excluded in court.²⁰¹ As a matter of practice, police (and particularly

196 This may be the case if AWS, as the subsidiary of a US incorporated entity, falls within the reach of the US Clarifying Lawful Overseas Use of Data Act, HR 4943, 115th Congress (2018) ('CLOUD Act'), which contains the requirement to provide access to data, including overseas data, to the US government (s 2713). See Witzleb and Paterson (n 194).

197 See above n 194 and accompanying text.

198 *Charter of Fundamental Rights of the European Union* [2012] OJ C 326/391, art 8. See Witzleb and Paterson (n 194).

199 Note, however, that there was a Statement of Compatibility with Human Rights that accompanied the Privacy Amendment (Public Health Contact Information) Bill 2020, which stated that the app promotes the right to health through facilitating efficient and accurate contact tracing: Explanatory Memorandum, Privacy Amendment (Public Health Contact Information) Bill 2020 (Cth) 4.

200 See Ryan Gallagher, 'The Powerful Global Spy Alliance You Never Knew Existed', *The Intercept* (online, 2 March 2018) <<https://theintercept.com/2018/03/01/nsa-global-surveillance-sigint-seniors/>>. See also Witzleb and Paterson (n 194).

201 See Rebecca Bradfield, "'Can I Take a Look at Your Phone?': Police Powers to Search Mobile Phones" (2020) 45(3) *Alternative Law Journal* 215. See also *Reeves v The Queen* [2017] VSCA 291, [30] (Santamaria, Kaye JJA and Forrest AJA); cf *McElroy v The Queen*; *Wallace v The Queen* (2018) 55 VR 450, 475 [155] (Santamaria, Beach and Ashley JJA).

the Australian Federal Police) also access electronic data held outside Australia's territorial borders in 'the cloud', often through products such as Gmail, Apple iCloud and Microsoft Office 365. This occurs despite the absence of any legal authority to conduct an extraterritorial data search and seizure.²⁰²

In addition, there is the clear potential for 'mission creep', or the smuggling in of related surveillance-type legislation under cover of the pandemic. We have discussed above the manner in which the 'War on Terror' provided cover for the extension of investigatory and executive powers in other contexts, for example anti-bikie legislation. It is perhaps too early to assess properly whether this has happened since the pandemic, or indeed if any extensions of power that have occurred since the pandemic can be linked to that event, or if they are better viewed as the continuation of clearly pre-existing trends. In May 2020, for example, Home Affairs Minister Peter Dutton announced a suite of changes to ASIO's powers, with the changes allowing the spy agencies to question children of 14 years and over, and to have easier access to tracking devices.²⁰³ The Greens criticised these moves as an attempt to 'use the pandemic as cover for the increased scope of the surveillance state'.²⁰⁴

3 *Parliamentary Accountability and COVID-19*

Parliamentary scrutiny has been drastically reduced during the COVID-19 pandemic. The federal Parliament has authorised broad spending powers to the executive in the pandemic.²⁰⁵ More importantly, the State and Territory Parliaments have adjourned their sitting dates,²⁰⁶ meaning that parliamentary processes have been effectively brought to a standstill while the executive government is dealing with this crisis. The federal Parliament adjourned in March 2020, and both Houses did not conduct a full sitting until 10–18 June 2020,²⁰⁷ while the House of Representatives only sat a handful of days in that period.²⁰⁸ In August 2020, due to travel restrictions and border closures between States, the

202 Matthew McKenna, 'Up in the Cloud: Finding Common Ground in Providing for Law Enforcement Access to Data Held by Cloud Computing Service Providers' (2016) 49(5) *Vanderbilt Journal of Transnational Law* 1417, 1419. See also Dan Svantesson and Felicity Gerry, 'Access to Extraterritorial Evidence: The Microsoft Cloud Case and Beyond' (2015) 31(4) *Computer Law and Security Review* 478.

203 Australian Security Intelligence Organisation Amendment Bill 2020 (Cth).

204 Hurst (n 8).

205 This includes a \$40 billion Advance to the Finance Minister under the *Appropriation Act (No 5) 2019–2020* (Cth) and the *Appropriation Act (No 6) 2019–2020* (Cth), and broad discretion to the Finance Minister to allocate the spending. The Minister for Social Services has the power to alter eligibility rules and payment rates for all social security payments under the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth), while the Treasurer is empowered to set rules for the \$130 billion JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth).

206 Nicholas Horne, 'COVID-19 and Parliamentary Sitings', *FlagPost* (Blog, 2 April 2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/April/COVID-19_and_parliamentary_sittings>.

207 Parliament of Australia, 'The Parliament's Response to the COVID-19 Pandemic' (Media Release, 28 July 2020) <https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/News/The_Parliament's_response_to_the_COVID-19_pandemic>.

208 The House of Representatives sat with a drastically reduced schedule for one day in April and three days in May, while both Houses sat from 10–18 June: *ibid*.

House of Representatives conducted its first ever hybrid parliamentary sitting, with some members present in person, while others connected virtually.²⁰⁹ This is a dramatically reduced federal parliamentary sitting arrangement compared to other large-scale crises such as the two World Wars and the Spanish Flu, where the Commonwealth Parliament continued to sit throughout these crises.²¹⁰

During the pandemic, there has been limited parliamentary committee activity. On 8 April 2020, the Parliamentary Select Committee on COVID-19 was established to vet the government's policy, legislative and financial responses to the COVID-19 pandemic.²¹¹ However, this parliamentary committee has faced intransigence from government departments and agencies, with the committee expressing 'concerns with the forthrightness of departments and agencies in answers to oral and written questions', and noting that public servants had the 'tendency to refrain from providing full and complete responses to the committee', particularly relating to information that may have a connection to cabinet.²¹²

The Senate Standing Committee for the Scrutiny of Delegated Legislation has also continued to meet to provide parliamentary oversight of all delegated legislation, particularly 'executive-made laws which implement COVID-19 response measures'.²¹³ The Committee's website contains a list of COVID-19-related delegation legislation and the committee's consideration of it.²¹⁴ This is important as the coronavirus response bills authorise the use of delegated legislation with broad powers.²¹⁵ Nevertheless, the emergency requirements

209 Michelle Grattan, 'View from the Hill: "Virtual" Participants and Border Restrictions Will Make for a Bespoke Parliamentary Sitting', *The Conversation* (online, 17 August 2020) <<https://theconversation.com/view-from-the-hill-virtual-participants-and-border-restrictions-will-make-for-a-bespoke-parliamentary-sitting-144602>>. See generally, Tom Gerald Daly, *Prioritising Parliament: Roadmaps to Reviving Australia's Parliaments* (Policy Brief No 3, 1 August 2020) <https://government.unimelb.edu.au/_data/assets/pdf_file/0003/3454743/GDC-Policy-Brief-3-Prioritising-Parliament_final1.pdf>.

210 See Parliament of Australia, *House of Representatives Practice* (Australian Government, 7th ed, 2018) app 16 <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Appendices/Appendix16?fbclid=IwAR1uDM-zysdxy_CZkwtJkPpAQ2WyP5i2bPe43SPhJGsrONKUxnaGG6Zx8>.

211 'Senate Select Committee on COVID-19', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19>; Commonwealth, *Parliamentary Debates*, Senate, 8 April 2020, 1903–9. See Sarah Moulds, 'Keeping Watch on COVID-19 Laws: Are Parliamentary Committees up to the Job?', *Australian Public Law* (Blog Post, 1 May 2020) <<https://auspublaw.org/2020/05/keeping-watch-on-covid-19-laws-are-parliamentary-committees-up-to-the-job/>>.

212 Letter from Katy Gallagher and James Paterson, Senate Select Committee on COVID-19 to Commonwealth Departments and Agencies, 15 June 2020 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Committee_letter_to_Commonwealth_Departments_and_Agencies>.

213 'Scrutiny of COVID-19 Instruments', *Parliament of Australia* (Web Page, 25 February 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>.

214 Ibid.

215 This includes the power to exempt 'classes of persons from the operation of provisions of the Corporations Act and regulations'; modify 'provisions of the social security law relating to the

determined by the Health Minister under section 477(1) of the *Biosecurity Act* are not subject to disallowance by Parliament and scrutiny by the Senate Committee;²¹⁶ 17.2% of legislative instruments made since the beginning of the COVID-19 crisis are considered exempt from disallowance.²¹⁷ Thus, there remains a significant proportion of delegated instruments immune from parliamentary accountability.

At state level, a limited level of parliamentary scrutiny exists in terms of committee work, although such scrutiny tends to be after the fact rather than a consultative process prior to decisions being made. For example, the Victorian Public Accounts and Estimates Committee has published a detailed interim report into the Victorian Government's handling of the pandemic.²¹⁸

C Lessons from Pandemic Regulation

Despite the broad coercive powers provided by the *Biosecurity Act*, there are legislative safeguards to executive power, in terms of three-monthly reviews of emergency periods, biosecurity personnel being required to exercise their powers in accordance with principles of minimal restriction, and those decisions being reviewable by the AAT and courts, as well as oversight by the Inspector-General of Biosecurity. The safeguards in the *Biosecurity Act* compare favourably to the provisions of its predecessor, the *Quarantine Act*.²¹⁹ The deployment of the COVIDSafe app however, leads to privacy risks in terms of the potential of the sharing of data with foreign intelligence authorities and governments, and the broader issue of further and more oppressive surveillance Australian legislation being smuggled through Parliament under the cover of the pandemic. Moreover, parliamentary scrutiny in the COVID-19 pandemic is at an unprecedented low, with State and Territory Parliaments prorogued and federal Parliament sitting very rarely. By contrast, the federal Parliament continued to sit throughout both World Wars and the Spanish Flu pandemic. There is also a significant proportion of delegated legislation that is immune from review by Parliament.

qualification of persons for social security payments and the rate of social security payments'; and 'prescribes circumstances in which the Commonwealth may pay money from the \$1 billion fund for assistance for severely affected regions'. *Coronavirus Economic Response Package Omnibus Act 2020* (Cth): see *ibid*.

216 *Biosecurity Act 2015* (Cth) s 477(2).

217 Of the 430 legislative instruments made during COVID, 74 were disallowed from exemption. 'Scrutiny of COVID-19 Instruments' (n 213).

218 Public Accounts and Estimates Committee, Parliament of Victoria, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Interim Report, July 2020). The NSW Legislative Council's Public Accountability Committee has been tasked with undertaking an inquiry into the NSW Government's management of the COVID-19 pandemic: 'NSW Government's Management of the COVID-19 Pandemic', *Parliament of New South Wales*' (Web Page) <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2593>>. Special select COVID-19 Committees have also been established in South Australia and the ACT: 'Committees', *Parliament of South Australia* (Web Page) <<https://www.parliament.sa.gov.au/en/Committees/Committees-Detail>>; 'Committees', *Legislative Assembly of the Australian Capital Territory* (Web Page) <<https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees>>.

219 Gray 'Constitutionality and Critique' (n 156).

IV IMPLICATIONS

In exceptional situations of disaster and crisis, the executive government tends to take a pre-eminent role in managing emergencies and threats to the nation, while the other branches of government, Parliament and the courts, tend to relinquish their robust scrutiny roles, leading to a ‘government by decree’.²²⁰ This tendency, coupled with a ‘sophisticated bureaucratic and regulatory state ... with the capacity to observe, police and regulate its citizens’,²²¹ generates great risks for individual rights and liberties. As we are faced with the largest worldwide public health crisis for a century, it is timely to consider what lessons can be gleaned from adopting a long-run historical perspective to major crises involving emergency powers such as wars and pandemics.

In times of war, it can be observed that temporary coercive measures have become permanent, or reincarnated in similar forms in other legislation. The external wars with defined boundaries have been reimagined as internal amorphous threats in the form of the ‘War on Terror’, justifying the continuation of broad-ranging executive powers beyond a clearly defined emergency period. These sweeping executive powers have then been strategically deployed by successive governments for unintended purposes: to attack dissidents, protestors, journalists and whistle-blowers. The Second World War has also been used to successfully wrest financial power from the States to the Commonwealth, paving the way to an enduring vertical fiscal imbalance where the States are now permanently beholden to the Commonwealth for the funding of their programmes and policies.

Yet wars can be distinguished from pandemics, as national security concerns create a centralising force, where there is a need for a uniform approach and secrecy in the governmental approach, which needs to be concealed from the enemy. In such crises, the ‘national-level executive branch will have access to unique information in the form of intelligence resources and capability assessments’.²²² On the other hand, we argue that pandemics create a centrifugal or decentralising force, as information needs to be deployed to the whole of the community, and subnational governments tend to play a strong role in health-care provision. Thus, pandemic regulation requires intergovernmental coordination and cooperation between the Commonwealth and the States, as administration of quarantine is ‘intimately entwined with the state government functions of public health, policing, customs, harbours and marine and government health officers’.²²³ On that basis, Ginsburg and Versteeg have contended that in crises such as a pandemic – in which information is dispersed, the crisis is slow-moving, and local governments are needed to implement the crisis response – the executive should

220 K D Ewing, ‘Covid-19: Government by Decree’ (2020) 31(1) *King’s Law Journal* 1.

221 Batlan (n 10) 61.

222 Ginsburg and Versteeg (n 12) 19.

223 Hodgson (n 133) 59.

be structurally more bound, i.e. subject to legal and parliamentary checks and balances, than in national security crises.²²⁴

Yet Australia's modern approach to pandemic regulation displays strong centralising features. From the fledgling federalist efforts during the 1918 Spanish Flu that failed spectacularly, the Commonwealth government has through fiscal dominance and strengthened national federalist arrangements managed to solidify its powers in terms of managing risks of infectious diseases in Australia. This centralisation is exhibited in the information-gathering processes in COVID-19. While Ginsburg and Versteeg contend that there should be decentralisation of information-gathering processes in a pandemic, as valuable information is dispersed amongst public and private actors such as universities, pharmaceutical companies and healthcare providers as to the best health response,²²⁵ this has not been the case in Australia. Rather, in Australia, information has been centralised in the form of the Chief Medical Officer in the Commonwealth and States – a medical technocratic response to crisis governance.²²⁶

Although it is reasonable in a public health crisis for politicians to defer to medical experts, reliance on such advice needs to be supplemented with greater procedural and legislative safeguards to prevent abuse.²²⁷ Further, this technocratic approach may have flow-on effects on the way that Australian courts and legislatures may see their role. For instance, Ginsburg and Versteeg's empirical study of 106 countries has shown that Australia was in a small minority of democratic countries worldwide 'where the legislature, courts and subnational units have not (yet) exercised active oversight' during COVID-19,²²⁸ whereas in 82% of countries, there was either legislative involvement, judicial enforcement, or resistance from subnational units. Thus, Australian legislatures and judiciaries have been remarkably acquiescent to the executive government in COVID-19 compared to other democracies worldwide.

In terms of individual rights and liberties, a distinction can be made between individual versus population-wide coercive measures. While far-reaching population-wide restrictions tend to be rolled back by governments as soon as possible, as it is not tenable to maintain widespread restrictions on the freedom of association and movement for the whole populace for an extended period, the coercive individual biosecurity measures pose a fundamental threat to individual rights and freedoms. The permissive legislative regime for individual coercive measures that allows biosecurity officials to subject individuals to executive

224 Ginsburg and Versteeg (n 12) 20.

225 Ibid.

226 Eric L Windholz, 'Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy' (2020) 8 (1–2) *The Theory and Practice of Legislation* 93, 97.

227 For discussion of other jurisdictions which have successfully navigated the pandemic while not jettisoning democratic norms, see Victor V Ramraj (ed), *Covid-19 in Asia: Law and Policy Contexts* (Oxford University Press, 2020). More generally, see a recent popular treatment, John Micklethwait and Adrian Wooldridge, *The Wake-Up Call: Why the Pandemic Has Exposed the Weakness of the West: And How to Fix It* (Short Books, 2020).

228 Ginsburg and Versteeg (n 12) 26–7. Other democratic countries in the study where the legislature, courts and subnational units have not (yet) exercised active oversight are Botswana, Jamaica, Switzerland, Peru, and Guyana: at 27.

detention and invasive bodily treatments therefore present a significant risk of misuse.

There have been cases in Australia and overseas where the power of quarantine has been used by governments for reasons beyond genuine public health concerns, e.g. to target and segregate certain races or vulnerable groups.²²⁹ As Mariner, Annas and Parmet observe: ‘Measures like quarantine, surveillance, and behavior control have historically been targeted at people who are already disadvantaged, those on the margins of society, especially immigrants, the poor, and people of color’.²³⁰

For instance, entire ethnic groups were quarantined during the Sydney plagues.²³¹ More recently, in the handling of COVID-19 in Australia, concerns were raised that the hard-line housing commission tower lockdown in Melbourne,²³² which confined 3,000 vulnerable individuals to their rooms for 14 days, enforced by a battalion of police that stormed into the housing commission towers immediately during the government announcement. This was seen to be a heavy-handed approach that directly targeted a vulnerable lower socio-economic group, while equivalent outbreaks in affluent areas were not treated in the same way.²³³ In late 2020, the Victorian Ombudsman found that this ‘hard lockdown’ imposed on residents at the Melbourne public housing tower was in breach of the human rights of those residents, including the right to humane treatment when deprived of liberty.²³⁴ Further, lower socioeconomic groups have been adversely impacted by Victorian governmental policies that enforced lockdowns based on suburb hotspots, where researchers have found that COVID-19 outbreaks have

229 Alison Bashford, ‘At the Border: Contagion, Immigration, Nation’ (2002) 33(120) *Australian Historical Studies* 33(120) 344; Batlan (n 10) 75–6 (showing that threatened epidemics of typhus and cholera in New York City in 1892 resulted in the quarantine of thousands of people, the large majority of which were poor immigrants, primarily Italians and Russian Jews); *Wong Wai v Williamson* 103 F 1 (ND Cal, 1900) (restraint on Chinese residents leaving the city limits unless they agreed to inoculation with the Haffkine vaccine (that could cause significant side effects) was struck down as unconstitutional); *Jew Ho v Williamson* 103 F 10 (ND Cal, 1900) (quarantine for plague limited to Chinese residents in San Francisco struck down as unconstitutional).

230 Mariner, Annas and Parmet (n 10) 358–9.

231 Peter Curson and Kevin McCracken, *Plague in Sydney: The Anatomy of an Epidemic* (University of New South Wales Press, 1989) 169–74.

232 Deputy Chief Health Officer (Communicable Disease), *Detention Directions (130 Racecourse Road, Flemington)* (4 July 2020).

233 David Kelly, Kate Shaw and Libby Porter, ‘Melbourne Tower Lockdowns Unfairly Target Already Vulnerable Public Housing Residents’, *The Conversation* (online, 6 July 2020) <<https://theconversation.com/melbourne-tower-lockdowns-unfairly-target-already-vulnerable-public-housing-residents-142041>>; Dilan Thampapillai, Yasmin Poole and Andrew Ray, ‘The Challenge Posed by Victorian Tower Lockdowns’, *COVID-19 and the Rule of Law Blog* (Blog Post, 22 July 2020) <<https://anulrsj.wordpress.com/2020/07/22/the-challenge-posed-by-victorian-tower-lockdowns/>>.

234 Victorian Ombudsman (n 9). The investigation noted that it ‘was not satisfied proper consideration was given to the human rights of those affected by the lockdown at 33 Alfred Street when restrictions were introduced’: at 18. On the right to humane treatment when deprived of liberty, a right recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), see 179. More generally, the report noted that ‘[w]e 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 ... In a just society, human rights are not a convention to be ignored during a crisis, but a framework for how we will treat and be treated as the crisis unfolds’: at 5.

disproportionately affected communities with housing affordability stress, overcrowding and homelessness.²³⁵

Beyond the boundaries of the pandemic, in Australia, the power to quarantine within State public health legislation has allowed for isolation for dubious reasons, such as the involuntary detention of sex workers with sexually transmitted diseases.²³⁶ For instance, Sharleen Spiteri, a sex worker with HIV, was held in various forms of public health detention in empty hospital wards and rented houses in New South Wales, under 24-hour supervision provided by nursing and security staff. Spiteri was detained, mostly unlawfully, for 16 years until her death in 2005, with the public health order sticky-taped above her bed in the hospice while she lay dying.²³⁷ An empirical study by Carter found ‘evidence of the indefinite detention of multiple individuals by public health authorities [in Australian jurisdictions], including those detained until their death, and public health orders made without time limits and never rescinded’.²³⁸ The contempt in the treatment of vulnerable individuals with communicable diseases shows how the broad executive powers conferred by the public health regimes across Australia can and have been abused.

In the wake of the COVID-19 pandemic, there is emerging and significant evidence that vulnerable individuals in Victoria are being treated in a way that breaches international human rights standards. In July 2020, COVID-19 cases were confirmed amongst both detention centre staff and detained people in Victoria. This led to significant concerns being raised about lack of social distancing in detention centres, with the concomitant risk of the disease spreading uncontrollably amongst detainees.²³⁹ In the same month, a coalition of Victorian legal services called for decarceration, or a reduction in the number of people in

235 Rebecca Bentley and Erika Martino, ‘Overcrowding and Affordability Stress: Melbourne’s COVID-19 Hotspots are also Housing Crisis Hotspots’, *The Conversation* (online, 29 June 2020) <<https://theconversation.com/overcrowding-and-affordability-stress-melbournes-covid-19-hotspots-are-also-housing-crisis-hotspots-141381>>.

236 Bernadette McSherry, ‘“Dangerousness” and Public Health’ (1998) 23(6) *Alternative Law Journal* 276, 277.

237 Carter (n 170) 118–19.

238 Ibid 117.

239 Note for example the following media: Keira Jenkins, ‘“We Could See Deaths in Custody”: Renewed Calls for At-Risk Inmates to be Released from Prisons’, *SBS News* (online, 22 July 2020) <<https://www.sbs.com.au/nitv/article/2020/07/22/we-could-see-deaths-custody-renewed-calls-risk-inmates-be-released-prisons>>; Annie Hastwell, ‘Prison Guard COVID Case Fuels Calls for Decarceration’, *The Wire* (online, 22 July 2020) <<http://thewire.org.au/story/prison-guard-covid-case-fuels-calls-for-decarceration/>>; David Sparkes, ‘Prisons in Lockdown to Block Spread of COVID-19’, *The World Today* (ABC Radio Adelaide, 22 July 2020) <<https://www.abc.net.au/radio/adelaide/programs/worldtoday/prisons-in-lockdown-to-block-spread-of-covid19/12480918>>; The Victorian Aboriginal Legal Service also did a further media release: Victorian Aboriginal Legal Service, ‘The Government’s Decisions are Critical to Containing the Spread of Covid-19 in Prisons, Youth Detention Centres’ (Media Release, 21 July 2020) <<https://www.vals.org.au/the-governments-decisions-are-critical-to-containing-the-spread-of-covid-19-in-prisons-youth-detention-centres/>>.

prisons and detention centres, as part of the response to COVID-19.²⁴⁰ Given the continuing high rate of incarceration among Indigenous people in Australia, Indigenous people and organisations have expressed particular concerns about the impact of COVID-19 on vulnerable Indigenous people, with Indigenous organisations in the Northern Territory making a joint submission to the United Nations Special Rapporteur on the Rights of Indigenous Peoples about this issue.²⁴¹

Another broad phenomenon historically exhibited in times of crisis is the scapegoating of certain vulnerable societal groups as the ‘other’. During the First World War, Australians with German, Austro-Hungarian or other enemy descent were subject to surveillance and internment. This discriminatory treatment carried over to the Spanish Flu, where the Australian media unfairly blamed the Spanish Flu on the Germans, who were the enemies of the war.²⁴² In essence, quarantine enabled the language of biomedicine, such as ‘epidemic, contagion, immunity, hygiene’ to be entwined with the language of defending the nation – ‘resistance, protection, invasion, immigration’.²⁴³ Thus, in a crisis and beyond, the rights and freedoms of minority or vulnerable groups who may not be able to effectively exercise their legal rights, would need to be carefully monitored and protected.

In the heat of a pressing national crisis, in the face of a quiescent Parliament and judiciary, alongside the risk of coercive executive powers extending long beyond the crisis has concluded and utilised for unintended purposes, legislative safeguards are required in order to protect individual rights and freedoms. These include a requirement for a proclamation of states of emergency before coercive powers are enlivened. In this regard, emergency periods should be carefully circumscribed with defined and relatively short time periods. An example of this is Ackerman’s proposal that emergency legislation should include a ‘super-majoritarian escalator’, where the legislation has an automatic expiration date, unless ever-increasing majorities in the legislature vote to maintain the

240 See Victorian Aboriginal Legal Service, ‘VALS Calls for Human Rights Compliant Response to Covid-19 Case in Melbourne Prison’ (Media Release, 29 July 2020), jointly calling for reducing the number of people in prisons as part of the response to COVID-19.

241 See National Aboriginal and Torres Strait Islander Legal Services, Danila Dilba Health Service, Aboriginal Peak Organisations of the Northern Territory and Andreea Lachsz, Submission to the Special Rapporteur on the Rights of Indigenous Peoples, *The Impact of COVID-19 on the Rights of Indigenous Peoples* (19 June 2020) <https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Callforinput_COVID19.aspx>.

242 The *Australasian* newspaper reported:

This modern plague ... has commonly been called Spanish influenza. Yet it did not originate in Spain, nor was it exactly the gripe or influenza of other days. It appears that the Germans, in anticipation that the malady might be justly named German plague ... broadcast a misleading name which they had craftily devised before the infection spread from Germany to other countries.

“‘Spanish’ Influenza”, *The Australasian* (Melbourne, 29 March 1919) 32. See Anthea Hyslop, ‘Insidious Immigrant: Spanish Influenza and Border Quarantine in Australia, 1919’ in S Parry and B Reid (eds), *Migration to Mining: Collected Papers of the Fifth Biennial Conference of the Australian Society of the History of Medicine, Darwin, July 1997* (Northern Territory University Press, 1998); Anthea Hyslop, ‘Old Ways, New Means: Fighting Spanish Influenza in Australia, 1918–1919’ in Linda Bryder and Derek A Dow (eds), *New Countries, Old Medicine* (Pyramid Press, 1995) 46.

243 Huf and Mclean (n 133) 8. See generally Bashford (n 229).

emergency.²⁴⁴ Furthermore, all legislation enacted in response to the crisis should have sunset clauses or be periodically reviewed. In addition, all delegated legislation and executive orders (e.g. directions, decrees, orders) should have an automatic expiry date that are of a short duration. All coercive decisions made under legislation should be subject to both merits review and judicial review.

The Commonwealth government has heeded some of these warnings in its legislative response to the COVID-19 pandemic. Emergency periods in the *Biosecurity Act* are subject to periodic review, and decisions of biosecurity officials are subject to tribunal and judicial review, enabling individual redress. In its surveillance COVIDSafe legislation, stored data has to be deleted following the end of the pandemic. Despite these safeguards, there remain significant risks of abuse of executive power. Empirical research has shown that Australian State public health legislation has previously been abused in its application to vulnerable individuals with communicable diseases.²⁴⁵ Further, there are issues of the police and militarised implementation of restrictions on individual association and movement being unduly harsh and heavy-handed, which may disproportionately impact upon vulnerable and low-socioeconomic groups. There are also privacy and surveillance risks in the use of population-wide contact tracing apps, such as COVIDSafe, in terms of the potential for data sharing with foreign intelligence agencies and governments, and the ability of the government to enact further far-reaching surveillance legislation during the pandemic.

In addition, there are risks of executive overreach in the height of a crisis. For example, to tackle a second outbreak of COVID-19 in Victoria, the Victorian Premier indicated that he wished to amend the Victorian *Public Health and Wellbeing Act 2008* (Vic) to enable the extension of Victoria's state of emergency for an additional 12 months (to a consecutive period of 18 months).²⁴⁶ However, following parliamentary negotiations, the legislation passed by the Victorian Parliament provided for an additional six month extension of emergency powers (to a consecutive period of 12 months).²⁴⁷ Under previous legislative provisions, a state of emergency, which must be declared in four-week blocks, could only be extended for a consecutive six month period.²⁴⁸ This attempt to evade parliamentary scrutiny for an extended period is a worrying development.

V CONCLUSION

In the midst of a pandemic, and with overwhelming and justified public acceptance of the need for emergency measures, including dramatic restrictions on

244 Ackerman (n 2) 1047.

245 Carter (n 170).

246 Calla Wahlquist, 'Victorian Plan to Extend State of Emergency by 12 Months Prompts Human Rights Concerns', *The Guardian* (online, 24 August 2020) <<https://www.theguardian.com/australia-news/2020/aug/24/victorian-plan-to-extend-state-of-emergency-by-12-months-prompts-human-rights-concerns>>.

247 See *Public Health and Wellbeing Amendment (State of Emergency Extension and Other Matters) Act 2020* (Vic).

248 *Public Health and Wellbeing Act 2008* (Vic) s 198(7).

civil liberties which would never be accepted in any other context short of a war, it is easy to lose sight of deeper underlying issues. These issues, as we have illustrated, include the danger that temporary measures become accepted as ‘permanent’, and that an attitude of fatigue, or resigned acceptance of the omnipresent need for restrictions, becomes further entrenched in the population. In this article, we have attempted to illustrate how historically this has been the case. We have not attempted to assess how far this trend has gone in Australia, although extensions in surveillance and security measures since the ‘War on Terror’ give significant cause for concern.

It is not difficult, however, to find evidence that democratic norms and practices are under threat in a variety of countries facing real or confected ‘threats’ of various types. Political scientist John Keane has written eloquently, if at times hyperbolically, of the ‘new despotism’ he claims to have overtaken democracy in many countries world-wide:

[T]he principles and practices of constitutional power-sharing democracies as we have known them for a generation are not threatened only by their outside political rivals. The arrangements of power-sharing democracy can be snuffed out at home, bit by bit, by means of the quiet seductiveness of new forms of power and methods of government found in China, Russia, Saudi Arabia, Singapore, and elsewhere. Amid the present-day confusion and disagreement about global trends ... everywhere something sinister is being born of our darkening times: a kind of despotism the world has never before known.²⁴⁹

Whether Keane has established this broad claim is not for the present paper to assess. Rather, the point is that in an emergency, we must be particularly vigilant to protect civil liberties and human rights against incursions that are more than the absolute minimum necessary to combat the crisis, lest the dystopia he outlines might come to pass.²⁵⁰

249 Keane (n 11) 12.

250 As Witzleb and Paterson (n 194) observe:

Over recent decades, government significantly curtailed personal freedoms on the basis that this was necessary in the fight against terrorism. During the pandemic, citizens have quite willingly accepted unprecedented limitations to our freedoms in the fight against the invisible threat of the SARS-CoV-2 virus ... Privacy, which has never been an absolute right, is here at greater risk than other freedoms. It is invisible and the dangers that result from a loss of privacy may seem distant and abstract. We therefore need to be vigilant.