Executive Detention in the Time of a Pandemic

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The global COVID-19 pandemic has raised many important legal issues in Australia. One was the legality of proposed detention of an individual at the behest of an authorised person, on the basis the person was considered likely to breach the lockdown measures. Though the Victorian Government eventually abandoned this contentious proposal, it raised significant controversy, and is considered worthy of examination in this article.

I. Introduction

The COVID-19 crisis has clearly triggered discussion of a vast array of legal issues in Australia, not least of which are the restrictions on civil liberties introduced by State governments in an effort to reduce the spread of the disease. One of the most contentious of these measures is found in the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020* (Vic). At the time of writing, this bill has been passed by the Victorian Parliament, but the aspect of it the subject of this article was withdrawn (after it had been passed in the Lower House) after a loud community outcry from senior members of the legal profession.[1] Given the significance of what it contained, and the possibility that a bill of its nature might be resurrected in future in response to a future emergency, its content is still considered worthy of consideration.

The bill contained a provision that permitted an authorised officer to detain a person who was considered to be "high risk", where there was a belief that the person was not likely to comply with a direction under the emergency powers legislation, including a direction to restrict movement. It is, of course, not unprecedented for a member of the executive (or their delegate) to seek to detain an individual based on supposed community safety grounds. There is a lengthy history of quarantine in our legal systems, stretching back to include the time of Hippocrates and Biblical times.[2] Nor is it unprecedented to detain a person involuntarily based on suspicion of what they may do, not proof of what they have done.[3] However, the proposed legislation went further than past iterations of such legislation, and risked triggering a challenge to the validity of the measures. We are also aware of times in the past where quarantine measures were used for illegitimate purposes unrelated to health issues.[4] This rightly makes us wary, and we must always remain vigilant, at a broader level, of the dangers of unbridled power being used in an arbitrary manner to abrogate fundamental human rights.

This article will first outline the controversial measures. It will then consider the relevant Australian case law that has considered the extent to which the courts have accepted that a member of the executive may lawfully detain a person. In that light, it will consider possible grounds upon which such legislation

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[1] Elias Clure, "Victorian Government Drops Detention Powers from Coronavirus Omnibus Bill", *ABC News*, 7 October 2020.

[2] Mark Rothstein, "From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine" (2015) 12 *Indiana Health Law Review* 227, 229.

[3] Legislation of this nature was held constitutionally valid by a majority of the High Court in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46.

[4] For example, during the Bubonic plague outbreak at the start of the 20th century, quarantine laws were applied in a racially discriminatory manner: *Wong Wai v Williamson*, 103 F 1, 10 (CCND Cal, 1900); Michael Ulrich and Wendy Mariner, "Quarantine and the Federal Role in Epidemics" (2018) 71 *Southern Methodist University Law Review* 391, 412: "history shows that officials have often enforced measures like quarantine … disproportionately against minorities, immigrants and the poor. Infectious disease emergencies are typically accompanied by paranoia and fear, and 'commonly trigger retributive and discriminatory instincts, so that actual quarantines often impose inhumane, stigmatizing or even penal treatment upon persons who are confined based on caprice or even prejudice'", quoting Daniel Markovits, "Quarantines and Distributive Justice" (2005) 33 *Journal of Law Medicine and Ethics* 323, 323.

might be challenged in the courts, were a Parliament to consider such measures in the future. In so arguing, the guidance provided by a recent High Court of New Zealand decision will be noted.

II. Outline of Relevant Victorian Provisions

Section 198 of the *Public Health and Wellbeing Act 2008* (Vic) permits the Health Minister to declare a state of emergency in relation to a situation causing a serious risk to public health. A state of emergency is currently in place in Victoria in relation to COVID-19. In such circumstances, the State Chief Health Officer can authorise particular individuals to exercise emergency powers. Section 200 sets out what these emergency powers are. They include:

(1) To detain a person or group of persons within an emergency area for a period reasonably necessary to eliminate or reduce a serious risk to public health;
(2) Restrict the movement of any person or group of persons within the emergency area;
(3) Prevent any person or group of persons from entering the emergency area; and
(4) Give any other direction reasonably considered to be necessary to protect public health.

Usually it will be necessary for the authorised person to explain to the person why it is considered necessary to detain them, unless it is not practical. Before exercising the powers, the authorised person must tell the person it is an offence to fail to comply with the direction, unless there is a reasonable excuse. Section 200(6) requires that the authorised officer must review every 24 hours whether continued detention remains necessary to eliminate or reduce the serious risk to public health.

The *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Bill 2020* (Vic) sought to introduce a new provision, s 200A, to the above legislation. Proposed s 200A would have applied where a direction has been given under s 200. It would have applied where a designated authorised officer reasonably believed that a person who is required to comply with the direction (1) was a *high risk person*; and (2) was likely to refuse or fail to comply with the direction. Formerly proposed s 200A(2) stated that a person is a high risk person if either (1) they have been advised that they have COVID-19 and have not been given clearance from self-isolation; or (2) they have been advised they are a close contact of a person who has been diagnosed with COVID-19 and have not been given clearance from self-isolation.[5] This detention would have lasted for the period mentioned in s 200(1)(a); in other words, while the designated authorised officer reasonably believed that a person was a high risk person and was likely to refuse or fail to comply with the direction, where such detention is reasonably necessary to prevent a serious risk to public health. Such detention would have been reviewed every 24 hours.

It was noteworthy that literally anyone could have been appointed to be an authorised officer/designated authorised officer under the legislation. No particular qualifications, experience or skills were stated as being necessary. At the very least, this makes the provision extremely unusual. Typically, where executive detention has been permitted in the public health sphere, including quarantine, the decision was made by a person with appropriate health expertise, such as a Chief Health Officer or other senior health professional,[6] and the actual act of detention is often carried out by police.[7]

The Victorian Bill did not specify where detention would take place.[8] Further, no criteria were provided by which the designated authorised officer was to determine whether or not a person was considered to be likely to refuse or fail to comply with the direction. There was no express provision for the authorised officer to explain to the person why they were to be detained,[9] no written notice which might outline

[5] This is not unprecedented. For example, the New York Court of Appeals in *Crayton v Larabee*, 220 NY 493 (1917) upheld under quarantine legislation the detention of a woman who was herself healthy, but who lived next door to premises at which smallpox had broken out.

[6] For example, *Public Health and Wellbeing Act 2008* (Vic) s 117.

[7] *Biosecurity Act 2014* (Cth) s 103(3) states that where a person is to be detained for failing to comply with an isolation measure, the human biosecurity officer makes the decision to detain, but the actual detention is by a member of the police: s 103(3)(a)–(c).

[8] Compare the *Biosecurity Act 2014* (Cth) s 103(2) which states that detention for similar reasons would occur in a medical facility.

[9] In contrast, the *Biosecurity Act 2014* (Cth) s 83 requires that before a biosecurity officer makes a control order, they must take reasonable steps to explain to the individual of the risks posed by the relevant virus.

the basis of the detention,[10] no express requirement to give them an opportunity to make submissions to the authorised officer prior to the decision being made, and no specific provision for judicial review of the decision of the authorised officer.[11] These features are in sharp contrast with general features of the legislation into which the proposed provision was to be inserted, which are much more consistent with the features of the *Biosecurity Act 2014* (Cth) in relation to transparency of process.[12]

It is not clear from a reading of the legislation how the authorised officer would be aware that the person possibly to be detained has been advised either that the person has COVID or is a close contact of someone with COVID, though it is possible that this information might be provided to the authorised person by the Victorian Health Department. In itself, this raises privacy concerns that are important, but with which this article cannot deal in the space available.

III. Relevant Australian Case Law on Executive Detention

Some preliminary points should be made. This is that, consistently with the rule of law, any involuntary detention of an individual must be made pursuant to (valid) statute.[13] The law has long had antipathy towards arbitrary detention of individuals.[14] The second is that in the past, the law accepted bills of attainder, special legislation which applies to particular individuals which involves an assessment of, or punishment of, the guilt of such individuals within the non-judicial branches of government.[15] However, they fell into disuse in the United Kingdom, and are constitutionally prohibited in the United States.[16] While they are not specifically prohibited by the *Australian* Constitution, it is likely that they would raise significant constitutional issues in relation to the separation of powers principle.[17]

This matter was first considered during World War I in the decision *Lloyd v Wallach*.[18] There relevant provisions permitted the Minister for Defence to order the detention of a person whom he or she

[10] In contrast, the *Biosecurity Act 2014* s 61 sets out the contents of a human biosecurity control order, including that the officer give the relevant person a notice including detail such as the ground on which the order is imposed: s 61(1)(a) and other matters.

[11] In contrast, rights of review must specifically be included in a biosecurity control order made under the *Biosecurity Act 2014* (Cth) s 61(1)(i)(iii). For further discussion on the *Biosecurity Act 2014* (Cth) see Anthony Gray, "The Australian Quarantine and Biosecurity Legislation: Constitutionality and Critique" (2015) 22 JLM 788.

[12] *Public Health and Wellbeing Act 2008* (Vic) s 117; Anthony Gray, n 11, 809: "a particularly laudable aspect of the Victorian legislation is the provision setting out the power of the Chief Health Officer to make a public health order. It requires that Officer to have regard to several explicit factors in determining whether or not to make the order. If an order is to be made, it must be in writing, specify the disease which the person affected is believed to have, why it is considered that the person has the disease, or been exposed to it, specify the period during which the order has effect, explain the person's right to seek review of the decision, and a suggestion that they obtain legal advice."

[13] *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514, 528: "the common law of Australia knows no letter de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate."

[14] *Magna Carta 1215* (Eng); *Habeas Corpus Act 1679* (Eng); *International Covenant on Civil and Political Rights*, Art 9(1); *Universal Declaration of Human Rights*, Art 9; *European Convention on Human Rights*; *Fifth* and *Fourteenth Amendments to the United States Constitution*, Art 5. For a suggestion of an explicit constitutional protection against arbitrary detention see Kate Chetty, "Protection from Arbitrary Detention in Australia: A Proposal for an Explicit Constitutional Right" (2016) 35(2) *University of Tasmania Law Review* 79. On the other hand, note the observation of Michael Head, "High Court Sanctions Indefinite Detention of Asylum Seekers" (2004) 8 *University of Western Sydney Law Review* 153, 156 that "a desire to guarantee freedom from arbitrary imprisonment lay at the core of the doctrine of separation of powers". On the interpretation of arbitrary in this context, and in particular a definition which includes notions or inappropriateness, injustice and lack of predictability, see Claire Macken, "Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights" (2005) 26 *Adelaide Law Review* 1, citing Van Alphen v The Netherlands, Communication No 305/88, UN Doc CCPR/C/39/D/305/1988.

[15] *Liyanage (Don John Francis Douglas) v The Queen* [1967] 1 AC 259, 290 (Lord Pearce, for the Privy Council); *Polyukovich v The Commonwealth* (1991) 172 CLR 501.

[16] *United States* Constitution Art 1, ss 9 and 10.

[17] *Polyukovich v The Commonwealth* (1991) 172 CLR 501, 536 (Mason CJ), 617–618 (Deane J), 686 (Toohey J), 706 (Gaudron J).

[18] *Lloyd v Wallach* (1915) 20 CLR 299.

considered to be disloyal, for as long as the Minister considered necessary while the war continued. The Minister had ordered the detention of Wallach on this basis. He challenged his detention, arguing he was not disloyal. All members of the High Court overturned a lower court decision that the detention was unlawful.

Griffith CJ, with whom Gavan Duffy, Powers and Rich JJ agreed, stated that the Minister's opinion was the sole basis for the exercise of the power, and that it was up to the Minister to determine whether the evidence was sufficient to justify its use.[19] Griffith CJ found that, given the nature of the power, it was effectively unreviewable by a court.[20] The Court found the Minister was not required to attend court and explain the basis of the decision he had made.[21]

This decision was subsequently applied by the High Court.[22] In one of those cases, where the power was conditioned upon the Minister believing that the person to be detained was disloyal, Dixon J conceded the Court had been provided with no evidence that the person had in fact been disloyal, and there was a "very strong presumption" that the orders had been mistakenly made. However, in his view, this did not mean the person detained had a constitutional remedy, in the absence of proof of bad faith.[23] The High Court was fortified in reaching this conclusion by the majority decision of the House of Lords in *Liversidge v Anderson* on similar facts.[24] It should be acknowledged that these examples of executive detention occurred during wartime.[25] It is not entirely clear from these precedents what the High Court's position would be in relation to executive detention occurring outside of wartime.[26] Clearly, it would be less likely they would be supported by the Commonwealth's defence power outside of war time.[27]

In the 1950s two High Court decisions of importance to the current discussion were rendered. In *Australian Communist Party v Commonwealth*,[28] the High Court strongly asserted the importance of judicial review. It emphasised that the exercise of executive power cannot be made effectively unreviewable,[29] and the fact that powers are expressed in extremely vague terms, without express criteria for their exercise,[30] might be relevant in determining whether or not they are constitutionally valid.[31] It must be acknowledged that

[19] *Lloyd v Wallach* (1915) 20 CLR 299, 304, with whom Isaacs J agreed (308).

[20] *Lloyd v Wallach* (1915) 20 CLR 299, 309, with whom Isaacs J (308) and Higgins J (313) agreed.

[21] *Lloyd v Wallach* (1915) 20 CLR 299, 305 (Griffith CJ), 309 (Isaacs J), 313 (Higgins J), 314 (Gavan Duffy and Rich J).

[22] *Ex Parte Walsh* [1942] ALR 359; *Little v The Commonwealth* (1947) 75 CLR 94. The continued correctness of these decisions was the subject of "robust" disagreement in *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37, with McHugh J asserting that they were correctly decided and would be decided in the same manner today (589), but Kirby J denouncing them as "embarrassing" (620–621) and comparing them with the US decisions such as, *Korematsu v United States* 323 US 214 (1944) validating the internment of Japanese people in the United States in the 1940s, which later American courts rejected, *Trump v Hawaii* 585 US ___ (2018).

[23] *Little v The Commonwealth* (1947) 75 CLR 94, 103.

[24] *Liversidge v Anderson* [1942] AC 206.

[25] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 195 (Dixon J).

[26] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 227, Williams J stated that the legislation validated in these cases could only be validated during wartime. Others were more equivocal (eg, Fullagar J (258)). In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, three members of the High Court, Brennan Deane and Dawson JJ, stated that "the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court" (28–29); Susan Kiefel "The High Court Justices and the Weight of War" (Speech delivered at Samuel Griffith Society 4 August 2018).

[27] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 195 (Dixon J), 207 (McTiernan J), 282 (Kitto J).

[28] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[29] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 186, Dixon J complained that "in committing to the executive government an authority to say whether the continued existence of a body or the activities or a person are prejudicial to the security or defence of the Commonwealth, the sub-sections provide a most uncertain criterion depending on matters of degree … the present power … is not directed to the conduct of an existing war, and its exercise is not examinable and is not susceptible to testing by reference to the constitutional power above which is cannot validly rise" (186).

[30] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J referring to the lack of objective tests regarding the applicability of the power).

[31] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 188 (Dixon J).

"whether or not they are constitutionally valid" in that case was relevant to whether a head of power existed to support such a law, because the law concerned was of the Commonwealth. Clearly, that precise reasoning cannot be applied in respect of a State law that might have similar features.[32] In the alternative, the *Australian Communist Party* decision could be read in a more general sense as a strong re-affirmation of the rule of law,[33] including not permitting intrusions on civil liberties without the clearest mandate, cast in terms specific enough so as to permit meaningful judicial review.

In the 1950s, a majority of the High Court accepted that the *Australian* Constitution enshrined a separation of powers between the legislative, executive and judicial arms of government.[34] In short, constitutional difficulties would arise where the judicial arm of government purported to exercise non-judicial powers, or where a non-judicial arm of government purported to exercise judicial powers. While in most cases it is clear whether a body is, or is not, judicial in nature, it is less clear whether judicial power is being exercised. The recognition of the separation of powers between the three arms of government made it extremely important to define what judicial power was, in order to determine whether or not it was being exercised in a given case.

The High Court has been somewhat reluctant to define judicial power,[35] being more willing to identify its characteristic features.[36] In the current context, the High Court considered this question in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[37] where the Parliament passed legislation providing for individuals within a particular class (namely, those who had arrived in Australia by boat within a certain period and had not presented a visa or granted an entry permit) to be involuntarily detained for a period not exceeding approximately nine months. The legislation stated that a court must not order the release of individuals within the specified class. A majority of the Court struck out that part of the legislation that purported to direct a court not to order the release of individuals within the specified class. It found that this provision was contrary to the separation of powers for which the *Australian* Constitution provides.

The joint reasons of Brennan Deane and Dawson JJ stated that the adjudgment and punishment of criminal guilt were exclusively judicial powers.[38] This meant that any law purporting to allocate such powers to the legislature or executive would be unconstitutional. It confirmed that the question of whether judicial power was involved was a question of substance, rather than form. The joint reasons stated that, in most cases, involuntary detention of an individual was in substance penal or punitive

[32] In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, Fullagar J specifically acknowledged that the Commonwealth legislation struck out in the case would have been a valid law if enacted by any State parliament or, indeed, the United Kingdom Parliament (262).

[33] Dixon J (193) stated in the case that the rule of law was an "assumption" underlying the *Constitution*; In *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 381; [1998] HCA 22 Gummow and Hayne JJ noted the occasion was "yet to arise" to determine the full implications of the observation of Dixon J; *Al-Kateb v Godwin* (2004) 219 CLR 562, 618 (Kirby J, dissenting); [2004] HCA 37.

[34] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[35] In the early case of *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330, 357 Griffith CJ (with whom Barton J agreed) defined judicial power in s 71 of the Constitution to be "the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision … is called upon to take action".

[36] "Consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law": *Nicholas v The Queen* (1998) 193 CLR 173, 208–209; [1998] HCA 9 (in terms with which six members of the High Court indicated agreement in *Bass v Permanent Trustee Group* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)); [1999] HCA 9.

[37] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[38] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27. Mason CJ agreed with the relevant aspects of the joint reasons (10).

in character, and involved the exercise of judicial power.[39] The reasons recognised exceptions to this general rule.[40] Apart from the facts before them, they included the arrest and detention of a person pursuant to executive warrant, in order that they be available to meet criminal allegations against them in court. This power was not punitive in nature. Further, involuntary detention in cases of mental illness or infectious disease was well established, and again not seen as punitive in nature.[41] It mentioned other exceptions in relation to Parliament's power to punish for contempt, and military tribunals.[42] The joint reasons stated that, these exceptions aside, citizens enjoyed an immunity from being imprisoned by the Commonwealth except pursuant to a court order.[43] Thus, a majority of the Court here recognised that generally involuntary detention was punitive, and only to be ordered by a court, but exceptionally, executive detention was permissible and consistent with the separation of powers principle, where such detention was in substance for a non-punitive purpose.[44] Further, detention would only be authorised where it was reasonably necessary to fulfil this non-punitive purpose.[45] The Court has indicated that these categories of exceptional case are not closed.[46]

The decision in *Chu Kheng Lim* also represented an important re-affirmation of the importance of judicial review. The requirement that executive detention be confined to situations where it was reasonably necessary to fulfil a non-punitive purpose assumed the power of a court to determine for itself whether particular detention met this "reasonably necessary" standard. A majority of the Court struck out s 54R of the Act, which purported to direct a court that it must not order the release from custody of those within a designated class. The majority interpreted this provision as an attempt to effectively preclude the Court from being able to conduct meaningful judicial review of the legality of executive detention. Such an attempt was held to be offensive to the requirements of Ch III of the *Constitution*.[47]

The High Court again considered executive detention in the context of a non-citizen in *Al-Kateb v Godwin*.[48] The appellant had arrived in Australia without a visa. His refugee claims were rejected. Relevant legislation required an officer to detain unlawful non-citizens within immigration detention, until they could be deported from Australia. This was to occur as soon as reasonably practicable. At the relevant time, the Australian Government's attempts to find a country to which they could deport

[39] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

[40] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28. Gaudron J expressed agreement with these exceptional categories (55).

[41] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28. McHugh J agreed that executive detention for non-punitive purposes was compatible with the constitutionally mandated separation of powers (71).

[42] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28.

[43] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28–29.

[44] McHugh J added that where imprisonment went beyond what was necessary to achieve the non-punitive object, it would be regarded as punitive in nature (71). This distinction, between detention for punitive purposes and detention for non-punitive purposes, was accepted in later judgments. See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 162 (Gummow J); *Fardon v Attorney-General* (*Qld*) (2004) 223 CLR 575, 653–655 (Callinan and Heydon JJ); [2004] HCA 46. In *Fardon*, Hayne J noted there was "evident force in the proposition that to confine a person for what he or she might do, rather than what he or she has done, is at odds with identifying the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct" (648).

[45] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), with whom Gaudron J agreed. Similarly, McHugh J stated that "if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character" (71).

[46] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27–29 (Brennan, Deane and Dawson JJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 110 (Gaudron J). Jeffrey S Gordon, "Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-criminal Detention" (2012) 36 *Melbourne University Law Review* 41, 92 states that "freedom from arbitrary detention is one of the most fundamental aspects of the system of justice in Australia, and for this reason the exceptions to the Chapter III prohibitions are few and strictly defined. Courts must be very slow to recognise new categories of case in which non-criminal detention is permitted".

[47] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36–37 (Brennan, Deane and Dawson JJ) (with whom Gaudron J agreed); see for discussion Amelia Simpson, "Executive Detention as a Site for Creative Constitutional Interpretation in Australia" (2019) 45(2) *Commonwealth Law Bulletin* 296, 306–307.

[48] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37.

the appellant had been unsuccessful, because he was stateless. The question was the legality of the appellant's continued detention in such circumstances, with a majority of the Court determining that such detention was not unconstitutional.

McHugh J applied the distinction between punitive and non-punitive detention. He found that the appellant's detention was for a protective, not punitive, purpose. Executive detention for such purposes was not offensive to Ch III of the *Constitution*. He said that a law that was purely protective could infringe Ch III if it "prevents the Ch III courts from determining some matter that is a condition precedent to authorising detention".[49] However, this was not the case on the facts. The courts retained this ability.

Hayne J, with whom Heydon J agreed, also applied the distinction between punitive and non-punitive detention. He referred to Hart's five elements of punishment, that it must: (1) involve pain or other consequences normally considered unpleasant; (2) be for an offence against legal rules; (3) be of an actual or suspected offender for an offence; (4) intentionally administered by people other than the offender; and (5) imposed and administered by an authority constituted by a legal system against which the offence is committed.[50] On the facts, the detention here was not for an offence, since it was not an offence to enter Australia as a non-citizen. Hayne J said that segregating a person who had allegedly done so was not punitive.[51] He added that the fact that the detention may be for a long time, or that at the time of hearing the precise duration could not be determined, did not make it punitive.[52] Callinan J agreed that the detention here was for non-punitive purposes.[53]

Gummow J (dissenting) disagreed with the distinction between punitive and non-punitive detention, suggesting there was often no clear dividing line between the two.[54] Often, given government action met both objectives. He cited with evident approval the statement of Blackstone that "the confinement of the person, in any wise, is an imprisonment". Gummow J also insisted on the judicial reviewability of assertions that detention was for a purpose sufficiently connected with the aliens power so as to be valid.[55] As noted above, care must be taken with applying these statements in the context of a State law, where issues such as head of power are obviously otiose. Gummow J's statement might be slightly adjusted to the more general sentiment in terms of the requirement that judicial review of a decision of the executive regarding a person's involuntary detention must be available, in order to meet constitutional requirements. Kirby J (dissenting) stated that "indefinite detention, at the will of the executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements".[56] Gleeson CJ applied the principle of legality to interpret the legislation so as not to envisage indefinite administrative detention.[57] Gleeson CJ determined that when the purpose of the detention could no longer practically be fulfilled, the person detained was entitled to release.[58]

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[49] *Al-Kateb v Godwin* (2004) 219 CLR 562, 584; [2004] HCA 37.

[50] *Al-Kateb v Godwin* (2004) 219 CLR 562, 650; [2004] HCA 37, citing HLA Hart, *Punishment and Responsibility: Essays in the Philosphy of Law* (OUP, 2nd ed, 1968) 4–5.

[51] *Al-Kateb v Godwin* (2004) 219 CLR 562, 650; [2004] HCA 37.

[52] *Al-Kateb v Godwin* (2004) 219 CLR 562, 651; [2004] HCA 37. Callinan J took a similar position (660).

[53] *Al-Kateb v Godwin* (2004) 219 CLR 562, 657; [2004] HCA 37.

[54] *Al-Kateb v Godwin* (2004) 219 CLR 562, 612; [2004] HCA 37. This reflects sentiment expressed in *Rich v Australian Securities & Investment Commission* (2004) 220 CLR 129, 145; [2004] HCA 42: "the supposed distinction between punitive and protective proceedings or orders suffers from the same difficulties as attempting to classify all proceedings as either civil or criminal. At best, the distinction between punitive and protective is elusive" (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See similarly Stephen McDonald, "Involuntary Detention and the Separation of Judicial Power" (2007) 35 *Federal Law Review* 25, 28: "once it is accepted that the essential feature of the exclusively judicial function of adjudging and punishing criminal guilt is the conclusive declaration of the consequences imposed by law for engagement in past conduct, it becomes clear that a strict dichotomy between detention for punishment and detention for protection cannot be maintained"; Jeffrey S Gordon, "Imprisonment and the Separation of Judicial Power" (2012) 36 *Melbourne University Law Review* 41, 68–69.

[55] *Al-Kateb v Godwin* (2004) 219 CLR 562, 613; [2004] HCA 37.

[56] *Al-Kateb v Godwin* (2004) 219 CLR 562, 615; [2004] HCA 37.

[57] *Al-Kateb v Godwin* (2004) 219 CLR 562, 577–578; [2004] HCA 37.

[58] *Al-Kateb v Godwin* (2004) 219 CLR 562, 572; [2004] HCA 37.

The question of the constitutionality of executive detention was considered again in *North Australia Aboriginal Justice Agency Ltd v Northern Territory*.[59] The legislation at issue there permitted a police officer, without warrant, to detain a person for up to four hours where the officer reasonably believed that the person had committed, was committing or was about to commit an offence. The four-hour period could be extended in cases where the person detained was intoxicated. After the four-hour (or longer) period, the police officer would be required to pursue one of several courses of action. One was to release the person unconditionally, another was to issue them with an infringement notice, another was to release them on bail, and another was to bring them before a judge based on the infringement notice or some other alleged offence. The provision required that the officer bring the person detained to court as soon as practical within that four-hour period, unless released earlier. The appellants challenged the constitutional validity of the provision, arguing that the four hour detention period (or longer) amounted to punitive detention, and was thus offensive to the requirements of Ch III of the *Constitution*, and also argued the provision was contrary to the *Kable* principle. A majority of the Court, Gageler J dissenting, dismissed the constitutional challenge.

The joint reasons of French CJ Kiefel and Bell JJ accepted the Northern Territory's arguments as to the purpose of the legislation. These included to provide alternatives to a person detained being brought before a magistrate, to de-escalate social disorder situations, to prevent completion, continuation or repetition of an offence, and for community protection purposes. Thus, these judges did not accept the argument that the purpose of detaining the person for up to four hours was punitive in nature. However, the joint reasons stated that if the maximum detention period were "significantly greater" than the four hours specified, doubts might arise as to whether the legislation was truly for the purposes claimed by the Northern Territory, or whether it was instead punitive in nature, in which case serious constitutional questions would arise. This is clearly a reference to the High Court's statements about the unconstitutionality of executive punitive detention in *Chu Kheng Lim* and *Al-Kateb*.[60]

Gageler J (dissenting) stated that executive detention would only be constitutionally valid if two conditions existed: (1) the duration of the detention is reasonably necessary to effectuate a purpose identified in the statute that conferred the power, and which was capable of fulfilment; and (2) the duration of the detention was capable of objective determination by a court at any time and from time to time.[61] Gageler J said that the Northern Territory provision met neither condition:

> The duration of the detention within the four hour maximum specified … is not limited by reference to the time needed to effectuate any identified statutory purpose and the duration of that detention within the four hour maximum is designedly left to the discretion of a member of the Police Force. The duration of the detention depends on the choice of the member as to how long to take a person out of circulation … (it) is detention of a person whom the member of the Police Force has arrested on the basis that the member believed, albeit on reasonable grounds, that the person had committed, was committing, or was about to commit an offence. It is a form of detention which results from the member acting not as an accuser but as a judge. This is not an occasion to mince words. The form of executive detention authorised by the (provisions) is punitive.[62]

The Court also considered a Kable argument.[63] As that doctrine has not yet been discussed in this article, it is necessary to succinctly describe it. It involved State legislation that conferred powers upon a State

[59] *North Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; [2015] HCA 41.

[60] Nettle and Gordon JJ, in agreement, stated that the detention here fell within one of the well-recognised exceptions to the general prohibition on executive detention explained in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 652. In dissent, Gageler J said that the detention was too open-ended. It was not confined to that time which would practically permit the person to be brought before a justice or allow them to be dealt with in another way. It was not stated in terms of the protection of the person detained (609–610). Gageler J alluded to the difficulties in drawing a bright line between detention for punitive purposes and for other purposes (611) and said that this difficulty suggested a presumption that involuntary detention was for punitive purposes was appropriate.

[61] *North Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 612; see also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 111 (Gageler J); [2016] HCA 1.

[62] *North Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 612.

[63] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

court to order, in respect of one person, further incarceration of that person, if the court believed it were more likely than not that the person would re-offend, if released from prison. A majority of the Court held that the legislation was invalid. It undermined the institutional integrity of a court, by conscripting it into an executive process, such that public confidence in the independence and impartiality of the Court was called into question.[64] It purported to confer powers on a court that were not judicial in nature, contrary to the separation of powers. Although the legislation at issue was State legislation, and although the relevant court was a State court, the Court found that there was one integrated court structure in Australia, and State courts were invested with federal jurisdiction. Thus, the separation of powers enshrined in the *Australian* Constitution was drawn down to State courts.[65]

French CJ Kiefel and Bell JJ found no breach of the Kable principle on the facts. The processes involved under the legislation were not materially different from those that typically applied to a criminal process, where a court was asked to consider a matter involving a person, after a period when they had been detained by a member of the executive for a limited time. The Court's institutional integrity was not undermined. The joint reasons noted there could be occasions where legislation conferred power on a member of the executive in such a way that the court's institutional integrity was compromised. It gave an example where the court's supervision of the exercise of the executive power was undermined. However, that was not the current situation.[66]

Subsequent cases have confirmed the correctness of the *Chu Kheng Lim* precedent, permitting the executive to engage in involuntary detention for limited, non-punitive purposes, connected (in the case of Commonwealth laws) with a head of power.[67] The fact that one purpose of the detention is to deter particular behaviour does not mean that the detention is necessarily punitive in nature.[68] The lawfulness of the duration of any form of detention "must be capable of being determined at any time and from time to time".[69] In other words, there must be objectively determinable criteria for detention.[70] This is required, so that judicial scrutiny of the decision remains practically possible. As six members of the High Court noted in *Plaintiff M96A/2016 v Commonwealth*:

> There must be objectively identifiable criteria for detention. In other words, Parliament cannot avoid judicial scrutiny of the legality of detention by criteria which are too vague to be capable of objective determination. This would include an attempt to make the length of detention at any time dependent upon the unconstrained and unascertainable opinion of the Executive.[71]

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[64] Subsequently the Court has often resorted to expressing the *Kable v Director of Public Prosecution*s *(NSW)* (1996) 189 CLR 51 principle in terms of the United States Supreme Court decision in Mistretta v United States 488 US 361, 407 (1989), namely that legislation must not effectively "cloak" the exercise of executive power in the neutral colours of judicial power (*Pollentine v Bleijie* (2014) 253 CLR 629, 650–651 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2014] HCA 30). In other words, that the judiciary must not be conscripted into the playing out of a scheme designed by the executive to achieve a particular outcome. This would seriously offend the separation of powers doctrine.

[65] This does not mean that the principles apply in the same way to State courts exercising federal jurisdiction as they would to federal courts: *Pollentine v Bleijie* (2014) 253 CLR 629, 649 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); [2014] HCA 30.

[66] *Pollentine v Bleijie* (2014) 253 CLR 629, 596. Keane J agreed that the Court's institutional integrity was undisturbed by the provisions (638), as did Nettle and Gordon JJ (652). Gageler J (dissenting) found that the Court's institutional integrity was compromised because the justices were being used as "support players in a scheme the purpose of which is to facilitate punitive executive detention. They are made to stand in the wings during a period when arbitrary executive detention is being played out. They are then ushered onstage to act out the next scene. That role is antithetical to their status as institutions established for the administration of justice" (621).

[67] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; [2014] HCA 34; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 69–70 (French CJ, Kiefel and Nettle JJ); [2016] HCA 1.

[68] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 87 (Bell J); [2016] HCA 1.

[69] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 232 (French CJ, Hayne, Crennan, Kiefel and Keane JJ); [2014] HCA 34; similarly *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2015) 257 CLR 42, 111 (Gageler J); [2016] HCA 1.

[70] Amelia Simpson, "Executive Detention as a Site for Creative Constitutional Interpretation in Australia" (2019) 45(2) *Commonwealth Law Bulletin* 296, 310.

[71] *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 597 (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); [2017] HCA 16 (citing the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1).

The list of exceptions to the general rule that involuntary executive detention is punitive and contrary to the requirements of Ch III of the *Constitution* is not necessarily closed.[72] The mere fact that the period of executive detention is dependent upon a condition that is beyond the control of the executive does not mean that the detention becomes an exercise of judicial power.[73] The High Court has confirmed that an inference may be made that involuntary detention is for a punitive purpose, and that the onus is on the legislature to demonstrate that the law has a legitimate non-punitive purpose.[74] This does not mean there is a constitutionally guaranteed freedom from executive detention.[75] Nor does it mean that the legislature must always demonstrate that the detention provisions are a proportionate method of achieving a legitimate non-punitive end.[76] In the context of detention being reasonably necessary to achieve a legitimate non-punitive end, the Court has confirmed that this implies a temporal limitation. For example, it is possible that detention could initially be seen as being valid, as being reasonably necessary for a legitimate objective, but may at a later time become punitive, because no longer reasonably necessary for a legitimate objective.[77]

IV. Constitutional Arguments against the Proposed Victorian Provision

The article will now consider constitutional arguments against the proposed Victorian provision. The emphasis here is on constitutional arguments. In this context, clearly questions of whether the laws are sound, sensible or fair are irrelevant.

A. The Legislation Imposes Punitive Detention

If proposed new s 200A imposed punitive detention, it would be constitutionally invalid. It would amount to a member of the executive (or their delegate) imposing punishment. It is well accepted that only a Ch III court can impose punitive detention on an individual. Though the distinction between punitive and non-punitive detention has been criticised and may be unclear at times,[78] a majority of the High Court continues to recognise the distinction, and thus it must be considered in applying the current law.

The Victorian Government would assert that detention under proposed s 200A is non-punitive in nature. It would point to the fact that involuntary detention for the purposes of quarantine is a long-established practice. It exists not for the purpose of punishing anyone, but for the purpose of preventing the spread of infectious disease, a legitimate non-punitive purpose.

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[72] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 161 (Gordon J); [2016] HCA 1; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 55 (Gaudron J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 648 (Hayne J); [2004] HCA 37; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 653 (Callinan and Heydon JJ); [2004] HCA 46; *Kruger v Commonwealth* (1997) 190 CLR 1, 162 (Gummow J).

[73] *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 598 (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); [2017] HCA 16.

[74] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [24] (Kiefel CJ, Bell, Keane and Edelman JJ); [2018] HCA 2.

[75] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [25] (Kiefel CJ, Bell, Keane and Edelman JJ), [95] (Nettle J); [2018] HCA 2. For an argument in favour of a constitutional immunity from executive detention, see Gordon, n 46, 60–67; "generally speaking, Chapter III prohibits parliament from enacting legislation that results in or effects imprisonment without trial" (70).

[76] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [25] (Kiefel CJ, Bell, Keane and Edelman JJ), [95] (Nettle J); [2018] HCA 2 (this was in the context of denying a constitutionally enshrined freedom from executive detention, interference with which would require justification under a proportionality analysis adopted by the High Court in relation to the implied freedom of political communication in *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34.

[77] *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 369 (Crennan Bell and Gageler JJ); [2013] HCA 53. Where a court has ordered indefinite detention, legislation which reposes in a member of the executive the power to determine whether or not the person should be released from custody is not offensive to Ch III requirements: *Pollentine v Bleijie* (2014) 253 CLR 629; [2014] HCA 30.

[78] Jeffrey S Gordon, n 46, 63; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 612–613; [2004] HCA 46.

There are a range of sources relevant to determining whether or not a particular measure is punitive or non-punitive in nature. HLA Hart provided five elements of punishment.[79] He said that a measure involved punishment if: (1) it involves pain or other consequences normally considered to be unpleasant; (2) it is for an offence against legal rules; (3) it is of an actual or supposed offender for an offence; (4) it is intentionally administered by human beings other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offence is committed.[80] Applying these elements to proposed s 200A, the section involves involuntary detention, which is clearly unpleasant, in terms of (1). Regarding (3), it was for someone considered likely to commit an offence. Regarding (4), it would be administered by someone other than the person against whom it was used. Regarding (5), it appears to be implemented by a person authorised under legislation that is part of the legal system. Regarding (2), there is some room for argument, given that the section applies to a person who has not actually (allegedly) committed an offence, but against someone who is considered likely to commit an offence in future. On one view, it is not for an offence against legal rules, because no offence has been committed. On another view, it is for an offence against legal rules, on the supposition that the word "offence" can include future offences, or the suspicion that a future offence will be committed.

In the United States, the Supreme Court in *Kennedy v Mendoza-Martinez*[81] discerned seven factors that would help determine whether or not a particular proceeding was criminal in nature, considered to be a reasonable proxy for punishment. They included: (1) whether the sanction involved affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether its application is conditioned upon a finding of scienter; (4) whether the proceeding will further purposes of retribution and/or deterrence; (5) whether the behaviour for which it is applicable is already criminal; (6) whether alternative purposes of the provision can be articulated, and (7) whether it appears excessive. Again, these factors have been criticised.[82]

Applying these factors to proposed s 200A, the measure does involve restraint, in terms of (1). Regarding (2), detention for quarantine and related purposes has in the past been accepted as non-punitive. Regarding (3), scienter is irrelevant to s 200A. Regarding (4), the provision seems primarily protective and preventive rather than retributive. Regarding (5), the behaviour for which it provides is already criminal. Regarding (6), a non-punitive, protective purpose can be articulated. Views will differ regarding whether the measure is excessive, in terms of (7).

The question of whether the measure is excessive, regarding whether the measure is constitutionally valid or not, connects with other lines of reasoning that have been utilised in determining whether or not legislation contemplates punitive detention. For instance, it has been argued that where legislation contemplates detention that is "what is reasonably capable of being seen as necessary" to achieving the non-punitive objective,[83] it may readily be seen as non-punitive in nature. Others have labelled this proportionality analysis.[84] Outside the Australian constitutional realm too, it has been argued that governments must meet a necessity test in order to validly detain another based on public health grounds.[85]

There are considered to be good arguments either way in relation to this. Given that detention under the proposed Victorian provision was to be reviewed each day, and could only have continued while the

[79] Hart, n 50, 4–5.

[80] These factors were cited and applied by Hayne J in *Al-Kateb v Godwin* (2004) 219 CLR 562, 650; [2004] HCA 37.

[81] *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (Goldberg J) (1963); *United States v Ward* 448 US 242 (1980).

[82] Gordon, n 46, 63 refers to them as "notoriously uncertain and capable of easy manipulation".

[83] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), 57 (Gaudron J) and 71 (McHugh J).

[84] Gordon, n 46, 73; McDonald, n 54, 39.

[85] Wendy Parmet, "JS Mill and the American Law of Quarantine" (2008) 1 *Public Health Ethics* 210, 213: "the restriction of an individual's bodily liberty in the name of public health is legitimate only when it is necessary for and capable of preventing the spread of disease"; John D Blum and Norchaya Talib, "Balancing Individual Rights versus Collective Good in Public Health Enforcement" (2006) 25 *Medicine and Law* 273, 277: "a noted group of legal scholars and ethicists have developed several guiding principles to underpin laws concerning quarantine and isolation … abiding by the rule of law and application of such measures only when absolutely necessary".

designated person was satisfied that the person detained met the two required conditions, it is suggested that there may be proportionality between the detention and the non-punitive object of preserving community safety.[86]

On the other hand, the legislation may not meet a requirement that the measure be the least restrictive means necessary to achieve the legitimate objective,[87] if that is considered relevant to proportionality questions.[88] A challenger might legitimately argue that the legislation is overbroad, because it applies to a person with COVID or a close contact of someone with COVID. This might be overbroad in the sense that it is not limited to a situation where a person is actually in the contagious phase, in the former case, and in the case of a close contact of someone with COVID, the person is obviously not infectious at all.

It may also be argued that it is not *necessary*, because it is not clear why the existing powers that police have to enforce the lockdown measures are not sufficient to prevent the spread of the virus. It was not clear from the proposed legislation or the explanatory memorandum which accompanied it why this legislation was *necessary* – specifically, why the existing police power to enforce the existing lockdown measures was not sufficient to deal with the risk that a person might go around spreading COVID. It is not a response to this argument to argue that a proactive power to detain a person likely to breach lockdown was necessary, because a reactive power to detain a person who has committed a breach of lockdown is not sufficient. It has not been demonstrated (at least, on the evidence that is publicly available) that the existing police power to detain a person who has committed a breach of lockdown was so inadequate that it led to large-scale infections. Victoria did have large-scale infections at one point, but it was *not* because police lacked the power to enforce existing lockdown measures. It was largely because of well-documented failures in the hotel quarantine process, and deficiencies in contact tracing.

Sometimes, the distinction between what is punitive detention, on the one hand, and what is considered non-punitive detention, on the other, is resolved by application of a categories-based approach.[89] For instance, laws that fit within existing, recognised categories of non-punitive detention are accepted as valid. The joint reasons in *Chu Kheng Lim* identified existing accepted categories of non-punitive detention.[90] One of those identified was detention for the purposes of quarantine. If a category-based approach were taken to questions whether detention was punitive or not,[91] the Victorian government would be able to demonstrate that detention under the proposed regime was for the purposes of quarantine. It was slightly broader than a traditional quarantining of a person with an infectious disease, because it would have applied to close contacts of those with COVID, not just the person themselves, and would have applied in a situation where the designated person believed it was likely that the person would breach lockdown. This situation is considered similar enough to the existing accepted category of executive detention for purposes of quarantine to be part of that category. If a category-based approach were taken, it is concluded the proposed measures could have been shown to have been for a non-punitive purpose.

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[86] Jeffrey S Gordon, n 46, 82: "quarantine legislation will be valid if the detention it requires and authorises is reasonably capable of being seen as necessary for preventing and containing the spread of a specific and currently threatening infectious disease."

[87] This is contemplated in the legislation itself: *Public Health and Wellbeing Act 2008* (Vic) s 112.

[88] *McCloy v New South Wales* (2015) 257 CLR 178, 195; [2015] HCA 34 where the joint reasons of French CJ, Kiefel, Bell and Keane JJ referred to whether a measure was the least restrictive in terms of the impact on a freedom, in applying a test of proportionality.

[89] Gordon, n 46, 74–77.

[90] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ).

[91] Gordon favours this approach: "the categorisation approach prohibits balancing in each cases and forbids reference to any background justifications. … all the fundamental interpretive work is done by the superior court at the outset. It is best equipped to deal with core constitutional values which are constant and generally accepted, usually to the point of consensus". Gordon refers to international human rights instruments such as *Magna Carta*, the *Petition of Right* and the *Habeas Corpus Act* of 1679 (Eng) which, together in his view with the separation of powers for which the *Australian Constitution* provides, "all point to freedom from arbitrary imprisonment as a core constitutional assumption that can be overcome only in very limited circumstances" (75). He concludes that "the suspicion of arbitrary imprisonment is so deeply ingrained in Australia's constitutional narrative that it should not be susceptible to being routinely overridden by government interests; rather it should be categorically protected by the High Court. It is not a fluid constitutional norm, but an assumption upon which our very constitutional architecture is built.".

On balance, if the distinction between punitive and non-punitive detention continues to be made,[92] it is considered that the Victorian government might have been able to demonstrate that proposed s 200A was non-punitive in nature. This is regardless of whether a "proportionality" or "categories of case" approach is taken to the issue, although it is considered more difficult for the government to meet a requirement of proportionality, depending how that concept is defined and applied. On balance, and notwithstanding serious questions about proportionality, this aspect of constitutional challenge to the provisions would likely fail.

B. Meaningful Judicial Review

The High Court, in cases such as *Australian Communist Party*,[93] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[94] and *Plaintiff M96A/2016 v Commonwealth*,[95] has repeatedly warned that Commonwealth laws might be invalid if they fail to provide objective criteria for the exercise of executive power. They are conscious that when the Commonwealth parliament fails to do so, it can effectively preclude a court from being able to conduct judicial review as to the validity of government action. The High Court has jealously guarded its power of judicial review, which has an express constitutional dimension in s 75 of the *Australian Constitution*.[96] This has been applied at the State level.[97]

Dixon J famously noted in *Australian Communist Party* that the *Australian* Constitution was:

> Framed in accordance with many traditional conceptions, to some of which it gives effect, as for example in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.[98]

Of course, the rule of law encompasses judicial review.[99]

Lord Bingham discussed eight sub-rules of the rule of law.[100] The first two are of particular interest here. His first rule was that the law had to be accessible, and as far as possible intelligible, clear and

[92] I have noted above judicial and academic criticism of the distinction, but it continues to be applied by the Court.

[93] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 188–193 (Dixon J), 211 (McTiernan J), 222–223 (Williams J), 236 (Webb J), 258 (Fullagar J), 272–273 (Kitto J).

[94] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36–37 (Brennan, Deane and Dawson JJ), with whom Gaudron J agreed.

[95] *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 597 (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); [2017] HCA 16.

[96] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484; [2003] HCA 2: "legislation which confers power or jurisdiction on officials or tribunals … and which, in addition, deprives or purports to deprive courts of jurisdiction to control excess of power or jurisdiction … involves a potential inconsistency" (Gleeson CJ); Gaudron, McHugh, Gummow, Kirby and Hayne JJ stated that "the centrality, and protective purpose, of the jurisdiction of this Court … places significant barriers in the way of legislative attempts (by privative clause or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial and other official action lawful and within jurisdiction" (514).

[97] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

[98] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193, quoted with apparent approval by Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513; [2003] HCA 2; see also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J); [2005] HCA 44. In the same case, Gleeson CJ agreed (492); see to like effect *South Australia v Totani* (2010) 242 CLR 1, 62 (Gummow J) and 155 (Crennan and Bell JJ); [2010] HCA 39. In *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, 381; [1998] HCA 22 Gummow and Hayne JJ noted the occasion was "yet to arise" for the full consideration of what the remarks of Dixon J might entail. Sir Victor Windeyer expressed extra-judicially similar comments: "A Birthright and Inheritance – Establishment of the Rule of Law in Australia" (1962) 1 *University of Tasmania Law Review* 635.

[99] *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70: "judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of individuals are protected accordingly" (Brennan J).

[100] Lord Bingham, "The Rule of Law" (2007) 66(1) *Cambridge Law Journal* 67.

predictable.[101] This rule has been expressed by the European Court of Human Rights.[102] It has been accepted in Canada,[103] and in the United States through the "void for vagueness" principle of constitutional law.[104]

Lord Bingham's second rule was that:

> Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion … the broader and more loosely-textured a discretion is, whether conferred on an official or judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification.[105]

This is similar to the expressed view of Dicey that the rule of law required that "no man is punishable or can be lawfully made to suffer in body except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land".[106] He distinguishes legal systems based on the rule of law from arbitrary detention of an individual. Recently, the High Court of New Zealand re-affirmed that a law that was ad hoc or arbitrary in nature would not be within the meaning of "prescribed by law" in terms of that country's human rights legislation.[107]

On the other hand, it must be conceded that members of the High Court of Australia have not always recognised the possible rule of law implications of a vague law. In the recent decision of *Brown v Tasmania*, three members of the Court stated that "it is well understood that our Constitution does not say that the uncertainty of laws violates a constitutional safeguard",[108] although one member of the Court seemed to find to the contrary.[109]

The dynamics of a pandemic are also important here. Parmet noted:

> History teaches that quarantines are usually applied during periods of great fear. On the one hand, these are the times when quarantine is most ripe for abuse and when judicial review is most urgently needed[110] … courts should ensure that quarantine is imposed in conformity with other constitutional norms (and) …

[101] Lord Bingham, n 100, 69.

[102] "The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case … a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable to citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail": *Sunday Times v United Kingdom* (1979–80) 2 EHRR 245, 271.

[103] *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, 983 (Dickson CJ, Lamer and Wilson JJ).

[104] The United States Supreme Court stated that the requirement that legislatures express laws clearly "ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review": *Roberts v United States Jaycees* 468 US 609, 629 (1984); see also *Connolly v General Construction Co* 269 US 385, 391 (1926): "a statute which either forbids or requires the doing of an act in terms so vague that (persons) of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law". A Canadian judge has specifically connected the void for vagueness principle with the rule of law: *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139, 209–210: "the void for vagueness doctrine and the related idea of overbreadth are relatively new to Canadian constitutional law but are strangers neither to American constitutional jurisprudence nor to European law. Importantly, the roots of the concepts can be traced back to the fundamental principle of the rule of law" (L'Heureux-Dube J, with whom Gonthier and Cory JJ agreed); Anthony Gray, "The First Amendment to the United States Constitution and the Implied Freedom of Political Communication in the Australian Constitution" (2019) 48(3) *Common Law World Review* 142, 168–171.

[105] Lord Bingham, n 100, 72.

[106] Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund Inc, 1982) 110.

[107] *Borrowdale v Director-General of Health* [2020] NZHC 2090, [200] (Thomas, Venning and Ellis JJ).

[108] *Brown v Tasmania* (2017) 261 CLR 328, 373 (Kiefel CJ Bell and Keane JJ); [2017] HCA 43.

[109] *Brown v Tasmania* (2017) 261 CLR 328, 424; [2017] HCA 43 (where Nettle J, in articulating the fact that a law conferring arbitrary discretion on an official was more likely to be held to be unconstitutional in Australia, cited liberally American precedents, concluding the position in the United States was not dissimilar.

[110] Wendy Parmet, "Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law" (2018) 9 *Wake Forest Journal of Law and Policy* 1, 20.

> must be placed securely within our constitutional system and subject to judicial oversight to ensure that it is only used in circumstances in which evidence points to it being able to protect the public's health.[111]

This principle could be applied to present a strong challenge to the proposed legislation. It could be cogently argued that the legislation provides no express criteria for the determination by the designated person that another person is likely to breach the existing lockdown restrictions. This makes it effectively impossible for a court to undertake its task of reviewing the exercise of executive power in a particular circumstance, to determine whether or not it is legally justified.

Members of the High Court very clearly set out the rule: "parliament cannot avoid judicial scrutiny of the legality of detention by criteria which are too vague to be capable of objective determination".[112] It is submitted that the Victorian legislation breaches this rule – the criterion that a person is likely to refuse or to fail to comply with the direction is too vague to be capable of objective determination. No factors are stated as being relevant to the decision-maker's determination. No reason/s for the detention must be given. How could a court meaningfully review this decision, for example, on the administrative law grounds of whether the decision-maker took into account all relevant considerations, or took into account irrelevant considerations, whether the power was used for an improper purpose,[113] whether the decision was tainted with "no evidence", whether the jurisdiction to exercise the power actually existed on the facts etc, with such scant detail in the legislation? Legislation of this kind would be of serious concern in any context. In the *Australian Communist Party* decision, the context was the right of an individual to associate with others, and to manifest political beliefs. This is a very important human right. If anything, the current context is even more serious – here we are considering the freedom of an individual from detention.

The High Court decision in *Plaintiff M96A v Commonwealth* also stated that a law might be invalid where it involved "an attempt to make the length of detention at any time dependent upon the unconstrained and unascertainable opinion of the executive".[114] This is what proposed s 200A did. The proposed law gave the power to a designated person to detain another person for as long as they believed it to be necessary, to prevent a "high risk individual" from breaching the lockdown laws. This effectively meets the test of power being based on the "unconstrained and unascertainable opinion of the executive". The power is barely constrained – limited to those with COVID, or a close contact of someone who has, where it is believed they will likely breach lockdown. It is clearly based on an "unascertainable opinion" – the decision-maker is not required to provide the reasons for their decision. In such circumstances, how could a person detained be aware of the reason for the decision to detain them, other than the fact they are considered at high risk of breaching lockdown? This would make it extremely difficult, if not impossible, for them to successfully challenge the exercise of the power in their particular case, a difficulty that may be a deliberate, not inadvertent, feature of the way in which the power is expressed. Elsewhere too, courts have insisted that those detained must have the realistic opportunity to contest the basis of their involuntary detention.[115]

Somewhat analogously, five members of the High Court stated in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (*S4/2014*)[116] that "the duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time".[117] This is a

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[111] Parmet, n 110, 30.

[112] *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 597 (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); [2017] HCA 16.

[113] Matthew Groves and HP Lee, (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (CUP, 2007) 203: "it is very difficult to establish an improper purpose especially if a right to reason is not conferred by law."

[114] *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 597; [2017] HCA 16.

[115] *Hamdi v Rumsfeld* 542 US 507, 509 and 511 (O'Connor J) (2004).

[116] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; [2014] HCA 34.

[117] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 232 (French CJ, Hayne, Crennan, Kiefel and Keane JJ); [2014] HCA 34; to like effect *North Australia Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 611 (Gageler J); [2015] HCA 41.

reference to the *courts* being practically able to do so. It is argued the Victorian legislation breaches this requirement. It is practically not possible for the court to determine the duration of the detention, because it is based on an assessment by a member of the executive, which in turn is entirely subjective in nature. Further, that decision-making is inscrutable, with no requirement for the decision-maker to provide the reasons justifying their opinion. The legislation contains no criteria for exercise of the power. This makes it extremely difficult, if not impossible, for the person detained to practically exercise their rights to seek judicial review of the decision taken.

The proposed legislation also fails the test espoused by the High Court in S4/2014. The courts effectively cannot assess the duration of the detention, because it is not aware of the detail of the decision-maker's decision as to detention, why a particular person was detained (and in particular, why the decision-maker thought this person to be at high risk of breaching lockdown), what factors were taken into account and, if multiple factors were considered, what relative weight was given to each factor.

New Zealand authorities are of some assistance in fortifying this conclusion. In the recent High Court of New Zealand decision in *Borrowdale v Director-General of Health*,[118] the Court considered the validity of aspects of that nation's lockdown laws. In so doing, it reiterated that laws must be capable of being given an ascertainable and reasonable meaning, providing reasonable certainty. It also re-affirmed that laws must not be ad hoc or arbitrary in nature, and the nature and consequences of limits on human rights must be clear.[119] In the case of the Victorian legislation, these are not clear, given the lack of criteria for exercise of the power, what the detention actually entails etc.

The High Court of New Zealand also referred to the earlier decision of *F E Jackson and Co Ltd v Collector of Customs*,[120] where the Court invalidated a measure whereby the Governor-General had purported to give power to a government minister to make a decision without the formulation of any principles to guide them. This was held invalid. Though that precedent was distinguished in Borrowdale on the facts, the principle clearly remains in place. It is equivalent to the Australian High Court decision in *Australian Communist Party* in re-affirming the dangers of unbridled discretion being reposed in a member of the executive.

C. Due Process

It is noteworthy that the authorised person need not explain to the person being detained why they are being detained. Specifically, the authorised person need not explain the factors that they took into account in determining that the person met the requirements of the proposed legislation and should be detained. The legislation does not apparently require a high standard of evidence in order for the decision maker to exercise their power of detention. Further, the authorised person is not required to provide the person proposed to be detained with an opportunity to present arguments as to why they should not be detained before that decision is taken.

It is conceded that there might be arguments that natural justice is not feasible in emergencies where public health is at serious risk.[121] Yet, even here, judges have expressed the need for natural justice to apply. Kiefel J, when a member of the Federal Court, expressed a view that natural justice should be accorded to those potentially liable to be affected by decisions under quarantine legislation.[122]

While understandably there have been few decisions as to the due process rights to which someone proposed to be detained under quarantine legislation are entitled, some courts have insisted upon due process. In the United States, this is guaranteed by the *Fifth* and *Fourteenth Amendments* to the

[118] *Borrowdale v Director-General of Health* [2020] NZHC 2090.

[119] *Borrowdale v Director-General of Health* [2020] NZHC 2090, [200] (Thomas Venning and Ellis JJ).

[120] *F E Jackson and Co Ltd v Collector of Customs* [1939] NZLR 682 (SC).

[121] *Kioa v West* (1985) 159 CLR 550, 586 (Mason CJ), 615 (Brennan J) (in both cases, where the purpose of the legislation would otherwise be defeated), 633 (Deane J) (in cases of "practical necessity"); see Matthew Groves, "Exclusion of the Rules of Natural Justice" (2013) 39(2) *Monash University Law Review* 285.

[122] *Pacific Century Production Pty Ltd v Watson* (2001) 113 FCR 466, [32]–[35]; [2001] FCA 1139 (appeal to Full Federal Court dismissed).

Constitution. Courts in that country have required, as part of due process in this context, that the decision-maker demonstrate clear evidence as to why involuntary detention is necessary (for instance, that the person detained has in the past failed to comply with orders), and why a less restrictive method would be ineffective.[123] Courts have written due process guarantees into legislation, where it is otherwise silent.[124] There the court required that the person involuntarily detained due to infectious disease be given written notice of the basis of the detention, a right to legal representation, right to confront any witnesses being used to support the detention, and a standard of proof at the level of "clear, cogent and convincing evidence" that the person is unlikely to be unable or unwilling to conduct themselves so as not to be a danger to others.[125] It is noteworthy that none of these were features of the proposed Victorian measure.

Another means of attacking the proposed Victorian provision concern the identity of the decision-maker. As noted above, an authorised person need not have had any particular qualifications or skills. Notably, they did need to be a health professional. In determining due process standards in the United States in relation to quarantine, courts have noted that opinions of public health authorities must be based on the latest knowledge of science, including virology, epidemiology and public health.[126] The decisions of public health authorities are entitled to respect, and to some extent deference, but "such deference is not appropriate if those powers are exercised in an arbitrary, unreasonable manner".[127] The Court there was conscious that, in the past, decisions made about those believed to have contagious diseases were sometimes coloured by "pernicious myths". It sensibly concluded that the best way to avoid such risks was an individualized, fact-specific determination regarding a particular person by the decision-maker.[128] A reviewing court should review the evidence relied upon to make such a decision to determine whether the decision reflected a "careful and open-minded weighing of the risks and the alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice".[129] It has been suggested that it would be difficult for a government to be able to demonstrate, at a level sufficient to meet the clear and convincing evidence requirement, that a person was likely to commit future wrongdoing (including breaching a quarantine requirement) in the absence of evidence that a person had in fact done so in the past.[130]

The contrast with proposed s 200A is telling. It was not stated in the proposed Victorian provision that the decision-maker was required to be satisfied by "clear and convincing evidence". No evidence was necessary that the person had in the past breached lockdown provisions.

Section 21(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that an individual must not be subject to arbitrary detention, and s 21(7) provides that a person detained is entitled to bring proceedings in court whereby the lawfulness of their detention is to be determined. Section 12 protects freedom of movement within Victoria. It is conceded that these human rights are not absolute in nature,

[123] *City of New York v Antoinette R*, 630 NYS 2d 1008 (1995); *City of New York v Doe*, 614 NYS 2d 8 (1994).

[124] *Greene v Edwards,* 263 SE 2d 661 (W Va, 1980).

[125] *Greene v Edwards,* 263 SE 2d 661, 663 (W Va 1980) (Supreme Court of Appeals, West Virginia); Wendy Parmet, "Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law" (2018) 9 *Wake Forest Journal of Law and Policy* 1, 30 concluding that authorities "should be required to show that when they issued a quarantine order, they had clear and convincing evidence, grounded in science, for believing that it might be the least restrictive alternative. Anything less invites the possibility that public health powers will be abused for political ends and to the detriment of public health". The US Supreme Court has also applied a requirement of "clear and convincing" evidence in relation to other civil commitment, for example, in relation to those with mental health issues: *Addington v Texas*, 441 US 418 (1979); *United States v Salerno*, 481 US 739 (1987).

[126] *City of Newark v JS*, 665 A2d 265, 274 (1980) (Superior Court of New Jersey).

[127] *City of Newark v JS*, 665 A2d 265, 274 (1980) (Superior Court of New Jersey).

[128] *City of Newark v JS*, 665 A2d 265, 274 (1980) (Superior Court of New Jersey).

[129] *Arline v School Board of Nassau County*, 772 F 2d 759, 765 (11th Cir, 1985). Similarly, Christopher Ogolla, "Non-criminal Habeas Corpus for Quarantine and Isolation Detainees: Serving the Private Right or Violating Public Policy?" (2011) 14 *DePaul Journal of Health Care Law* 135, 136: "it is reasonable to worry about the improper use of quarantine because a significant number of health departments are led by political appointees with little expertise in public health disease control."

[130] David Cole, "Out of the Shadows: Preventive Detention, Suspected Terrorists, and War" (2009) 97 *California Law Review* 693, 711.

and s 7 confirms that they may be reasonably limited having regard to factors such as the nature of the right, the importance of the legislative object, and whether the legislation is the least restrictive means of achieving the legitimate objective.

It could be argued that the proposed provision subjected the individual to arbitrary detention. This is because the legislation did not provide criteria by which the decision-maker was to reach their decision,[131] and contemplated that the power could be exercised by someone who was not necessarily a health professional, and not necessarily a law enforcement official. In this context the Grand Chamber of the European Court of Human Rights noted that law:

> Must afford a measure of legal protection against arbitrary interferences by public authorities with (human) rights. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.[132]

The proposed legislation also clearly conflicted with s 12 of the *Charter*, protecting freedom of movement within the State.

Parliament may include within proposed legislation a statement of intent to override the human rights contained in the Charter,[133] but no override was included in the draft bill. Thus, the court could issue a statement that the proposed provision could not be read in a manner consistent with the Charter,[134] specifically ss 12 and 21, though of course this would not make the provision invalid.

Some may argue that the American precedents are inapt because that nation enshrines an express commitment to due process of law, which has no express equivalent in the *Australian* Constitution. However, it is possible that the High Court might read in a right to due process into the *Australian* Constitution, given that it has already been determined that the rule of law forms an assumption underlying the Constitution, the rule of law encompasses aspects of due process,[135] and it has been demonstrated that the proposed provision fails to provide due process. It is conceded that would require some development in the law from its current position, where the rule of law per se has not been utilised to strike down legislation as being invalid, and where, to the limited extent that the High Court has recognised something approaching due process, it has been in the limited context of protecting essential attributes of a judicial process.[136] It would require development of Dixon J's statement in the *Australian Communist Party* of the rule of law being an "assumption" underlying the Constitution, a statement that has effectively lain dormant for nearly 70 years.

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[131] Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence (CUP, 2nd ed, 2002) 380: "if there are no criteria, express or implied, which governs the exercise of discretion, detention resulting from the exercise of such discretion is arbitrary." Jayawickrama states that the drafting of *International Covenant on Civil and Political Rights*, Art 9, including the prohibition on arbitrary detention, suggests an intention that the word "arbitrary" was understood to mean unjust, incompatible with principles of justice, or with human dignity (376). This is important because the Victorian provisions were drawn from international human rights instruments, so it is reasonable to suggest that meanings given to words in the international instruments are, at the very least, relevant in interpreting the equivalent State provisions in Australia.

[132] *Gillan v United Kingdom* [2010] Crim LR 415; [2010] 1 WLUK 74, [77] (Grand Chamber).

[133] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31.

[134] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31.

[135] Bingham, n 100 includes within his sub-rules of the rule of law that the law must afford adequate protection of fundamental human rights, that a decision making process should feature natural justice and a right to know the basis of a decision being made against them, as well as protection from arbitrary decision-making. See for further development of this argument Anthony Gray,"Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions" (2014) 37(1) *University of New South Wales Law Journal* 125; Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (Federation Press, 2016).

[136] Fiona Wheeler, "Due Process, Judicial Power and Chapter III in the New High Court" (2004) 32(2) *Federal Law Review* 205; Fiona Wheeler, "The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia" (1997) 23 *Monash University Law Review* 248.

V. Conclusion

This article has demonstrated there were serious question marks over the proposal to confer power on an authorised person to detain another citizen based on a purported assessment the person was in a high risk category and likely to breach lockdown rules. The most powerful argument against the legislation is that it was constitutionally invalid because it effectively precluded a court from being able to practically review the decision made. This was because of the lack of criteria that governed the exercise of the power. The court would be crippled in its ability to conduct a meaningful judicial review of the decision of the authorised person. The High Court has previously carefully guarded its role in judicial review, and not looked kindly on legislation which effectively hampers it. There are also arguments that the law is punitive, but it has proven difficult for challengers to successfully argue this. The government might respond that the laws were passed for legitimate, non-punitive ends, and it may well be that they are found to be proportionate to that end, and/or within a category of case recognised as exceptional, where executive detention has been permitted. It would be open for a court to issue a declaration of incompatibility under the Victorian Charter, due to the arbitrary nature of the powers. Further, the law could be developed to provide some constitutional protection for due process rights, through the prism of the rule of law, which Dixon J found to be an "assumption" underlying the *Australian* Constitution. Australian judges have found that due process must be accorded in the quarantine realm. In numerous ways, the proposed legislation infringed what many consider to be part of due process, including natural justice, understanding the basis of decisions, having decisions based on clear and convincing evidence, and made by independent, expert decision makers. In the absence of these, the risks of arbitrary decision-making loom large.