The COVID-19 border closure to India: Would an Australian Human Rights Act have made a difference?

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Abstract
In late April 2021, the Commonwealth government determined to prohibit overseas travellers who had been in India from returning to Australia, subjecting them to heavy penalties for breach. This measure was controversial and unprecedented in Australia’s response to COVID-19, drawing sharp criticism for breaching human rights. This article analyses the human rights issues arising under the Health Minister’s determination, and the ensuing Federal Court case of Newman v Minister for Health and Aged Care. Against the backdrop of a renewed push for a national Human Rights Act, it finds that a national Human Rights Act could have made a difference.

Keywords
National Human Rights Act, COVID-19, border closure to India, Biosecurity Act 2015 (Cth)

On 30 April 2021, the Commonwealth government undertook a highly controversial step in response to the ongoing COVID-19 pandemic. The Commonwealth Health Minister made a determination to place a ‘temporary pause’ on overseas travellers, who had recently been in India, from flying to Australia (the Determination). The Determination commenced on 3 May 2021 and was due to expire on 15 May 2021 if not extended. Breach would attract a maximum penalty of $66,600, five years imprisonment or both.

The Determination was intended to include Australian citizens who had travelled to India. This kind of restriction had not been imposed earlier on Australian citizens in other countries experiencing COVID-19 outbreaks (eg, the United Kingdom (UK), United States and South Africa). More generally, Australia in its history had never attempted to wholly exclude its own citizens from returning home. In the ensuing controversy, the Determination was labelled in the media as a ‘travel ban’ which was ‘racist’ and ‘draconian’. Legal commentators argued it breached human rights and the Australian Constitution.

The Office of the United Nations High Commissioner for Human Rights weighed in, saying ‘[w]e have serious concerns about whether the … Determination – and the severe penalties which can be imposed for its breach – meets

1Minister for Health and Aged Care (Cth), ‘Travel Arrangements to be Strengthened for People who have been in India’ (Media Release, 1 May 2021) https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/travel-arrangements-to-be-strengthened-for-people-who-have-been-in-india.
2Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 (Cth).
3See, eg, Catalina Flores and Biwa Kwan, ‘Indian-Australians are Feeling Betrayed and Targeted by the Government’s “Racist” New Travel Measures’, SBS News (online, 2 May 2021) https://www.sbs.com.au/news/indian-australians-are-feeling-betrayed-and-targeted-by-the-government-s-racist-new-travel-measures.
4See, eg, Bevan Shields, ‘World Wondering What Decision Says About Us’, The Age (Melbourne, 5 May 2021).
5See, eg, Mills (n 3); Helen Irving, ‘India Travel Ban Breaches Constitutional Rights’, The Age (Melbourne, 6 May 2021); Liberty Victoria, ‘A Comment from Michael Stanton: What Does Australian Citizenship Even Mean Any More?’ (3 May 2021).

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Australia’s human rights obligations. Most relevantly, the human right to freedom of movement under the International Covenant on Civil and Political Rights (ICCPR) includes being free to leave any country and not being arbitrarily deprived of the right to enter a person’s own country. In addition, the right to life under the ICCPR encompasses the right not to be arbitrarily deprived of life. The Determination imperilled the lives of those Australian citizens left stranded in India, where the public health system had been overrun by COVID-19 infections.

Notably, ‘Australia is the only democratic country in the world’ without a national bill of human rights. In lieu of a bill of rights, the Commonwealth Parliament passed the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (HRPS Act), which implemented a human rights parliamentary scrutiny process. This article considers what potential impact a national Human Rights Act may have had on the decision to make the Determination, as well as the ensuing Federal Court case of Newman v Minister for Health and Aged Care (Newman). The potential influence of a national Human Rights Act on a particular legal controversy has been raised previously, but in a different context. The present case study argues that the enactment of a Human Rights Act could have made a difference to both the Determination and Newman case – in reasoning and perhaps in outcome.

The Determination and legislative framework

The Determination was made under the Biosecurity Act 2015 (Cth) (the Biosecurity Act). That Act provides for the recognition of a biosecurity emergency and the making of emergency requirements. The purposes of that Act include to provide for managing biosecurity risks and biosecurity emergencies (human or otherwise) and risks of contagion of infectious human diseases, and their entrance, emergence, establishment or spread in Australia.

Section 475 of the Biosecurity Act relevantly provides that the Governor-General may declare that a ‘human biosecurity emergency’ exists, on the advice of the Health Minister. A declaration of a human biosecurity emergency was made by the Governor-General on 18 March 2020 regarding ‘human coronavirus with pandemic potential’ that is posing a severe and immediate threat to human health on a nationally significant scale. The declaration period has been regularly extended since that date.

The making of a declaration enlivens the emergency powers of the Health Minister. Section 477(1) provides that during this period, the Health Minister ‘may determine any requirement that he or she is satisfied is necessary’ to, among other things, ‘prevent or control’ the entry, emergence, establishment or spread of the listed human disease. This confers extremely broad powers on the Health Minister, which can be exercised based on the Minister’s personal satisfaction. A determination cannot be disallowed by Commonwealth Parliament. It is also accompanied by heavy penalties for breach, noted above.

However, the Biosecurity Act does provide some safeguards. Section 477(4) requires that the Health Minister ‘must be satisfied’ the requirement is: likely to be effective in, or to contribute to, achieving its purpose; appropriate and adapted to achieve its purpose; no more restrictive or intrusive than is required in the circumstances; and the period that it applies for is only as long as is necessary. This partly reflects what is typically known in human rights law as a justification and proportionality test. That concept is regularly applied under Human Rights Acts.

In announcing the Determination, the Health Minister said it was ‘based on advice about the worsening COVID-19 situation in India’ and informed by ‘the proportion of overseas travellers in quarantine in Australia who have acquired a COVID-19 infection in India’. The Minister said: ‘[i]t is critical the integrity of the Australian public health and quarantine systems is protected and the number of COVID-19 cases in quarantine facilities is reduced to a manageable level’. The subsequently disclosed health advice of the Chief Medical Officer (CMO) revealed that ‘over 50% of overseas acquired cases [in Australia] since mid-April 2021 were acquired in India’.

The court proceedings: Newman v Minister for Health and Aged Care

The applicant, Gary Newman, was an Australian citizen born in Melbourne and aged in his 70s. On 6 March 2020,
prior to the declaration of a human biosecurity emergency, he flew to India to visit friends.25 However, as a result of the pandemic, he remained in India for over a year. In late 2020, Mr Newman attempted to book a flight home, but this was cancelled by the airline.26 He wanted to return home. Following the making of the Determination, Mr Newman brought judicial review proceedings in the Federal Court against the Health Minister.

Mr Newman brought the proceedings on several grounds of challenge based on both administrative law and constitutional law. The most significant were:

- The Determination was invalid because the Health Minister failed to properly consider whether the requirement is likely to be effective in, or to contribute to, achieving its purpose (s 477(4)(a)), and whether it was no more restrictive or intrusive than is required in the circumstances (s 477(4)(c)).27
- The Determination was invalid because as a matter of statutory interpretation pursuant to the ‘principle of legality’, there was no power under s 477 of the Biosecurity Act to wholly prevent an Australian citizen from entering.28
- Section 477 of the Determination was invalid because it impermissibly burdened an implied freedom of Australian citizens to enter Australia under the Australian Constitution and/or was not supported by any Commonwealth ‘head of power’ under the Australian Constitution.29

Given the absence of a national Human Rights Act, grounds of challenge based on human rights were not raised. Instead, as outlined above, Mr Newman relied on arguments that a freedom of citizens to enter Australia existed under the common law applicable to statutory interpretation and, by implication, under the Australian Constitution. The Constitution provides very few express rights protections, so they otherwise have to be implied by reference to the text and structure of the Constitution. Neither of these arguments involved applying human rights directly to the Minister’s decision.

On 10 May 2021, the Federal Court dismissed the administrative law grounds. Thawley J held that the Determination was valid. The Court found that the Health Minister had not failed to properly consider whether the Determination was likely to be effective in, or contribute to, achieving its purpose. Mr Newman’s argument was that the Minister had not considered the impact on the risk of infection within prisons, if potentially infected overseas returned travellers breached the Determination and were imprisoned pursuant to the penalty provision.30 This argument was too far removed from the ground of review and rightly dismissed.31

The Determination was also found to be no more restrictive or intrusive than was required in the circumstances. The CMO’s health advice had considered that this precondition was satisfied.32 To infer a failure to consider this requirement is against [the Minister’s] acceptance of the recommendation made.33 Moreover, the Determination contained express exemptions,34 and excluded international ‘Australian Government facilitated’ flights and ‘emergency medical evacuation’ flights.35

The Court held that the Minister had power under s 477 of the Biosecurity Act, properly construed, to wholly prohibit people including Australian citizens from entering Australia to prevent the entry of a human disease.36 The principle of legality (discussed briefly below) had been abrogated by the Act.

The Determination expired on 15 May 2021 and was not remade. Presumably, this was why Mr Newman’s proceedings were discontinued.37 The constitutional law grounds had been bifurcated, and the administrative law grounds given priority. As such, the constitutional law issues were left undetermined. Constitutional law scholar George Williams considered that the existing High Court jurisprudence ‘provides weak support for the idea that citizens have a constitutional right to re-enter Australia’, and has ‘not fully consider[ed] the issue’ before.38

**Overview of a national Human Rights Act model**

A Commonwealth Human Rights Act would be a statutory bill of human rights like those enacted in certain Australian jurisdictions (the Australian Capital Territory, Victoria and Queensland),39 as well as New Zealand and the UK.40 This

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25Ibid [36].
26Ibid.
27Ibid [45].
28Ibid [44(2)(a)], [67]–[68].
29Ibid [3].
30Ibid [45(1)].
31Ibid [59]–[60].
32Ibid [38].
33Ibid [61].
34Ibid [61]. See Determination (n 2) cl 7.
35[2021] FCA 517, [61]. See Determination (n 2) cl 4 definition of ‘relevant international flight’.
36[2021] FCA 517, [82]–[83].
37On 17 May 2021.
38George Williams, ‘Citizens’ Right to Return Home is Not Guaranteed’, The Australian (online, 15 March 2021) https://www.th australian.com.au/ commentary/citizens-right-to-return-home-is-not-guaranteed/news-story/5a30eb77b95d588de2079297d4ab6673 citing Air Caledonie International v Cth (1988) 165 CLR 462.
39Human Rights Act 2004 (ACT), Charter of Human Rights and Responsibilities Act 2006 (Vic), Human Rights Act 2019 (Qld).
40New Zealand Bill of Rights Act 1990 (NZ); Human Rights Act 1998 (UK).
can be compared to constitutional bills of rights like those enacted in Canada and South Africa.\textsuperscript{41} The statutory model was endorsed in the last attempt to enact a national Human Rights Act — the 2009 National Human Rights Consultation Report (Brennan report).\textsuperscript{42}

There are typically three key features to a Human Rights Act. First, a requirement on members of Parliament to prepare statements of compatibility to accompany new Bills for parliamentary scrutiny of human rights. Second, a requirement aimed particularly at courts and tribunals to interpret legislation where possible compatibly with human rights (but they cannot strike them down as constitutionally invalid). Third, members and bodies of the Executive are required not to act incompatibly with, or fail to give proper consideration to,\textsuperscript{43} human rights. Failure can then be challenged before the courts in, for example, judicial review proceedings.

Following the Brennan report, the Commonwealth Parliament enacted the HRPS Act, which broadly implemented the first feature of a Human Rights Act. The HRPS Act imposed a requirement to prepare statements of compatibility\textsuperscript{44} by reference to a range of international human rights treaties.\textsuperscript{45} It also established the Commonwealth Parliamentary Joint Committee on Human Rights, responsible for scrutinising legislation — informed by statements of compatibility — and reporting to Parliament.\textsuperscript{46}

However, the second and third key features of a Human Rights Act were not implemented. Thus, a true national Human Rights Act remains absent in Australia.

The second feature of a Human Rights Act, not considered at length in this article, co-exists with the common law principle of legality.\textsuperscript{47} The principle of legality is a presumption of statutory interpretation that Parliament does not intend to interfere with fundamental common law rights, freedoms, immunities and principles, or to depart from the general system of law. Here, the fundamental common law right to enter and reside, in the context of the Newman case, has significant overlaps with the human right to enter one’s own country. But that will not always be the case — there is ‘a wider field of application’ for human rights.\textsuperscript{48}

In relation to the third feature of a Human Rights Act, by comparison there is no general obligation on the Executive to act compatibly with human rights or to take human rights into account as a relevant consideration under Australian domestic law, breach of which could form grounds for court challenge.\textsuperscript{49}

Would a national Human Rights Act have made a difference?

This article now focuses on the first feature (human rights parliamentary scrutiny) and third feature (acting compatibly with and properly considering human rights) of a Human Rights Act. It analyses what impact these features potentially would have had on the Determination and Newman case. It makes the assumption that a national Human Rights Act would have enacted a human right to enter one’s own country and human right to life, modelled on the ICCPR.

Human rights parliamentary scrutiny process

The Minister’s emergency powers under the Biosecurity Act incorporate a justification and proportionality test in s 477(4). This is not a universal feature in legislation which is capable of limiting rights.\textsuperscript{50} Tellingly, the Act was developed as a ‘modernisation of the Australian biosecurity legislation’.\textsuperscript{51} It was enacted subsequent to the HRPS Act.

As the Explanatory Memorandum to the Biosecurity Bill said, it ‘includes a range of measures that can be tailored to accommodate an individual’s circumstances and aims to ensure individual liberties and freedoms are considered, as well as the risk posed by the disease’.\textsuperscript{52} Accordingly, proportionality-based safeguards were built into the Act, including the s 477 power.\textsuperscript{53}

The Statement of Compatibility expressed the view that the Bill was compatible with human rights,\textsuperscript{54} including the right to freedom of movement.\textsuperscript{55} It pointed to the ‘range of protections’ in s 477(4).\textsuperscript{56} The Parliamentary Joint Committee on Human Rights, upon scrutinising the Bill and Statement of Compatibility, agreed. In its view, the Bill had ‘been drafted in a manner which is consistent with

\textsuperscript{41}Canada Act 1982 (UK) c 11, sch B pt 1 (‘Canadian Charter of Rights and Freedoms’); Constitution of the Republic of South Africa Act 1996 (South Africa).

\textsuperscript{42}National Human Rights Consultation Committee, Parliament of Australia, National Human Rights Consultation Report (2009).

\textsuperscript{43}The proper consideration obligation exists at least with respect to the Australian Human Rights Acts: see Human Rights Act 2004 (ACT) s 40B(1)(b), Charter of Human Rights and Responsibilities Act 2006 (Vic) s 3B(1), Human Rights Act 2019 (Qld) s 58(1)(b).

\textsuperscript{44}HRPS Act, Pt 3.

\textsuperscript{45}This is a broader range than the human rights typically incorporated in a Human Rights Act. See HRPS Act s 3(1), definition of ‘human rights’.

\textsuperscript{46}HRPS Act, Pt 2.

\textsuperscript{47}Although it has been argued that interpretation pursuant to a Human Rights Act should be stronger as a statutory command: See, eg, Victorian Toll v Taha (2013) 49 VR 1, 62 [189]-[190] (Tate JA); Bruce Chen, ‘The Principle of Legality and s 32(1) of the Victorian Charter: Is the Latter a Codification of the Former?’ (2020) 31(4) Public Law Review 444, 450 (see fn 58 and other citations therein).

\textsuperscript{48}Momcilovic v The Queen (2011) 245 CLR 1, 50 [51] (French CJ). There is also a common law presumption of consistency with international law, including the ICCPR, but this was not raised in the proceedings: see Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

\textsuperscript{49}See discussion in National Human Rights Consultation Committee (n 42) 117–8 [5.6].

\textsuperscript{50}Indeed, the Biosecurity Act replaced the Quarantine Act 1908 (Cth) which contained a ‘reasonably appropriate and adapted’ test for exercise of its quarantine powers: s 4. This concept, drawn from constitutional law was until recently seen as a more limited form of proportionality testing.

\textsuperscript{51}Commonwealth, Parliamentary Debates, House of Representatives, 27 November 2014, 13428 (Barnaby Joyce, Minister for Agriculture).

\textsuperscript{52}Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 10.

\textsuperscript{53}See also the general principles affecting decision-making by a ‘biosecurity official’: Biosecurity Act (n 14) s 32.

\textsuperscript{54}Explanatory Memorandum (n 52) 19.

\textsuperscript{55}See also the general principles affecting decision-making by a ‘biosecurity official’: Biosecurity Act (n 14) s 32.

\textsuperscript{56}Ibid 31. See also 26.

\textsuperscript{57}Ibid 31.
Australia's human rights obligations and that limitations on rights have been well considered with appropriate safeguards. 65 67

Thus, the human rights parliamentary scrutiny process appeared to drive the development of safeguards in the Biosecurity Act. The member of Parliament introducing the Bill (and in theory, other members in debating and passing the Bill) turned their mind to the Bill’s impact on the right to freedom of movement. The effectiveness of this Commonwealth process in the absence of a complete Human Rights Act has been heavily critiqued. 58 Nevertheless, its influence on this particular Bill should not be overlooked. Assessment of the Bill against human rights standards, which would have otherwise occurred under a Human Rights Act, took place pursuant to the HRPS Act.

**Acting compatibly with and properly considering human rights**

The greater deficit in existing human rights protections revealed in this case study is the absence of a general obligation on the Executive (here, the Health Minister) to act compatibly with human rights or give proper consideration to human rights.

This was somewhat mitigated by the proportionality test built into s 477(4) of the Biosecurity Act. However, there can be a gap between drafting human rights laws which are human rights compatible, and the Executive applying those laws compatibly in decision-making. That is particularly so where the powers are broad and discretionary. As will be seen below, the obligation to act compatibly with human rights includes examination of the rights limited and the nature and values of those rights. The obligation to properly consider human rights includes

understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. 59

These are not expressly reflected in s 477(4) of the Biosecurity Act. That provision does not present the full human rights balancing equation.

Relevantly, the CMO’s health advice noted this ‘would be the first time that such a determination has been used to prevent Australian citizens … entering Australia’, and there was ‘the risk of serious illness without access to health care … and in a worst-case scenario, deaths’. 60 But these were not considered in human rights terms. The acting compatibly and proper consideration obligations are ‘intended to have a normative effect’ on Executive decision-making 61 by ensuring that human rights considerations are taken into account in administrative practice. 62

At international human rights law, the right to enter one’s own country and the right to life are among the most sacred. It has been observed by the United Nations Human Rights Committee – the quasi-judicial expert body on the ICCPR – that the right to enter one’s own country ‘recognizes the special relationship of a person to that country’ 63 and ‘there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.’ 64 The right to life is ‘the supreme right’ and of ‘crucial importance.’ 65 That right is ‘most precious for its own sake as a right that inheres in every human being’ and ‘is the prerequisite for the enjoyment of all other human rights’. 66

Such matters are relevant to the Executive’s obligations under a Human Rights Act. For example, a relevant factor under a justification and proportionality test is ‘the nature of’ the right limited. 67 The discussion above highlights the significant ‘values and interests’ 68 protected by the nature of the right to enter one’s own country and right to life, and the high bar involved to establish that a limit does not breach these rights. Under a national Human Rights Act, this would have been relevant to whether the Determination was a non-arbitrary deprivation, and a justified and proportionate limit. 69

On its face, the CMO’s health advice – relied upon by the Health Minister in making the Determination – was deficient in its human rights reasoning. Justification and proportionality testing was undertaken, as mandated by s 477(4), and some of its impacts noted. However, the advice did not explain the Determination by reference to the right to enter one’s own country and the right to life, and their significant nature and values.

That is unsurprising, given the lack of a domestic obligation on Executive decision-makers to comply with and

57 Parliamentary Joint Committee on Human Rights, Parliament of Australia, Eighteenth Report of the 44th Parliament (Report, 10 February 2015) 33 [1.142].
58 See, eg, Adam Fletcher, ‘Australia’s Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?’ (Melbourne University Publishing, 2018); Daniel Reynolds, Winsome Hall and George Williams, ‘Australia’s Human Rights Scrutiny Regime’ (2020) 46(1) Monash University Law Review 256.
59 Castles v Secretary, Department of Justice (2010) 28 VR 141, 184 [185].
60 [2021] FCA 517, [38].
61 Bare v IBAC (2015) 48 VR 129, 203 [235] (Tate JA).
62 See, eg, Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).
63 Human Rights Committee, General Comment 27: Article 12 (Freedom of Movement), 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [19].
64 Ibid [21].
65 Human Rights Committee, General Comment No 36: Article 6, Right to Life, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [2]; Office of the UN High Commissioner for Human Rights, CCPR General Comment No 6: Article 6 (Right to Life), adopted at the 16th session of the Human Rights Committee (30 April 1982) [1]. Indeed, the right to life is ‘non-derogable’ under international law: ICCPR, art 4(2).
66 Ibid General Comment No 36.
67 See Human Rights Act 2004 (ACT) s 28(2)(a), Charter of Human Rights and Responsibilities Act 2006 (Vic) s 7(2)(a), Human Rights Act 2019 (Qld) s 13(2)(a).
68 Kracke v Mental Health Review Board (2009) 29 VAR 1, 41 [139]. See also PJB v Melbourne Health (2011) 39 VR 373, 449 [335].
69 See further Alistair Pound and Kylie Evans, Annotated Victorian Charter of Rights (Lawbook Co, 2nd ed, 2018) 88 [CHR.9.40], 54 [CHR.7.40], 66–67 [CHR.7.280] in the Victorian context.
specifically turn their minds to human rights. This might have shifted the balance to a different outcome in the Determination. At the very least, it would have played an important role in the balancing process and made the Determination’s rationale more robust. These obligations are of a ‘stringent’ standard and involve ‘a greater intensity of review’ by the courts.

Turning then to the Newman case, assuming the CMO had referenced human rights but still reached the same outcome, would a national Human Rights Act have made a difference to the proceedings? This is a difficult question. Common law courts often defer to the Executive’s evaluative judgment when confronted with challenges to decisions made during emergency situations. This Determination involved difficult, competing considerations in a public health emergency — balancing between the rights of stranded overseas travellers in India, the general population within Australia (who also have the right to life and are entitled to protection of public health), and resource allocation issues regarding the hotel quarantine system.

Nevertheless, the experience in Australian jurisdictions with a Human Rights Act tells us that they can have a real impact in holding Executive decision-makers to account on judicial review. This includes in emergency situations involving resourcing decisions. In the Victorian case of Certain Children v Minister for Families and Children (No 2), the Supreme Court made findings of breach of human rights and granted remedies in respect of a decision by the Executive to transfer young persons in youth justice to a hastily repurposed unit of a maximum-security adult prison. The government’s arguments — that rioters had seriously damaged a youth justice centre, there was a general accommodation crisis in the youth justice system, and this was a resource allocation decision — did not pass muster in that instance.

In Newman, the CMO placed significant emphasis in his advice, among other things, on the ‘integrity’ and ‘capacity’ of the hotel quarantine system (noting ‘the risk of leakage’ which had led to recent community transmissions). These are resource allocation-related issues. A Human Rights Act may have led the Federal Court on judicial review to examine these justifications more rigorously. Questions could then have been asked as to why Australia’s quarantine system, at this stage of the COVID-19 pandemic, failed to have adequate quarantine facilities to sufficiently manage the repatriation of our own citizens. A national Human Rights Act may have enabled a court finding that the Determination breached human rights, given the high significance of the rights impacted and degree of severity of restrictions (even if temporary).

Conclusion

The Newman decision poses an interesting case study as to whether a national Human Rights Act would have made a difference. It is complicated by a couple of factors. First, the legislation is somewhat exceptional in that safeguards were drafted in the Biosecurity Act, due to the influence of the human rights parliamentary scrutiny process. But this should be seen as a success of a key aspect of a Human Rights Act, not an argument against enacting one. Second, the exercise of emergency powers often involves decisions made by the Executive at the margins of compatibility/incompatibility, with the courts reluctant to intervene.

In any event, this case study highlights the significant limitations of the existing hotel quarantine system in Australia and the flow-on consequences this has had on Executive decision-making and human rights. Moreover, the way in which the Newman proceedings needed to be brought — particularly on indirect constitutional law grounds, rather than directly on human rights grounds — is illuminating.

A national Human Rights Act would have provided more certainty as a complete and democratically agreed set of rights — such as the right to enter one’s own country and the right to life. It would shape the development of legislation compatibly with human rights (thereby augmenting or replacing the HRPS Act). More significantly, a national Human Rights Act would encourage greater justification on human rights grounds when the Executive makes decisions, even in hard cases, and provide for the direct enforcement of human rights before the courts when there is a failure to do so.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This work was supported by an Alfred Deakin Postdoctoral Research Fellowship.

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70 Certain Children v Minister for Families and Children (No 2) (2017) 52 VR 441, 503–4 [199]–[200] citing Krakke v Mental Health Review Board (2009) 29 VAR 1, 18–19 [27]: 510 [223] citing Bore v IBAC (2015) 48 VR 129, 226 [299] (Tate JA).

71 Certain Children v Minister for Families and Children (No 2) (2017) 52 VR 441, 507 [212] citing PJB v Melbourne Health (2011) 39 VR 373, 443–4 [315].

72 See Bruce Chen, ‘Comments: The Victorian COVID-19 Response: Reflections on Loeilo v Giles’ (2021) 32(1) Public Law Review 8, 13: Janina Boughey, ‘Executive Power in Emergencies: Where is the Accountability?’ (2020) 45(3) Alternative Law Journal 168, 171.

73 (2017) 52 VR 441.

74 Ibid 576–7 [457]–[458], 580–1 [471]–[475]. See further discussion in Tessa van Duyn, ‘Gaining Teeth’ (2018) March Law Institute Journal 44.

75 [2021] FCA S17. [38].

76 This is a general ongoing issue, post-Newman: see Australian Human Rights Commission, ‘Statement on Australia’s International Arrival Caps’ (Media Statement, 7 July 2021); Jane McAdam and Regina Jefferies, ‘Why the Latest Travel Caps Look Like an Arbitrary Restriction on Australians’ Right to Come Home’, The Conversation (online, 5 July 2021) https://theconversation.com/why-the-latest-travel-caps-look-like-an-arbitrary-restriction-on-australians-right-to-come-home-161882.