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No. 31 2003–04

Quarantine Amendment (Health) Bill 2003

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Quarantine Amendment (Health) Bill 2003

David Walsh
Law and Bills Digest Group
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Quarantine Amendment (Health) Bill 2003

Date Introduced: 21 August 2003

House: Senate

Portfolio: Health and Ageing

Commencement: Sections 1 to 3 on the day the Act receives Royal Assent; Schedule 1 Part 1 6 months and one day after Royal Assent unless commenced earlier by Proclamation; Schedule 1 Part 2 the later of (a) after the commencement of Schedule 1 Part 1 and (b) commencement of items 1 to 113 Part 1 Schedule 1 to *Agriculture, Fisheries & Forestry Legislation Act Amendment Act (No1) 2003*.

Purpose

The *Quarantine Act 1908* provides the legislative basis for human, plant and animal quarantine activities in Australia. A recent review of human quarantine provisions has resulted in the adoption of a two stage response to implement recommendations flowing from that review. This Bill is the first stage of that response and focuses on technical amendments to better implement current policy and practice with respect to human quarantine emphasising a comprehensive approach to border control measures.

Background

Introduction

Quarantine measures are generally thought of in the context of plant and animal importation. Human quarantine is rarely mentioned. That this is so is not surprising as the very high standard of health services and public infrastructure in Australia have had the effect of removing protection from dangerous infectious disease as an issue for consideration by most people in this country. This lack of attention to the potential spread of infectious disease is a relatively recent phenomenon and reflects the success of Australia's public health measures and scientific developments introduced over the last 100 years.

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Public health and what constitutes legitimate public health issues and the response to those issues has been the subject of considerable recent examination and debate.¹ Public health and its attendant collection of legislation provides the context in which human quarantine rules operate.

Modern laws relating to quarantine of people have their origins in attempts to control infectious disease. The need to control the spread and resultant mortality from disease became more pressing as the size of urban populations grew and the movement of people internationally became more common during the eighteenth and early nineteenth century. The same period saw the genesis of public health concepts which, even if based on flawed scientific understanding, resulted in the beginnings of modern urban sanitation as we know it together with coercive powers for government to enforce a degree of conformity with the new concepts.

Given the more obvious and historically understood and experienced threat of externally introduced diseases, it is not surprising that England passed the *Quarantine Act 1825* before giving expression to the new move to more sanitary environmental conditions by passing the *Public Health Act 1848*. Both pieces of legislation formed the basis of like Acts in the [then] Australian colonies.

All the Australian colonies passed Quarantine Acts prior to Federation, starting with New South Wales in 1832 and Western Australia in 1833. New and amending legislation was instituted in the remaining colonies over the course of the nineteenth century. The need for a national level response to infectious disease was reinforced by a combination of increased scientific knowledge (e.g. the discovery of bacteria), a general move towards more sanitary conditions, the smallpox epidemics of 1880-1885 and the political developments leading to Federation.

Although the Commonwealth was given a specific power to make laws with respect to quarantine,² the states did not transfer their quarantine powers to the Commonwealth until 1909 under the provisions of the *Quarantine Act 1908 (Cth)* (the ‘Act’). Rather than provide a definition of ‘quarantine’, the Act states the “scope” of its purpose to be,

... includes, but is not limited to, measures:

(a) for, or in relation to:

(i) the examination, exclusion, detention, observation, segregation, isolation, protection, treatment and regulation of vessels, installations, human beings, animals, plants or other goods or things; or

(ii) the seizure and destruction of animals, plants, or other goods or things; or

(iii) the destruction of premises comprising buildings or other structures when treatment of these premises is not practicable; and

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(b) having as their object the prevention or control of the introduction, establishment or spread of diseases or pests that will or could cause significant damage to human beings, animals, plants, other aspects of the environment or economic activities.³

That is, from the earliest days it was accepted that particular circumstances would give rise to the need to quarantine people – to examine, test, isolate and if necessary, restrain them where infectious disease was present or suspected. These powers of detention to enforce human quarantine have equivalents in state and territory legislation.⁴ However, in the early years of Federation these powers were not always administered efficiently or effectively.⁵ This resulted in the Commonwealth amending the Act in 1920 to insert s.2A,⁶ which now reads at subsection (1):

Whenever the Governor-General is satisfied that an emergency exists which makes it necessary to do so, he or she may, by proclamation, declare that any or all measures of quarantine prescribed by or under any State Act shall, for such period as is specified in the proclamation, cease to have effect, and such measure shall thereupon cease to have effect accordingly.

Current health concerns

The result is that the Commonwealth has pre-eminent powers in matters of human quarantine. These general powers are more readily enforced where the government has identified and gazetted a quarantinable disease.⁷ The recent gazettement of Severe Acute Respiratory Syndrome ('SARS') is the latest example of the reactive nature of quarantine i.e. the need to respond to immediate and perceived threats to the communities' health.

The actual risk to Australia's population from highly contagious diseases such as SARS is considerable, with consequences not yet fully understood.⁸ Newer variants of older diseases also present the Australian community with significant risks.⁹ Multi-drug Resistant Tuberculosis ('MDR-TB') is the more serious variant of drug resistant tuberculosis.¹⁰ The international spread of TB and MDR-TB was noted in 1998 as a matter of great concern by the World Health Organisation ('WHO').¹¹ MDR-TB is relevant to Australia as the disease is widespread in the countries of origin of immigrants and others who come to Australia. The spread of MDR-TB is compounded by a number of factors identified by WHO – inappropriate treatment regimens, over the counter availability of anti-TB drugs, inferior and counterfeit drugs, erratic drug supplies and stigmatisation of sufferers.¹² These issues might be controlled in Australia but they certainly are not in many other nations.

Judicial consideration of quarantine

How and when best to quarantine to achieve optimal public health outcomes are distinct issues. The concept of quarantine itself as a measure to protect the wider community is well accepted and has been distinguished by the High Court of Australia from other forms of detention.¹³ Some might suggest that Australian law protects a person from the sort of

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arbitrary detention that is arguably implicit in human quarantine orders, but this view does not appear to be supported by the High Court.¹⁴

Although the propriety of quarantine is accepted, the ongoing problem will always be the application of orders which of necessity will involve significant derogation of individual human rights and freedoms. This dilemma is particularly pronounced when the community faces a highly infectious disease which is also very difficult to identify in its early stages. For example, to screen for SARS "... is particularly difficult, as the signs and symptoms are vague and consistent with virtually any viral illness."¹⁵ However, as already noted, the consequences for the community of taking inadequate quarantine measures can be catastrophic. This suggests that the quarantine dilemma will always remain. If this is accepted, then the issue really becomes focused on the application of quarantine orders and the avoidance of abuse of such orders.

Basis of policy commitment

"Public health law is now at the stage of extensive restructuring and reform in most Australian jurisdictions."¹⁶ An element of this process was the review undertaken by the Department of Health and Aged Care in 2000 of the human quarantine provisions of the Act.¹⁷ The committee was chaired by the Commonwealth Chief Medical Officer (who is also the Director of Human Quarantine) and issued a report recommending a two stage response to the Review's findings. This Bill is the first stage response and is designed to "... ensure the Act is comprehensive yet flexible in its approach to border control measures."¹⁸ The second stage of the Review will concentrate on quarantine and the management of current and future communicable diseases.

Given the need to recognise inherent imperfection in any public health system and recognising the character of the global economic environment, the modern approach to legislation is to manage risk.¹⁹ This presumes that the likelihood of disease spreading is weighed against the costs and infringement to civil liberties associated with the implementation of control measures. Australia's approach to quarantine aims to manage this risk to an acceptably low level.

Consequences of failure to pass

The Bill focuses on technical issues in the existing Act and so does not create substantive change to the quarantine regime already in place. Should the Bill not be passed, the most significant effect would be for individuals, who if subject to a quarantine order would not be able to take advantage of the proposed independent medical assessment process.

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Main Provisions

Initial Items, which are technical and enabling provisions are followed by three main areas of amendments:

Pratiques

To issue 'pratique' means to give authority to enter a port (including an airport) having determined that there are no quarantinable diseases on board.²⁰ **Item 22** provides for an updated process permitting overseas aircraft to be automatically granted pratique unless one of the specified exceptions applies (**new subsection 32B(2)**). Essentially the changes recognise the huge increases in international travel by air while keeping in place the traditional onus on the captain of the aircraft to notify quarantine officers where there is or might be a quarantinable condition on board together with the power of a quarantine officer (human quarantine) to form his or her own opinion as to whether the aircraft is free from infection (**new paragraphs 32(2)(a) and (b)**).²¹ Pratique provisions applicable to overseas aircraft as against other overseas vessels are also distinguished.²²

Medical assessment

For members of the public

It is noted that the Bill, for the first time, provides a person detained under a quarantine order the right to an independent medical assessment (**Item 32**).²³ However there are limitations on this right – it cannot be availed of at all where epidemics or unusual quarantine measures in place (**new subsection 35C(3)**),²⁴ the person seeking the independent medical examination must pay for that examination and the requested doctor must agree to provide the examination (**new subsection 35C(2)**)²⁵ and a further request for medical assessment cannot be made until at least 72 hours have passed since the last assessment (**new subsection 35C(4)**).²⁶ There are also the practical considerations associated with the request for such an assessment being processed by a quarantine officer and the timing and procedural issues that might be involved with the provision of the independent assessment.²⁷

Obtaining an independent medical assessment has limited usefulness as, although it may trigger a review and must be taken into account when assessing whether or not a person will remain in quarantine²⁸ the view of the independent doctor is not determinative.²⁹

There are existing and specific powers in the Act for the detention of a person (being a non-citizen) who has or is suspected of having an active pulmonary tuberculosis.³⁰ **Item 29** extends the same right of independent medical assessment, as detailed above, to such persons.

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Should a person be placed in quarantine they will no longer be liable for any of the costs of the quarantine (**Item 39**).³¹

Increased powers for quarantine officers (human quarantine)

Items 25, 26 and 30 give quarantine officers (human quarantine) full discretion to utilise their decision making powers concerning whether or not to order a person into quarantine without first having to seek medical opinion as to the validity or otherwise of the assertions upon which the decision to quarantine is made.³²

Vector monitoring and control

A vector is the means by which a quarantinable disease is or might be transmitted. **Item 36** creates a new Part VAA which is concerned with the monitoring of actual or potential vectors and the way in which vectors might be identified and controlled. In identifying a monitoring or control area, a quarantine officer (human quarantine) need only satisfy a ‘reasonableness’ standard in making a decision to invoke the powers available in the Bill.³³

Although entry upon private property requires the voluntary and informed consent of the person owning or controlling the property³⁴, such consent is not required to be sought in an emergency situation.³⁵ In determining the existence of an emergency type circumstance the quarantine officer need only believe on reasonable grounds that the circumstance exists.³⁶

It would be expected that most vector monitoring and control activities were conducted in circumstances such that a warrant was obtained before entering private property. This is provided for in the new Part VAA.³⁷ Although a magistrate may request further information concerning the grounds on which the warrant is sought³⁸ the request need only satisfy a ‘reasonable suspicion’ test for the warrant to be issued.³⁹ Warrants can authorise entry and carrying out of activities to be conducted at any time of day or night and can be valid for up to seven days.⁴⁰ Successive warrants may be issued with respect to the same property.⁴¹ The Act already allows for the granting of a warrant by telephone or other electronic means and where this occurs, the warrant is valid for 48 hours rather than seven days.⁴²

Technical issues

Although the Bill introduces, in **Item 32 new sections 35C and 35D**, a significant change by permitting independent medical assessments of people ordered into quarantine, the effectiveness of this change is diminished by the lack of reference to any time frames within which independent medical assessments are to be made and the resultant report to be considered. This contrasts with, for example, the wording in **Item 30**, where the **new paragraph 35A(3B)(b)** refers to a notification being made “as soon as practicable”.

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Concluding Comments

The introduction of a form of appeal against a quarantine order is highlighted with respect to this Bill.⁴³ Although a qualified process, its introduction represents an important recognition of the basic human right of freedom from arbitrary detention without compromising the absolute importance of government being able to protect the wider community from public health threats. The same can be said with respect to provisions concerning vector monitoring and control activities.

Some parties' issues with respect to this Bill are likely to be informed by the repeated references to 'suspicion' and 'reasonableness' as a conceptual basis for what can be broad powers of detention, search and seizure. The potential extent of the application of these powers is best illustrated by reference to what constitutes a 'prescribed illness'⁴⁴ the suspected or actual presence of which can trigger a quarantine order. Failing to notify a 'prescribed illness' is an offence for which a person can be imprisoned for up to five years.⁴⁵ Apart from the list of diseases notified in the regulations,⁴⁶ any illness during which the person suffers from "glandular swelling" is a prescribed illness for the purposes of subsection 22(2) of the Act.⁴⁷

While glandular swellings can be present in many conditions that do not present a threat to Australia, equally such symptoms could presage a SARS or SARS like outbreak. Quarantine officers (human quarantine) are required to act reasonably. The Full Court of the High Court has considered what constitutes 'reasonable suspicion'.⁴⁸ It is worth considering the Court's comments:

Suspicion, as Lord Devlin said in *Hussien v. Chong Fook Kam* (1970) AC942, at p 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

The considerable responsibility exercised by quarantine officers is recognised in the Act by the Act protecting persons from all civil proceedings for all actions done by a person pursuant to duties under the Act, so long as those actions are done in good faith.⁴⁹

Finally, in considering the likelihood of whether an officer might abuse his or her powers of quarantine, it should be noted that where this happens the officer will commit an offence and face imprisonment for up to five years.⁵⁰

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Endnotes

- 1 *Public Health Law in the New Century* Christopher Reynolds, in 'Journal of Law and Medicine' Vol 10 May 2003 pp. 435-441 see generally and at p. 435 in article summary, "Public health law is a broad and sometimes nebulous field which has undergone extensive reform and rethinking over the past decade."
- 2 *Commonwealth Constitution 1901* s.51(ix).
- 3 *Quarantine Act 1908 (Cth)* s.4(1).
- 4 *Public Health Act 1991 (NSW)* ss.23(3)(e) and (f); *Health Act 1958 (Vic)* s.121(4) – (15); *Health Act 1937 (Qld)* ss.36 and 37; *Public Health (Infectious and Notifiable Diseases) Regulations 1930 (ACT)* reg. 7, 8 and 11; *Notifiable Diseases Act 1981(NT)* s.13(2)(a); *Public and Environmental Health Act 1987 (SA)* s.32 and 33; *Public Health Act 1962 (Tas)* s. 14(1)(m) and 28; *Health Act 1911 (WA)* ss.249, 251, 263 and 294.
- 5 *Public Health Law and Quarantine in a Federal System* Helen Kelsall, Priscilla Robinson and Genevieve Howse in *Journal of Law and Medicine* Vol 7 August 1999 p87 at p91 - conflicting Commonwealth and State responsibilities resulted in poor responses to a ship board measles epidemic in 1912, conflicts over the declared quarantine area during the 1913 smallpox outbreak in Sydney and competing restrictions during the 1918 – 1919 influenza pandemic.
- 6 Inserted by the *Quarantine Act 1920*.
- 7 *Quarantine Act (Cth)* s.12 – the most recent gazetting of a disease was on 8 April 2003 and identified Severe Acute Respiratory Syndrome (SARS) as a quarantinable disease.
- 8 *The SARS epidemic: lessons for Australia* Peter A Cameron, Timothy H Rainer and Peter De Villiers Smit in *Medical Journal of Australia* Vol 178 19 May 2003 p. 478. At page 479 the authors, all of whom practice in emergency medicine, state "SARS has the potential to totally disrupt the healthcare system of cities or states. Apart from the potential to use hundreds of general ward beds – a disaster in itself given the bed capacity of most Australian hospitals – the biggest threat is the need for intensive care unit (ICU) beds. If 20% - 30% of cases required care in ICU, and a cluster of 200 cases occurred in Melbourne or Sydney, there would be little likelihood of finding 50 ICU beds at short notice. A further problem is that ICU staff are likely to contract the disease (unpublished data)... Health authorities need to think about their capacity to provide "surge capacity" – not only in terms of ventilators, but also in terms of trained staff."
- 9 Tuberculosis ('TB') has long been specifically targeted by quarantine regimes e.g. *Quarantine Act (Cth)* s.35AA. However there is no additional recognition of MDR-TB.
- 10 The rate of drug resistant tuberculosis amongst sufferers is reported by the World Health Organisation and the International Union Against Tuberculosis and Lung Disease to be 11.1%, while MDR-TB is 1.8% - cited in *Tuberculosis Drug Resistance in Canada 2000* published by authority of the Minister of Health, copyright Minister of Public Works and Government Services Canada 2001, p. 3.

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- 11 *WHO Report on the Global Tuberculosis Epidemic 1998* Global TB Programme, World Health Organisation 1998, Geneva, Switzerland.
- 12 *ibid.*, pp. 28–29.
- 13 *Chu Kheng Lim & Ors v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ “Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts.... Involuntary detention in cases of mental health or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power”.
- 14 *ibid.*, at pp. 51–52 per Toohey J “But the plaintiffs said that they relied upon Art. 9 of the Covenant which is set out in Sched. 2 to the *Human Rights and Equal Opportunity Commission Act*, in particular Art.9(1) and (4). Article 9(1) reads: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Article 9(4) reads: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”.... If ss. 54L and 54N are valid law of the Parliament, their contents prevail over the *Human Rights and Equal Opportunity Commission Act* and any relevant provision of the Schedules thereto.” Although referring to immigration law, the principle is clear i.e. the *Quarantine Act 1908*, being a valid law of the Parliament prevails over the human rights Covenants and the act of quarantining people reasonably suspected of having or carrying infectious disease(s) is a legitimate and lawful action. This view seems generally supported by other members of the Court, see for example Gaudron J at p. 55 where her Honour refers to the “well-accepted categories” of detention.
- 15 Cameron et al op cit p. 479.
- 16 Reynolds op cit p. 438.
- 17 *The Human Quarantine Legislation Review*.
- 18 Sen the Hon R Hill, Minister for Defence, Second Reading speech, Quarantine Amendment (Health) Bill 2003, Senate, *Debates*, 21 August 2003: p. 13798.
- 19 Reynolds op cit p. 439.
- 20 *Quarantine Act 1908 (Cth)* s.33.
- 21 Item 22.
- 22 Item 23.
- 23 Item 32 see the new section 35C.
- 24 *ibid.*, the new subsection 35C(3).
- 25 *ibid.*, the new subsection 35C(2).
- 26 *Ibid.*, the new subsection 35C(4).
- 27 *ibid.*, which must be in writing, see the new subsection 35C(1).

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- 28 *ibid.*, the new subsections 35D(1) and (2).
- 29 *ibid.*, the new subsection 35D(3).
- 30 *Quarantine Act 1908 (Cth)* subsection 35AA(4).
- 31 Item 39 repeals the existing s.62.
- 32 See the new subsections 35(1AAAA), 35(1B), 35A(3A).
- 33 Item 36 see the new paragraph 55B(d).
- 34 *ibid.*, see the new subsections 55E(2) and (3).
- 35 *ibid.*, see the new section 55F.
- 36 *ibid.*
- 37 *ibid.*, see new section 55G.
- 38 *ibid.*, new subsection 55G(4).
- 39 *ibid.*, new subsection 55G(3).
- 40 *ibid.*, new paragraphs 55G(5)(b) and (c).
- 41 *ibid.*, new subsection 55G(6).
- 42 *ibid.*, new subsection 55G(7).
- 43 *Quarantined to get independent opinion* in *Australian Financial Review* 22 August 2003 p. 22.
- 44 *Quarantine Act 1908 (Cth)* s.22. Note Item 18 of the Bill repeals and substitutes new subsections 22(1), (2) and (3).
- 45 *ibid.*
- 46 *Quarantine Regulations 2000 (Cth)* sub-regulation 6(1).
- 47 *ibid.*, sub-regulation 6(2).
- 48 *George v Rockett* (1990) 170 CLR 104 at 115–116.
- 49 *Quarantine Act 1908 (Cth)* s.82. Note, protection extends to acts done negligently.
- 50 *ibid.*, s.84.

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