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A Federal Charter of Human Rights: Would it make any difference?

A report prepared for the Australian Human Rights Commission by students of the RMIT Juris Doctor Program.

Brigette Rose, Frank Aloe, Helen Metzger, Luke Fowler and Veronica Snip.

RMIT UNIVERSITY

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Executive Summary

Background to the project

This project is the result of a series of discussions between the Australian Human Rights Commission (AHRC) and the Centre for Innovative Justice (CIJ) about how law students might contribute to discussions about human rights in the community. Together, the AHRC and CIJ designed a research project that would create an opportunity for RMIT Juris Doctor students to make a tangible contribution to the national debate about the recognition and protection of human rights in Australia. With the expert guidance of industry mentors from the Human Rights Law Centre and Refugee Legal, and supervision of staff from the CIJ, students assessed the potential impacts of one of the mechanisms through which human rights protections might be enhanced nationally without requiring Constitutional amendment: a Federal Charter of Human Rights.

Methodology

The potential impacts of a Federal Charter of Human Rights are forecast through the creation of a hypothetical *Federal Charter of Human Rights and Responsibilities Act 2016 (Cth)* ('the Charter') and consideration of how it may have impacted the construction and application of recent Australian legislation and case law. An impact assessment was undertaken for cases and laws across five broad themes with human rights implications: anti-association; migration; national security; disability discrimination and paperless arrests. The impact assessments do a number of things. Firstly, they indicate whether the lack of a federal legislative protection of human rights contributed to the outcome in the particular case. Secondly, they predict whether and how the Charter would have made a difference to the creation of that law, its interpretation and application by government decision-makers and its interpretation by the courts. The Charter is based upon the existing 'dialogue' model charters in Victoria and the Australian Capital Territory, as well as other jurisdictions internationally, such as the United Kingdom and New Zealand. Under a dialogue model, the courts and the parliament engage in constructive dialogue about whether Australian laws are consistent with human rights, and if not, whether the inconsistency is reasonable and appropriate.

The Charter provides a step-by-step process that decision makers should follow when faced with these complex issues. The process prompts decision-makers to ask questions, including: Who will be most affected? Which right is being limited? How important is that right relative to

the circumstances? And, if the community has a goal, how can that goal best be achieved while ensuring all people are properly heard and respected?

By applying the Charter retrospectively to laws passed and cases determined, we are able to consider if the Charter would have altered the decision making process or the outcome. For example, would the Queensland Government have introduced laws that mandate harsh criminal penalties for members of motorcycle gangs who associate with one another? Could the High Court have found the indefinite detention of an asylum seeker consistent with Australian law?

The methodology we determined and followed in undertaking this human rights impact assessment is laid out on page 4 of this report.

Summary of findings

Although an imaginative exercise, the creation of a hypothetical Charter and the application of a considered and consistent analysis to recent legislation and case law enabled key procedural and thematic impacts to emerge.

The three key impacts of a Charter were found to be:

1. Increased transparency: the parliament must be clear when it intends to pass laws which may infringe the rights of individuals.
2. Increased debate: through the consideration of compatibility with human rights.
3. Increased consideration of alternative means of achieving a particular purpose by parliament and the courts.

These findings demonstrate that a Charter would not wrest power from the parliament and place it into the hands of the courts. Rather, it demonstrates that it would open new lines of communication between the parliament, the courts and the community about human rights. This may, in turn, reduce the frequency of legislation and decision-making that infringes the rights of individuals and the litigation that results. We hope that this paper offers up a useful tool for measuring the impact of a Charter and that it stimulates debate in the community about the need for stronger human rights protections in Australia.

Flowchart of Process

STEP ONE
Designing the 'model' Charter

- Used Victorian Charter as a base, then made adjustments influenced by the ACT, UK and NZ models, as well as recommendations from eight-year review of the Victorian Charter and submissions made to the National Human Rights Consultation (2009).
- Included: more expansive rights than Victorian Charter; right to an independent cause of action if rights breached; courts have power to award damages where breach of rights found to have occurred.
- Drafted the Australian Charter of Human Rights and Responsibilities Act 2016 (Cth) (Hypothetical) (Appendix 1).

STEP TWO
Defining the Rights

- Identified the most significant rights limited or infringed by each case or law (Further defined at Appendix 2, 'Glossary of Rights Reviewed').
- Determined the nature and scope of each specified right using UN general comments and jurisprudence. Defining the rights in this way helped us to identify how parts of legislation or actions of decision makers affected those rights.

STEP THREE
Analysing Legislation

Considered how the Charter would impact the legislative process for each piece of legislation analysed, asking:

- Does the legislation limit rights? (Defining the scope of the rights was an essential precursor to this step)
- Is the limitation compatible with the right? This was determined by applying the proportionality test, which involves considering the nature of the right/s, importance and purpose of legislation, what kind of limitation of the right occurs, and less restrictive means available to achieve the legislation's purpose.
- If incompatible with a right, can override declaration be made and justified by relevant Minister?

STEP FOUR
Analysing Cases

- Considered how the Charter would impact the legislative process for each piece of legislation analysed, as above.
- Considered how the Charter would affect the decision making of public authorities and whether it would alter the outcome.
- Considered how the Charter would impact the Court's interpretation of the relevant legislation, identifying any potential breach of the Charter or declaration of inconsistency that might have been found.

STEP FIVE
Common Impacts Identified

From the group of analyses, common impacts of the Charter across the cases and legislation were identified.

1. Introduction

1.1 Background to the Project

The Australian Human Rights Commission (AHRC) approached the Centre for Innovative Justice (CIJ) about supporting students to undertake an independent piece of research which forecasts the possible impacts of a federal human rights instrument. Together, the AHRC and CIJ designed a research project that would create an opportunity for RMIT Juris Doctor students to make a tangible contribution to the national debate about the recognition and protection of human rights in Australia. The project assesses the potential impacts of one of the mechanisms through which human rights protections might be enhanced nationally without requiring Constitutional amendment: a Federal Charter of Human Rights.

1.2 What are human rights?

Human rights, when they are recognised, protected, and promoted, can become the most ordinary of things. If we walk out our door in the morning without fearing violence, we enjoy our right to liberty and security of person. If we meet friends in a park without fear of being arrested, we enjoy our freedom of association. If we take a train or plane to visit our family, we enjoy freedom of movement. If we can get on that train or plane without being told that our body, abilities, racial group, religion, or gender prevents us from doing so, we enjoy the right to equality and non-discrimination. If we have a birth certificate that lists a country of citizenship, we enjoy our right to a nationality.

Human rights can become so ordinary that many of us may never know, or need to know, that we have them. This is often how rights can become endangered – as we become less aware that we enjoy them, the less we notice them being eroded. Those same rights may not be protected when we *do* need them. For people whose rights are *not* recognised, or are limited, ignored, or violated, the consequences can be severe. This may be especially so for unpopular cross-sections of the population or for vulnerable persons.

People in prisons, offshore detention facilities and hospitals, as well as people with disabilities and from particular racial groups or minorities, are at greater risk than others of having their rights infringed, because they are out of view and out of favour. Laws which protect rights can

be subtly eroded, or boldly changed without transparent and robust debate about the implications of those changes on particular individuals or groups.

Most human rights can be reasonably and lawfully limited in circumstances which require them to be balanced against other human rights.[1] Some rights, such as freedom from torture and slavery, are understood to be absolute. This distinction is significant, as it recognises that some rights are intrinsic to every person's existence and can never justifiably be limited. In addition to this, because we live in communities, rights are often in interplay. For example, one person's right to be free from violence and another's right to liberty may be in conflict. It is the job of parliament, as lawmakers, and courts, as interpreters of the law, to determine where and how to strike a balance between the enjoyment of one person's rights and the protection of another's. In complex areas such as national security or criminal punishment a balance must be reached between individuals' freedoms, protections and responsibilities.

1.2 Current human rights protections in Australia

Many people are unaware of how or whether human rights already exist in Australian law. Some rights are legally protected by the Constitution or other pieces of legislation, or at common law[2]. For example, the Australian Constitution expressly protects the right to vote[3], to just compensation for acquired property[4], to trial by jury for indictable criminal offences[5], and forbids legislation prohibiting the right to free exercise of any religion.[6] The Constitution has also been interpreted by the courts to imply the right to freedom of political communication.[7] Federal and state parliaments have enacted specific legislation protecting and promoting many of the values that we have established that we, as a community, wish to uphold; for example, the various equal opportunity and anti-discrimination acts,[8] the Racial Discrimination Act,[9] the Disability Discrimination Act[10] and the Fair Work Act.[11] Criminal laws make the infringement of some rights an offence – for example, holding someone hostage inhibits their right to liberty; assaulting someone infringes their right to security of person. Both of these acts are criminal offences.[12]

In some states and territories in Australia, human rights have been incorporated more explicitly through the introduction of specific human rights legislation. In 2004, the ACT introduced a Human Rights Act,[13] and, in 2006, Victoria introduced a Charter of Rights and Responsibilities.[14] As recently as November 2016, the Queensland Government announced its intention to introduce a Human Rights Act, similar to Victoria's Charter.[15] Despite pre-implementation criticisms that the Acts would dramatically increase litigation in these jurisdictions,[16] neither

the ACT nor Victoria have been overburdened with litigation relying on the legislation.[17] Instead, these human rights protections have facilitated a balanced and proportional approach to lawmaking and interpretation at the state and territory level, offering transparency when human rights are limited and highlighting when legislation is inconsistent with human rights. The reach of these instruments only extends to the borders of the state and territory which introduced them and cannot influence federal lawmaking powers or interpretation by federal courts.

The 'rule of law', which underpins the Australian legal and political system, requires that everyone (including the public, politicians, the executive government, the judiciary and law enforcement) are subject to the same laws. Through the rule of law, the principle of *equality before the law* is reflected. While there is an expectation that parliament will not infringe human rights, this expectation can be removed by clear and plain intention of parliament to make laws which will infringe rights.[18]

The protection of some human rights are not as certain as one might think. Protections do not extend to all civil and political rights[19] and they do not protect everyone in Australia. For example, while the Constitution has been interpreted by the courts to imply the right to freedom of political communication, there is little protection in Australian domestic law for a person's right to freedom of expression generally.[20] In this way, Australia is distinct from the United States, where a Bill of Rights offers protection to a person's freedom of communication generally.[21]

Australia, unlike the United Kingdom, the European Union, the United States, New Zealand, South Africa and Canada, does not have a constitutional or legislated charter that expressly protects fundamental rights and liberties.[22] A Federal Charter has the capacity to bring all fundamental civil, political, economic, social and cultural rights together in one clear document, providing an effective tool for the government, parliament, the courts, the media and the public to use. It would educate those in power and the Australian and international community about what is expected in Australian society and the scope of human rights that are protected here.

1.3 Project aims

This project sought to assess how the introduction of a Federal Charter of Human Rights might affect the legal, political and social landscape in Australia. To do this, we considered the impact that a Charter might have had on five current pieces of legislation as well as five significant

Australian cases, across the policy areas of anti-association, migration, national security, anti-discrimination and minor criminal infringements. In undertaking these impact assessments, we aimed to highlight some of the existing gaps in human rights protection in Australia and to understand how a Charter might operate and what it can bring to the process of human rights protection and awareness. We hope that analysing the impacts in this way might deepen the discussion about how rights can be best protected in Australia, in a way that is engaging and accessible for the community.

2. Methodology

2.1 Imagining the Charter

For the purpose of this report, a hypothetical *Federal Charter of Human Rights and Responsibilities Act 2016 (Cth)* ('the Charter') has been imagined in order to assess the impact that such a Charter would have upon legislation, government decision-making, case law and individuals into the future. These predictions are made by applying the Charter retrospectively to laws and cases from the past two decades and considering if and how processes and outcomes may have been altered. The Charter is a 'dialogue model', based on the Victorian Charter but also influenced by other dialogue model charters, including those in force in the Australian Capital Territory,[23] the United Kingdom and New Zealand.[24] It is also influenced by recommendations from the eight-year review of Victorian Charter and submissions made to the National Human Rights Consultation (2009).[25] The primary distinctions between the Charter and the Victorian Charter are:

- There is no requirement for a foundational cause of action[26] before a person can bring an action for relief of remedy on the grounds of unlawfulness arising because of the Charter. An allegation of unlawfulness arising because of the Charter is sufficient grounds.
- The rights protected under the Charter include those protected under the *International Covenant on Civil and Political Rights* (ICCPR) as well as the *International Convention on Economic, Social and Cultural Rights* (ICESCR).[27]

For the purpose of this exercise, from herein, references to the Charter (except where otherwise noted) are to the hypothetical Charter and the resulting steps that it would necessitate.

2.2 How does the Charter work?

The aim of the dialogue model is to facilitate a constructive conversation between the courts and the parliament about whether Australian laws are consistent with human rights, and, if not, whether the inconsistency is reasonable and appropriate.[28] The model allows the courts to interpret the meaning of statutes consistently with human rights, and while the parliament must take the court's findings into consideration, the parliament will have the final say.
The Charter creates a legal avenue for a person who alleges that their human rights have been infringed to seek redress but does not alter the right of parliament to make laws as it sees fit. It

is based upon the recognition that parliament fundamentally decides how 'processes… should be altered to achieve…human rights protection.'[29] This model would impact upon all three branches of government in the following ways:

2.2.1 Impacts on the Executive

Requirement to issue statements of compatibility.*[30]*

When a bill is introduced into parliament, the relevant minister is required to 'indicate whether or not the proposed legislation is compatible with human rights standards'[31] by tabling a statement of compatibility. Parliament is then able to debate the compatibility of the legislation, bringing to light any exceptional circumstances or states of emergency which may exist to justify limitations upon human rights.

As described in *Momcilovic,*[32] this requirement of the Charter would encourage Parliamentarians to provide justification for overriding human rights, and for these to be scrutinised through parliamentary debate. A provision which limits human rights 'must relate to concerns which are pressing and substantial' and, in addition, be 'rationally connected' and proportionate to the objective of the legislation.[33] This ensures that human rights considerations become an 'integral part of the law-making process.'[34] The statement of compatibility does not, however, encroach upon the sovereignty of parliament, as the statement of compatibility does *not* affect the validity or operation of the law.[35]

2.2.2 Impacts on the Legislature

Requirement to issue an override declaration when human rights can be justifiably limited.[36]

An override declaration contained in the Charter provides the legislature with the power to expressly state that human rights considerations do not apply to the passing of certain statutes. This provision requires the member presenting the Bill to explain the exceptional circumstances which apply and 'justify' overriding protected human rights.[37] While this provision maintains the legislature's control over what it legislates, it places it under additional scrutiny when it intends to limit human rights. Parliament may be less inclined to introduce legislation that is inconsistent with human rights if it were required to publicly declare its intention to create laws that infringe our human rights.[38] This is the underlying premise of a dialogue model, as the government will be held to a higher standard of accountability, and will be required to justify to the public why human rights are limited in certain circumstances.

2.2.3 Impacts on the Judiciary

Requirement to interpret legislation and decisions consistently with the protection of human rights, where possible.

The Charter places a clear obligation upon the courts to interpret legislation and decisions, insofar as it is possible, consistently with the human rights protected under the Charter.

Power to issue remedies where a breach of human rights is found to have occurred.

An aggrieved person is able to bring an action to the court based on a breach of their human rights.[39] This 'empower[s] individuals to assert their rights' and serves as a signal to public authorities that 'there will be consequences for breaches of human rights.'[40] In addition, the court is able to issue an appropriate remedy, which, in the case of this Charter, may include the payment of money in recognition of damages caused.[41]

While the court is able to hear cases involving alleged human rights infringements (in breach of the Charter), beyond issuing a relevant remedy it is unable to alter the application of the law into the future.[42] This ensures a clear separation of powers between the three branches of government as 'the courts [should] not have the power to invalidate legislation.'[43]

Power to make declarations of inconsistent interpretation.[44]

Where the court deems the legislation to be inconsistent with the Charter, it may issue a declaration of inconsistent interpretation. This declaration serves to notify parliament of the inconsistency, and once this has occurred, it is up to parliament to 'consider the future of that law.'[45] This provision is based upon the UK *Human Rights Act 1998*[46], the NZ *Human Rights Act 1993*,[47] and the recommendation of the Australian Human Rights Commission, that a 'mechanism to alert parliament when the court finds that a law cannot be interpreted consistently with human rights' should be implemented.[48]

2.2.4 Impacts on public authorities exercising public functions

Requirement to act compatibly with human rights.

This Charter applies to 'public authorities',[49] including an agency, department, public official or any other entity who carries out functions of a public nature. This means that any person exercising a function of a public nature must act consistently with the Charter, and the authority they act on behalf of can be liable where breaches of human rights protected under the Charter are found to have occurred. The Charter does not apply courts or Tribunals exercising judicial

(rather than administrative) functions. Private companies and individuals acting on their own behalf are not required to comply with the Charter.

2.3 Which human rights does the Charter protect?

The human rights which are explicitly protected under the Charter draws on the rights protected by the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention on Economic, Social and Cultural Rights* (ICESCR). The ICCPR seeks to ensure that 'all people are able to participate in public and political affairs,'[50] while the ICESCR 'creates obligations on government to progressively realise a diverse range of economic, social and cultural rights.'[51] These rights have been chosen based on the premise that human rights are 'indivisible and interdependent',[52] and that civil and political rights can be difficult to achieve if economic and social rights are not protected.[53]

However, based on the recognition that the rights protected by the ICCPR and ICESCR are not an exhaustive list of human rights, section 35 of the Charter provides that international law can be considered when interpreting human rights compatibility. By implication, international treaties ratified by Australia, beyond those referenced within the Charter, such as the *Covenant on the Elimination of All Forms of Discrimination Against Women,* and the *International Convention on the Elimination of All Forms of Racial Discrimination,*[54] are able to be considered when interpreting the compatibility of a provision.

While all rights are important, those that are listed as absolute and non-derogable by the ICCPR require universal enforcement, and may only be limited in very particular circumstances.[55] The distinction between absolute and non-derogable rights is significant, although these categories are 'often conflated and confused,'[56] serving to distinguish the significance of certain rights above others. This is evident as absolute rights 'cannot be limited in any way, at any time, for any reason,'[57] and as such, represent the most fundamental rights that must always be protected, regardless of the circumstances. These rights include the right to be free from torture, the right to be free from slavery and the prohibition on genocide. Conversely, non-derogable rights represent those which cannot be completely suspended (however, can be reasonably limited) in times of national emergency.[58] These rights include freedom of speech, the right to liberty and security of person, and the freedom of thought, conscience and religion.[59]

These factors are considered in the formulation of the Charter, as rights are divided between absolute, non-derogable and all others to represent this distinction, and highlight the differing analyses undertaken.

2.4 Steps taken to assess impact of the Charter on cases and laws

1. Does the legislation or case involve the infringement of rights protected by the Charter?
   Identify any rights of individuals that may be infringed by the proposed legislation or decision. Defining the scope and nature of rights (outlined in Appendix 2 'Rights Recognised') was essential to ensuring a consistent interpretation of rights across the analyses.

2. Proportionality Test
   Based on the recognition that rights 'must be balanced against each other and against other competing public interests,'[60] a proportionality test was applied to the selected provisions. This test is based upon section 7(2)[61] of the Victorian Charter,[62] which imposes a 'stringent standard of justification' upon lawmakers.[63] This is effectively the test that Parliament would have to apply to each new law it sought to introduce. We undertook a detailed analysis based upon the provisions of section 7(2) which addressed:

   i) the nature of the right;
   ii) the importance and purpose of the limitation;
   iii) the nature and extent of the limitation;
   iv) the relationship between the limitation and its purpose; and
   v) any less restrictive means reasonably available to achieve the purpose of the limitations.

   Additional materials such as explanatory memorandum, second reading speeches and cross-jurisdictional jurisprudence and commentary were also analysed to identify the importance of the human rights limitations in proportion to Parliament's intended purpose.

   The process of identifying any less restrictive means of achieving Parliament's intended purpose is particularly significant, as it enabled an in-depth analysis of amendments which could be implemented without altering the law's application.

3. Interpretation

   Following the proportionality test, the 'special interpretative obligation'[64] under section 35 of the Charter[65] was applied to provisions deemed to have disproportionately limited human rights. This was achieved by considering whether the statutory provision could be interpreted in a way that was compatible with human rights based upon standard principles of statutory interpretation.[66] Where a provision could reasonably be read in a compatible manner, this interpretation of the legislation was adopted, based on the presumption that parliament does not intend to disregard human rights unless clearly stipulated.[67] It is worth noting that there has been significant debate in the UK about the how to determine whether it is possible to read a statutory provision in a comparable manner with human rights. Current precedent set by the House of Lords[68] favoured broader statutory interpretation principles, which is not limited to the words of the statute but includes considerations of the broader purpose of the legislation[69].

   Analysing laws in this way still requires an element of guesswork, but provides an indication of whether human rights are proportionally limited, and, where they are not, presents alternative ways to achieve the same or similar purpose which could be considered and implemented. As discussed in future chapters, parliament will always retain its power to decide if, when, and how to respond to such conclusions and findings.

4. Likely outcome

   Where a provision could not be interpreted in a way that was compatible with human rights, we considered the options available to the parliament (issuing an override declaration) and the court (making a declaration of inconsistent interpretation).

It is worth noting that this process is laid out in the first impact analysis (immediately below) in relation to Charter's impact on the *Vicious Lawless Association Disestablishment Act 2013* (Qld). In the interest of brevity, such detail is not provided in the remaining impact assessments, despite this process having been followed for each to determine the impact of the Charter.

3. Impact Assessments

3.1 Anti-Association

Summary

The following impact assessment discusses the effect the Charter would have had on the passage of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) through Parliament and the effect it would have had on the High Court decision in *Kuczborski v The State of Queensland.*[70]

The decision in *Kuczborski v The State of Queensland*[71] considered the so-called suite of 'Anti-Bikie laws', including sections of the *Criminal Code 1899* (Qld)[72] and sections of the *Liquor Act 1992* (Qld)[73]. The court ruled that the plaintiff, Mr Kuczborski, did not have standing, that is, a protectable legal interest, to challenge sections of the *Vicious Lawless Association Disestablishment Act 2013* (Qld)[74],the *Bail Act 1980* (Qld), or sections of the *Criminal Code 1899* (Qld).[75]

The assessment will show that provisions of the V*icious Lawless Association Disestablishment Act 2013* (Qld) – which can add 10 or 25 years to the sentence of a defendant merely for being an associate of a declared criminal organisation, without the possibility of parole – limit the right to liberty, the right to equality before the law,[76] and the right to freedom of association. The analysis shows that the provisions would fail the reasonable limits test set out in the Charter, that the Charter would have led to a robust public discussion of human rights by both the parliament and the media, and that the lawmakers behind the enactments could not make a strong case for an override of the Charter based on exceptional circumstances.

This analysis shows that sections of the *Criminal Code 1899* (Qld) limit the right to peaceful assembly, the right to freedom of association and the right to a fair trial. It will show that the provisions considered would not pass a reasonable limits test and, further, that certain provisions could be held to be invalid, pursuant to the Australian Constitution, which states that, if a federal law and a state law cannot be interpreted consistently, then the federal law will prevail.[77]

3.1.1 The *Vicious Lawless Association Disestablishment Act 2013* (Qld)

The *Vicious Lawless Association Disestablishment Act 2013* (Qld) (the Act)'s purpose is to:

- 'disestablish associations that encourage, foster or support persons who commit serious offences' with the aim of promoting 'public safety and security', and
- 'deny to persons who commit serious offences the assistance and support' they would ordinarily receive by virtue of their association with 'other persons who participate in the affairs of the associations'.[78]

Does the legislation limit rights?

The Act contains four provisions that may be inconsistent with the Charter. As the short title of the Act suggests, it targets individuals described as 'vicious lawless associates'. Section 5 of the Act describes a vicious lawless associate as an individual that commits a declared offence,[79] is a participant in the affairs of an association, and committed the act considered a declared offence while a member of the association. Section 3 of the Act defines an association as a corporation, an unincorporated association, a club or league, or any group of more than three people 'associated formally or informally and whether the group is legal or illegal'. Section 5(2) of the Act provides that a person is *not* a vicious lawless associate if they are able to prove that the association is *not* an association that has 'as one of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences'.

The Act stipulates that a court, when sentencing an associate of a declared organisation, must add a minimum of 15 years onto the already prescribed sentence,[80] and, if the defendant is an office bearer of the organisation, the court must add another 10 years.[81] This is a mandatory requirement; the court has no discretion, and may not reduce this sentence for any reasons other than if the defendant agrees to cooperate with law enforcement officers.[82] The Act also deals with the eligibility for parole for vicious lawless associates. The law restricts the decision-making powers of public authorities insofar as it removes the parole officer's discretion to grant parole to a convicted offender during the added 15 or 25-year period.[83] The Act provides an example of how the provision may operate:

> A vicious lawless associate is sentenced to 5 years imprisonment for a declared offence. The vicious lawless associate is an office bearer in an association and the declared offence was done for the purposes of the association, so the further sentences imposed on the associate a total of 25 years. The sentencing court fixes a notional parole eligibility date for the base sentence as a date 3 years in the future. However, under subsection (2), for this Act and the *Corrective Services Act 2006*, the associate's parole eligibility date for the period of imprisonment is a date 28 years in the future.[84]

Impacted right: right to freedom of association

Sections 3 and 4 of the Act limit the right to freedom of association. The definitions of 'association' and 'participant' in the Act are arguably too broad to justify a claim based on public order when an association can be formed by any group of three persons meeting together and a 'participant' can be a person who has attended more than one such meeting. The Act clearly aims to limit the ability for associations to recruit and for people to associate in any way with them, whether that be drinking together in a bar with more than two other associates[85] or attending more than one meeting of the association. While this law limits this right, its purpose is to 'disestablish' criminal associations, and the definitions in the Act, while harsh, serve a clear purpose. Accordingly, penalties for consorting in such a way could well be justified in the maintenance of law and order.[86] There are, however, no penalties for merely being an associate of a criminal association in and of itself. The provisions of the Act only apply to associates found guilty of committing an offence, which begs the question as to why extant provisions do not serve the same purpose, and, further, why an offence is considered more serious merely as a result of the perpetrator's membership of a criminal association.

Impacted right: Right to liberty and security of the person

The sentencing and non-parole provisions limit the right to liberty and security of person. The imposition of a possible mandatory 25-year sentence for an offence merely because the defendant committed the crime as a member of a group that may or may not be illegal[87] constitutes a sentence that is unjust and disproportionate. It could result in a disproportionately long sentence for what might otherwise be a minor offence.

For example, take the offence of affray[88], which appears in the Act as a declared offence.[89] The *Criminal Code Act 1899* (Qld) lists the maximum penalty for affray as one year's imprisonment.[90] However, if a vicious lawless associate is sentenced for the same offence, he or she could receive a penalty of seven years for the affray, plus 25 years for being an office-holding associate. This could result in a sentence of 32 years with a non-parole period of 29.5 years.[91] This is a significant and unreasonable limit on this right.

Impacted right: Right to equality and equal protection before the law

These provisions also limit the right to equality and to equal protection before the law by enabling a judge to commit two offenders, who may both have committed a similar crime, and may have similar criminal histories (or no criminal histories at all) to wildly divergent custodial sentences merely because one offender is considered a vicious lawless associate due to

membership of a declared group. Indeed, the laws as they stand remove a judge's ability to take previous good behaviour on the part of the vicious lawless associate into account, but they do not similarly limit the judge's ability to take previous good behaviour into account in the case of a defendant that faces the court without any such ties (but with a similar criminal history).[92] The difference could amount to 30 years behind bars between two defendants who may well have committed their crimes together.

The proportionality test

The importance and purpose of the limitation

It is difficult to argue against the importance and purpose of the Act. It is clear that the purpose of the parliament is to enact laws that ensure peace and order in society. It is also important that criminal organisations are not permitted to flourish. However, the sentencing and non-parole provisions are unreasonably harsh. There is no equality before the law when two defendants can commit the same crime, have the same criminal history, and display the same level of contrition, and yet one can be sentenced to one year's imprisonment while the other can be sentenced to 32 years, 29 of those years being without the possibility of parole. The limitation of two fundamental human rights appears to far outweigh any good that the provisions are meant to achieve.

The relationship between the limitation and its purpose

This law, however, does not actually punish associates of the organisation. A person could be a member of the association, pay dues, and host the association's parties[93] and not be sanctioned by the Act in any way shape or form. A person could rise to the upper echelons of the club and yet still be immune from prosecution according to the provisions of the Act. Yet, if they received a toaster as a gift from a club member, and it was later found that the toaster was 'tainted' property (therefore, ownership of it would be a crime),[94] they would face a minimum sentence of 25 years imprisonment with a possible maximum of 39 years. If they are clever and rank highly, however, what is preventing them from sending a younger, less senior associate in their place to collect the toaster? If the purpose of the Act was to disestablish these associations, why did the Government not merely make it illegal to be a member of one? There does not seem to be a workable relationship between the limitation and its expressed purpose.

Any less restrictive means reasonably available to achieve the purpose of the limitations

Some of the less restrictive means to achieve the stated purpose of the Act might be:

- to introduce harsher penalties for offences such as affray,[95] rioting,[96] going armed as to cause fear,[97] and other offences closely associated with declared organisations;

- to allow the police extra resources to surveil and to disperse large[98] numbers of members wearing the organisation's colours;
- to introduce harsher sentences for leaders of the organisations and those who procure membership on behalf of the organisations.

These appear more proportionate responses to criminal organisations that exist within the confines of an otherwise law-abiding society. Consequently, the Act in question appears to be one ill-befitting its purpose.

Can the legislation be interpreted in a way that is compatible with human rights?

Section 32 of the *Charter* states that, 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. In the explanatory notes to the Act, the Queensland Government states 'the bill impacts on the rights of individuals through increasing penalties, imposing mandatory imprisonment and denying parole for particular types of offenders'. [99] This is a clear indication that it was the intention of the parliament in passing this Law to limit the rights discussed above.

Further, there is no way to interpret provisions that direct the courts to impose a mandatory sentence of 15 years for an associate of a criminal organisation and a further 10 years for an office bearer in any way other than as they are stated. The court is additionally ordered to apply a non-parole period for the total period of imprisonment. To remove any possibility of being misinterpreted, it provides a ready reckoner for sentencing judges in the Act. Accordingly, there can be no interpretation of the relevant provisions in the Act that does not limit the human rights discussed, as the parliament has gone to lengths to make its intentions clear.

It is clear that the legislation limits a number of human rights. Accordingly, in order to be compliant with the Charter, parliament would have the choice of severing the offending provisions or making an override declaration on exceptional circumstances. The special circumstances cited by the parliament would be the proliferation of violence by lawless gangs, especially in the 'wake of the violence at Broadbeach involving criminal motorcycle gangs.'[100] However, as has been eluded to above, this Act would appear to be the most ineffectual of a suite of Acts that penalise membership of criminal organisations[101] and it includes unacceptable limitations on rights.

The Act was introduced to a parliament in which the Government held 78 of the 89 seats. Consequently, there was little to no resistance to the laws. However, if the Charter had existed at the time, the Government would have been made aware by the Scrutiny of Legislation Portfolio

Committee[102] that the law was inconsistent with the right to liberty, the right to equality before the law and the right to freedom of association. The committee would also advise that the laws would not pass the reasonable limits test in the Charter and that it would need to make a case for an override declaration.

Likely outcome

It is difficult to see how, in this case, a strong argument could be made for an override declaration under the Charter. The explanatory memorandum to the Victorian *Charter of Human Rights and Responsibilities Act 2006* describes examples of exceptional circumstances as threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.[103] Even if it could be argued that the mere existence of declared organisations constituted a threat to national security, a committee would require evidence of this, and how the legislation achieves its purpose.

The same committee would necessarily need to advise the Government that failing to successfully demonstrate that the legislation's limits are reasonable, or that an override declaration is appropriate, could leave the laws open to being challenged and struck down by the High Court pursuant to the conferral of rights test in *Clyde Engineering v Cowburn*.[104] The test states that one law will be inconsistent with another law 'when it takes away a right conferred' by that other law,[105] and, pursuant to section 109 of the Australian Constitution,[106] the impugned provisions of the State Act would be held by the High Court to be invalid. That is the Charter would confer the rights to liberty and security of person, to equality and to equal protection before the law and to freedom of association. State laws, such as those discussed, could not then limit these rights without a breach of the Constitution and a probable High Court challenge.

3.1.2 *Kuczborski v The State of Queensland* (2014) 254 CLR 51

Stefan Kuczborski was a tattooist, a Polish immigrant, and a member of the Hell's Angels Motorcycle Club. At the time of the case, he told the ABC's 7:30 Report, he saw himself as more of a free spirit than an outlaw.[107] This, however, was not Mr Kuczborski's stated main aim for challenging the laws in the High Court; rather, he did so because he wanted to 'live in a democracy … a free country.[108] Having grown up in totalitarian society in Poland in his youth, he did not want Australia to become 'a society like that' – a society where an individual could be imprisoned 'for going to a pub to have a beer'.[109] Mr Kuczborski had not been charged with any of the offences in question, rather, he appeared before the court as a concerned citizen or

interested party (due to his membership of a declared organisation), not as a person charged under the laws.

Mr Kuczborski mounted a challenge to a suite of laws that were enacted by the parliament of Queensland designed to put an end to gangs such as the Hell's Angels Motorcycle Club in the State. Mr Kuczborski contended that the laws were unconstitutional.[110] In the case, the Court considered three substantive questions of law.[111] Firstly, did Mr Kuczborski have standing to challenge the provisions in question (see below); secondly, what was the remedy that Mr Kuczborski sought, since he had not committed any of the offences prohibited by the provisions, and the case was merely hypothetical; and thirdly, did any, and if so which, of the impugned provisions infringe the *Kable* principle,[112] a doctrine that empowers the High Court to strike down laws that gave Federal Courts, or State courts with Federal jurisdictions, the power to act outside of their constitutional remit, thereby violating their integrity.

The Court held, six to one (Justice Hayne dissenting), that none of the suite of provisions that make up what have become known as the 'anti-bikie' laws infringed the *Kable* principle, as, although the laws were harsh, they did not substantially impair the State courts' integrity.[113] The Full Court held that the provisions of the *Liquor Act 1992* (Qld) that placed significant restraints on members of motorcycle gangs' freedom of movement and association were 'laws of general application' which served to merely determine 'what acts or omissions gave rise to criminal responsibility'.[114]

Impact of the Charter on the Legislation

Human rights arguments were also not the basis for the decision in *Kuczborski;* indeed, the Court held that Mr Kuczborski did not have standing to challenge a number of the impugned provisions, including: the *Vicious Lawless Association Disestablishment Act 2013* (Qld); sections of the *Criminal Code 1899* (Qld) and amendments to the *Bail Act 1980* (Qld), as all of the provisions increased the penalty for, or reversed the presumption of bail for, offences that were already unlawful. Mr Kuczborski had not committed or did not intend to commit any of the offences in the impugned provisions and, therefore, his challenge to said provisions could only be hypothetical and 'divorced from a real controversy'.[115] The existence of a Charter would not serve to produce a different decision with regard to standing; therefore, the provisions that will be considered here are those that the Court considered Mr Kuczborski had standing to challenge.

The Court ruled that Mr Kuczborski had standing to challenge the 'offence creating'[116] provisions of the *Criminal Code 1899* (Qld), that is, the provisions that as a result of their enactment had rendered behaviour, that was previously lawful, unlawful. The Court's reasoning here was that Mr Kuczborski had engaged, and wished to engage in the future, in certain activities that would otherwise have been lawful if the provisions had not been enacted.[117] Mr Kuczborski's challenge to the provisions was, consequently, not hypothetical as these provisions would have a significant effect on his future actions. The majority held, however, that the provisions in question were valid as they did not represent the executive dictating policy to the Court (which would have impaired the Court's integrity), but rather that the Court was applying legislation that 'reflects the policy of the executive'.[118]

The impugned provisions make it an offence for:

- any person who is a participant in a criminal organisation to knowingly be in a public place with two or more other participants; and
- a participant in a criminal organisation to enter prescribed places or attend prescribed events; and
- a participant to recruit for a declared criminal organisation.

These provisions of the *Criminal Code* limit the right to freedom of peaceful assembly. Justice Crennan stated that they restricted Mr Kuczborski's 'freedom to do as he wishes', such as 'attend social events in public places in company with other members'[119] of his motorcycle club. They also limit the right to freedom of association by limiting his right to 'promote to other individuals the benefits of membership' of the Hell's Angels Motorcycle Club.[120] The Law Council of Australia notes that the provisions of the Act, in this respect, shift criminal liability from the person's deeds to their associations.[121]

The provisions also limit the right to a fair trial. Included in this right is the right to be presumed innocent,[122] which appears at odds with the so-called 'defence' that requires the defendant to prove that the organisation that he or she is an associate of does not 'have as one of its purposes the purpose of engaging in or conspiring to engage in criminal activity.' [123] This reverses the presumption of innocence insofar as the defendant in any criminal case would have to prove what Justice Hayne described as 'an impossible negative proposition'.[124] That is to say, this is an impossible task, as the defendant is being asked to prove a negative, specifically, that contrary to the advice of the Government, it is not an organisation that is involved in any criminal activity or is planning to be so involved. The interests of justice dictate that the onus here should not be

reversed and the prosecution must first prove that there is basis to the claim that the organisation is indeed one with the purpose of committing criminal acts.

The provisions which limit the right of peaceful assembly by making it an offence for associates to gather in groups of two or more in a public place, or to even enter designated venues, have as their purpose the prevention of meetings of associates, presumably to discuss club matters or to plan or take part in criminal behaviour. Ironically, the criminal behaviour is currently inherent in the act of meeting in and of itself. These provisions make criminal behaviour emerge in the absence of any discernible crime – or, at least any discernible crime if any member of the public, that did not happen to be an associate, committed it. Accordingly, there is some doubt over whether these provisions will achieve their rather ill-defined purpose. That is, there is doubt whether the provisions will have any effectiveness at all. As Phillip Boulton QC has stated, 'if these people who are shooting and killing each other can't obey the laws that say you can't shoot and kill each other, I don't think that they are going to obey a law that says that you can't have a beer with each other or go on a motorcycle ride with each other'.[125] However, as Justice Bell pointed out in *Kuczborski,* the provisions could have effects that go beyond those envisioned by the parliament. For example, if two or more associates had attended the Kuczborski hearing with the plaintiff, they could have been breaking the law in doing so.[126] Another effect of the provision is the fact that certain categories of people will, for 'socio-economic or familial reasons', be unable to avoid associating with members of declared organisations, which seriously undermines their equality before the law, among other rights.[127]

Impact of the Charter on the *Kuczborski* decision

It is clear that the provisions discussed limit human rights, and they are disproportionate to their express purpose. They also fail to achieve their purpose where other extant laws may succeed.[128] They do however, clearly state parliament's intention (even if the logic behind the intention is, arguably, muddled) and exist within constitutional limits. The laws cannot be interpreted in a way that is compatible with human rights, and therefore the Court would be unable to interpret the provisions in a way that was compatible with human rights unless it was acting beyond the accepted bounds of statutory interpretation and parliamentary sovereignty.

As a Federal act, the Charter would also engage section 109 of the *Constitution,* as the provisions discussed are provisions in State acts, and they are inconsistent with what would be a Federal Charter. All but one of the judges in Kuczborski found that the provisions in question did not violate the *Kable* principle and therefore the separation of powers guaranteed by the Constitution. However, it would have been much easier to find that the provisions contradicted

the Charter and were not reasonable limitations to human rights as can be demonstrably justified in a free and democratic society. The provisions also fail the conferral of rights test in *Clyde Engineeering v Cowburn*[129] which, as mentioned above, states that one law will be inconsistent with another law 'when it takes away a right conferred' by that other law,[130] and, accordingly, pursuant to section 109 of the Australian Constitution, if there was a Charter, the Court in *Kuczborski* would have declared the relevant provisions of the *Criminal Code* to be invalid as they limited the right to liberty and security of person, to equality and to equal protection before the law, and to freedom of association conferred by the Charter.

3.2 Migration

This section addresses examples of prominent cases and legislative amendments illustrating how the Charter could impact future development in migration and refugee law. It particularly examines the potential for constructive dialogue between the judiciary and the Australian Parliament regarding the protection of human rights of people impacted by Australia's immigration regime.

Included are analyses on:

- *Al-Kateb v Goodwin* (2004) 219 CLR 526
- *Migration Amendment (Regional Processing Arrangements) Act 2015*
- *Migration & Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)
- *Plaintiff B9/2014 v Minister for Immigration and Border Protection* [2014] FCAFC 178.

3.2.1Indefinite detention: *Al-Kateb v Goodwin* (2004) 219 CLR 526

Background

Al-Kateb v Goodwin[131] is an Australian High Court case regarding the ability for the Commonwealth Government to hold someone in detention indefinitely, even where they have not been charged with a crime and pose no threat to the community.[132] The case was considered against provisions of the *Migration Act 1958* (Cth).

At its centre was Ahmed Ali Al-Kateb, a man born to a Palestinian family in Kuwait. As Kuwait limits access to citizenship or permanent residency, Ahmed never received citizenship and was effectively a 'stateless' person.[133] In the period during and after the Gulf War most Palestinians in Kuwait were either forced out or fled the country as anti-Palestinian sentiment grew.[134] After

smuggling over the border into Jordan, Ahmed eventually made his way to Australia where the boat he was on was intercepted by the Australian Navy.[135] Under the *Migration Act* he was classed as an 'unlawful non-citizen' and placed in immigration detention.[136]

Ahmed applied for an Australian protection visa but was denied, and after a number of failed reviews of the decision he requested that he be deported (an option provided under the Migration Act),[137] seeking to either return to Kuwait or go to Gaza. However, without any citizenship and despite attempts by the Commonwealth Government, no deportation country could be found. Later described as 'the man who couldn't get away',[138] Ahmed's concern was that without a visa and with no deportation options, he may never be released from immigration detention.

At the time of the case Ahmed was one of many stateless persons facing a potentially unlimited period detention without criminal charge.[139] Despite the High Court's eventual finding in favour of indefinite detention, the Commonwealth Government, under pressure from the public, allowed Ahmed to come to Australia under a bridging visa, although applications from 13 others in similar circumstances at the time were denied.[140] His case is commonly raised as an illustration of why basic protections of human rights should be considered in Australia.

Judgement summary

The judgement in Al-Kateb explored two issues:

- Whether the Migration Act[141] provided for indefinite detention of an unlawful non-citizen where they are not granted a visa and cannot be deported.
- Whether indefinite detention was beyond the legislative power of the Commonwealth as provided by the Australian Constitution.[142]

A majority of the High Court (comprising Justices McHugh, Hayne, Callinan and Heydon) indicated that the provisions of the Migration Act did allow for indefinite detention, and that the Commonwealth Government was not in breach of the Australian Constitution in exercising indefinite detention as a result. Chief Justice Gleeson, and Justices Gummow and Kirby disagreed.

Human rights considerations were raised at several points in the reasoning of the judges, including forming a significant basis of the dissenting judgements, most notably in Justice Kirby's judgement on the basis of Australia's human rights obligations and international

norms.[143] However, human rights also featured in the majority judgements, which found indefinite detention legal and constitutional.

It seemed the potential for the Migration Act to be in breach of Australia's international human rights obligations was not lost on these judges, but rather its consideration was placed out of reach. In his judgement, Justice Hayne expressed doubt as to whether indefinite detention complies with international human rights obligations,[144] but felt that the Court was limited to the wording of the Migration Act.[145] This limitation in the scope of the Court's reasoning was also reflected in comments of Justice Callinan, who stated that 'it is not for courts, exercising federal jurisdiction, to determine whether the course taken by parliament is unjust or contrary to basic human rights.'[146] Justice McHugh also noted these limitations, highlighting that 'the justice or wisdom of the course taken by the parliament is not examinable'[147] and expressing the 'tragic' effect of the laws.[148]

Impact of the Charter on the *Al-Kateb* decision

<u>The impacted right: the right to liberty, including the right to freedom from arbitrary detention</u>
The most significant right impacted by the Al-Kateb decision is the right to liberty and security of person.[149] Like many other rights the right to liberty is not absolute. Governments can legitimately deprive people of their liberty in appropriate circumstances, typically after conviction for serious offences, in serious mental health cases, and to prevent the spread of infectious disease.[150] There is, however, an implication that procedures must be proportionate,[151] recognised in the Charter by prohibiting arbitrary detention. Australian and international commentary on the right to liberty notes that 'detention' includes immigration detention[152] and that lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to a legitimate aim.[153] The arbitrariness of detention therefore includes elements of inappropriateness, injustice or lack of predictability.[154]

This codification of the right to liberty and security of person provided by the Charter could have therefore affected the outcome of Al-Kateb in two ways; by impacting the development of the relevant law by parliament, and the consideration of the court when assessing its application.

Impact on the parliament

The Charter would firstly affect the manner in which the relevant provisions of the Act were initially created. The Charter requires the scrutiny of new legislation[155] and places clear obligations on public authorities,[156] including providing that it is unlawful for a public authority to act in a way that is incompatible with a human right, or failing to give proper consideration to a relevant human right.[157] This in turn may have provided an alternative wording for relevant sections of the Migration Act, or supported the introduction of amendments to directly address long-term or indefinite detention where deportation is not possible.

Impact on the Court

The Charter would additionally have provided greater scope for alternative interpretations by the judiciary when considering the case. This notably includes the interpretive provision directing the judiciary to 'so far as it is possible to do so consistently with their purpose' interpret the legislation 'in a way that is compatible with human rights.'[158] This may have enabled judges in the *Al-Kateb* case to more directly address the human rights concerns alluded to during the judgements. For example, the lack of human rights protections was raised directly in the judgement of Justice McHugh. Although finding indefinite detention legal and constitutional, he highlighted that many:

> … believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring—and many would say just—criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.[159]

Relevantly, when assessed by the Supreme Court of Papua New Guinea, offshore detention on Manus Island was found to contravene that country's constitutionally-protected right to liberty.[160] In its judgement, the PNG Supreme Court highlighted aspects of detention relevant to the Al-Kateb case, noting that 'treating those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status … is to offend [their rights and freedoms].'[161] The operation of human rights protections considered in the PNG case also reflect elements of the Charter, requiring that laws which regulate or restrict a person's rights or freedoms be necessary and justified, having regard to the purpose of the restriction.[162] This is similar to the Charter provision which directs interpretations compatible with human rights, as discussed above.

The range of less restrictive measures raised in the dissenting judgements and in other Australian and international migration cases helps illustrate potential interpretations of the Migration Act more compatible with human rights. These include the combination of:

- detention time limits confined to a period needed to meet their initial purpose,[163] such as to determine whether a person is likely to be removed to another country;[164]
- alternatives to detention where there is no real likelihood of removal in the reasonably foreseeable future;[165] and
- the use of less restrictive means of monitoring and tracking of detained persons, such as community-based measures in cooperation with 'the imposition of reporting obligations, sureties or other conditions.'[166]

In the earlier judgement of the Australian case of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[167] the Court noted the power under the Migration Act to detain a person pending removal from Australia is impliedly limited by time. This requires that the Commonwealth Government is taking all reasonable steps to secure the person's removal from Australia as soon as is 'reasonably practicable', in the sense that there is a real likelihood or prospect of removal in the reasonably foreseeable future, thereby limiting the ability for indefinite detention where this could not be assured.[168]

The judgement in *Al Masri* further explained this interpretation (similar to what could be envisioned under the Charter) stating that the duty to detain could not operate where there was *no* prospect of removal, but rather 'would be enlivened again when there was a real likelihood or prospect of removal in the reasonably foreseeable future'.[169]

Elements of this limitation have since been reiterated in subsequent migration cases (though not in direct reference to indefinite detention) such as *Plaintiff S4/2014 v Minister for Immigration and Border Protection*.[170] In *Plaintiff S4* the High Court highlighted the connection between purpose and timeframe of detention, noting:

> 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 … it must serve the purposes of the Act and its duration must be fixed by reference to what is both necessary and incidental to … those purposes.[171]

International case law and decisions of the United Nations Human Rights Committee regarding indefinite detention under Australian migration law also illustrate interpretations that find a more compatible balance with human rights. Justice McHugh in the Australian High Court case of *Woolley (Manager of the Baxter Immigration Detention Centre); Ex parte Applicants M276/2003 by their Next Friend GS*[172] refers to this growing body of case law in his judgement,[173] stating:

> They suggest that something more is required if the regime is not to be found to breach the Refugees Convention, the ICCPR or the Convention on the Rights of the Child, or to be otherwise contrary to international law. Something more may include periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens.[174]

Additionally, the American case of *Zadvydas v Davis*[175] illustrates the practical application of a reasonable time-limit interpreted into a US migration law, providing a six-month presumptive detention period where removal or deportation is not reasonably foreseeable.[176]

Outcome

Importantly, had the Commonwealth Government clearly intended to breach human rights, by imposing the form of indefinite detention considered in the *Al-Kateb* case, it would have still been able to do so under the proposed Charter, although this would have required the public to be clearly informed by a declaration of this intention to breach human rights and the reasons for it.[177] However, under the legislation as it stood at the time, given the small majority on which the *Al-Kateb* decision was held, and references to human rights expressed in a number of the majority judgements, the existence of the Charter would likely have impacted the overall outcome of the case, paving the way for a decision more in-line with similar international cases.

3.2.2 Actions in offshore detention facilities: *Migration Amendment (Regional Processing Arrangements) Act 2015*

Background

The *Migration Amendment (Regional Processing Arrangements) Act 2015* introduced section 198AHA into the *Migration Act 1958* (Cth). The new section expanded the Commonwealth Government's payment-making power and the actions that can be undertaken at regional processing centres overseas, such as the Nauru and Manus Island immigration

detention centres. The change also operated retrospectively, ensuring the legality of prior actions and payments undertaken as far back as August 2012.

The change was introduced in response to the Australian High Court case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection*,[178] which was ongoing at the time of the amendment. The case involved the legality of regional processing arrangements, including a claim that the Minister for Immigration had been acting beyond the executive power of the Commonwealth by making payments to other countries to facilitate immigration detention at regional processing centres. As a result of the retrospective amendment the case was subsequently thrown out, although the Court indicated that the challenge in the case had been 'well-founded' until the new section was inserted retrospectively.[179]

The amendment

The amendment was primarily inserted to provide a statutory basis for the Commonwealth Government to take broad actions in a regional processing country, including restraining a person's liberty and making payments, so long as that action or payment relates to an 'arrangement' with, or the 'regional processing functions' of, that country.[180]

The operation of the amendment can be considered in three ways:

1. A broadening of the power provided to the Commonwealth Government to allow for the restraint over liberty of a person within Australia and overseas, for the purposes of immigration detention.[181]
2. Providing the Commonwealth Government with a basis on which to make financial payments in regards to regional processing arrangements.
3. Power for the Commonwealth Government to take *any* action in a regional processing country.

The Commonwealth Government's current interpretation of its human rights jurisdiction is that it does not exercise sufficient control over regional processing facilities to be held accountable for its human rights obligations at these facilities.[182] This limited interpretation is in contrast to positions held by the United Nations,[183] judges within the Australian High Court,[184] and parliament's own Joint Committee on Human Rights,[185] who note that 'the evidence demonstrates that Australia could be viewed as exercising 'effective control' of the arrangements relating to the treatment of persons transferred to Manus Island or Nauru.'[186]

When considered in light of the Commonwealth Government's disputed interpretation, the amendment operates to allow the Commonwealth Government to take largely unfettered action in these locations, including limiting the consideration of Australia's human rights obligations imposed under international law.[187]

Impact of the Charter on the amendment

The amendment most directly affects the right to liberty and security of person[188] protected under the Charter. It does this by empowering the Commonwealth Government to take *any* action in a regional processing country as long as it relates to regional processing. This includes restraint over liberty[189] and enforcing aspects of arbitrary detention (as discussed in relation to *Al-Kateb v Goodwin* earlier in this report).

Impact on the parliament

This codification of the right to liberty and security of person provided by the Charter could have significantly affected the drafting and application of the amendment by imposing requirements for additional scrutiny of new legislation and amendments.[190] This may have better highlighted the human rights implications to parliament prior to the passing of the amendment, as well as alternative measures which could have been applied instead.

Outcome

The existence of the Charter may have supported further debate to refine the wording of the amendment, incorporating greater protections of the right to liberty and security of person. An indication of such developments can be seen via the suggested changes put forward by members of Australian Senate when the amendment was raised in parliament. They include:

- not authorising or empowering an individual acting on behalf of the Commonwealth Government within a regional processing facility to take, or cause to be taken, any action that would contravene Australian law;[191]
- requiring assurances as to access and human rights be made by regional processing countries before payments are made to, or persons transferred to, regional processing facilities;[192]
- removing the designation of a country as a regional processing country where the Commonwealth Government becomes aware that the country has not complied with relevant assurances;[193] and
- prohibiting action or payments to the extent that they would impact the human rights of an individual.[194]

Furthermore, the Charter would help ensure that Australia is held responsible for its human rights obligations extraterritorially. It imposes clear obligations on public authorities,[195] prohibiting them from taking actions that are incompatible with a human right or failing to give proper consideration to relevant human rights.[196] This has the ability to affect day-to-day decisions and actions taken by Commonwealth Government officials at regional processing facilities regardless of differing interpretations of the level of 'effective control' exercised in that location.

3.2.3 Fast Track amendments: *Migration & Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)

Summary

The *Migration & Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (the 'Amendment Act') substantially varied many aspects of Australia's migration regime including the *Migration Act 1958* (Cth) (the 'Migration Act') and the *Maritime Powers Act 2013* (Cth). The amendments limited the following human rights protected by the Charter:

- The right to a fair hearing
- The right to equality and non-discrimination
- Freedom from torture and cruel, inhumane or degrading treatment or punishment
- Rights of the child
- Right to protection of families and children
- Freedom of movement
- Right to liberty and security of person

This report is confined to a review of three major changes to the Migration Act, all of which have retrospective effect, meaning they have an impact on people who had arrived in Australia or who applied for protection visas prior to the provisions becoming law. The three major changes are:

- The Fast Track provisions.
- The declaration that any baby born in Australia to an unauthorised maritime arrival is also an unauthorised maritime arrival (and/or transitory person where relevant).[197]
- The prohibition of certain people from being eligible for permanent protection visas.

The Charter's requirement for transparency, further debate and a review of less restrictive options in relation to these rights may have resulted in changes to the Amendment Act prior to its passing. Even if the legislation had passed as is, the Charter would have influenced the legislative process to ensure all Parliamentarians, the media and the public were more aware of the potential impact of the limitations of rights.

(a) Fast Track provisions

The Fast track provisions are a new, separate regime for protection visa applications for the approximately 30,000 asylum seekers (called 'unauthorised maritime arrivals')[198] who arrived in the Australian migration zone by boat between 13 August 2012 and 31 December 2013.[199] While the intention of the provisions was to allow for the fast and efficient processing of the applications, Fast Track assessments and processing began in July 2015, nearly three years after the arrival of many of the affected asylum seekers.[200]

Fast Track applicants are only allowed to apply for (temporary) protection or safe haven once the Minister 'lifts the bar' currently in place for protection visa applications.[201] At December 2016, the Minister was inviting applications from those unauthorised maritime arrivals who entered the migration zone between November 2012 and April 2013.[202]

One of those unauthorised maritime arrivals was an asylum seeker known as 'AFK16'.[203] Without knowing his true name, we will refer to him as 'Daniel'. Daniel[204] sought asylum in Australia after fleeing Iran, and arrived on Christmas Island in late 2012. He applied for a (temporary) safe haven visa through the Fast Track assessment process once he was invited to do so, two and a half years after his arrival.[205] His claims for protection included that he feared persecution due to both his non-belief in Shia Islam and his alleged actions of passing a message from a political prisoner to the prisoner's family while completing military service[206] in a prison.[207] Daniel[208] said he had been 'arrested, detained and tortured for five to seven months' and subsequently monitored by the military force as a result of this action.[209] His application was denied by a delegate of the Minister. In the next section, this report will consider the impact of a limited right to a fair hearing on Daniel's[210] protection application.

How the amendments limit the right to a fair hearing

Unlike other asylum seekers, under the new laws all Fast Track applicants whose protection visa applications are rejected have a limited, if any, right for the merits of their case to be reviewed.[211] Merits review is considered to be integral to a fair hearing in relation to

administrative decisions affecting a person's liberties and interests,[212] particularly where the outcome of an incorrect decision would bear significant and detrimental consequences for the person. The restrictions and complete exclusion from review of a decision are significant in light of the fact that a large number of negative protection visa decisions are overturned after a full merits review. For example in 2012–2013, the following rates of original protection visa rejections for unauthorised maritime arrivals were overturned after full merits review (by country): Afghanistan: 84.5%, Iran: 62.5%, Sri Lanka: 44%, Pakistan: 83.1%, Iraq: 60% and Stateless people: 71.7%.[213] Without the opportunity for full merits review, these asylum seekers may have been returned to face possible persecution and/or death.

This highlights the significant and potentially disastrous consequences of the limitation of a person's right to a fair hearing by restricting access to merits review. As explained in this report, the right to a fair hearing is procedural; therefore, it cannot guarantee 'the absence of error on the part of the competent tribunal'.[214] However, it ensures standards are in place to facilitate fair and correct decisions and to avoid decisions made on an erroneous basis due to missing relevant evidence or bias.[215]

The Fast Track provisions, however, exclude some applicants from merits review entirely,[216] thereby severely curtailing their right to a fair hearing. This group of excluded applicants include:

- non-citizens who are considered to have access to protection from a third country;[217]
- persons who have had protection visas refused by Australia, another country or the UNHCR or who withdrew a previous protection application to Australia;[218]
- persons who present fraudulent documents without reason;[219]
- persons whose claim is considered to be 'manifestly unfounded';[220]
- persons for whom a reviewed or revised claim would be 'contrary to the national interest';[221]
- other classes of persons who are determined by the Minister to not be eligible for merits review.[222]

A preclusion from merits review opportunities completely denies the person the chance to give any explanation for the adverse criteria that formed the grounds for their exclusion from review in the first place.

Fast Track applicants who are *not* excluded are only eligible for limited review, conducted by the Immigration Assessment Authority (IAA), rather than by the Administrative Appeals

Tribunal (AAT),[223] which hears all other migration and protection visa appeals.[224] Unlike the AAT, the IAA cannot overturn a decision; it can only affirm a decision or remit it for further consideration.[225]

A fair hearing ensures a person knows the reasons for a decision made against them and offers a right of reply to those reasons.[226] In the asylum seeker context, merits review generally requires 'fresh consideration of all aspects of a case, including new information or claims raised'.[227] However, Fast Track applicants reviewed by the IAA are judged on the papers presented in their initial applications. They are not afforded the opportunity to explain their case for the review. The IAA is not required to give an applicant any information the Minister knew when assessing the visa application.[228] Nor is the IAA required to provide the applicant with any new information relevant to their application that also applies to others, such as country of origin information, effectively preventing an asylum seeker from defending their application by responding to the information, even if it was the basis for confirming the decision to refuse their visa.[229] If new information or reasons are submitted to the IAA by the applicant, the IAA is only permitted to review that material in exceptional circumstances.[230] Furthermore, the Fast Track provisions are an 'exhaustive statement of the natural justice hearing rule', meaning an applicant's presumed right to a fair hearing is removed and replaced by these explicit and narrow provisions.[231]

Internationally, short timeframes that have not allowed for a person to reasonably defend their application at a review have been found to be systematically and unjustifiably unfair.[232] In Australia, where there is no right to respond or to know all of the information against one's application, asylum seekers experience even greater limitations of their right to a fair hearing.

Take Daniel,[233] our fictional name for AFK16 above, who received a limited review by the IAA. Daniel[234] claimed he was not informed about four country information articles used by the IAA as grounds to confirm the Minister's decision in relation to his religious beliefs.[235] The articles made reference to a section of Iran's Muslim-born population not practising Islam.[236] The IAA was 'not aware of any information which indicated that such persons were subject to arrest, significant physical harassment' or other harm, and highlighted Daniel's initial application interview statement that he himself had not faced 'problems' due to his religious beliefs.[237] Therefore, the IAA 'was not satisfied…' that Daniel 'would face a real chance of persecution for his lack of belief in Shia Islam were he to return to Iran'.[238]

The issue is that the country articles were based on a class of persons; therefore, pursuant to the Fast Track provisions, the information contained within did not need to be and was not disclosed to Daniel[239] for his consideration or response at review.[240] This limit on the right to a fair hearing was raised in Daniel's[241] case for judicial review brought against the Minister for Immigration and Border Protection and the IAA. However, the Court found the IAA's decision valid because it was not required to disclose country information to Daniel[242] pursuant to the Fast Track provisions.[243]

Daniel[244] also sought to bring a claim against the IAA for jurisdictional error for denying him procedural fairness because the IAA did not consider the first part of his initial arrival interview recording in its review (because it had not been given to the IAA by the Secretary of the Department as it could not be found or had not properly recorded), and because the IAA did not disclose to him or confirm the correctness or validity of a transcript provided in lieu of the recording.[245] The Court did not accept this claim, however, as they found the Fast Track provisions intentionally exclude applicants from the common law right to the hearing rule as part of procedural fairness.[246] This meant that the Court determined it was not open to find that the IAA had committed jurisdictional error because the IAA does not function within the ordinary requirements of the right to a fair hearing.[247]

Given these circumstances, if the Charter had been in place, the Court would have likely issued a declaration of inconsistent interpretation between the fast track provisions and the right to a fair hearing, which was explicitly excluded for unauthorised maritime arrivals as part of the Fast Track provisions.[248]

Purpose of limitations and impact of a Charter

The Fast Track provisions were introduced to efficiently and cost effectively manage protection visa applications and their review, with the goal of 'addressing the backlog of unauthorised maritime arrivals'.[249] This was intended to achieve 'better outcomes' for the asylum seekers themselves and for Australian migration support services and to 'acknowledge the diverse range of claims from asylum seekers'.[250]

However, the Government also implied that the limited review rights were a punitive measure for people who do not seek asylum 'through lawful channels',[251] in order to deter people

smugglers and discourage 'unmeritorious claims',[252] which are an 'an inefficient and costly use of resources'.[253]

The Charter would have required parliament to consider and reconcile the limitations imposed by the Fast Track provisions against their purposes. In this case, the right to a fair hearing is not clearly linked to the first purpose – to process asylum claims efficiently for better outcomes while adapting to complex claims. For example, a process that is designed to be expedient and specifically excludes new information is badly designed to deal with the complexities of asylum claims and achieve appropriate, safe and fair outcomes for asylum seekers.

Debate prompted by the Charter would have highlighted these inconsistencies, shedding light on the fact that the provisions limit a person's right to a fair hearing without creating an efficient and effective process. Daniel[254] waited three years for his original decision and was not able to respond to information used by the IAA to confirm the decision of the Minister's delegate.[255] If the Charter had been in place at the time of parliamentary debate on the bill, there would have been more transparency about the potential for lengthy judicial review applications challenging a mechanism that limits the right to a fair hearing but is not adapted to complex situations and does not streamline the protection visa process.[256]

Under the Charter, the irrelevance of applying a retrospective and restrictive process to a person who already arrived in Australia in order to prevent arrival through 'unlawful means'[257] may have also attracted greater discussion in parliament, potentially leading to a different outcome in the legislation. Parliament may have considered the Fast Track process to be a disproportionate limit to the right to a fair hearing that, by nature, could not achieve its purported goals of efficiency and effective processing.

Parliament may have then considered options for less restrictive measures to process this group of asylum seekers effectively and efficiently, such as:

- utilising the already functioning AAT rather than needing to develop and manage a specific secondary process for certain applicants;[258] or
- including the objectives of 'fairness' or 'justice' in the IAA's remit, similar to that of the AAT and other administrative review bodies;[259] and/or

- requiring the IAA to disclose reasons and *all* new information to an applicant and enabling review of new information provided by the applicant if it is received within a fair and appropriate time frame; and/or
- ensuring a hearing is available to an applicant unless the IAA has already decided in the applicant's favour 'on the papers';[260] and/or
- enabling efficiency by allowing the IAA to set aside and replace a decision;[261] and/or
- allowing applicants who have presented fraudulent, false or unfounded documents or claims to explain these rather than automatically excluding them from review. Similar to the explanations considered reasonable for other asylum seekers, acceptable explanations could include any 'undue financial burden' caused by procuring real documentation,[262] or that the lasting effects of previous torture or trauma, including anxiety or distrust,[263] may have stopped them from being able to effectively present their claim for protection.[264]

If the legislature truly intended for the measures to function punitively and to infringe the right to a fair hearing, parliament would have needed to express this clearly after debating alternative options suited to the purpose of efficient claim processing.

If the provisions had still passed, the Charter would enable and require both the IAA and the Court (in the case of a challenge) to interpret the fast track provisions in ways that are appropriate to meet parliament's stated aims and in line with human rights. For example, the requirement for exceptional circumstances before the IAA can review any new information from an applicant could be interpreted broadly, for example, to align with the right to a fair hearing to achieve better, more effective and efficient processing.

Retrospective declaration that any baby born to an unauthorised maritime arrival is also an unauthorised maritime arrival (and/or transitory person)

The Amendment Act clarifies that some babies born in Australia are immediately unlawful upon their birth and are subject to the same detention, removal and ineligibility for protection visa rules as people who arrived by sea – a process that was claimed to be implemented for the best interests of the family and child, among other factors.[265] The newborn baby provisions apply where at least one parent is an unauthorised maritime arrival and/or transitory person[266] (without another parent who is a citizen or permanent resident). [267, 268] These provisions are retrospective – they also apply to babies born before the commencement of the new laws and invalidate prior but not yet determined visa applications made for babies in this situation.[269, 270]

In a worst-case scenario, the limitation may effectively make a baby born in Australia a stateless person without protection options other than offshore detention. There is no explicit requirement that the Government consider whether the newborn is a stateless person requiring protection. Instead, the baby *must* be removed from Australia to regional processing,[271] even when that means indefinite offshore detention for the child (if their parent arrived on or after 13 August 2012 and is not a fast track applicant).

Rights of the child

These provisions, which apply the punitive measures designed to stop asylum seekers arriving in Australia by sea to newborn babies who were born in Australia or in the Australian migration zone, impact negatively on the rights of the child.[272] Ensuring that newborn babies are 'liable for offshore processing and unable to make a valid application for a visa in Australia where their parents are unable to do so',[273] resulting in the babies' detention for unlawfully 'arriving in Australia by sea' even though they were born and drew their first breaths in Australia, is not in the best interests of those babies. Disallowing those babies from ever applying for permanent protection in Australia is also not in their best interests.

Purpose of the limitations and impact of the Charter

The Charter would have facilitated debate about the proportionality of the limitations of the rights of the child to the provisions' purposes: to maintain the integrity of the regional processing regime for unauthorised maritime arrivals[274] and to preserve the family from separation of children and parents, therefore protecting the child.[275] The integrity of the Government's policies on offshore processing of unauthorised maritime arrivals would be unlikely to be considered a valid reason for such an extensive limitation of children's rights. This is particularly the case when the babies would not undermine the unauthorised maritime arrival regional processing framework (as they did not actually arrive by boat) except for that the provisions declare them to be unauthorised maritime arrivals.

While protection of family is an important right itself, protection of the family unit and, therefore, the child's interests in remaining with their parents, should not be used as a reason to undermine the best interests of that child in actuality. The child's best interests must be a 'primary consideration' in any determination or action involving children.[276] This is the

fundamental principle in both international and Australian law.[277] Therefore, the practical effect of the laws, which would require offshore detention for newborn babies, is not proportionate to its stated purposes.

In considering less restrictive means to achieve the purpose of the provisions, parliament may have considered the following.

- If not a citizen by birth[278] and not actually an unauthorised maritime arrival, the baby could instead simply be considered to be an asylum seeker. This would allow the baby's parent(s) an opportunity to put forward a protection visa application on behalf of the baby, which would then be evaluated on the facts and circumstances. This would also facilitate the operation of the stated government perspective on the best interests of the child in migration matters generally, 'to give effect to the obligation to treat the best interests of a child as a primary consideration *in individual cases*'.[279]
- Parliament may have included measures to protect babies born in Australia to stateless persons, in particular, from being considered unauthorised maritime arrivals and stateless themselves. This may help to avoid the possibility of the baby being subject to indefinite detention.
- Without explicitly declaring the babies to be unauthorised maritime arrivals themselves, Parliament or the Minister could make an exception for the families of such babies and allow them to stay in Australia while they await processing.

The fact that on 18 December 2014, exactly two days after these explicit provisions had been incorporated into the Migration Act, the Government announced only hours before the relevant *Plaintiff B9 'Baby Ferouz'* judgement (see sidebar) was released that it would allow (as a one-off) baby Ferouz, and thirty other babies and their families in the same position, to apply for protection through the fast track provisions, indicates that the Government itself was aware of less restrictive and more publicly acceptable means.

It is clear that the Government at the time felt pressured. It is likely that the Charter would have increased this pressure by supporting a more transparent and open public and parliamentary debate of the Amendment Act, considering both whether it was suited to its purpose without infringing the rights of the child, and whether other means were available.

Finally, if the provisions had passed as they are now even with the Charter, the Minister, Department and public officers would be required to continue to consider the best interests of the child as a primary consideration in any determinations made in relation to babies and children. This may equate to further exercises of Ministerial power to allow protection visa applications for individual affected babies.[280]

In any case brought against the laws, the Court could further the 'dialogue' on these issues by issuing a declaration of inconsistent interpretation with human rights. It would have been difficult for the Court to find the amendments to be consistent with their own purposes, let alone with the rights of the child or other fundamental human rights, such as the right to a fair hearing. While this would not invalidate the provisions, it would continue an ongoing communication between Australia's judiciary, the Australian public, and the media about the need for the Government to consider these fundamental human rights, including the right to a fair hearing and the rights of the child.

3.2.4 Baby Ferouz Case: Plaintiff B9/2014 v Minister for Immigration and Border Protection [2014]281

The provisions concerning newborns born in Australia must be analysed in the context of the case of *Plaintiff B9/2014 v Minister for Immigration and Border Protection* [2014],[282] which was decided by the Full Court of the Federal Court on 18 December 2014, two days after their commencement. While not directly based on these provisions, the case examined the same question raised in the context of a previous version of the Migration Act – whether a baby born in Australia to stateless parents who had sought asylum by boat, and whose mother had been transferred from detention in Nauru to a Brisbane hospital due to concerns for her pregnancy, could be deemed to be an unauthorised maritime arrival.

The Court's unanimous finding that baby Ferouz was, in fact, an unauthorised maritime arrival rendered his protection visa application invalid. This decision would have seen Ferouz and his family sent to Nauru if not for the last-minute exercise of Ministerial discretion.

Interpretation of the legislation and impact of a Charter

The Court did not include any analysis of whether the declaration would be a breach of Ferouz's rights and liberties, save for a brief observation that 'this is not a case of overthrowing fundamental rights or departing from the general law' in the same sense as the human rights precedents raised by Ferouz's counsel.[283] There was no mention of the right to a fair hearing or the rights of the child, or any other particular limited rights or liberties, and no review of the less restrictive means that could have been taken (for example, ensuring the newborn is not considered an unauthorised maritime arrival as the child did not actually arrive by sea, or declaring the child to be an unauthorised maritime arrival but expressly excluding them from regional processing and detention or by moving the whole family into the fast track regime).

The Charter would have had a significant impact on this judgement as it would have required the Court to consider the provisions in the context of human rights. Instead, the case was decided based on other principles of statutory interpretation: whether the parliament meant a birth to be considered 'entering Australia' for the purpose of defining a person as an unauthorised maritime arrival.[284] The Court deduced that because baby Ferouz was a non-citizen who had not entered Australia by aircraft, he *must* be an unauthorised maritime arrival who entered Australia by sea because sea arrival was the only other option provided for by the legislation (even though this conclusion created a legal fiction).[285] If the Charter had been in place, the Court would have needed to consider the provisions in the context of the right to a fair hearing, the right to liberty, the right to equality and non-discrimination, protection of families and children, and the rights of the child, including the right to a nationality.

It is doubtful whether the Court could have construed the provisions in the same way had the Charter been in place. As the Court highlighted, there was nothing explicit in the relevant Explanatory Memorandum about babies of unauthorised maritime arrivals born in Australia also being declared to be unauthorised maritime arrivals, therefore, subject to regional processing and detention.[286] The purpose of the particular provisions was interpreted from the fact that the Explanatory Memorandum stated that 'all *arrivals* in Australia by irregular maritime means will have the same legal status regardless of where they arrive, unless they are an excluded class or otherwise exempted' to reduce the likelihood of risks taken to reach Australia.[287]

Because the judgement drew on statutory presumptions to reflect a purpose that was not explicit,[288] there is a strong likelihood that the Court would have interpreted the provisions

differently if it had been required to do so in a way that reflected human rights so far as possible, as per the interpretive provision of the Charter.[289]

Right to equality and non-discrimination

Unlike a permanent protection visa holder, a person with temporary protection has no assurance of continued protection and no right to sponsor family members to come to Australia, or to even leave to be reunited with family members, as this would breach the terms of their temporary visa.

The Amendment Act, through changes to the *Migration Regulations 1994*, prohibited select groups of asylum seekers from *ever* being eligible for permanent protection in Australia. Any person who *arrived* in Australia unlawfully, (i.e. without a valid visa) or who had ever received a temporary protection, safe haven or humanitarian visa[290] was made ineligible for permanent protection. This change included those who arrived unlawfully by aircraft as well as boat; however, there are relatively few people who arrive by air without a valid visa to enter Australia as they are generally stopped before getting on the plane.

It retrospectively applied to any unlawful arrival who was, at the time of the commencement of the Amendment Act, waiting for a response in relation to their previously submitted permanent protection visa application by 'converting' any application of an unlawful arrival to a temporary protection application.[291]

This change enabled only those who arrived with a different type of valid visa, for example, a student visa, a tourist visa or a working holiday visa, to be eligible to apply for a permanent protection visa. If a person lawfully arrived in Australia on a student visa, and then overstayed that visa and therefore became an unlawful non-citizen, that person would still be eligible to apply for permanent protection. However, if a person was fleeing persecution and, due to this persecution, was not able to obtain a passport which is required to gain an Australian entry visa, they would not ever be able to access permanent protection in Australia.

This limitation could be seen to discriminate against people on the basis of race, country of origin, nationality or social origin; particularly against those who were seeking asylum from an

area of conflict, or from a country where they are not recognised. In any of these cases, it is much less likely that the asylum seeker would have the time, resources and/or necessary stability and security to gather the government documentation necessary to apply for a valid entry permit to Australia. Therefore, discrimination on the basis of unlawful arrival, as opposed to unlawful status in Australia, could be imputed on the basis of race, country of origin, nationality and/or social origin.[292]

The Government stated that this differential treatment is not discriminatory because the distinction is based on 'reasonable and objective criteria…[that being] whether or not the individual entered Australia illegally'.[293] However, Australia is a signatory to the *Convention Relating to the Status of Refugees* and *1967 Protocol Relating to the Status of Refugees*,[294, 295] which confirms that illegal arrival must not be considered illegal if the arrival is for the purpose of seeking asylum.[296] It thus follows that for every case in which a person arriving in Australia is a genuine refugee, determining them to be 'illegally entering' would be in breach of these international laws, and would call the objectivity of the criteria into question. If the Charter had been in place, these concerns and considerations would have been live issues, able to be considered by parliament, decision-makers, and the judiciary when considering individual cases and the laws in general.

Purpose of the limitations and impact of a Charter

The purposes of creating a roadblock to permanent protection was to clarify that permanent protection is not available for any person who 'travel[s] to Australia illegally'[297] and 'to maintain the integrity of Australia's migration system'.

The Charter would have required parliament to debate the tenuous relationship between the purpose of making it clear that unlawful arrival precludes a person from permanent protection[298] and the retrospective nature of the provisions. As noted in an Australian Law Reform Commission report on rights and freedoms, 'it makes little sense to apply these changes to people who could not possibly have known that they would be eligible for temporary protection *only* should they arrive without a visa and thus could not possibly have been deterred' by these new laws.[299]

Should a Charter have been in force, the Government would have likely considered maintaining the continuation of the previous permanent protection visa process and criteria rather than implementing this sweeping measure based on a perceived characteristic of each asylum seeker, which is out of proportion to the limitations it imposes on the right to equality and non-discrimination. This would allow those found by the Department of Immigration and Border Protection to be in need of permanent protection to continue to reside in Australia for their lifetimes and those granted initial temporary protection visas the opportunity to apply for permanent protection if it is found to be warranted once a specified period of time has elapsed. This would enable the Department to consider the individual protection needs of each applicant, rather than issuing a blanket ban on permanent protection for certain perceived types of people (i.e. those people who seek asylum without a visa).

However, if parliament did pass the provisions, if challenged, the Court would likely declare the provisions to be inconsistent with human rights, since the basis of arrival of an asylum seeker may be a characteristic typically found in asylum seekers of a particular nationality, country of origin, social origin or other, which would impute discrimination in the provisions. A declaration of inconsistent interpretation would further promote public and parliamentary debate on the prohibition. However, while a Charter may enable a person to receive a remedy for discrimination inconsistent with its protections, this would not, in itself, invalidate the law or section.

Conclusion

Overall, the Amendment Act places severe limits on both the right to a fair hearing, the rights of the child and the right to equality and non-discrimination through measures that are disproportionate to their stated purposes. The Charter would have had an impact on the way that parliament considered the new laws more demanding on the government to consider alternative, less restrictive measures to achieve the intended purposes and to at least justify and be transparent about the limitations of rights. It is likely that the Amendment Act may not have passed in its current form. If it had, the Charter would require entities such as the IAA and the Minister for Immigration and Border Protection, as public authorities,[300] to consider human rights when making determination and exercising their discretion. It would also ensure the Court would review any challenged provisions with an eye towards human rights, ensuring that the practical implications of, and alternatives to, such laws were highlighted, and requiring the

interpretation of the laws in line with human rights rather than considering only their strict legality under the Constitution.

3.3 National Security

Counter-terrorism has been a central dimension of Australian national security legislation since the September 11, 2001 terrorist attacks.[301] This area of law enjoys bipartisan support which has been aimed at 'weeding out the terrorist contagion',[302] as was emphasised by Prime Minister Malcolm Turnbull in his address to the parliament when he stated that 'security is a prerequisite to the trust and confidence that allows a diverse and free society to flourish'.[303] However, in this framework human rights are not provided adequate and proportionate consideration. As distinct from the criminal law which seeks to punish those who have committed a crime, national security legislation intervenes at a much earlier stage, which is justified by terrorism's 'potential for catastrophic damage and loss of life.'[304]

Among a myriad of other reforms, the anti-terror environment has led to the establishment of two fundamental national security 'legislative planks'.[305] These reflect amendments to the *Criminal Code 1995* (Cth) and the *Australian Security Intelligence Organisation Act 1979* (Cth),[306] which provide wide-ranging powers to law enforcement such as the powers to enhance surveillance, enter private premises, and control the movement of Australian nationals in designated areas overseas. Despite the justification that such measures are 'a reaction to a temporary exceptional state of affairs',[307] laws are continually strengthened rather than wound back, and as such, have become an entrenched aspect of Australia's legal framework.

Australia has been at an 'elevated level of threat since September 2014', during which time there have been 'four attacks and eleven successful major disruptions'.[308] As the laws enacted are intended to reflect 'the most robust and proportionate response possible in the current threat environment',[309] the following analysis serves as an aid in this process as a means of ensuring that the legislative measures proposed are 'carefully tailored to the level of the threat'.[310]

3.3.1 *National Security Legislation Amendment Act (No 1) 2014* (Cth)

The *National Security Legislation Amendment Act (No 1) 2014* (Cth) ('the Act') was enacted to 'modernise and improve' the legislation which 'governs the activities of the Australian Intelligence Community (AIC)'.[311] This piece of legislation seeks to meet the technological

advancements employed by suspected terrorists, which 'make the detection and interception of terrorist communications far more difficult'.[312] The amendments in this Act focus directly on the powers and scope of the Australian Security Intelligence Organisation (ASIO) and the Australian Security Intelligence Service (ASIS). This is achieved by a number of provisions which streamline ASIO's warrant-based intelligence collection power, strengthen ASIO's capability to conduct intelligence operations, and seek to limit disclosure relating to the collection of intelligence.[313]

The Charter would require Ministers to consider the impact national security legislation would have upon individuals and their fundamental human rights. The following analysis seeks to highlight the considerations that Ministers are required to take into account to ensure their constituents are protected and do not have their rights unjustly limited. For the purpose of this report a hypothetical Minister from the seat of Bruce, in suburban Melbourne, Victoria, has been created, to highlight the additional factors for consideration a Charter would bring to Ministerial decision making.

The member for Bruce is a member of a major political party, who was elected to promote the interests of his electorate, which encompasses the Melbourne suburbs of Wheelers Hill, Springvale, Noble Park and Dandenong. This seat is 'one of the most racially diverse in the nation'[314] and reflects the growing migrant population which the member for Bruce represents. The protection of national security is of bipartisan concern, and as such, party politics are not significant considerations. However, 'striking a balance'[315] between protecting national security whilst ensuring basic human rights are protected is a key figure stone of the Member's political platform.

National security is a significant concern for the member as anti-terror raids have taken place in other areas of Melbourne,[316] and his electorate is concerned that they may be targets. The member for Bruce is determined to ensure that the protection of national security does not unfairly limit the human rights of his constituents. The Charter would empower the member with a proportionality test to ensure that limitations on human rights are absolutely necessary to protect national security. In addition, with the aid of the Charter, the member for Bruce will be able to present less restrictive means of achieving the same national security outcome, when voting on bills in Parliament. This will allow him to emphasise the interests of his electorate while debating significant national security amendments.

Right to privacy

Computer access warrants[317]

The Act equips ASIO with new broad powers enabling it to access the data of multiple computers belonging to the same person, found on the same premises or under the same computer network, without the need to apply for separate warrants. Where this is not possible, the Act facilitates the use of an 'innocent'[318] third party computer, in order to obtain the information.[319] It is a significant shift from previously existing law, as an issuing officer should 'be satisfied' that there are *reasonable grounds* for suspecting that evidential material will be found under the search granted by warrant.[320] Where ASIO is able to search multiple computers across one network, this removes consideration of whether reasonable grounds exist.

Such a provision means that ASIO is able to enter people's homes to search all the computers on a home network, and, where required, search the computers of friends, without any substantial legal oversight of whether this is necessary. While this amendment seeks to meet the requirements of 'advancements in technology',[321] recognising that applying for separate warrants and needing to enter the same premises on multiple occasions is inefficient, it is a significant intrusion into the privacy of the individual. It does not provide a system of protections[322] to ensure that interferences with privacy are proportionate to the aim of gathering intelligence.

In addition, international law, such as the German case of *Klass v Germany*[323] should be considered when assessing the validity of privacy provisions. This case stated that 'states may not, in the name of the struggle against...terrorism, adopt whatever [surveillance] measures they deem appropriate'.[324] Based on this analysis, a Charter would have required consideration of alternate means of obtaining information without substantially interfering with the right to privacy. These could include:

- Interferences could be limited to those which are 'minor or inconsequential',[325] and therefore do not substantially compromise an individual's privacy.
- A higher threshold for granting search warrant applications could be implemented, so that only 'circumstances [which] are sufficiently serious' to justify the collection of information permit intrusions into a person's privacy.[326]

Surveillance device warrants[327]

The amendments relating to the issue of surveillance device warrants seek to ensure that ASIO is no longer required to obtain separate warrants to listen and track suspects. This amended process has the potential to 'dilute existing safeguards',[328] as an applicant will no longer be required to demonstrate the need for each intrusion into someone's privacy and will be issued with a single broad warrant to cover all manner of surveillance methods. This is a significant incursion into privacy as it seeks to limit legal oversight in favour of strategic expediency.

The Charter would prompt parliament to consider the need for additional legal oversight, including options such as:

- A less restrictive approach to mirror the previous warrant process, wherein a new warrant would be required by ASIO officers in 'every instance in which there is a significant change in circumstances'.[329] This would include instances where the premises has changed or where the individual named in the warrant has altered.[330]
- The implementation of a privacy impact test to ensure that privacy is not disproportionately interfered with. The implementation of this test would require the issuing authority to consider whether access to private data would deliver a benefit to the investigation and the extent to which the privacy of any person will be compromised.[331]

Freedom of expression

Unauthorised disclosure of information[332]

The 'unauthorised disclosure of information' is stipulated as a criminal offence, punishable by five years imprisonment. This has been implemented to ensure that the disclosure of information relating to a special intelligence operation is controlled, and does not detrimentally impact ASIO activities. However, this provision is wide in scope and has the potential to impact 'whistleblowers, journalists, or lawyers seeking to disclose information about suspected wrongdoing'.[333] This means that journalists seeking to report on ASIO wrongdoing could be silenced, and as such has the potential to isolate 'serious abuses of government power from public scrutiny'.[334] The Charter would also enable international guidelines to be raised as a framework for how the freedom of expression can be permissibly limited. As per the Johannesburg Principles, this is quite a high threshold as in order for expression to be a threat to national security, it should encompass the following characteristics:

(1) Intend to incite imminent violence
(2) Is likely to incite such violence and

(3) There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[335]

Based on this analysis, the following less restrictive measures could be considered under a Charter:

- Only information 'likely to endanger health or safety of any person' or detrimentally impact a security operation[336] should be prohibited.
- Public interest exemptions should be implemented where the importance of information 'outweighs the harm' that results from its disclosure.[337]
- Exemptions should also apply where individuals seek legal advice, to ensure that they are able to understand their legal rights without fear of prosecution.[338]

Such amendments would ensure that the disclosure of information to protect national security remains an offence, and specifically targets individuals who intended to endanger national security, without limiting the genuine freedom of expression.

Liberty and security of the person

Use of force under search warrant[339]

The right to security of the person is impeded under the Act, as the Minister is able to authorise 'the use of any force against persons and things that is necessary and reasonable' under a search warrant.[340] The amendments clarify that the use of such force is not limited to the means of entry, and, as such, may be used at 'any time during the execution of a warrant'.[341] This means that an individual could be restrained in any way deemed reasonable in the circumstances by ASIO when they enter and search a premises. Such a provision seeks to ensure that ASIO is able to fulfil its functions under a search warrant, and collect the relevant data with efficiency and without interference. This power does not apply when force is unreasonable and unnecessary, and will remain subject to general criminal and civil penalties.[342] While assurance that ASIO operations can be conducted without obstruction is necessary, the provision permitting the use of force limits the right to 'bodily and mental integrity'.[343]

The right to security of the person can only be limited in circumstances of public emergency and to the extent which reflect the 'exigencies of the actual situation'.[344] With this in mind, the Parliament would be required to consider whether this provision meets the public emergency threshold, or whether less restrictive means could be adopted to achieve the same purpose without threatening liberty and security of the person.

It is likely that the Parliament would find that the current amendments do not reach this threshold as they are implemented for an indefinite period of time, and do not seek to address any particular threat. Based on this analysis the following less restrictive means could have been raised:

- The use of force by ASIO officers could be limited to property and not individuals. Such a provision is 'more appropriate' and underlines the recognition that police officers are trained to restrain individuals in this manner, while ASIO officers are not.[345] While ASIO would be unable to exercise force, the AFP or accompanying law enforcement officers would have the authority to do so.

3.3.2 Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014

This legislation was enacted as a means of addressing the security threat posed by 'the return of Australians who have participated in foreign conflicts'[346] or had participated in training with designated extremist organisations. The Act seeks to strengthen counter terrorism by restricting the movement of Australians into foreign areas designated as terrorist hotspots, creating offences for advocating terrorism and cancelling welfare payments to 'persons involved in terrorism'.[347] This is primarily achieved through amendments to the *Criminal Code 1995* (Cth).

The threat posed in 2014, when this legislation was enacted, continues to be relevant to this day, as Prime Minister Malcolm Turnbull recently emphasised that 'as Daesh[348] loses ground, many hundreds of foreign fighters in Syria and Iraq may seek to return to their countries of origin'.[349] This means that the 'international security environment has flow-on effects for Australia's domestic threat environment',[350] which is said to justify the expansion of counter-terrorism legislation to monitor the movements of Australian nationals overseas.

Right to privacy

Delayed notification search warrant[351]

The delayed notification search warrant stipulates that notice does not need to be provided at the time of entry and search of a premises and can be provided at a 'later time'.[352] This is implemented to ensure that suspected terrorists are not alerted to ongoing investigations, as this may jeopardise the outcome.[353] Prior to issuing a delayed notification warrant, the issuing officer is required to 'have regard' to any alternative means of attaining the information and the

extent to which privacy will be curtailed.[354] This provision is an intrusion into the right of privacy, as 'having regard' to alternative means of collecting intelligence does not require those alternate means to be adopted. This is likely to be of concern to members of Parliament, as a lack of checks and balances may result in people feeling unfairly targeted and unsafe in their homes.

Had this amendment been subject to the scrutiny of the Charter, alternate means of achieving a similar outcome would have been considered in the process of debate:

- A 'necessity test' could be applied to identify whether alternative means of intelligence gathering are available,[355] ensuring this warrant only applies in exceptional circumstances.
- An issuing officer may also be required to consider the limitation of the right to privacy, when having regard to any alternative means of obtaining information, and to adopt those means whenever they are more proportionate to the limitation of the right.

Control Orders[356]

A control order has the ability to stop a suspect from being in certain areas, accessing technology such as the internet, and communicating with particular people.[357] The control order regime seeks to limit the threshold requirement to a member of the AFP 'suspecting' that a terrorist threat is possible, without needing to prove evidence of a particular threat.[358] While control orders are necessary to curtail threats to national security, the reduced threshold is a disproportionate incursion into the human right to privacy. The reduced threshold contradicts the proposals put forward by the Council of Australian Governments (COAG) Review, which stated that control orders should not be sought on the basis of mere suspicion'.[359]

This amendment could mean that individuals would have their movement and internet access restricted, without any substantial proof that this is necessary.

The Charter would therefore require less restrictive means to be considered, such as:

- The standard of proof being altered from 'suspects' to 'considers,' requiring the member of AFP seeking a control order to have evidence beyond suspicion of a national security threat to ensure that the right to privacy is not arbitrarily limited.[360]

Right to social security

Cessation of welfare payments[361]

The right to social security is limited by the *Counter Terrorism Act,* which stops the payment of welfare to individuals suspected of terrorism related offences. This is applicable to provisions which seek to remove family assistance, parental leave or partner pay based on security grounds. The purpose of such limitations is deemed necessary as a means of ensuring that the Government 'does not support individuals who are fighting or training with extremist groups',[362]and, as such, the cancellation of welfare payments will be applied 'where it is appropriate or justified on the grounds of security'.[363] In addition, there is no requirement to provide reasons for a decision to cancel payments, based on the recognition that such decisions will be made with the use of 'highly classified' security information, which 'if disclosed to an applicant may put Australia's security at risk'.[364]

These amendments mean that families who are already doing it tough would be faced with additional pressures when their family assistance payments are declined.

The Charter would empower members of parliament to consider less restrictive options which would not have an impact upon the broader family dynamic[365]:

- Provisions enabling designated nominees to receive payments could be extended to all family payments,[366] rather than applicable only to family assistance payments as is the current circumstance. This seeks to ensure that while the purpose of preventing state funded terrorist activity is protected, it does not detrimentally impact innocent families members.
- In addition, 'sufficient' information could be provided to ensure the individual is aware of why payment of social security was cancelled.[367] This ensures that review of this cancellation can be sought, as the individual understands the basis on which the decision was made.

Right to liberty and security of the person

Lowering of the arrest threshold[368]

A constable is able to arrest a person without warrant where there is suspicion on 'reasonable grounds' that the person has committed or is committing a terrorism offence.[369] The ability of a constable to arrest an individual on the basis of mere suspicion limits the right to freedom from

arbitrary detention. This amendment seeks to 'allow police to intervene and disrupt terrorist activities'[370] at a point as early as possible, as a means of preventing attacks from occurring.

As this threshold is implemented to address the prevention of terrorism offences, this is likely to meet the public emergency threshold attached to this right.[371] However, despite this, the provision is not proportionate to the right of liberty and security of the person, as the reasons for and purpose of the arrest can be unclear, and fundamentally, 'reasonable suspicion' 'is an inadequate standard of proof for arrest under international law'.[372] This would be a significant consideration for members of parliament, as this amendment could result in constituents feeling unfairly targeted and antagonised without sufficient justification by this amendment.

In order to comply with the Charter, consideration of less restrictive means would be required, which may include:

- The threshold for arrest could be shifted from a reasonable suspicion to a belief based on evidence,[373] to ensure detention is not arbitrary, and is based on substantial evidence.

Freedom of expression

Advocating terrorism[374]

The new offence of advocating terrorism is applicable to situations where a person advocates for the commission of a terrorism offence and is reckless as to whether another person will engage or commit a terrorist act. This is a substantial limitation as unlike the direct incitement of violence, advocacy goes much further and may encompass 'a general statement of support for terrorism that is posted online with no particular audience in mind'.[375] As such, this provision may disproportionately limit the freedom of speech. As it stands, there is a lack of clarity relating to 'what behaviour could be deemed to be acts which advocate'.[376] This is a substantial limitation on the freedom of speech, may cause substantial problems, as, for example underage citizens could 'like' a post on facebook without knowledge or consideration of the consequences and be charged with the offence of advocating terrorism.[377]

The application of the Charter would require the consideration of whether less restrictive means are available to achieve the provisions purpose:

- The Charter may require this definition to be amended to recognise that free communication online within reason should not be restricted. This amendment would not apply to the online orchestration of acts of terror or incitement of violence, rather it

would create a clear distinction between legitimate free communication and that which may incite terrorism.

Freedom of movement

Entering, or remaining in, declared areas[378]

This provision creates an offence where a person enters or remains in an area of a foreign country which has been designated as a 'declared area' by the Foreign Affairs Minister.[379] This is a broad limitation, as the Minister has wide discretion as to what areas are declared, and as such the right to freedom of movement has the potential to be substantially limited. It is up to the individual charged with an offence under this section to prove that they were travelling to a designated area for a legitimate purpose.

This offence is likely to 'criminalise a range of legitimate behaviours.'[380] The defences available are 'narrow'[381] and do not provide for a range of situations where a person may travel to a designated area and should not be criminally prosecuted. These could likely include visiting friends, conducting a pilgrimage, working as a freelance journalist or travel as a tourist.[382] This is particularly applicable to designated areas in countries which remain tourist destinations, such as Indonesia and Israel.[383] Such a threshold is difficult to establish and it is 'not at all clear' what evidence would be required to prove that the person in question was travelling solely for the purpose of an approved activity and not for any other unlawful reason.

In order for this provision to be compatible with the freedom of movement, less restrictive alternatives would require consideration:

- The offence of entering or remaining in a declared area could be amended to include mention of an 'illegitimate purpose'[384] such as an intent to engage in terrorism related activity. Such a provision would ensure that movement for non-criminal purposes is expressly excluded from criminal liability.

Conclusion

The analysis of national security legislation fundamentally highlights that while there are provisions which are incompatible with human rights, less restrictive means of achieving the same national security outcomes can be applied to ensure compatibility with the Charter. While the powers of law enforcement organisations to protect national security would not be diminished, law enforcement officers may be required to use those powers in a manner which is both regulated by the law and simultaneously considers the rights of individuals. In addition, it

is clear that the Charter would assist members of parliament in protecting both the interests of their electorate and in addition, the broader national security concerns of the state. Such a Charter does not limit the ability of law enforcement to oversee strict national security protections, however ensures that human rights are not compromised in the process.

3.4 Paperless Arrests

3.4.1 The paperless arrest laws and the case of *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015]

In November 2014, the Northern Territory Attorney-General, John Elferink, introduced a bill[385] into the NT Parliament amending the *Police Administration Act* (NT) (the PAA), introducing the 'paperless arrest' laws.[386]

These amendments allowed police to arrest a person where a police officer reasonably believed that the person had committed, was committing, or was about to commit, an infringement notice offence ('INO').[387] INOs are minor offences which would ordinarily attract a fine as punishment.[388] The new laws meant that for these offences, which were not on their own punishable by imprisonment, a person could be arrested and detained. The laws were said to be aimed at addressing social issues in the NT, including issues of public disorder and police workloads.[389]

INOs range from noise complaints (playing a musical instrument so as to annoy)[390] through to obscenity in a public place or licensed premises,[391] cultivating not more than two cannabis plants, or consumption of alcohol in a prohibited area.[392] The paperless arrest laws targeted those who commit public nuisance INOs.[393] Once arrested under these laws, a person could be held for up to four hours (or longer if intoxicated) before one of four things had to occur. The person could be: released with an infringement notice; released on bail; brought before a bail justice, or released unconditionally.[394]

Prior to the paperless arrest laws, police already had extensive powers to arrest without a warrant on reasonable grounds, which could cover circumstances of nuisance, safety, intoxication, and serious crime.[395] In addition, police already had the power to arrest an intoxicated person as a means of protective custody – protecting the intoxicated person and the

public from potential harm if the person could not care for themselves, and protecting the public from intimidation, alarm or *substantial annoyance*.[396]

If arrested under the intoxication provision, the person cannot be questioned or charged with a crime.[397] They can be ordered to undertake a mandatory alcohol treatment order if they are apprehended under this section at least twice.[398]

The previous powers to arrest without a warrant under these sections did not limit which offences police could arrest people for. The 'paperless arrest' laws then, seemed not to add powers, per se, but rather acted as an encouragement to police to arrest people for up to four hours *in addition* to issuing an infringement notice for minor offences.[399]

When the laws were introduced, advocates raised the laws' potential to infringe a number of human rights, including the right to liberty and security of person and the right to non-discrimination.[400] In Parliament these concerns were raised, highlighting the laws' potential overreach, how they were to be managed and reviewed,[401] and the potential to disproportionately impact vulnerable cohorts, such as people who were homeless,[402] and Aboriginal people.[403]

In the case of *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 ('*NAAJA*'), two plaintiffs sought to have the laws declared unconstitutional. The case raised questions about the purpose of the 'paperless arrest' laws – whether the arrest power given in the law was intended to be punitive, or whether it was simply another form of detention powers similar to those police already held under the PAA.[404] If the law was found to be punitive, it was argued that extending punishment in this way, with a four-hour imprisonment on top of the infringement notice, was in breach of the Northern Territory's law-making powers.[405]

Approximately four months before the case of *NAAJA* was heard,[406] the death in custody of a 59-year-old Walpiri man, Kumanjayi Langdon,[407] arrested under the paperless arrest laws, gravely demonstrated a materialisation of the concerns which had been raised at the laws' introduction.[408]

Impact of the Charter on the parliament

Had it been in place at the time that the Attorney General sought to introduce the paperless arrest laws, the Charter would have required Parliament to:

- consider whether, in light of the risks of custody and extensive professional advice against any increases in incarceration,[409] the law was proportional to its purpose;[410]
- consider other less restrictive (and long-term) ways to prevent certain public alcohol use and related public order-type offences, including, but by no means limited to, funding for sobriety support services, Return to Country services, outreach, and safe space provision, and reinstating the banned drinkers register;[411]
- respond to any declaration of inconsistency found by the court;
- justify any override declaration they sought to use to introduce the laws.[412]

Impact of the Charter on police

In addition to whether or not the laws would have been passed in the form they were had the Charter been in place, the Charter would also have had an impact on the actions of police, as employees of the public service,[413] requiring them to abide by the Charter[414] and to implement ways of responding to situations that would not infringe human rights. Such alternatives could include:

- utilising alternative means of responding to public nuisance issues, other than arrest, such as de-escalation or therapeutic responses; and
- utilising arrest under other laws available, such as the intoxication or protection provisions, if the situation deemed it necessary.

Impact of the Charter on the Court (in determining *NAAJA*)

The Court would have been required to:

- investigate the proportionality of the laws, with reference to the nature of the right to liberty, security of person, and non-discrimination;
- consider alternative, less-restrictive means available to parliament and the police;
- if finding the laws disproportionate in light of the rights, and unable to be interpreted to be consistent with the rights, issue a declaration of inconsistency.

As will be seen in the analysis, considering the historical and current high risk to Aboriginal people in custody, it would be difficult for parliament, police, or the courts to justify as a proportional response a law which increased arrests. 'Paperless arrest' laws would have likely been declared inconsistent with the rights laid out in the Charter.

The case – administrative vs punitive detention

The case of *NAAJA* was brought against the Northern Territory in the High Court by the North Australian Aboriginal Justice Agency ('the NAAJA') and Miranda Maria Bowden, an Aboriginal

woman arrested under the laws.[415] Ms Bowden had been arrested in Katherine, NT, and detained for approximately 12 hours before being released and issued with infringement notices for two offences.[416] Rather than simply bringing a case for false imprisonment on her own behalf,[417] Ms Bowden and the NAAJA sought to have the laws declared unconstitutional, and raised several questions about the laws.

The NAAJA argued that if arrest under the laws was interpreted as 'punitive' detention, it would be either outside the NT's powers, or outside the separation of powers as per Chapter III of the Constitution.[418] 'Punitive' or 'penal' detention is detention intended to act as a *punishment* for an offence found to have been committed. The aims of such detention also include: deterrence, denouncing the behaviour, protecting the community, and rehabilitation.[419]

'Administrative' detention, on the other hand, can include managing the circumstances that arise when a person is first arrested, including: ensuring the person is available for further action in relation to any offence; preserving public order; preventing continuing offending; preventing loss of evidence; preventing harassment or interference with others involved; preventing fabrication of evidence; and/or ensuring the safety of the public or person in custody.[420] The Northern Territory claimed to be managing these kinds of risks in the new paperless arrest laws.[421]

Administrative detention can also manage risks in the aim of protecting the community and/or the individual. Risks to be managed might include terrorism-related risks,[422] mental health concerns,[423] or continuing dangerous behaviour after a prisoner has completed their sentence.[424] Administrative detention, being forward looking, seeks to ensure general public safety but not to impose a punishment if a crime has not been committed.

While the purposes of these two types of detention are different, the conditions involved may end up looking quite similar.[425] Justice Gageler in *NAAJA* pointed specifically to the difficulty in drawing a 'bright-line distinction between penal or punitive detention and protective or preventive detention'.[426] Importantly, the aims and conditions of detention must be proportional and balanced in relation to a person's right to liberty and security.[427]

Overall, the majority of the Court rejected both the argument that the laws were punitive, or that the nature of arrest under the new laws stopped judicial oversight of the detention. The Court found that the laws acted within the same conditions as other arrest without a warrant, and in combination with the sections governing arrest and bail conditions, were not outside the

jurisdiction of the Northern Territory to make or administer. In finding that the detention under these circumstances was not punitive, and the powers of arrest for INOs not outside the Northern Territory's power,[428] the Court found the laws were constitutional.[429]

Only Justice Gageler found that the wording of the section and its relationship to other sections in the PAA led to it being a punitive, and, therefore, unlawful form of detention.[430] He highlighted that if its purpose was identical to pre-existing powers, there would be no reason to enact the new sections at all.[431] Justice Gageler also found that the paperless arrest laws compromised the court's institutional integrity[432] under the Kable principle, as 'whatever the outcome of … adjudication, the person will already have been punished through the executive detention that has occurred'.[433] In finding the laws punitive, Justice Gageler determined that the allocation of a four-hour punishment without hearing by a court had effectively ousted the court's supervisory and adjudicatory role.

The majority judgement gave guidance, though, on how the laws could operate to not infringe on the right to liberty.[434] In finding that the detention was intended to last '*up to* four hours' and to be governed by the same conditions as other arrest, rather than considering the four hours a fixed period of 'additional' punishment, the court clarified the intended operation of the law, on paper, at least: police were to use administrative detention as a time to decide how to proceed and to take action as soon as possible, not as a blanket additional time of imprisonment. The court also noted that if the period of detention were 'substantially longer' than four hours, it could surpass being 'administrative' detention and become 'punitive'.[435]

The decision in *NAAJA* involved the interpretation of the law by its written purpose and not how it was being applied in each case.[436] While there was substantial evidence suggesting that the police were relying on the four-hour detention period as a matter of course,[437] the court did not consider specific facts about the length of detention and whether 'the detention was not for the purposes of investigating an offence'[438] and being used in a way which would 'interfere with basic common law freedoms'.[439]

Impact of the Charter

Right to non-discrimination

The NT Coroner, commenting on the death of Kumanjayi Langdon,[440] noted that the law, targeting 'common street and 'public order' offences,[441] was highly likely to apply to more Aboriginal than non-Aboriginal people due to several intertwined social issues and cultural

experiences,[442] including the fact that alcohol is banned in the communities and town camps of many Aboriginal Northern Territorians.[443] He estimated, based on the evidence available, that 'upwards of 80%' of those detained under the new laws were Aboriginal.[444]

In addition, the Coroner observed the differential treatment of Territorians with regards to alcohol use, highlighting the many pubs and bars in the area with outdoor drinking areas, the footpath cordoned off to accommodate them:[445]

> … laws that impact so disproportionately on one sector of our community are manifestly unfair. Moreover, they are irreconcilable with the recommendations of the Royal Commission, which urged that Police use arrest and detention as an option of last resort.[446]

In highlighting the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), the Coroner brought to the fore the well-known and researched risks for Aboriginal people over-represented in the prison system.[447]

Right to liberty and security of person

Judges in *NAAJA* noted that, in Australian law, detention has been characterised as being primarily penal, its main aims being determining and punishing criminal guilt, and ensuring the attendance of the accused in court.[448] Despite the court finding that in the case of paperless arrests the detention was not punitive or penal in nature, incarcerating someone remains a limitation of their right to liberty, and comes with the risks attendant to the deprivation of liberty.[449]

In light of the history of Aboriginal deaths in custody in Australia and the 1989 – 1991 Royal Commission into those deaths,[450] recent investigations into juvenile detention conditions and treatment in the Northern Territory[451] (which has led to another Royal Commission),[452] recent Aboriginal deaths in custody,[453] and the still elevated detention rates of Aboriginal Australians,[454] the seriousness of incarceration is laid bare. The RCIADIC, which investigated 99 deaths in custody occurring over a nine-year period, starkly demonstrated the relationship between liberty and security of person.[455]

Relationship between purpose and limitation

Referring to administrative detention as 'paperless arrests', the NT Attorney-General[456] claimed the laws involved less work for police officers and the courts by reducing the paperwork involved in referring charges to the court. It was said such paperwork 'would tie up the courts and police with things that would just be fineable offences anyway'.[457]

However, while described as 'paperless', an arrest in itself involves paperwork. While the Attorney-General, John Elferink, acknowledged that the arrests were not in reality 'paperless',[458] in being introduced as a 'simplified' arrest, the laws failed to address the fact that all arrests require detail, including documented health checks of those arrested.[459]

The Coroner highlighted the increased workload experienced by police under the new laws. Alongside a police operation designed to address drinking in public and anti-social and alcohol-related incidents,[460] the new 'paperless arrest' laws, without any corresponding increase in police watch-house staff, could make the pace of a police shift 'frenetic'.[461] He found that officers were so busy they were unable to complete all their tasks.[462] This fact in itself was liable to put those already at risk, such as Kumanjayi Langdon, in danger of dying in custody.[463]

The laws' other purpose, it was said, was to remove people from the public whose behaviour was considered anti-social or, in Elferink's words, those engaged in 'rat-baggery'.[464] Elferink reasoned that:

> Taking a person out of circulation was really important because every single copper out there will know this truth: the moron standing on a street corner being a foul-mouthed git at 9.30 pm at night is nearly always the person you are arresting at 2 am for a serious assault, sexual assault or something worse. If you take them out of circulation nice and early you are already well in advance of cutting off a lot of problems down the track.[465]

Described as targeting people perhaps slightly drunk and at risk of committing offences, and the arrest giving them 'time out' to 'cool off',[466] the measure was aimed at protecting the community's right to safety more generally – broadly, protecting the right to life, and security of person for others in the community. Elferink defended the laws as proportionate to the need to impose 'social order' and to reduce the time police spent on administrative tasks as opposed to being on the street.[467]

Is it interesting to note that all the elements which would be raised under the Charter were actually raised during the Parliamentary debate: the risks to liberty and security of person inherent in incarceration; the risk that the law would be applied discriminatorily; and the other means that were available[468] to address public drunkenness concerns.[469] What difference, then, would the Charter make?

If the Charter were in place, Parliament have been required to comprehensively confront with those aspects and risks of the laws and come to a well-supported position on whether the laws were proportional to the infringement of the rights. It would be in contrast to the debate that did occur, where the laws were likened to 'catch and release' (a recreational fishing term)[470] and the logic of how incarceration would address safety in anything but the short term were not addressed.

In addition, further concerns may have had scope to be raised, including the potential police overload due to increased arrests, and consequent dangers to those arrested as a result of the limits placed on their liberty.[471] Parliament would have needed to justify with more transparency, and more fully, the relationship between increased arrests and safer streets, which was the said aim of the laws:

- Would arresting someone for four hours actually decrease public drinking and the issues which fed into it in the long term?
- Would it, in the long term, decrease police workloads?
- Was an increased arrest rate, for offences not punishable by imprisonment, a proportionate response?
- Would arrest for such offences decrease the rate of arrests over time?[472]

At the level of public service decision-making (police actually making the arrests), the right to liberty and assessment of breaches of the Charter, if mandated, would also be live concerns in the police force's mind. It would arguably have a similar effect to the findings of the RCIADIC,[473] and the findings of the inquest into the death of Kwementyaye Briscoe[474] on improving the conditions and care of prisoners.[475]

In consideration of the historical and current high risk to Aboriginal people in custody, it would be difficult for parliament, police, or the courts to justify a law which increased arrests as being a proportional response. 'Paperless arrest' laws would have likely been declared inconsistent with the rights laid out in the Charter.

Other less restrictive means

In addition, the Charter requires 'less restrictive means' to address the purpose of the legislation to be considered. Those less restrictive means could include a wide range of evidence-based approaches beyond what was already raised in Parliament.

On advice from the Criminal Lawyers Association Northern Territory and the NAAJA, Walker in parliamentary debates raised previous programs such as the banned drinker register, and the Return to Country program, which had been used to address homelessness and its attendant problem drinking and behaviour.[476] The RCIADIC itself made multiple recommendations to address issues which fed into incarceration rates.[477] Since the RCIADIC there has been no shortage of advocacy groups, both led by Aboriginal people and other reputable NGOs, which have recommended many different approaches to the social issues aiming to be address by the 'paperless arrest' laws.[478]

At each level, then, other less-restrictive means could have included:

- Parliament:
    - funding for sobriety support services
    - Return to Country services
    - outreach
    - safe space provision
    - reinstating the banned drinkers register.[479]

- Police:
    - De-escalation measures[480]
    - Other options as outlined by the Coroner, including:
        - sobering up shelters
        - Night Patrol assistance
        - issuing a banning notice
        - directions to return home, to a hostel, or to family
        - assistance from the person's family
        - escort to a hostel
        - tipping out alcohol and issuing an INO.

All the above measures, relevant at the parliamentary and police level, could also have been taken into account by the court in its assessment of the laws' operation. These considerations

are both wider and more specific to the operation of the law than the constitutional questions raised in the case.[481]

In considering pragmatic approaches to the issues concerned (the relationship between the limitation and its purpose) and other means of achieving a law's purpose, the Charter grounds the law's application in *practicality*. Concerns raised as early as the law's introduction to Parliament would have been required to be addressed before harm occurred. The Charter could encourage an evidence-based approach to addressing such social issues, rather than a political one.

In addition, as a Territory law, if the law was found incompatible with the Charter, it could have been struck out due to inconsistency between the Federal Charter and the State law provided for by the Constitution[482] (as applicable to the Territory pursuant to the *Northern Territory (Self-Government) Act 1978* (Cth)).[483]

3.5 Disability Discrimination

3.5.1 *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 ('Mulligan')

Background

In 2010, David Mulligan attempted to book a flight with Virgin Australia, requesting that his assistance dog travel with him. Mr Mulligan, a 48-year-old[484] who lived in Lithgow, NSW, suffered cerebral palsy. Because of this he had balance, sight and hearing difficulties. He had a national identity card from Blind Citizens Australia, which he was recommended by Guide Dogs Australia to obtain,[485] confirming his sight-impaired status, as well as documentation from his doctor confirming the diagnosis of cerebral palsy and symptoms of hearing and sight impairment.[486]

Interstate travel was necessary for Mr Mulligan to keep in contact with close family members by regular visits. He had a relative who had become ill and whom he wanted to see before they passed away. Travel from his home in Lithgow to his family in the Gold Coast involved a long and difficult train or bus journey for him, and it was not possible for him to make the 22-hour journey.[487] As such, travelling by aeroplane was the least difficult option for him.

In everyday travel, Mr Mulligan was accompanied by his dog. Willow had permission to travel as an assistance dog for both New South Wales and Queensland public transport.[488] Mr Mulligan also had a letter from Coffs Harbour Dog Training Club, which is affiliated with Dogs NSW, a government organisation. The letter stated that Willow was trained appropriately as an assistance dog.[489] A doctor's letter and a medical report confirmed that Willow's assistance was required for Mr Mulligan to be able to travel long distances.[490]

Mr Mulligan, over a two-year period, liaised with various people at Virgin Australia regarding Willow being able to travel as an assistance animal.[491] During that time Virgin took different positions on the issue, finally rejecting Mr Mulligan's application to bring Willow on the plane, on the basis of limited permission Virgin (incorrectly) understood it had to carry such animals.[492]

Does the law limit human rights?

The Civil Aviation Safety Authority ('CASA') oversees aviation safety in Australia, including management of assistance animals and/or the possible risks associated with them. The *Civil Aviation Act 1988* (Cth) ('the CAA') gives CASA's purpose as:

> To establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.[493]

CASA has the power to direct airlines whether to accept or not, with conditions, animals on flights, and makes such laws under the *Civil Aviation Regulations 1988* (Cth) ('the Regulations'). After the introduction of the *Disability Discrimination Act 1992* (Cth) the government foresaw the potential for aviation safety measures to impact on disability rights, and added a caveat to the CAA that:

> The regulations may contain provisions that are inconsistent with the Disability Discrimination Act 1992 if the inconsistency is necessary for the safety of air navigation.[494]

The Regulations state, in summary, that an aircraft operator can bring animals on planes if the animal is in a container in accordance with regulations, or carried with the permission of CASA. In the case of a dog accompanying a visually or hearing impaired person in the passenger cabin, permission from CASA is not required if the dog is restrained and animal hygiene is maintained. However, an aircraft operator cannot carry animals in an aircraft if it would affect anyone on board in a way that could compromise safety of the aircraft.

Importantly, the exemption *only* applied to hearing and sight impaired people – other disabilities were not covered by the law.[495] However, in addition to the Regulations, CASA can issue supplementary written permission directly to airlines regarding carriage of animals.[496] In addition to the exemption for hearing and sight-impaired people, CASA issued Virgin written permissions[497] to carry assistance animals. The permissions allowed Virgin to carry an assistance animal on board if the animal had completed certain approved training and public access tests.[498]

Equality and non-discrimination

The *Disability Discrimination Act 1992* (Cth) ('the DDA') makes it unlawful to treat a person less favourably, either directly[499]or indirectly[500], than a person without the disability in the same or similar circumstances. Under the DDA, failing to make reasonable adjustments for a person with a disability[501] or requiring a person to comply with a requirement that a person cannot or would not comply with because of their disability are both considered discrimination on the grounds of disability[502].

The right to non-discrimination is also recognised and protected by international conventions and the Charter. Particularly relevant to disability discrimination, Australia ratified the *Convention on the Rights of Persons with Disabilities (2008)* (CRPD) in 2008[503] and made amendments to the DDA in 2009, bringing aspects of the CRPD further into Australian domestic law.[504] The CPRD outlines the guiding principles and obligations on state parties to protect the right of non-discrimination on the grounds of disability, as well as the scope of the right. Article 9 provides the obligations on state parties to protect the right to non-discrimination in relation to accessibility, stating that:

> To enable persons with disabilities to live independently and participate fully in all aspects of life, State Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation….[505]

The scope of the right to non-discrimination protected under the Charter would likely extend to include the obligation outlined in Article 9 (above).

Reasonable measures to accommodate a person with a disability can be in the aim of achieving substantive equality when people's circumstances differ – for example, providing extra room for Willow might be seen as a positive distinction to achieve equality for Mr Mulligan. Such measures are not considered discrimination under the CRPD.[506]

In the context of the case if heard under the Charter, if denying Mr Mulligan carriage on a Virgin flight because he required an assistance dog was a *reasonable limitation* in the circumstances, and *proportional* to the aims of the Regulations, it would not be an infringement of the rights to equality, non-discrimination and freedom of movement. [507] If not proportional, it would be an infringement of those rights.

As the aim of the Regulations is to ensure safe air travel, the Regulations themselves protect both Mr Mulligan's and other passengers' right to life and security of person by controlling possible disturbances on flights that might compromise safety. Mr Mulligan's right to non-discrimination would be balanced with the protection of these other rights.[508]

Under the Charter, Parliament and CASA would also be required to consider other means[509] of ensuring the rights and limitations are balanced – whether there are other ways the laws could be better drafted so that, on a case-by-case basis, disabilities and the requirement for an assistance animal could be assessed and accommodated while ensuring safety.

Once brought to court, the Court is also required to read, if possible, the legislation in way that will not infringe the right, and consider other means of addressing the legislative aim.[510]

Impact of the Charter

The DDA contains intricate and detailed coverage of non-discrimination law in relation to disability in Australia.[511] It provides a definition of assistance animals,[512] direct and indirect discrimination,[513] and also refers to discrimination in the provision of services by private companies.[514] It provides exceptions for when private companies will not be in breach of the DDA,[515] a section the judge at first instance incorrectly relied upon to initially dismiss the case.[516]

On appeal, Virgin was found to be in breach of the *Disability Discrimination Act 1992* (Cth) ('the DDA') by not allowing Mr Mulligan's assistance dog to travel on Virgin flights, and Mr Mulligan was awarded damages for some of his claims.[517] The question, then, is what impact would the Charter have had in the scenario, both before Virgin's involvement and afterwards.

If the Charter had been in place, it would have had an impact on each of the following steps:

- The Regulations passed by Parliament;
- CASA's written permission to Virgin regarding animal carriage guidelines;[518]
- Virgin's decision-making in setting and enforcing its assistance animal guidelines;
- The Courts interpretation of the Regulations and permissions.

Impact on Parliament

It is evident that Parliament had considered the effect on disabled Australians in its introduction of the Regulations in question. The explanatory memorandum refers to the legislation as 'not unnecessarily restrictive or discriminatory', while pointing to its purpose as being 'developed solely for reasons of aviation safety',[519] and highlighting that in 'higher interests of aviation safety' such inconsistency with anti-discrimination legislation may occur.[520]

When drafting how those laws would affect people with disabilities; however, the exceptions written into the Regulations by CASA were overly focused on a subset of disability – hearing and sight impairment, thus creating unwarranted difficulty for Mr Mulligan (who had multiple disabilities). Perhaps overly broad in its absence of definition for required training, and overly narrow in terms of disabilities sufficient to warrant an exception, the Regulations were able to be misconstrued by both Virgin and, at first hearing, the Federal Circuit Court.

The Charter would operate to ensure Parliament and CASA, as a public authority,[521] both considered other, less restrictive means of addressing safety concerns, both in the Regulations and in the permission outlined to Virgin by CASA. This could have included considering a greater breadth of possible situations. A less restrictive form of drafting could have been:

- to explicitly broaden the scope of appropriate training bodies recognised in the permission provided by CASA to the airlines; and
- to broaden the scope of disabilities which may require an assistance animal.[522]

If the Charter had been in place, and the case was brought alleging a breach of one or more of Mr Mulligan's rights protected by it, the judge at first instance would have been required to consider a broader interpretation of the laws in the aim of reading them consistently with the rights of the Charter. Specifically, the Regulations and permissions would both need to be interpreted as far as possible to be consistent with non-discrimination while remaining consistent with the aim of aviation safety. This may have encouraged the primary judge to interpret that the exception did, in fact, apply to Mr Mulligan, regardless of the complexities of his disabilities.[523] In addition, as the permission to Virgin did not specify which organisations were 'approved organisations',[524] Judge Street, called upon to interpret law consistently with the Charter, would be further encouraged to accept

evidence of training from a variety of organisations so as to interpret the law consistently with the Charter to ensure non-discrimination.

It is most notable that in this case Mr Mulligan was found, under the current laws, to qualify for the exception in the Regulations *because* of his hearing and sight disabilities. In short, another person with a valid need for an assistance animal due to disability (who suffered perhaps serious mobility issues due to cerebral palsy), whose animal was adequately trained in the same way as Mr Mulligan's, would have lost the case because they were *not* hearing or sight impaired.

Under the Charter, such a limitation on the right to non-discrimination would very likely have been held to be disproportionate and a breach of the Charter. If the Court found it could not interpret the words 'visually impaired or hearing impaired' to mean disability more broadly, it could issue a declaration of inconsistent interpretation. Parliament would then be at liberty to either alter or sever the provision, or make an override declaration. An override declaration, however, would require exceptional circumstances to apply. A Charter, in effect, would ensure a better case-by-case analysis of disability, reasonable measures and whether particular regulations, processes of actions amount to discrimination.

Conclusion

Every person may at some stage wish to travel by plane, but not every person will need an assistance dog to do so. In the case of Mr Mulligan, having his disability and Willow's training recognised by a single airline took two years of communication with the airline, an attempt at conciliation via the AHRC, and two court cases before the law was correctly interpreted. If the Charter was in place, its operation at the various levels of consideration – Parliament, CASA, Virgin, and the court – could have clarified the rights in play and the necessity for them to be clearly understood and protected, alongside the protection of aviation safety.

If Mr Mulligan had not been hearing or sight impaired his case may not have succeeded under the current Australian law. A person with mobility difficulties, who is not hearing or sight impaired but is assisted by an animal to travel, would not be able to travel under the current laws, regardless of the level of training of the animal. It is in these cases that a Charter would make the most significant difference, clarifying both the laws and their application.

4. Summary of Impacts

The lack of comprehensive protection for human rights at a federal level has been recognised as a weakness of the human rights framework within Australia.[525] While some human rights enjoy varying levels of protection through federal legislation (such as anti-discrimination and privacy laws) others have not been adopted into domestic law despite Australia's ratification of human rights treaties under international law.

This report examines this perceived shortfall in protection by assessing the potential impact of a federally legislated human rights charter, and considering the impact it may have had on contentious cases and legislation. Intertwined with this analysis of the past is a growing understanding of what human rights protection may mean for Australia's future. By analysing cases and legislation across issues ranging from migration to national security, anti-association and discrimination the report seeks to ground public debate for and against developing further protections in real and practical examples.

The report considers the use of a 'dialogue' model for a federal human rights charter. This framework is supported by the Law Council of Australia,[526] and similar to models currently in force at state[527] and territory[528] levels within Australia, and further afield in New Zealand[529] and the United Kingdom.[530] At its core this model establishes a dialogue between parliament and the courts regarding human rights, but stops short of allowing courts to disregard an elected legislature. Instead it seeks to bring a discussion of issues to the fore, and ensure that where parliament sees fit to limit or infringe human rights it does so clearly and openly.

The analyses highlight three impacts of the Charter that arose consistently across the range of cases and legislation considered. These are:

- Increased transparency.
- Increased public and parliamentary debate.
- Increased consideration of options, where human rights may be affected.

Increased transparency

Importantly, many of the human rights protections considered in the Charter already exist within Australia in some form or another. However many of these protections are disjointed, applying only in some states, and many are imposed via complex processes of legal interpretation undertaken by judges. This includes:

- state-based human rights charters in Victoria,[531] the Australian Capital Territory,[532] and soon to be introduced in Queensland;[533]
- principles of judicial interpretation such as proportionality (an interpretative principle providing that means should be legitimate to their purposes),[534] and legality (an interpretive principle providing that parliament does not intend to legislate in breach of its human rights obligations);[535] and
- rights which have been imputed into the Australian Constitution (such as forbidding legislation prohibiting the right to exercise religion,[536] and the implied right to freedom of political communication).[537]

A Charter, if introduced, would pave the way for consistent and transparent processes to be followed where legislation or actions have the capacity to infringe upon human rights. It would provide Parliament with a process through which it must indicate where it intends to limit a human right and why. Also among these processes would be a dialogue between the judiciary – informed by international human rights jurisprudence – and the Parliament about the compatibility of a law with one or more human rights. In this way, the Charter would enhance the transparency of the passage of laws through the Parliament. We see this impact as a positive one, capable of fostering informed parliamentary and public debate on such laws, and consistent application by the courts.

The transparency that the Charter brings is likely to enhance both the awareness of human rights implications of certain laws and also the effectiveness of those provisions. Requiring laws to be subjected to a proportionality test requires Parliament to ask more than 'are the laws consistent with human rights' and 'will the provisions survive a legal challenge' but, more importantly, to investigate the relationship between the limitation and its purpose, and whether that purpose is ultimately going to be met by the limitation. Parliament is also required to consider whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. Put simply, is the Parliament limiting a human right in order to enact legislation that will make a positive difference to the society it is purporting to protect?

This would have been a difficult test for the Queensland Parliament to satisfy in relation to its V*icious Lawless Association Disestablishment Act 2013*, where it is clear that the provisions did nothing more than lead to a considerable limit on the right to liberty and to equal protection before the law for no apparent increase in public safety, or in law and order. Shining the light on these issues would compel the Parliament to consider what the purpose of the provisions were

in the first place, and would potentially foster debate on how the provisions could be redrafted to not only increase their efficacy, but to re-establish some continuity between the limitation and its purpose.

Parliament would be required to consider any less restrictive means reasonably available to achieve the purpose that the legislation seeks to achieve. This should be the goal of any lawmaker, regardless of their political stripe. This would not mean laws would never limit human rights, and the analysis of *Mulligan* portrays how public safety (especially in relation to commercial aviation) can overcome concerns about discrimination with little controversy. A Charter would not dictate the outcome but merely compel the Parliament to have a thorough and well-considered discussion about that limitation. Laws drafted after such discussion may reduce the likelihood of discriminatory decision-making and lessen the need for the courts to weigh in on their merits.

Increased debate

As highlighted in the methodology section of this report, the aim of a dialogue model is to facilitate a constructive dialogue between the courts and the parliament about whether Australian laws are consistent with human rights, and, if not, whether they remain appropriate for the Australian community.

The currently limited opportunity for debate can be seen in the passing of the *Migration Amendment (Regional Processing Arrangements) Act 2015.* As discussed in this report, these amendments expanded the actions the Commonwealth Government was able to take in relation to offshore processing. The wide-reaching amendment provided for potentially unnecessary limitations of basic human rights in offshore processing facilities. Notwithstanding the attempts of some parliamentarians to suggest modest revisions (as basic as ensuring the amendment did not allow a person acting on behalf of the Commonwealth Government to breach Australian law), the amendment was passed quickly by both houses after receiving limited parliamentary debate, and the suggested revisions were not made.[538] In addition, it was passed and became law before the Australian Parliamentary Joint Committee on Human Rights could assess it and make comment.[539]

While greater transparency shines a light on the process of bringing a contentious bill to the Parliament and passing it into law, it also serves as another instrument to ensure that laws are not surreptitiously passed through Parliament by whichever party has a majority. The dialogue model ensures debate, and not only in the Parliament, but also in the public, media and between

various lobby groups. It compels lawmakers to mount credible arguments as to why they believe that a certain right should be curtailed. If the proportionality test has shown that there are less restrictive ways to achieve an end, or that provisions may not be as efficacious as initially thought, lawmakers will be less able to justify the provisions on the grounds of 'public safety' or 'law and order'.

It also allows the media, lobby groups, and, most importantly, the broader public to be better equipped to ask lawmakers difficult questions, forcing them to justify their positions, or to alter or abandon them where appropriate. Transparency in the Parliament and robust public debate is not a hindrance to our democracy, but rather the very essence of it. It should not be the case that the electorate is not entitled to have politicians of any party explain their proposed laws and deal with any weaknesses or inconsistencies.

A Federal Human Rights Charter will encourage this dialogue and lead to a more robust discussion of the effects our laws have on our society. To this end, the introduction of a Federal Human Rights Charter would not be a brake on Parliamentary Sovereignty, but rather an enhancement of it insofar as Parliament is only sovereign because it reflects the will of the people.

Increased consideration of options where human rights may be affected

A Federal Human Rights Charter would most immediately impact actions taken within Australia by requiring public authorities to consider human rights when making decisions,[540] prohibiting acts that 'are incompatible with a human right' or that fail 'to give proper consideration to a relevant human right'.[541] This day-to-day operational requirement would in turn lend itself to the upfront consideration of options when undertaking public action and support an educative process for the decision making of public authorities.

The Charter would also importantly broaden the basis on which issues can be looked at by the courts, allowing the consideration of realistic impacts and potential alternatives for reaching the outcome. This is particularly highlighted by the proportionality test under the Charter, directing consideration of 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.[542]

For example, in NAAJA (the 'paperless arrest' legislation) although the constitutionality of the laws were being challenged, there was no ability for the court to consider whether the laws

were effective in addressing their purpose. In contrast, the Charter would provide for two important additional considerations, those being:

- the effect on individuals and their human rights being a front and centre consideration in passing and applying a law; and
- consideration of other evidence-based ways of achieving the said aims (of which there are often several).

In this way, the practical application of the laws and the realities of their context (i.e., the situations in which they will be used) could be fully addressed. It allows, rather than a simply legal argument, a pragmatic, evidence-based approach to laws which affect people's day-to-day lives. This can in turn open up better avenues of problem-solving in difficult areas of law making.

As an example, in relation to the indefinite detention considered in *Al-Kateb v Goodwin*,[543] making rights an additional consideration could have allowed the court to consider what else could be done in the circumstances. When similar indefinite detention problems have come up in other jurisdictions, such as the US, or in UN cases, the courts have read in more appropriate alternatives, including an implied six-month maximum detention and appropriate post-detention monitoring, to limit the extent to which rights are breached. Without the guidance and legal framework of a Charter Australian courts were less able to take these considerations into account or refer to the growing body of international jurisprudence from other courts which have grappled with similar issues.

As discussed in the assessment of *Kuczborski v The State of Queensland* and *NAAJA,* in the case of state and territory laws inconsistent with the rights conferred by the Charter, an additional option afforded to a court under the Charter is the option to strike down a law that is inconsistent with the Charter. This power has been available to the Court pursuant to section 109 of the Australian Constitution and the test in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466. The Charter would ensure that courts could act with regard to a basic set of human rights and ensure that these rights were protected against subsequent State legislation that attempted to unreasonably limit the rights. As a number of State legislatures have introduced, or are planning to introduce, their own Charters, it is hoped that the various State-based Charters would prevent Parliaments from enacting laws that directly contradicted the Federal Charter, and that they would be able to avoid the necessity of striking down any infringing State laws. It is nonetheless an option that would remain under the Charter.

5. Conclusion

Unlike New Zealand, the United Kingdom, Canada, South Africa, the United States, and the European Union, all of whom have protected the basic human rights discussed in this report, Australia sits at odds with these international allies and partners as one of the only Western democracies without clear and consistent human rights protections.

The selection of cases and legislation raised, ranging from indefinite detention of people who have not been convicted of a criminal offence, to the potential detention or statelessness of babies born within Australia, the illegality of association, and the arrest and imprisonment of Australian citizens without a warrant or charge, highlight only a snapshot of Australian laws and decisions that limit the human rights of individuals, with grave consequences. These limitations have occurred under various political leaderships, but have cumulatively resulted in a slow degradation of the principles and standards many Australians expect to be upheld by our legal and political system.

By codifying protections under an unambiguous and publicly accessible Federal Charter, Australia would be sending a clear message about its position on human rights to both its own communities and the world. This is particularly relevant, given Australia's ongoing bid for a seat on the United Nations Human Rights Council in 2018-20.[544] It also serves as a powerful symbolic and educative tool for future Australian generations, upcoming decision makers, and new arrivals in Australia by recording the most basic rights that Australians hold and expect their government to observe.

This report highlights that a Federal Charter of Human Rights, as proposed, would not limit the potential for the Parliament to legislate in any way it deems necessary to ensure the continued prosperity, security and protection of Australia. A Charter provides a system which promotes transparency, compelling the Commonwealth Government to be clear with all Australians on how and why changes to laws will impact or limit their human rights. It provides a foundation for more informed public and parliamentary debate as well as an avenue through which alternative measures which achieve the same or similar effect with less significant limitation of human rights, can be identified and considered. It is difficult to see how the introduction of a Charter will have anything but a positive influence on Australia's legal and political processes, and consequently, on how we treat each other in the broader Australian community.

Appendix 1: Model Charter

Australian Charter of Human Rights And Responsibilities Act 2016 (Cth) (Hypothetical)

PART 1 – Preliminary

1. Purpose

(1) The purpose of this Charter is to protect and promote human rights by—

(a) setting out the human rights that Parliament specifically seeks to protect and promote; and

(b) setting out which human rights can be limited and the circumstances in which they can be; and

(c) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and

(d) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and

(e) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Parliamentary Joint Committee on Human Rights to report on such compatibility; and

(f) conferring jurisdiction on an Australian Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration; and

(g) conferring jurisdiction on an Australian Court to issue a remedy where it finds that a breach of an individual's rights has occurred.

(2) In addition, this Charter—

(a) enables Parliament, in exceptional circumstances or a state of emergency, to override the application of the Charter to particular statutory provisions, except those absolute rights laid out in Division 1.

2. What is a public authority?

(1) For the purposes of this Charter a public authority is—

(a) an Agency, including a Department, Executive Agency or Statutory Agency, as defined by the *Public Service Act 1999*;

(b) an APS employee, as defined by the Public Service Act 1999.

(c) a public official employed under State or Territory legislation who carries out functions of a public nature, including, but not limited to:

(i) employees of the public service;
(ii) heads of government departments or administrative offices;
(iii) public service commissioners;
(iv) directors of public entities;
(v) court staff;
(vi) parliamentary officers; and
(vii) holders of statutory or prerogative offices; or

(d) a public officer employed under Australian statutory provisions and carrying out duties overseas; or

(e) an entity (including both a human being and a legal person, and unincorporated bodies) established by a statutory provision that has functions of a public nature; or

Note: A reference to an entity includes a reference to a person exercising a function of the entity, whether under a delegation, subdelegation or otherwise.

(f) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the Commonwealth, State, Territory, or a public authority (whether under contract or otherwise); or

(g) the Australian Federal Police, or any State or Territory police force;

(h) all local government Councils, Councillors and members of Council staff; or

(i) a Minister; or

(j) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or

(k) an entity declared by the Commonwealth to be a public authority for the purposes of this Charter—

but does not include—

(l) State or Federal Parliaments, or Territory legislative assemblies, or a person exercising functions in connection with proceedings in Parliament; or

(m) a court or tribunal except when it is acting in an administrative capacity; or

(n) an entity declared by the regulations not to be a public authority for the purposes of this Charter.

(2) In determining if a function is of a public nature the factors that may be taken into account include—

(a) that the function is conferred on the entity by or under a statutory provision;

(b) that the function is connected to or generally identified with functions of government;

(c) that the function is of a regulatory nature;

(d) that the entity is publicly funded to perform the function;

(e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the Commonwealth, or a State or Territory.

(3) To avoid doubt—

(a) the factors listed in subsection (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and

(b) the fact that one or more of the factors set out in subsection (2) are present in relation to a function does not necessarily result in the function being of a public nature.

(4) For the purposes of subsection (1)(c), an entity may be acting on behalf of the Commonwealth, Territory, State, or a public authority even if there is no agency relationship between the entity and the Commonwealth, Territory, State or public authority.

(5) For the purposes of subsection (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the Commonwealth, Territory, State or public authority.

PART 2 – Human rights

3. Human rights—what they are and when they may be limited?

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) Division 1 of this Part sets out absolute rights, which are not to be limited in any way, under any circumstances, for any purpose. These rights are also non-derogable – see section 2(3).

(3) Division 2 of this Part contains non-derogable rights, which are not to be suspended in a state of emergency, when the protection of other rights may be suspended under the conditions outlined in section 34.

(4) Division 3 of this part sets out all other rights protected by this Charter. These rights, and non-derogable rights, may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(5) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

Division 1 – Absolute Rights

4. Freedom from torture & cruel, inhumane or degrading treatment or punishment

(1) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

(2) No one shall be subjected without his free consent to medical or scientific experimentation

5. Freedom from slavery and servitude

(1) No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.

(2) No one shall be held in servitude.

6. Freedom from imprisonment for inability to fulfil a contractual obligation

(1) No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

7. Prohibition against the retrospective operation of criminal laws

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

(2) No one shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

(3) If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

(4) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

8. Right to recognition before the law

(1) Everyone shall have the right to recognition everywhere as a person before the law.

Division 2 – Non-derogable rights

9. Right to life

(1) No one shall be arbitrarily deprived of his life.

10. Right to Liberty and Security of the Person

(1) Every person has the right to liberty and security.

(2) A person must not be subjected to arbitrary arrest or detention.

(3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

(4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.

(5) A person who is arrested or detained on a criminal charge—

(a) must be promptly brought before a court; and

(b) has the right to be brought to trial without unreasonable delay; and

(c) must be released if paragraph (a) or (b) is not complied with.

(6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend—

(a) for trial; and

(b) at any other stage of the judicial proceeding; and

(c) if appropriate, for execution of judgment.

(7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must—

(a) make a decision without delay; and

(b) order the release of the person if it finds that the detention is unlawful.

(8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

11. Right to equality and non-discrimination

(1) Every person has the right to enjoy his or her human rights without discrimination.

(2) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

(3) All persons are guaranteed equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

12. Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—
   (a) the freedom to have or to adopt a religion or belief of his or her choice; and
   (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Division 3 – Other rights

13. Freedom of Movement

(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave any country, including his own.

(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Charter.

(4) No one shall be arbitrarily deprived of the right to enter his own country.

14. Right to Privacy and Reputation

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

15. Freedom of Opinion and Expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
   (a) orally; or
   (b) in writing; or
   (c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.

16. Right to Peaceful Assembly

(1) No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

17. Right to Freedom of Association

(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

18. Protection of Families and Children

(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State

(2) Marriage must be entered into with the free consent of the intending spouses.

19. Taking part in public life

(1) Every citizen shall have the right and the opportunity to:

(a) take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

20. Cultural Rights

(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

21. Humane Treatment when Deprived of Liberty

(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(2) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(3) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

22. Fair Hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

23. Rights in a Criminal Trial

(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

(e) to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

(3) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(4) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(5) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

24. Right not to be tried or punished more than once

(1) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

25. Right to self-determination

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

26. Expulsion of non-national

(1) An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise enquire, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

27. Rights of the Child

(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

(2) Every child shall be registered immediately after birth and shall have a name.

(3) Every child has the right to acquire a nationality.

28. Right to work

(1) Every person has the right to the opportunity to gain his living by work which he or she freely chooses or accepts, and will take appropriate steps to safeguard this right.

29. Right of everyone to the enjoyment of just and favourable conditions of work

(1) Everyone has the right to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

30. Right to social security

(1) Everyone has the right to an adequate standard of living for him or herself and his or her family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Part 3 – Application of human rights

Division 1 – Scrutiny of New Legislation

31. Statements of Compatibility

(1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.

(2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

Note The obligation in subsections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.

(3) A statement of compatibility must state—

(a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and

(b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

(4) A statement of compatibility made under this section is not binding on any court or tribunal.

32. No effect on Federal Law

(1) A failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

33. Scrutiny of Acts and Regulations Committee

(1) The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Division 2 – Override Declarations and States of Emergency

34. Override by Parliament

(1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.

(2) If an override declaration is made in respect of an Act or a provision of an Act that declaration must be taken to extend to any subordinate instrument made under or for the purpose of that Act or provision.

(3) A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.

(4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances or a state of emergency.

(5) A statement under subsection (3) must be made—

(a) during the second reading speech for the Bill that contains the override declaration; or

(b) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or

(c) with the leave of the Legislative Council or the Legislative Assembly, as the case requires, at any time before the third reading of the Bill.

(6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.

35. Exceptional circumstances and States of Emergency

Note: this section remains undefined as it is not pertinent to the analysis undertaken, but it is imagined that it will largely mirror the South African Bill of Rights 'State of Emergency' definition and conditions.

Division 3 – Interpretation of Laws

36. Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of—

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

37. Declaration of Inconsistent Interpretation

(1) This section applies if—

(a) in a Federal Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

(b) the Federal Court has had a question referred to it under section 33; or

(c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).

(2) Subject to any relevant override declaration, if in a proceeding the Federal Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

(3) If the Federal Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.

(4) The Federal Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that—

(a) notice in the prescribed form has been given to the Attorney-General and the Commission under subsection (3); and

(b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.

(5) A declaration of inconsistent interpretation does not—

(a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or

(b) create in any person any legal right or give rise to any civil cause of action.

(6) The Federal Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General—

(a) if the period provided for the lodging of an appeal in respect of the proceeding in which the declaration was made has ended without such an appeal having been lodged, within 7 days after the end of that period; or

(b) if on appeal the declaration is upheld, within 7 days after any appeal has been finalised.

38. Action on Declaration of Inconsistent Interpretation

(1) Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must—

(a) prepare a written response to the declaration; and

(b) cause a copy of the declaration and of his or her response to it to be—

(i) laid before each House of Parliament; and

(ii) published in the Government Gazette.

Division 4 – Obligations on Public Authorities

39. Conduct of public authorities

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

40. Legal Proceedings

(1) This section applies if a person—

(a) claims that a public authority has acted in contravention of section 38; and

(b) alleges that the person is or would be a victim of the contravention.

(2) The person may—

(a) start a proceeding in the Federal Court against the public authority; or

(b) rely on the person's rights under this Act in other legal proceedings.

(3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.

(4) The Federal Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

(5) This section does not affect—

(a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or

(b) a right a person has to damages (apart from this section).

41. Remedies

(1) A breach of human rights entitles the plaintiff to an appropriate remedy including damages where appropriate.

Appendix 2: Glossary of rights reviewed

In this Appendix, we define and give scope to the rights which are protected by the Charter and which have been impacted in the legislation and cases analysed in Part Three of this report. This is not an exhaustive list and description of the human rights which have been or may have been limited by the laws and decisions in question, but a sample of those which we identify to be the principal rights affected.

Right to peaceful assembly

The right of peaceful assembly is generally attached to the act of peaceful protest, such as in the context of political demonstrations and industrial action,[545] which is is generally characterised as a means to influence the public policies of the State.[546] The right however does not merely protect protests as ordinarily understood, but can also be interpreted to encompass a restriction by the State on a person's freedom to gather with other individuals merely due to their association with, or membership of an organisation that may attract criminals as members, such as laws against consorting,[547] or laws against criminal organisations themselves.[548]

The Charter contains its own internal restriction of the right to peaceful assembly insofar as it does not allow for such freedom if it represents a danger national security, public morals, or public order. The right is based on the premise that there is no inherent criminality in members of proscribed organisations meeting with comrades socially, or even to discuss the matters of the association, if mere membership of the organisation is not criminal. Further, even if the members of the organisation are convicted criminals, or known to be participating in criminal acts elsewhere; there is still not necessarily any reason for the limits on the right to be engaged. The International Court of Justice, citing the judgement of *Gay Alliance of Students v. Matthews*[549], highlighted that individuals have the fundamental right to meet, discuss current problems, and to advocate changes in the status quo, so long as there is no incitement to imminent lawless action.[550] This was considered true even for individuals whose very identity was considered criminal, such as they were in this case.

The right to peaceful assembly arises in the discussions of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) and *Kuczborski v The State of Queensland* (2014) 254 CLR 51 within this report (Section 3.1)

Right to freedom of association

The right to freedom of association[551] is similar conceptually to the right to peaceful assembly; the difference being that the right to freedom of association requires membership of an organisation in and of itself, as opposed to protecting the assembly of individuals who may or may not be actual members of that organisation. That is, the right to freedom of association might protect the right to be a member of a trade union, whereas the right to freedom of peaceful assembly might protect an individual's right to join a picket line whether they are a union member or not. The Charter stipulates that no restrictions may be placed on the exercise of the right to freedom of association other than those imposed in conformity with the law, and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

The scope of this right appears to cover the right to join associations with a political purpose, such as promoting the rights and wellbeing of its members or of a particular group. There is nothing to say that, by way of example, a motorcycle club does not exist for the same reasons as a trade union; that is, to effect change, and to protect the rights and enhance the wellbeing of its members. Insofar as this is the case, criminalising the membership of such organisations might limit the right to freedom of association.

In 2012, the Human Rights Council of the United Nations acknowledged that the freedom also extended to the membership of online communities and urged States to protect and nurture the formation of online communities.[552] This is an important acknowledgment as online communities often transcend borders and are not limited to one particular country. It is also important considering the impact that online communities can have on the terrestrial political landscape, as evidenced by the recent 'Arab Spring' movement.

Conversely, the Human Rights Council also reaffirmed that everyone has the right *not* to join an association or not to be compelled to do so.[553] This negative right assumes a great deal of importance when considering organisations that may exact violent reprisals against members who attempt to leave.

The right to Freedom of Association arises in the discussions of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) and *Kuczborski v The State of Queensland* (2014) 254 CLR 51 within this report (Section 3.1).

Right to equality and non-discrimination

The right to non-discrimination is not an absolute right, and is subject to reasonable limitations.[554] However, the right to equality and non-discrimination[555] cuts across and underpins all other human rights protected at an international level,[556] and is interpreted broadly. The UN Human Rights Committee notes that

> the term "discrimination"... should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*.[557]

The prohibition on discrimination is, in Australian legislation, understood as containing both direct and indirect discrimination.[558] Direct discrimination entails a person being treated differently to another person in circumstances which are, in all other aspects, essentially the same.[559] It can also include a failure to make reasonable adjustments to account for a particular person's needs, resulting in their being treated less favourably than another person.[560] Indirect discrimination entails the imposition of conditions or policies which are unable to be met by a person, would result in their being disadvantaged, or the refusal to make reasonable adjustments so that person can comply with such conditions.[561] In addition, the *Sex Discrimination Act 1984* (Cth) ('the SDA') and several state and territory anti-discrimination laws disallow discrimination on the basis of a characteristic generally found in or imputed to persons who share a particular protected attribute, such as sex, race or national or social origin.[562]

The Charter of Human Rights and Responsibilities Act 2006 (Vic)[563] and the UN[564], as well as many of Australia's anti-discrimination laws,[565] contemplate forms of *distinguishing* which are not discriminatory. Equal treatment does not necessarily constitute equality (or non-discrimination), when circumstances faced by the affected individuals are not equal.[566] The UN Human Rights Committee observes that

> not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[567]

Such measures can be in furtherance of the aim of the right to equality. Substantive equality[568] may require adjustments or acknowledgements of different needs, circumstances, and disadvantage to be acknowledged and addressed. In effect, the right to equality and non-discrimination will not always be identical treatment of every person. Non-discrimination may actually require such differential treatment – for example, allowing an assistance dog on a plane for a sight-impaired person is not an adjustment every passenger will require.[569] It is a differential measure given in the aim of promoting equal access and, hence, equality. Provisions such as these operate to enable positive steps to address disadvantage and general discrimination potentially faced by some groups.

Within the scope of this report the right to equality and non-discrimination is discussed in relation to:

- Migration
    - Regarding restrictions on permanent protection
- Disability Discrimination

Freedom of expression

The right to freedom of expression is specifically protected by the Charter as it stipulates that 'the freedom to seek, receive and impart information and ideas of all kinds'[570] is fundamental. This right is a 'necessary condition for the realisation of the principles of transparency and accountability'[571] and as such, seeks to promote the protection of other human rights.

However, limitations are placed upon this right, to ensure the protection of national security or public order can be maintained.[572] While the protection of national security is afforded certain exemptions, these 'must conform to the strict tests of necessity and proportionality'.[573] As such, while freedom of expression is limited in the context of national security, this does not extend to laws which suppress information of 'legitimate public interest'[574] nor does it enable the prosecution of individuals for disseminating such information (for example, laws that prosecute journalists, researchers or activists do not comply with the freedom of speech).[575]

A distinction is made between the freedom of expression and the freedom of opinion, as while the freedom of expression can be limited to protect national security, 'it can never become necessary'[576] to limit the freedom of opinion. All forms of opinion are protected under the ICCPR, including those of a political, scientific, moral or religious nature.[577]

The right to freedom of expression is discussed in relation to national security.

Right to a fair hearing (in a non-criminal law context)

The right to a fair hearing mandates that all people be equal 'before the courts and tribunals… in a suit at law' and be equally 'entitled to a fair and public hearing by a competent, independent and impartial tribunal'.[578]

This defines the right to a fair proceeding, where each step in the process is administered with equality and independence.[579] In an Australian context, it is more commonly referred to as 'procedural fairness'[580] or 'natural justice'.

The United Nations Human Rights Committee and Australian tribunals have confirmed the right to a fair hearing is inclusive of administrative law in addition to criminal or other forms of civil law.[581] A civil dispute, meaning the same as 'a suit at law'[582], has been said to exist once an administrative body (such as a government department or minister) merely exercises its power under law and 'objection is taken to that exercise' of power.[583]

The right to a fair hearing diminishes the likelihood that a decision affecting a person's rights and interests will be made on an erroneous basis due to missing relevant evidence, or other circumstances which could disadvantage them, such as bias.[584]

While the High Court has held that the specific requirements of a fair hearing in an administrative situation depend on the relevant legislation authorising the power,[585] the right to a fair hearing is considered to be particularly important where a 'power imbalance… may exist between an administrative decision-maker, such as a delegate representing a government agency, and an individual citizen'.[586]It is taken to include protection of a person's 'rights, interests and legitimate expectations',[587] unless Parliament has made clear in law that it intends not to protect those aspects.[588]

The right to a fair hearing operates through the hearing rule[589] and the rule against bias.[590]

Included in its protections are:

- 'adequate notice' that an unfavourable decision may be made[591]
- the provision of detrimental information to the person to which it relates[592]
- the ability to provide evidence, information or other submissions,[593] including a reply to any detrimental material[594] – essentially, being able to fairly and reasonably make a case[595] (although this does not necessarily include an oral hearing).[596]

- the requirement that the hearing is conducted 'by a competent, independent and impartial tribunal established at law'.[597] Impartiality means that decisions and reviews of decisions are without actual or apprehended bias,[598] as even apprehended bias affects the 'legitimacy of a decision',[599] bringing the process into disrepute.

As quoted by Chief Justice Gibbs in *Kioa v West,*[600] 'the fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power'.[601]

The right to fair hearing is not inflexible and it is possible to limit or the right through legislation;[602] however, it remains an important protection and has been said to have 'a curiously intractable quality',[603] due to its fundamental nature. Without clear language of an intention to remove the right to a fair hearing, the High Court has interpreted legislation to align with the fundamental protection, which 'has made legislative exclusion "very difficult in practice"'.[604] For example, codified procedural requirements may not be interpreted as an exclusion of right to a fair hearing.[605] Any clear exclusion, such as those found in the Migration Act (including an exclusion related to the fast track provisions[606] discussed in this report), will be interpreted as applying only to the specified provisions.[607]

Rather than a complete exclusion of the right, the issue will usually be an interpretation of what the right means in a specific context.[608] For example, in certain cases, withholding specific information may be justified.[609] The hearing must be fair in context, with regard to the individual's personal circumstances and the interest or right affected as well as the statutory provisions.[610]

Within the scope of this report the right to a fair hearing is discussed in relation to Migration, regarding fast track processing.

Rights of the child

Due to their status as minors, children benefit from additional, special protections[611] to ensure their human rights are safeguarded at all times. The rights of the child are interpreted internationally in line with the general civil rights of the child in the *ICCPR* as well as by the specific treaty on children – the *Convention on the Rights of the Child* (CRC).[612] As specified in the CRC, in each situation involving a child, the 'best interests' of the child must be a 'primary consideration'.[613] The principle of the best interests of the child must be 'widely known… appropriately integrated and consistently applied' by all branches of government in all decisions and actions.[614]

The Charter assures these rights and interests for each and every child, without distinction based on race, colour, sex, language, religion, national or social origin, property or birth.[615] Every child has the right to be registered, to have a name, and to acquire a nationality.[616] Specifically, these protections must extend to children who are citizens as well as non-citizens or aliens of a country.[617]

While most specific special measures to be taken to protect the rights of the child are to be determined by Australia,[618] there are certain protections that are considered compulsory under international law. For example, when children are lawfully detained for committing a crime, they must be held separate from imprisoned adults.[619] Any detention of children who are seeking asylum must be time-limited and subject to review, and should not be implemented as an automatic aspect of migration law.[620]

In relation to the right to a nationality, governments are not required to give citizenship to children upon their birth; however, countries must cooperate to ensure that the child receives a nationality at birth. In particular, 'no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.'[621]

Special measures adopted to preserve the rights of the child should enable a child to access all rights protected by the Charter, and should include a level of education to ensure children can understand and utilise these rights.[622]

Within the scope of this report the rights of the child are discussed in relation to:

- Migration
    - Regarding declarations that newborn babies born in Australia to unauthorised maritime arrival or transitory persons are also unauthorised martime arrivals or transitory persons and regarding the decision in *Plaintiff B9/2014 v Minister for Immigration and Border Protection* [2014].

Right to liberty and security of person

The Charter protects the right to liberty and security of person[623], and also provides for humane treatment when deprived of liberty.[624] Safeguarding of the right to liberty is paramount to allow for the enjoyment of other rights under the Charter, as the deprivation of liberty has historically been used as means for curtailing other protections.[625]

This right is not absolute, but is considered non-derogable.[626] Governments can, however, legitimately deprive people of their liberty in appropriate circumstances: typically, after conviction for serious offences, in serious mental health cases, and to prevent the spread of infectious disease.[627] There remains an implication that procedures must be proportionate and that the detention itself is lawful,[628] which the Charter recognises by prohibiting *arbitrary* detention.[629] The UN clarifies that 'arbitrariness' is not simply unlawful, but 'must be interpreted more broadly to include elements of inappropriateness, injustice, *lack of predictability* … as well as elements of reasonableness, necessity and *proportionality*'.[630]

The right itself is well covered in Australian common law, as discussed in by Gageler J in the high court case of *North Australian Aboriginal Justice Agency Limited v Northern Territory* (*NAAJA*)[631]:

> …confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. … it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.[632]

The United Nations therefore highlights that the restriction of liberty should be considered as a 'measure of last resort'.[633] This is a protection which Australian courts have at times shown a deep appreciation for, as highlighted by the High Court in *Williams v The Queen,*[634] noting that the right to liberty is 'the most elementary and important'[635] of common law rights.

Within the scope of this report the right to liberty and security of person is discussed in relation to:

- Migration
    - Regarding indefinite detention considered in *Al-Kateb v Goodwin* (2004) 219 CLR 526
    - Regarding offshore immigration processing under the *Migration Amendment (Regional Processing Arrangements) Act 2015*.
- National Security
    - Regarding use of force under a search warrant and lowering of the arrest threshold under the *National Security Amendment Act 2014*.
- Paperless Arrests
    - Considered in *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41.

Freedom of movement

This right is enshrined in the Charter,[636] and has been deemed to be an 'indispensable condition for the free development of a person',[637] as the unlawful restriction of movement is the first step in limiting the freedom of the individual.

The freedom of movement is twofold, as it entails that individuals are both free to move within their state, and have the liberty to choose their residence.[638] This right extends to the ability of people to leave any country, including their own, and is not dependent on their movement being for 'any particular purpose'.[639]

In addition, part of the 'legal guarantee' which the freedom of movement enforces is the right of the individual to determine the country of destination.[640] This right is subject to limitations based on exceptional circumstances, which permits the state to restrict the freedom of movement for the purpose of national security, public order and the rights and freedoms of others.[641] These restrictions must be provided by law, and be necessary 'for the protection of these purposes,' and as such requires that the restrictions must not impair the essence of the right'.[642]

The freedom of movement is discussed in the context of national security legislation: see page 63.

Right to privacy and reputation

The right to privacy refers to the unlawful interference with a person's 'privacy, family home or correspondence'.[643] Based on this definition, the *International Covenant on Civil and Political Rights* has sought to emphasise that 'everyone has the right to the protection of the law against such interference or attacks'.[644] While the protection of this human right is significant, this protection is 'necessarily relative',[645] and should be viewed within the framework of what is lawfully justified. As such, while interferences can be lawful, they cannot be arbitrary, as the incursions should be 'reasonable in the particular circumstances'.[646]

Although incursions into the right of privacy are justified when obtaining information which is 'essential in the interests of society',[647] strict limitations are placed upon the state as relevant legislation is required to 'specify in detail the precise circumstances in which such interferences

may be permitted'[648] and requires that this be applied in a case by case basis. In addition, searches of a person's home must be restricted to a 'search for necessary evidence'[649] and should not extend to harassment.

The search of personal information on computers and other devices, 'must be regulated by law' and must ensure that unauthorised individuals do not have access to the data collected.[650]

This right is discussed in relation to the National Security legislation, through the application of search warrants which seek to impede upon individual privacy.

Right to social security

The right to social security states that 'everyone has the right to an adequate standard of living...including adequate food, clothing and housing, and to the continuous improvement of living conditions'.[651] This encompasses the right to 'access and maintain benefits' to protect from a lack of work-related income, sickness, disability or old age. In addition, this right seeks to protect people from both unaffordable access to health care and insufficient family support, particularly for children and adult dependents.[652]

It is acknowledged by the UN that social security plays a central role in 'preventing social exclusion' and, as such, the right 'guarantee all peoples a minimum enjoyment' of the right to social security.[653]

This right is discussed in the context of national security legislation aimed at limiting the social security benefits of certain individuals.

Endnotes

[1] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 49.

[2] A well-recognised principle of statutory interpretation at common law in Australia is the presumption that Parliament did not intend to limit fundamental human rights unless there is a clear intention to do so. See *Coco v The Queen* (1994) 179 CLR 427 at 437.

[3] Section 24, Commonwealth of Australia Constitution Act.

[4] Section 51 (xxxi) Commonwealth of Australia Constitution Act provides that 'the Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.

[5] Section 80, Commonwealth of Australia Constitution Act.

[6] Williams, George and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 112–3.

[7] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; Leanne Griffiths, 'The Implied Freedom of Political Communication: The state of the law post Coleman and Mulholland' (2005) 12 James Cook University Law Review 93, 93.'

[8] *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

[9] *Racial Discrimination Act 1975* (Cth).

[10] *Disability Discrimination Act 1992* (Cth).

[11] *Fair Work Act 2009* (Cth).

[12] *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullager J); For example, see *Crimes Act 1958* (Vic) s 15A–15B.

[13] *Human Rights Act 2004* (ACT)

[14] *Charter of Human Rights and Responsibilities Act 2006* (Vic)

[15] Parliament of Queensland, 'Inquiry into a possible Human Rights Act for Queensland', Report No. 30, 55th Parliament, Legal Affairs and Community Safety Committee, June 2016; Bruce Chen, 'Opinion: Premier to be applauded for pursuing Human Rights Act', The Courier Mail, 2 November 2016; Chris O'Brien, 'Bill Shorten acknowledges Labor's election shortcomings in Queensland', ABC News (online) 29 October 2016.

[16] Michael Sexton, 'Bill of Rights a picnic for lawyers, disastrous for democracy', *The Australian*, 22 July 2016.

[17] Hilary Charlesworth, The Australian Experiment with Human Rights Charters' (Speech delivered at the Supreme Court of Victoria Library, Melbourne, 21 September 2016).

[18] *Coco v The Queen* (1994) 179 CLR at 436.

[19] These are the rights identified in the International Covenant on Civil and Political Rights 1966 (ICCPR) which Australia agreed to be bound to on 13 August 1980. The rights include the right to freedom of conscience and religion, the right to be free from torture, and the right to a fair trial.

[20] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; per Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

[21] First Amendment, *Bill of Rights of the United States of America* (1791).

[22] All countries that have legal and political systems similar to Australia have a Bill or Charter of Human Rights. For example, Canada, the United States and South Africa all have a Bill of Rights in their Constitutions and the United Kingdom and New Zealand have Human Rights Acts. Lots of other countries also have Bills or Charters of Human Rights, including: India, Brazil, Hong Kong, Kazakhstan, Iraq, East Timor, Turkey and Argentina.

[23] *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Human Rights Act 2004* (ACT).

[24] United Kingdom Human Rights Act 1998, New Zealand Human Rights Act 1993

[25] Human Rights Commission, Submission to National Human Rights Consultation, 2009.

[26] *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 39.

[27] By contrast, the Victorian Charter protects rights largely developed from the International Covenant on Civil and Political Rights.

[28] Law Council of Australia, Charter or Bill of Rights: A Constructive Dialogue?

[29] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 4

[30] *The Charter*, s30.

[31] Roger Masterman, 'Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' (2009) *Public Law*.

[32] *Momcilovic v The Queen* (2011) 245 CLR 1, 32.

[33] Summarised in *R v Hansen* [2007] 3 NZLR 1, 28 [64].

[34] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 347.

[35] Roger Masterman, 'Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' (2009) *Public Law*.

[36] *The Charter*, s 33.

[37] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 112.

[38] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 65.

[39] *The Charter,* s 39.

[40] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 445.

[41] *The Charter,* s 39.

[42] 'Any inconsistent legislation prevails over a Bill of Rights document,' *Momcilovic v The Queen* (2011) 245 CLR 1, in *R v Hansen* [2007] 3 NZLR 1, 28.

[43] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 31.

[44] *The Charter*, s31.

[45] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 31.

[46] UK Human Rights Act 1998 s 4.

[47] NZ Human Rights Act 1993 s 92J.

[48] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 31.

[49] *The Charter,* section 1.

[50] Human Rights Commission, Submission to National Human Rights Consultation, 2009, p 10.

[51] Ibid.

[52] Ibid, p9.

[53] Ibid.

[54] Ibid, p 10.

[55] Human Rights Law Centre, 'Absolute and Non-Derogable Rights in International Law' 21 July 2011, viewed 10/08/2016, <http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/supplementary_info/263_-_Addendum.pdf>.

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] Ibid.

[60] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls).

[61] The validity of s 7(2) in line with the court's interpretative role in s32 was discussed in *Momcilovic v The Queen* (2011) 245 CLR 1. This decision emphasised that there was no clear indication as to the context in which courts would make a decision relating to an Act's compatibility with s 7(2). However, despite this ongoing uncertainty, s7(2) is a valuable analytical tool for the Parliament, and is analysed in this manner.

[62] This provision has been adopted by the Charter as per s2(4).

[63] *Kracke v Mental Health Board Review* [2009] VCAT 646 [27].

[64] *Kracke v Mental Health Board Review* [2009] VCAT 646 [60].

[65] *The Charter,* s 35.

[66] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[67] *Coco v The Queen* (1994) 179 CLR 427.

[68] *Ghaidan v Mendoza [2004]* 2 AC 557 (HL).

69 A type of statutory interpretation called 'purposive interpretation'.

[70](2014) 254 CLR 51.

[71] (2014) 254 CLR 51.

[72] Sections 60A to 60C

[73] Sections 173EB to 173ED

[74] Sections 7 and 8.

[75] Sections 72, 92A, 320, and 340.

[76] It must be noted that the Right to liberty is arguably a non-derogable right and, insofar as this is the case, may be exempt from the proportionality test. For the purposes of this analysis we will assume that this is not axiomatic and the proportionality test is required to arrive at this conclusion.

[77] Australian Constitution s 109.

[78] Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 1.

[79] Declared offences are listed in Schedule 1 of the Act, however the list is not exhaustive as section 10 of the Act empowers the Governor in Council to 'make regulations declaring offences for the purposes of this Act'.

[80] *Vicious Lawless Association Disestablishment Act 2013* (Qld), s. 7(1)(b).

[81] *Vicious Lawless Association Disestablishment Act 2013* (Qld), s. 7(1)(c).

[82] *Vicious Lawless Association Disestablishment Act 2013* (Qld), s. 9.

[83] *Vicious Lawless Association Disestablishment Act 2013* (Qld), s. 8(1).

[84] *Vicious Lawless Association Disestablishment Act 2013* (Qld), s 8(3).

[85] See *Carew v The Office of the Director of Public Prosecutions* [2014] QSC 1, 28.

[86] But see Human Rights Committee, above n 4, 12.

[87] Indeed, in the suite of legislation that was introduced to Parliament, there was no prohibition on merely belonging to a relevant association, in and of itself. That is, there is no provision that specifically prohibits membership.

[88] *Affray* is defined in the *Criminal Code 1899 (Qld)* s.72 as taking part in a fight 'of such a nature as to alarm the public'. For example, a brawl would be considered an instance of affray.

[89] *Vicious Lawless Association Disestablishment Act 2013* (Qld), sch 1.

[90] *Criminal Code Act 1899* (Qld), s. 72 (1) 'Any person who takes part in a fight in a public place, or takes part in a fight of such a nature as to alarm the public in any other place to which the public have access, commits a misdemeanour.'

[91] Queensland Government, *Applying for Parole* (30 October 2015) Sentencing, Probation and Parole https://www.qld.gov.au/law/sentencing-prisons-and-probation/sentencing-probation-and-parole/applying-for-parole/

[92] Morrissey, Neil, 'The Queensland Anti-Bikie Laws: Good Governance or a Human Rights Disaster?' (2014) 41(4) *Brief* 28, 30.

[93] Provided they wear civilian clothes whilst doing so, see *Liquor Act 1992* (Qld) ss 173EB – 173ED.

[94] pursuant to section 433(1) of the *Criminal Code Act 1899* (Qld), a person who receives tainted property, and has reason to believe it is tainted property, commits a crime.

[95] *Criminal Code Act 1899* (Qld), s. 72.

[96] *Criminal Code Act 1899* (Qld), s. 61.

[97] *Criminal Code Act 1899* (Qld), s. 69.

[98] That is, much more than three.

[99] Above n 9, 3.

[100] Ibid, 1.

[101] The others being *Vicious Lawless Association Disestablishment Act 2013* (Qld), the *Criminal Law (Criminal Organisations Disruption) and other Legislation Amendment Act 2013* (Qld), and the *Tattoo Parlours Act 2013* (Qld). These will be considered in further detail below.

[102] Pursuant to the *Parliament of Queensland Act 2001*, s 93.

[103] Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (Vic), Clause 7.

[104] Clyde Engineering v Cowburn (1926) 37 CLR 466.

[105] (1926) 37 CLR 466, 478.

[106] Which states that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

[107] Australian Broadcasting Corporation, 'Hell's Angel takes aim at Queensland's anti-bikie laws', *7:30*, 19 March 2014 (David Lewis).

[108] Australian Broadcasting Corporation, 'Hell's Angel takes aim at Queensland's anti-bikie laws', *7:30*, 19 March 2014 (Stefan Kuczborski).

[109] Ibid.

[110] Ibid.

[111] *Kuczborski v The State of Queensland* (2014) 254 CLR 51, 128.

[112] Ibid.

[113] Ibid, 52.

[114] Ibid.

[115] Ibid, 61.

[116] *Kuczborski v The State of Queensland* (2014) 254 CLR 51, 72.

[117] Ibid, 86.

[118] Olijnyk, Anna, Case Discussion: Kuczborski v Queensland (3 December 2014) Public Law Blog https://blogs.adelaide.edu.au/public-law-rc/2014/12/03/case-discussion-kuczborski-v-queensland/

[119] *Kuczborski v The State of Queensland* (2014) 254 CLR 51, 101.

[120] *Kuczborski v The State of Queensland* (2014) 254 CLR 51, 101.

[121] Law Council of Australia, *Briefing Note: 'Anti-Bikie' Laws – Recent Developments* (28 April 2014) Law Council of Australia https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs_Fact_Sheets_and_Publications/29_4_14_-_M_-_Anti-bikie_laws_Briefings_2.pdf

[122] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976), article 14(2) and Human Rights Committee, *General Comment No 13: Article 14*, 21st Sess, UN Doc HRI/GEN/1/Rev.1 at 14 (1994), 2.

[123] Ibid.

[124] *Kuczborski v The State of Queensland* (2014) 254 CLR 51, 72.

[125] Phillip Boulton QC quoted in Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37(3) *Alternative Law Journal* 166, 169.

[126] *Kuczborski v The State of Queensland* (2014) 254 CLR 51, 72. David Lewis notes in Australian Broadcasting Corporation, 'Hell's Angel takes aim at Queensland's anti-bikie laws', *7:30*, 19 March 2014, 'While we were filming, this Rebels bikie had to stay on the street while Stefan Kuczborski and his mate were inside the tattoo parlour.

[127] Law Council of Australia, *Briefing Note: 'Anti-Bikie' Laws – Recent Developments* (28 April 2014) Law Council of Australia <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs_Fact_Sheets_and_Publications/29_4_14_-_M_-_Anti-bikie_laws_Briefings_2.pdf>

[128] Law Council of Australia, *Briefing Note: 'Anti-Bikie' Laws – Recent Developments* (28 April 2014) Law Council of Australia <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs_Fact_Sheets_and_Publications/29_4_14_-_M_-_Anti-bikie_laws_Briefings_2.pdf>

[129] (1926) 37 CLR 466, 478.

[130] (1926) 37 CLR 466, 478.

[131] (2004) 219 CLR 526.

[132] *Al-Kateb v Goodwin* (2004) 219 CLR 526, at [21] – [22].

[133] *United Nation Convention Relating to the Status of Stateless Persons*, Economic and Social Council resolution 526 A (XVII), New York (28 September 1954), Art 1 meaning one 'who is not considered as a national by any State under the operation of its law'.

[134] Timothy J Feighery, Christopher S Gibson and Trevor M Rajah, *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (Oxford University Press, 2015) 107-108; Devon E Hinton and Alexander L Hinton, *Genocide and Mass Violence: Memory, Symptom, and Recovery* (Cambridge University Press, 2014) 100.

[135] *Al-Kateb v Goodwin* (2004) 219 CLR 526, at [79]; David Marr, 'Escape from a life in limbo', *The Sydney Morning Herald* (Online), 27 October 2007 <http://www.smh.com.au/articles/2007/10/26/1192941339538.html>.

[136] *Migration Act 1958 (Cth),* s 14.

[137] *SHDB v Goodwin & Ors* [2003] FCA 300, at [5].

[138] David Marr, 'Escape from a life in limbo', *The Sydney Morning Herald* (Online), 27 October 2007 <http://www.smh.com.au/articles/2007/10/26/1192941339538.html>.

[139] *Al-Kateb v Goodwin* (2004) 219 CLR 526, at [21-22].

[140] Peter Prince, 'The High Court and indefinite detention: towards a national bill of rights?' (*Parliament of Australia – Current Issues Brief*, 16 November 2004) 7:2004–05, 4.

[141] Via the interaction of the *Migration Act 1958* (Cth) ss 189, 196 and 198.

[142] *Al-Kateb v Goodwin* (2004) 219 CLR 526, at [31].

[143] Ibid, at [145] – [193].

[144] Ibid, at [238].

[145] Ibid, at [239].

[146] Ibid, at [74].

[147] Ibid, at [239].

[148] Ibid, at [256].

[149] *The Charter* s 9.

[150] The Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Human Rights, *Migration (Regional Processing) package of legislation*, 31 January 2013, 33-34;

National Council for Civil Liberties, *Right to Liberty* <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-5-right-liberty>.

[151] The Australian Human Rights Commission, above n 9.

[152] Ibid; National Human Rights Committee, *General Comment No 8* (1982), note 111, para 1.

[153] The Australian Human Rights Commission, above n 9; Schultz and Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004), 308.

[154] The Australian Human Rights Commission, above n 9; *Woolley (Manager of the Baxter Immigration Detention Centre); Ex parte Applicants M276/2003 by their Next Friend GS* [2004] 225 CLR 1, as noted by Justice McHugh at [114], providing that indefinite immigration detention, especially without charge, can be considered 'arbitrary' and is protected by the right.

[155] Division 1 of the Charter.

[156] Division 4 of the Charter.

[157] Section 36 of the Charter.

[158] Section 33 (1) of the Charter.

[159] *Al-Kateb v Goodwin* (2004) 219 CLR 526, at [73].

[160] *Belden Norman Namah, MP Leader of the Opposition v Hon. Rimbink Pato, Minister for Foreign Affairs and Immigration & Ors* (SC1497, SCA No 84 of 2013); *Constitution of the Independent State of Papua New Guinea,* s 42.

[161] *Belden Norman Namah, MP Leader of the Opposition v Hon. Rimbink Pato, Minister for Foreign Affairs and Immigration & Ors* (SC1497, SCA No 84 of 2013), at [116 - 117]

[162] *Constitution of the Independent State of Papua New Guinea,* ss 38 – 39; *Belden Norman Namah, MP Leader of the Opposition v Hon. Rimbink Pato, Minister for Foreign Affairs and Immigration & Ors* (SC1497, SCA No 84 of 2013), at [52]; Stephen Tully, 'Manus Island Regional Processing Centre: Illegal Under PNG law' (2016) 23 *Law Society NSW Journal* 84, 84.

[163] Ibid, Gummow J at [117].

[164] Ibid, Kirby J at [193].

[165] *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1099, at [38]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, at [11].

[166] *D & E v Australia* CCPR/C/87/D/1050/2002 (Human Rights Committee Communication No. 1050/2002), para 7.2; *Bakhtiyari v Australia* CCPR/C/79/D/1069/2002 (Communication No. 1069/2002), para 9.3.

[167] (2003) 126 FCR 54.

[168] *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1099, at [38]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, at [11].

[169] *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, at [128].

[170] [2014] 253 CLR 219.

[171] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] 253 CLR 219, at [29].

[172] [2004] 225 CLR 1.

[173] *A v Australia* CCRP/C/59/D/560/1993 (Communication No. 560/1993); *C v Australia* CCPR/C/76/D/900/1999 (Communication No. 900/1999); *Bakhtiyari v Australia* CCPR/C/79/D/1069/2002 (Communication No. 1069/2002).

[174] *Woolley (Manager of the Baxter Immigration Detention Centre); Ex parte Applicants M276/2003 by their Next Friend GS* [2004] 225 CLR 1, at [114].

[175] 533 US 678 (2001).

[176] Alfred de Zayas, 'Human Rights and Indefinite Detention' (2005) 87 *International Review of the Red Cross* 857, 27.

[177] Section 32 of the Charter.

[178] [2016] HCA 1.

[179] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, Galager J at [188].

[180] Migration Act 1958 (Cth), s 198AHA (5).

[181] *Migration Act 1958* (Cth), s 198AHA (2).

[182] Explanatory Memorandum, Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth), 10.

[183] Human Rights Committee, *General Comment No 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 12, highlighting that a State Party will be responsible for extra-territorial violations of the ICCPR if its actions expose a person to a real risk that his or her rights will be violated; *Judge v Canada* CCPR/C/78/D/829/1998 (Human Rights Committee Communication No. 829/1998) para 10.6, noting that a State Party may be responsible if it is 'a link in the causal chain' that allows for violations in other jurisdictions.

[184] *Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1, comments by Bell J at [93], Gageler J at [173], and Gordon J at [276]; P*laintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, at [491 - 498].

[185] The Parliamentary Joint Committee on Human Rights, Australian Commonwealth, *Twenty-fifth Report of the 44th Parliament* (2015), 56.

[186] Ibid.

[187] Ibid.

[188] Addressed in s 9 of the Charter mirroring article 9 of the United Nations International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory.

[189] *Migration Act 1958* (Cth), s 198AHA (5).

[190] Division 1 of the Charter.

[191] Extracted from: motion for amendment to the Migration Amendment (Regional Processing Arrangements) Bill 2015, moved by Senator Leyonhjelm, 1.

[192] Extracted from: motion for amendment to the Migration Amendment (Regional Processing Arrangements) Bill 2015, moved by Senator Hanson-Young, 1

[193] Ibid.

[194] Ibid, 2.

[195] Division 4 of the Charter.

[196] Section 36 of the Charter.

[197] These provisions have been analysed in the context of the Court's decision in Plaintiff B9/2014 v Minister for Immigration and Border Protection [2014], FCAFC 178, in which the Court considered the same issue based on a prior version of the legislation.

[198] Asylum seekers who arrive by boat are collectively called "unauthorised maritime arrivals" in the *Migration Act 1958* (Cth) s5AA.

[199] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) Schedule 4 Part 1, referring to *Migration Act 1958* (Cth) s 5(1).

[200] Refugee Advice & Casework Service, 'Fast Track Processing' (Fact Sheet, September 2016) <http://www.racs.org.au/factsheets/> 1.

[201] Pursuant to *Migration Act 1958* (Cth) s 46A(1), which only allows visa applications to be made once the Minister permits them.

[202] Australian Government Department of Immigration and Border Protection, *When Will My Claims for Asylum Be Considered?*, Illegal Maritime Arrivals <http://www.ima.border.gov.au/Waiting-in-the-community/When-will-my-claims-for-asylum-be-considered#> (Note: 'current' as of 17 October 2016; however, no date details are provided on the website).

[203] The *Migration Act 1958* (Cth) s 91X states that in proceedings related to a person's protection visa application, the person's name cannot be published by the court; therefore, they are referred to by number and year.

[204] Fictional name.

[205] *AFK16 v Minister for Immigration & Anor (No. 2)* [2016] FCCA 1827 at [16].

[206] AFK16's claim included that the military service was compulsory. However, the Immigration Assessment Authority (IAA) referred to the military division in which he served as a voluntary Islamic revolution ideological military force (*AFK16 v Minister for Immigration & Anor (No. 2)* [2016] FCCA 1827 at [19].

[207] *AFK16 v Minister for Immigration & Anor (No. 2)* [2016] FCCA 1827 at [19].

[208] Fictional name.

[209] *AFK16 v Minister for Immigration & Anor (No. 2)* [2016] FCCA 1827 at [19].

[210] Fictional name.

[211] *Migration Act 1958* (Cth) Part 7AA.

[212] Per Gibbs CJ in *Kioa v West* (1985) 159 CLR 550, 563 quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360; Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), Modern Administrative Law in Australia: Concepts and Context (Cambridge University Press, 2014) 25, 47.

[213] Australian Government Department of Immigration and Border Protection, *Asylum Trends Australia: 2012 – 13 Annual Publication*, (Commonwealth of Australia, 2013) 29.

[214] UN Human Rights committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 8 at [26].

[215] Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), Modern Administrative Law in Australia: Concepts and Context (Cambridge University Press, 2014) 25, 47.

[216] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 referring to *Migration Act 1958* Part 7AA.

[217] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 1 referring to *Migration Act 1958* s 5(1) 'excluded fast track review applicant'.

[218] Ibid.

[219] Ibid.

[220] Ibid.

[221] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 21 referring to *Migration Act 1958* ss 473BD.

[222] AHRC Bill Senate Inquiry submission 31 Oct 2014.

[223] The Migration and Refugee Division of the Administrative Appeals Tribunal replaced the former Refugee Review Tribunal.

[224] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 21 referring to *Migration Act 1958* s 473DB.

[225] *Migration Act 1958* (Cth) s 473CC.

[226] Juliet Lucy, 'Core Principles of Merits Review' (Paper presented at Legalwise Seminar: Practice and Procedure in Running a Merits Review, Sydney, 4 September 2013) 12 citing Kioa v West (1985) 159 CLR 550; and see D G Jarvis, 'Procedural Fairness as it applies in the Administrative Appeals Tribunal', (2007) 81 Australian Law Review 465.

[227] Australian Government Department of Immigration and Border Protection, *Asylum Trends Australia: 2012–13 Annual Publication*, (Commonwealth of Australia, 2013) 29.

[228] Adverse information about the specific individual known to the Minister must have been indicated the applicant with an opportunity for them to respond during the initial application process as the Minister considered appropriate (*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 9 referring to *Migration Act 1958* s 57.)

[229] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 21 referring to *Migration Act 1958* ss 473DA, 473DE.

[230] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 21 referring to *Migration Act 1958* (Cth) ss 473BA, 473DB, 473DC, 473DD.

[231] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 21 referring to *Migration Act 1958* (Cth) ss 473DA.

[232] Nicol J in *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin) at [37], [43] and [47] citing Arden LJ in *FP (Iran) v SSHD* [2007] EWCA Civ 13 at [58].

[233] Fictional name.

[234] Fictional name.

[235] *AFK16 v Minister for Immigration & Anor (No. 2)* [2016] FCCA 1827 at [27].

[236] Ibid at [26].

[237] Ibid at [26].

[238] Ibid at [26].

[239] Fictional name.

[240] *AFK16 v Minister for Immigration & Anor (No. 2)* [2016] FCCA 1827 at [31] citing *Migration Act 1958* (Cth) ss 424A(3)(a) and 473DE(3)(a).

[241] Fictional name.

[242] Fictional name.

[243] *AFK16 v Minister for Immigration & Anor (No. 2)* [2016] FCCA 1827 at [31] citing *Migration Act 1958* (Cth) ss 424A(3)(a) and 473DE(3)(a).

[244] Fictional name.

[245] *AFK16 v Minister for Immigration & Anor* [2016] FCCA 1826 at [7]

[246] Ibid at [12] citing *Migration Act 1958* ss 473DA - added by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 4, Part 1 s 21.

[247] *AFK16 v Minister for Immigration & Anor* [2016] FCCA 1826 at [12].

[248] Ibid at [10]- [12] citing *Migration Act 1958* (Cth) ss 473DA.

[249] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 18.

[250] Ibid, 2, 18.

[251] Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 23.

[252] Ibid.

[253] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 8.

[254] Fictional name.

[255] *AFK16 v Minister for Immigration & Anor (No 2)* [2016] FCCA 1827 at [31].

[256] E.g. *AFK16 v Minister for Immigration & Anor (No 2)* [2016] FCCA 1827.

[257] The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) received Royal Assent on 15 December 2014 while the fast track provisions apply to people who arrived between 13 August 2012 and 31 December 2013.

[258] ANU Migration Law Program, Submission 59 submission to ALRC, ALRC report 408 - 409 at [14.73].

[259] E.g. The absence of '*fair*' or '*just*' as objectives is notably different from the aims of the MRD of the AAT or the previous RRT, which aim to provide an 'accessible, fair, just, economical, informal, quick and proportionate' review (Administrative Appeals Tribunal, 'Conducting Migration and Refugee Reviews' (President's Direction, 30 June 2015) <http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/legislation-policies-and-guidelines> 1 at [1.1], emphasis added).

[260] E.g. Administrative Appeals Tribunal Migration & Refugee Division, 'Refugee Review Process – MR Division' (Fact Sheet R10, September 2016) <http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/factsheets> 3.

[261] Similar to *Administrative Appeals Tribunal Act 1975* (Cth) s 43.

[262] Administrative Appeals Tribunal, 'Conducting Migration and Refugee Reviews' (President's Direction, 30 June 2015) <http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/legislation-policies-and-guidelines> 6 – 7 at [10.1] – [10.4].

[263] UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12 at [28].

[264] Administrative Appeals Tribunal, 'Conducting Migration and Refugee Reviews' (President's Direction, 30 June 2015) <http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/legislation-policies-and-guidelines> 6 at [9.1].

[265] Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 4, 5, 30.

[266] Similar provisions to those declaring babies to be unauthorised maritime arrivals were enacted for transitory persons, which are non-citizens brought to Australia for a specific temporary purpose, for

example, for reasons of ill health. A transitory person may also be an unauthorised maritime arrival. In this review, only "unauthorised maritime arrivals" will be referred to here for ease of reading; however, the same limitations apply to transitory persons.

[267] A person only acquires citizenship at birth in Australia if they have a parent who was an Australian permanent resident or citizen at the time or once they have resided in Australia for 10 years since the day of their birth (*Australian Citizenship Act 2007* (Cth) s 12).

[268] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 6, Part 1 s 2 referring to *Migration Act 1958* (Cth) ss 5(1), 5AA.

[269] Visa applications allowed by the Minister pursuant to ss 46A(2) or 46B(2) of the *Migration Act 1958* (Cth).

[270] Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 4, 30.

[271] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 202 - 203.

[272] Charter s 26.

[273] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 197 and Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 30, 31.

[274] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 12, 200.

[275] Ibid, 197 and Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 30, 31.

[276] *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990) article 3(1).

[277] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 16.6.

[278] Pursuant to the *Australian Citizenship Act 2007* (Cth) s 12.

[279] Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 5 emphasis added.

[280] Pursuant to ss 46A(2) or 46B(2) of the *Migration Act 1958* (Cth).

[281] FCAFC 178.

[282] FCAFC 178.

[283] *Plaintiff B9/2014 v Minister for Immigration and Border Protection* [2014] FCAFC 178 at [62].

[284] As per Migration Act s 5AA and s 10 at the relevant time the protection visa application was made (December 2013).

[285] *Plaintiff B9/2014 v Minister for Immigration and Border Protection* [2014] FCAFC 178 at [49], [53] - [54].

[286] Ibid at [57].

[287] Ibid at [56] quoting the Revised Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth) 1.

[288] *Plaintiff B9/2014 v Minister for Immigration and Border Protection* [2014] FCAFC 178 at [19] - [20], [25] - [27], [35], [54].

[289] Charter s 35.

[290] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 2 Part 4 s 29 referring to *Migration Regulations 1994* Schedule 1 Regulation 1.03 subitem 1401(3).

[291] *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* 2014 (Cth) Schedule 2 Part 4 s 53 referring to *Migration Regulations 1994* Reg 2.08F.

[292] Tania Penovic, 'Boat People and the Body Politic', Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 346.

[293] Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 14.

[294] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[295] All refugees are initially asylum seekers. Verification by an authority can give a person the 'label' of a refugee, but it does not change the fact that they were also a refugee when they sought asylum (Catherine Branson QC, 'Irregular Immigration – Is Australia Disregarding Its International Obligations?' (Speech delivered at the RMIT University 2014 Higinbotham Lecture, Melbourne, 27 August 2014).

[296] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) Article 31(1).

[297] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 2.

[298] Statement of Compatibility with Human Rights, Attachment A to the Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 14.

[299] Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Final Report No 129 (2015) 384 at [13.127] quoting Refugee Council of Australia, Submission 41.

[300] Section 1 of the Charter.

[301] George Syrota, 'Australia's Counter-Terrorism Offences: A Critical Study' (2008) 34(1) *University of Western Australia Law Review.*

[302] Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27(2) *UNSW Law Journal,* 428.

[303] Prime Minister Malcolm Turnbull, 'National Security Update on Counter Terrorism' (speech delivered to the Australian Parliament, Canberra, 23 November 2016) <https://www.pm.gov.au/media/2016-11-23/address-parliament-national-security-update-counter-terrorism>.

[304] George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne Law University Review,* 1161.

[305] Joseph, above n 299, p 428.

[306] Ibid.

[307] Williams, above n 301. p 1160.

[308] Prime Minister Malcolm Turnbull, above n 300.

[309] Ibid.

[310] Williams, above n 301. p 1161.

[311] Explanatory Memorandum, *National Security Legislation Amendment Act (No.1)* 2014 (Cth), 2.

[312] Prime Minister Malcolm Turnbullabove n 300.

[313] Explanatory Memorandum, *National Security Legislation Amendment Act (No.1)* 2014 (Cth), 3.

[314]Greg Brown, 'Federal Election 2016: Class warfare will hurt Labor's chances in Bruce', *The Australian* (online), 9 May 2016 <http://www.theaustralian.com.au/federal-election-2016/federal-election-2016-class-warfare-will-hurt-labors-chances-in-bruce/news-story/f11ad55b299ad58b98fefe6a67d00b02>.

[315] Labor Party, 'Postive Policy; Counter Terrorism under Labor' <http://www.100positivepolicies.org.au/counter_terrorism_under_labor>.

[316]Mosiqi Acharya, 'Breaking news; Counter terror raids in Melbourne', *SBS* (online) 17 May 2016, <http://www.sbs.com.au/yourlanguage/hindi/hi/article/2016/05/17/breaking-news-counter-terror-raids-melbourne?language=hi>.

[317] *National Security Legislation Amendment Act (No 1) 2014* (Cth), s25A.

[318] Law Council of Australia, Submission No 13 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Amendment Bill (No.1) 2014,* 6 August 2014,31 [66].

[319] Explanatory Memorandum, *National Security Legislation Amendment Act (No.1)* 2014 (Cth), 71.

[320] *Crimes Act 1914* (Cth) s3E.

[321] Explanatory Memorandum, *National Security Legislation Amendment Act (No.1)* 2014 (Cth), 67.

[322] Australian Human Rights Commission, Submission No 28 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Amendment Bill (No.1) 2014,* 21 August 2014, 11 [41].

[323] 1978 28 Eur. Ct. H.R.

[324] Klass et al. v. Germany, 1978 28 Eur. Ct. H.R., 49-50.

[325]Australian Human Rights Commission, Submission No 28 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Amendment Bill (No.1) 2014,* 21 August 2014, 10 [4].

[326] Law Council of Australia, above n 315, p 163.

[327] *Australian Security Intelligence Organisation Act 1979* (Cth), s26.

[328] Law Council of Australia, above n 315, 29 [144].

[329] Ibid.

[330] Ibid.

[331] Ibid, 51 [261].

[332] *Australian Security Intelligence Organisation Act 1979* (Cth), s35P.

[333] Law Council of Australia, above n 315, 29, 8 [12].

[334] Australian Lawyers Alliance, Submission No 7, to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Amendment Bill (No.1) 2014,* 6 August 2014, 5.

[335] Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, available at: http://www.refworld.org/docid/4653fa1f2.html [accessed 7 December 2016], 9.

[336] Australian Human Rights Commission, Submission No 28 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Amendment Bill (No.1) 2014,* 21 August 2014, 14 [60].

Ibid, 20 [102].

[338] Law Council of Australia, above n 315, 43 [202].

[339] *Australian Security Intelligence Organisation Act 1979* (Cth), s25(7)(a), 25(5A)(a) 27A(2)(a).

[340] *Australian Security Intelligence Organisation Act 1979* (Cth), 25(7)(a).

[341] Explanatory Memorandum, *National Security Amendment Act (No.1)* 2014 (Cth), 12.

[342] Explanatory Memorandum, *National Security Amendment Act (No.1)* 2014 (Cth), 12.

[343] UN Human Rights Committee (HRC), *General comment no. 35, Article 9, Liberty and Security of Person,* (16 December 2014) <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC35-Article9LibertyandSecurityofperson.aspx>

[344] Ibid, [65].

[345] Law Council of Australia, above n 315, 28 [141].

[346] Prime Minister Malcolm Turnbull, above n 300.

[347] Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), 1.

[348] 'Deash' is also known as ISIL (the Islamic State of Iraq and the Levant).

[349] Prime Minister Malcolm Turnbull, above n 300.

[350] Ibid.

[351] *Crimes Act 1914* (Cth), Pt 1AAA.

[352] *Crimes Act 1914* (Cth), s3ZZAA.

[353] Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth)

95 [514].

[354] Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) 25 [117].

[355] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 17 [2.59].

[356] *Criminal Code Act 1995* (Cth), Div 104.

[357] Attorney General's Department, *Control Orders,* <https://www.ag.gov.au/nationalsecurity/counterterrorismlaw/pages/controlorders.aspx>.

[358] Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* (2014), 124 [703].

[359] Gilbert + Tobin Centre of Public Law, Submission No 3 to Joint Parliamentary Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014), 1 October 2014, 6.

[360] Ibid.

[361] *A New Tax System (Family Assistance) Act 1999* (Cth), s 57GI, 278B, 38M.

[362] Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), 55 [266]

[363] Ibid.

[364] Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), 55 [266] 180 [1133].

[365] This provision also falls under s17 of the *Charter,* Protection of Families and Children.

[366] Australian Human Rights Commission, Submission No 7 to to Joint Parliamentary Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014), 2 October 2014, 18 [90].

[367] Ibid.

[368] *Crimes Act 1914* (Cth), s3WA.

[369] Ibid.

[370] Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* (2014), 21 [98].

[371] UN Human Rights Committee (HRC), *General comment no. 35, Article 9, Liberty and Security of Person,* (16 December 2014) <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC35-Article9LibertyandSecurityofperson.aspx>[65].

[372] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015,* 2016,14.

[373] Ibid, 32.

[374] *Crimes Act 1914* (Cth), s3WA

[375] Gilbert + Tobin Centre of Public Law, above n 356., 13.

[376] Australian Human Rights Commission, Submission No 7 to to Joint Parliamentary Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014), 2 October 2014, 60.

[377] Ibid.

[378] *Criminal Code Act 1995* (Cth), s 119.2.

[379] *Criminal Code Act 1995* (Cth), s 119.3.

[380] Gilbert + Tobin Centre of Public Law, above n 356, 9.

[381] Ibid.

[382] Ibid, 10.

[383] Ibid, 9.

[384] Ibid, 10.

[385] *Police Administration Amendment Bill 2014.*

[386] Xavier La Canna, 'New "paperless arrest" laws in NT under attack', *ABC News* (online) 27 November 2014.

[387] *Police Administration Act* (NT) s 133AB.

[388] *Summary Offences Regulations* (NT); *Liquor Regulations* (NT); *Misuse of Drugs Act* (NT).

[389] The explanatory memorandum for the bill presents no specific reasons for the introduction of the laws other than providing police officers an 'alternative option post-arrest'. Explanatory Memorandum, *Police Administration Amendment Bill 2014* (Serial 98). The best indication, then, of the law's purpose comes from the NT Parliamentary debate and second reading speech on its introduction. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014.

[390] Central Australian Aboriginal Legal Aid Service, *NAAJA and CAALAS' concerns with paperless arrests* <http://www.naaja.org.au/wp-content/uploads/2014/12/NAAJA-CAALAS-concerns-on-paperless-arrests.pdf>

[391] Ibid.

[392] Ibid.

[393] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker)

[394] *Police Administration Act* (NT) s 133AB.

[395] Ibid s 123.

[396] Ibid s 128.

[397] Ibid s 130.

[398] Ibid s 128A(1)(d).

[399] 'I encourage the police, as soon as this becomes law, to establish a general order as soon as possible. I encourage rank and file police officers to begin using this as soon as this legislation passes into law.' Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (John Elferink).

[400] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker, John Elferink); *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016.

[401] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker). At the time of the debate Ms Walker was the NT Labor Member for Nhulunbuy and Shadow Attorney-General and Shadow Minister for Justice.

[402] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker).

[403] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker). At the time of the debate Ms Walker was the NT Labor Member for Nhulunbuy and Shadow Attorney-General and Shadow Minister for Justice.

[404] *NAAJA* [8] (French CJ, Kiefel and Bell JJ).

[405] The arguments of the case are fully outlined below.

[406] *North Australian Aboriginal Justice Agency Limited & Anor v Northern Territory of Australia* [2015] HCATrans 211

[407] The name 'Kuimanjayi' is a culturally-appropriate name used to refer to the deceased.

[408] *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [65]–[71]. In his report of the inquest into Kumanjayi's death, Northern Territory Coroner Greg Cavanagh noted the laws' discriminatory nature, the difficulties in their application by police (whose workload had not decreased), and the seriousness of deprivation of liberty.

[409] James Haughton, Parliament of Australia, *The 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody*, 15 April 2016 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/April/RCADIC-25>; Australian Medical Association, *2015 AMA Report Card on Indigenous Health* <https://ama.com.au/sites/default/files/documents/2015%20Report%20Card%20on%20Indigenous%20Health_0.pdf>.

[410] *The Charter* s 2(4)(d).

[411] *The Charter* s 2(4)(e).

[412] *The Charter* s 33(4)–34.

[413] *The Charter*, s 1(1)(c)(i).

[414] *The Charter*, s 38.

[415] *NAAJA* [3] (French CJ, Kiefel and Bell JJ), [195] (Nettle and Gordon JJ), [137] (Keane J).

[416] *NAAJA* [195] (Nettle and Gordon JJ).

[417] *NAAJA* [150]–[151](Keane J).

[418] These arguments relied on the laws being either: a breach of the NT's power by extension of section 122 and the separation of powers found in the Constitution; or a breach of the separation of powers in Chapter III of the Constitution due to interference of the executive with the integrity of the NT courts, which, following the Kable principle, would also be a breach of the Constitution. The Kable principle, developed in *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 and the cases which follow it, means that a State cannot impose on a court capable of holding federal jurisdiction 'a function or power which substantially impairs its institutional integrity' and the separation of powers found in Chapter III of the Constitution. *NAAJA* [39] (French CJ, Kiefel and Bell JJ). See variously *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Wainohu v New South Wales* (2011) 243 CLR 181; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393; *Kuczborski v Queensland* (2014) 89 ALJR 59; *Duncan v Independent Commission Against Corruption* (2015) 89 ALJR 835; *South Australia v Totani* (2010) 242 CLR 1, in particular *Wainohu* and *Totani*. Importantly, it sets out that a State cannot make laws which exclude particular decisions from review by the court, or allow the executive arm of

government to intrude into the 'processes or decisions of a court'. *NAAJA* [39] (French CJ, Kiefel and Bell JJ). The NAAJA had argued the police power to detain in division 4AA did not necessarily interfere with the court's decision-making, but removed the court's ability to supervise the detention, [*NAAJA* [41] (French CJ, Kiefel and Bell JJ)], making it punitive and allowing the police officer to act 'not as an accuser but as a judge'. *NAAJA* [102] (Gageler J).

[419] *Sentencing Act* (NT) s 5(1)(a)–(e).

[420] *NAAJA* [35] (French CJ, Kiefel and Bell JJ).

[421] *NAAJA* [35] (French CJ, Kiefel and Bell JJ).

[422] Bronwen Jaggers, Parliament of Australia, 'Anti-terrorism control orders in Australia and the United Kingdom: a comparison', 29 April 2008 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp28#_ftn4>. See also 'National Security' within this report for a discussion of the balance between the right to privacy and control orders.

[423] For example, the *Mental Health Act 2014* (Vic) pt 4, which deals with compulsory patients who may be ordered to undergo assessment and/or treatment.

[424] For example, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), applied in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, and further appealed in *Fardon v Australia*, UN Human Rights Committee, *Views: Communication No. 1629/2007, Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010).

[425] UN Human Rights Committee, *Views: Communication No. 1629/2007, Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) 8–9.

[426] *NAAJA* [98] (Gageler J).

[427] This balance has been considered in various cases, including *Williams v The Queen* [1986] HCA 88; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, both cited throughout in *NAAJA*.

[428] *NAAJA* [43]–[44] (French CJ, Kiefel and Bell JJ), [242] (Nettle and Gordon JJ), [189] (Keane J). In contrast to the majority, Keane J found that the laws were within power regardless of whether they were construed as punitive or not.

[429] *NAAJA* [46] (French CJ, Kiefel and Bell JJ); [189] (Keane J); [242] (Nettle and Gordon JJ). Keane J decided the case on the basis of the constitutional arguments without reference to whether the law was penal or punitive, focusing instead on the powers of the NT Legislative Assembly, and dismissing the Kable argument on the same basis.

[430] *NAAJA* [94]–[104] (Gageler J).

[431] *NAAJA* [87] (Gageler J).

[432] *NAAJA* [119]–[135] (Gageler J).

[433] *NAAJA* [133] (Gageler J).

[434] *NAAJA* [36] (French CJ, Kiefel and Bell JJ); Human Rights Law Centre, 'Paperless Arrest police powers of detention validated but constrained', 24 November 2015 <http://hrlc.org.au/paperless-arrest-police-powers-of-detention-validated-but-constrained/>.

[435] *NAAJA* [41] (French CJ, Kiefel and Bell JJ).

[436] *NAAJA* [228] (Nettle and Gordon JJ).

[437] ABC Radio National, 'Paperless arrests', *Background Briefing*, 20 September 2015 (Wendy Carlisle) <http://www.abc.net.au/radionational/programs/backgroundbriefing/paperless-arrests/6778046>; *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016.

[438] *NAAJA* [151] (Keane J).

[439] Ibid.

[440] *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016.

[441] Jonathon Hunyor, 'Imprison me NT: Paperless Arrests and the Rise of Executive Power in the Northern Territory' (2015) 21(8) *Indigenous Law Bulletin* 3, 3.

[442] McKeich, Alister, 'Another Preventable Death: Ms Dhu Vs WA Police And Australia-At-Large' *newmatilda.com* (online), 28 January 2016 <https://newmatilda.com/2016/01/28/preventable-death-ms-dhu-vs-wa-police-and-australia-at-large/>; Ceranic, Irena, 'Police laughed at Ms Dhu as she lay dying, ignored partner's requests for help: inquest', *ABC News* (online) 24 November 2015 <http://www.abc.net.au/news/2015-11-24/police-laughed-at-miss-dhu-as-she-lay-in-vomit-inquest-told/6969072>.

[443] Hunyor, above n 110, 7–8; *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [79].

[444] Ibid [65]–[66], [68]. In the absence of conclusive data collection about the details of those arrested under the laws, a police officer in the inquest also agreed that up to 95% of those detained for liquor offences could be Aboriginal.

[445] Ibid [78]–[79].

[446] Ibid [87].

[447] Thalia, Anthony, 'Deaths in custody: 25 years after the royal commission, we've gone backwards', *The Conversation* (online), 13 April 2016 <http://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>.

[448] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, cited in *NAAJA* [236] (Nettle and Gordon JJ).

[449] *NAAJA* [95]–[96] (Gageler J). The UN also notes that deprivation of liberty is often used as the starting point for the deprivation of other rights, such as freedom from torture or right to a fair hearing. UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 1.

[450] Thalia, Anthony, 'Deaths in custody: 25 years after the royal commission, we've gone backwards', *The Conversation* (online), 13 April 2016 <http://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>.

[451] ABC, 'Australia's Shame', *Four Corners*, 26 July 2016 (Caro Meldrum-Hanna, Mary Fallon, Elise Worthington) <http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm>.

[452] Matt Doran and James Dunlevie, 'Four Corners: PM Turnbull to set up royal commission into mistreatment of children in detention', *ABC News* (online), 26 July 2016 <http://www.abc.net.au/news/2016-07-26/turnbull-calls-for-royal-commission-into-don-dale/7660164>; Amos Aikman, 'Dylan Voller to appear before Royal Commission after legal wrangle', *The Australian*, 12 December 2016.

[453] Alister McKeich, 'Another Preventable Death: Ms Dhu Vs WA Police And Australia-At-Large' *newmatilda.com* (online), 28 January 2016 <https://newmatilda.com/2016/01/28/preventable-death-ms-dhu-vs-wa-police-and-australia-at-large/>; SBS News, 'Aboriginal inmate dies after South Australian jail incident', SBS News (online), 26 September 2016 <http://www.sbs.com.au/news/article/2016/09/26/aboriginal-inmate-dies-south-australia-jail-incident>.

[454] James Haughton, Parliament of Australia, *The 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody*, 15 April 2016 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/April/RCADIC-25>

[455] Thalia Anthony, 'Deaths in custody: 25 years after the royal commission, we've gone backwards', *The Conversation* (online), 13 April 2016 <http://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>.

[456] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (John Elferink).

[457] Ibid (Lynne Walker).

[458] Ibid (John Elferink).

[459] *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [37]–[40], [47].

[460] Operation Ascari II. *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [49], [63]–[64]

[461] *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [51].

[462] Ibid at [49].

[463] Ibid at [71].

[464] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (John Elferink).

[465] Ibid.

[466] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker).

[467] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (John Elferink).

[468] The Return to Country program was specifically mentioned. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker).

[469] Ibid.

[470] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (John Elferink). Jonathon Hunyor, 'Imprison me NT: Paperless Arrests and the Rise of Executive Power in the Northern Territory' (2015) 21(8) *Indigenous Law Bulletin* 3, 3.

[471] *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [47], [51]–[52], [85].

[472] Considering the statistics found recently by the Victorian Coroner that the children of those incarcerated are *six times more likely* to experience imprisonment, it seems unlikely that in the long term an increased incarceration approach will decrease future rates of imprisonment. Deborah Glass, Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015 <https://www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17> 2, 5.

[473] It should be noted that it is argued that many of the 339 recommendations of the RCIADIC have not been implemented. Thalia Anthony, 'Deaths in custody: 25 years after the royal commission, we've gone backwards', *The Conversation* (online), 13 April 2016 <http://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109>.

[474] Improved watch-house policing and care of prisoners was noted by NT Coroner Greg Cavanagh as having occurred since the decision in *Inquest into the death of Terence Daniel Briscoe* [2012] NTMC 032. *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [13]–[14].

[475] The fact that the RCIADIC had an effect on prisoner care and police actions was actually noted by the Northern Territory Attorney-General himself, while not necessarily in a positive way. 'We used to keep 150 people under protective custody in Alice Springs – before the Royal Commission into Aboriginal Deaths in Custody – without the watch house being manned. Those were risky days, but that is how the system used to operate. Nobody thought too much about it.' Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (John Elferink).

[476] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker).

[477] *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016 [81]–[82].

[478] James Haughton, 'The 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody', *Parliament of Australia*, 15 April 2016 <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/April/RCADIC-25>; Australian Medical Association, *2015 AMA Report Card on Indigenous Health* <https://ama.com.au/sites/default/files/documents/2015%20Report%20Card%20on%20Indigenous%20Health_0.pdf>; Australian Law Reform Commission, Australian Government, *Aboriginal Customary laws and the Criminal Justice System* <http://www.alrc.gov.au/publications/17.%20Aboriginal%20Customary%20laws%20and%20the%20Criminal%20Justice%20System/statistical-background>.

[479] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 25 November 2014 (Lynne Walker).

[480] The initial judgement of in *Prior v Mole* [2015] NTSC 65 touched on appropriateness of police response and an ability to escalate or de-escalate situations. *Prior v Mole*, cited in *Mole v Prior* [2016] NTCA 2, fn 16.

[481] In a similar vein, Justice Keane highlighted this in his decision in *NAAJA*, by pointing out that pursuing a broad constitutional argument, rather than a narrower case for relief on specific facts, pre-empted 'arguments available to other persons affected by the statute, whose interests would be advanced in a practical way by a narrower interpretation of the statute'. [150] (Keane J) Justice Keane also stated that characterising whether the power of arrest was to be construed as punitive was better left for consideration 'in a case where its proper construction falls to be resolved in circumstances of greater "concrete adverseness"' [153] (Keane J) than the case argued on the constitutional basis.

[482] *Commonwealth of Australia Constitution Act* s 109.

[483] *Northern Territory (Self-Government) Act 1978* (Cth) s 51.

[484] 'Virgin Australia forced to pay disabled man $10,000 for refusing to let him fly with helper dog' *The Daily Telegraph* (online) (13 September 2015) <http://www.dailytelegraph.com.au/news/nsw/virgin-australia-forced-to-pay-disabled-man-10000-for-refusing-to-let-him-fly-with-helper-dog/news-story/535b9271247f458ecfd1cddf7c4d92cf>

[485] *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 [7], [11], [14], [119].

[486] Ibid at [5].

[487] Ibid at [23].

[488] Ibid at [5(b)–(c)].

[489] Ibid at [5(a)].

[490] Ibid at [5], [23].

[491] Ibid at [3], [6]–[12].

[492] Ibid at [12].

[493] *Civil Aviation Act 1988* (Cth) s 3A.

[494] Ibid, s 98(6B)

[495] *Civil Aviation Regulations 1988* (Cth) reg 256A(2).

[496] Ibid, reg 256A(1)(b).

[497] Instrument 1FHQK3(4) and Instrument 1FHQK3(5), *Mulligan* [26].

[498] *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 [26].

[499] *Disability Discrimination Act 1992* (Cth), section 5.

[500] Ibid, section 6.

[501] Ibid, Section 5 (2)

[502] Ibid, Section 6 (1)

[503] <http://indicators.ohchr.org/>

[504] Introduced through the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), and also accounted for in the *DDA*, section 12(8)(ba). *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 [138].

[505] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008) Art 9.

[506] 'Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.' *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008) Art 5(4).

[507] Although the Charter, similar to the Victorian Charter, does not impose a positive obligation on the government to provide means of transport, it is arguable that *unreasonably* limiting access to a particular form of transport for people with disability, when that kind of transport becomes more necessary in day-to-day life as the world changes, is an infringement on the freedom of movement relative to others in the population, engaging both the right to non-discrimination and freedom of movement. See Explanatory Memoranda, *Charter of Rights and Responsibilities Act 2006* (Vic) 12–3.

[508] Section 2, The Charter.

[509] Section 2(4)(e), The Charter.

[510] Section 35, The Charter.

[511] ABC Radio National, 'A Human Rights Act for Queensland?', *Big Ideas*, 23 May 2016 (Jeremy Gans at 00:21:15) <http://www.abc.net.au/radionational/programs/bigideas/a-human-rights-act-for-queensland/7431776>

[512] *Disability Discrimination Act 1992* (Cth) s 9(2).

[513] Ibid ss 5–6.

[514] Ibid s 24.

[515] Ibid s 47(2).

[516] *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157 [8]–[11], [14]; *Mulligan* [103].

[517] *Mulligan* [162]–[168].

[518] Instrument 1FHQK3(4) and Instrument 1FHQK3(5) – 'the Instruments'.

[519] Explanatory Memorandum, *Civil Aviation Amendment Bill 2005* (Cth) 1.

[520] Ibid.

[521] The Charter, s 1(1)(e).

[522] It may be true that the Regulations reflect the time at which they were drafted and the understanding of which disabilities which may require assistance animals, how varied disabilities can be, and what kinds of situations may evolve over time in the use of assistance animals, guide dogs having a relatively long history in Australia. *Guide Dogs Victoria*, 'History' (2015–6). <https://www.guidedogsvictoria.com.au/about-gdv/history/>.

[523] The statutory interpretive tools of either *expressio unius est exclusio alterius* or *ejusdem generis* could have been applied in this case. Judge Street adopted the approach of e*xpressio unius est exclusio alterius* ('express mention of one is the exclusion of the other'), stating that the mention of hearing or sight impairment was to the exclusion of other, complex, disabilities. Had Judge Street adopted the alternative approach of e*jusdem generis* ('of the same sort, kind or nature'), this would have given him the latitude to draw from the mentioning of serious disabilities, such as hearing and sight impairment, as outlining a type of disability severity that may warrant an assistance animal. Peter Butt (ed), *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011) 199, 226. An approach of *ejusdem generis* would have allowed the statute to be read on a case-by-case basis, considering complex disabilities, and is arguably the approach the Charter would encourage. *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157 [13]; *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 [94].

[524] *Mulligan* ,[26].

[525] *Al-Kateb v Goodwin* (2004) 219 CLR 526, Justice McHugh at [73]; Michael Kirby, 'Arguments for an Australian Charter of Rights' (Paper 2398, Constitutional Education Fund of Australia, September 2009), 3-4 & 8-9. Chief Justice Robert French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech delivered at the Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012) 1; David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58-70.

[526] Law Council of Australia, 'Charter or Bill of Rights: A Constructive Dialogue' (n.d.)

[527] *Charter of Human Rights and Responsibilities Act 2016* (Vic).

[528] *Human Rights Act 2004* (ACT).

[529] *Human Rights Act 1993* (NZ).

[530] *Human Rights Act 1998* (UK).

[531] *Charter of Human Rights and Responsibilities Act 2016* (Vic).

[532] *Human Rights Act 2004* (ACT).

[533] Anti Discrimination Commission Queensland, 'Human Rights Act for QLD' (Media Release, 31 October 2016) <https://www.adcq.qld.gov.au/about-us/media/media-releases/2016/human-rights-act-for-qld>.

[534] Virginia Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (Speech Delivered at the Sir Ninian Stephen Lecture, University of Newcastle, 26 April 2016).

[535] Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 391; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449; *Coco v The Queen* (1994) 179 CLR 427, at [10].

[536] *Australian Constitution* s 116.

[537] Steven Rares, 'Legality, Rights and Statutory Interpretation' (Paper presented at AGS Administrative Law Conference, 20-21 June 2013) 9-10.

[538] Motion for amendment to the Migration Amendment (Regional Processing Arrangements) Bill 2015, moved by Senator Leyonhjelm, 1; Motion for amendment to the Migration Amendment (Regional Processing Arrangements) Bill 2015, moved by Senator Hanson-Young, 1; Commonwealth, Parliamentary Debates, Senate, 25 June 2015, 4553-4 (Sarah Hanson-Young), discussion regarding the rushing of the legislation through parliament.

[539] The Parliamentary Joint Committee on Human Rights, Australian Commonwealth, *Twenty-fifth Report of the 44th Parliament* (2015), 58-59.

[540] The Charter s 38(1).

[541] Ibid.

[542] The Charter s 2(4)(e).

[543] (2004) 219 CLR 526.

[544] Stephanie Anderson, 'UN refugee summit: Malcolm Turnbull pushes bid for Human Rights Council in UN address', *ABC News* (online), 22 September 2016

<http://www.abc.net.au/news/2016-09-22/malcolm-turnbull-champions-bid-for-human-rights-council/7867556>.

[545] Kiai, Maina, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,* UN Doc A/HRC/26/29 (14 April 2014) 9.

[546] Ibid, 4.

[547] See s.93X *Crimes Act 1900* (NSW)

[548] See the analysis of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) and *Kuczborski v The State of Queensland* (2014) 254 CLR 51, below.

[549] 544 F.2d. 162 (Fed CA, 1976).

[550] International Commission of Jurists, *Sexual Orientation and Gender Identity Casebook: Chapter 4: freedom of Assembly Association and Expression* (2016) International Commission of Jurists http://www.icj.org/sogi-casebook-introduction/chapter-four-freedom-of-assembly-association-and-expression/

551 ICCPR Article 22. See also, Kiai, Maina, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,* UN Doc A/HRC/26/29 (14 April 2014) 9..

[552] Human Rights Council, *Resolution Adopted by the Human Rights Council: 21/16 The Rights to Freedom of Assembly and of Association*, 21st Sess, UN Doc A/HRC/21/16 (11 October 2012).

[553] Human Rights Council, *Resolution Adopted by the Human Rights Council: 15/21 The Rights to Freedom of Assembly and of Association*, 15th Sess, UN Doc A/HRC/15/21 (6 October 2010).

[554] *The Charter* s 2(4).

[555] *The Charter* s 10.

[556] Ibid [2].

[557] UN Human Rights Committee, *General Comment No. 18: Non-discrimination,* 37th sess (adopted on 10 November 1989) [7] (emphasis added).

[558] Disability Discrimination Act 1992 (Cth) s5, 6.

[559] Disability Discrimination Act 1992 (Cth) s5(1), 6; Racial Discrimination Act 1974 (Cth) s 9.

[560] Disability Discrimination Act 1992 (Cth) s 5(2).

[561] Disability Discrimination Act 1992 (Cth) s 6.

[562] Sex Discrimination Act 1984 (Cth) s 5(1)(c); state and territory legislation include: Equal Opportunity Act 2010 (Vic) s 7(2); Anti-Discrimination Act 1977 (NSW) s 7(2).

[563] The *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8 states, 'Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.'

[564] UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),* 42nd sess, Agenda Item 3, UN Doc E/C.12/GC/20 (2 July 2009).

[565] E.g. *Equal Opportunity Act 2010* (Vic) s 12, *Anti-Discrimination Act 1991* s 105, *Equal Opportunity Act 1984* (SA) s 47, *Racial Discrimination Act 1975* (Cth) s 8, *Age Discrimination Act 2004* s 33.

[566] Ibid [9]: 'In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities'.

[567] UN Human Rights Committee, *General Comment No. 18: Non-discrimination,* 37th sess (adopted on 10 November 1989) [13].

[568] Human Rights Law Centre, *National Human Rights Consultation: Submission on a Human Rights Act for All Australians* (May 2009) 15 June 2009 <http://hrlc.org.au/a-human-rights-act-for-all-australians/> 39.

[569] The *Disability Discrimination Act 1992* (Cth) s 5(3) states, 'for the purposes of this section, circumstances are not materially different because of the fact that, because of the disability, the aggrieved person requires adjustments'.

[570] *The Charter, s13*.

[571] UN Human Rights Committee (HRC), *CCPR General Comment No. 34: Article 19 Freedoms of Opinion and Expression* (11-29 July 2011) <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [3].

[572] *International Covenant on Civil and Political Rights,* signed 16 December 1966, United Nations Treaty Series, vol 99923 March 1976 art 19, *The Charter,* s13(3)(b).

[573] Ibid, [22].

[574] Ibid, [30].

[575] UN Human Rights Committee (HRC), *CCPR General Comment No. 34: Article 19 Freedoms of Opinion and Expression* (11-29 July 2011) <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [30].

[576] Ibid [5].

[577] Ibid [9].

[578] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

[579] UN Human Rights committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) at [26].

[580] Ibid at [26]; Australian Law Reform Commission, above n 24, 398 at [14.30] citing *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[581] UN Human Rights committee, above n 8, [16] - [17].

[582] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

[583] *Thomson v ACT Planning & Land Authority* [2009] ACAT 38 at [81] citing Lord Clyde in *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at [147].

[584] Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), Modern Administrative Law in Australia: Concepts and Context (Cambridge University Press, 2014) 25, 47.

[585] Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ in *SZBEL v Minister For Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160 at [26], [32].

[586] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014), 98 at [14.4].

[587] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014), 99 at [14.10] citing *Cooper v Board of Works for the Wandsworth District* [1863] 143 ER 414.

[588] Per Mason J in *Kioa v West* (1985) 159 CLR 550 at [31].

[589] Reference to a fair hearing in this paper is based on the internationally protected right as mentioned to be treated equally and to be 'entitled to a fair and public hearing by a competent, independent and impartial tribunal' as stated in this section. It does not refer solely to the protection offered by the hearing rule as an aspect of administrative law.

[590] Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014), 99 at [14.7]; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

[591] Matthew Groves, *Modern Administrative Law in Australia: Concepts and Contexts,* (Cambridge University Press, 2014) 437.

[592] Ibid; e.g. *SZBEL v Minister For Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

[593] Groves, above n 37, 437.

[594] Per Mason J in *Kioa v West* (1985) 159 CLR 550 at 582; See also Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

[595] Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014), 99 at [14.7]; Australian Government Attorney-General's Department, *Fair Trial and Fair Hearing Rights* <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx>.

[596] Groves, above n 37, 437.

[597] UN Human Rights committee, above n 8, 1 [3].

[598] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014), 99 at [14.8].

[599] Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), Modern Administrative Law in Australia: Concepts and Context (Cambridge University Press, 2014) 25, 47.

[600] (1985) 159 CLR 550.

[601] Per Gibbs CJ in *Kioa v West* (1985) 159 CLR 550, 563 quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

[602] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Final Report No 129 (2015) 395 at [14.15].

[603] Juliet Lucy, 'Core Principles of Merits Review' (Paper presented at Legalwise Seminar: Practice and Procedure in Running a Merits Review, Sydney, 4 September 2013) 111 - 12 quoting Justice John Basten, "Limits on Procedural Fairness", AIAL Administrative Law Forum, Canberra, 2005 at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_basten300605

[604] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Final Report No 129 (2015) 395 at [14.15] citing *Saeed v Minister for Immigration and Citizenship* 241 CLR 252 and Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397

[605] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Final Report No 129 (2015) 395 at [14.17].

[606] *Migration Act 1958 s 473DA.*

[607] Ibid, citing *Saeed v Minister for Immigration and Citizenship* 241 CLR 252 and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397.

[608] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Final Report No 129 (2015) 396 at [14.19] citing Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 397 and Mason J in *Kioa v West* (1985) 159 CLR 550, 585.

[609] *Bond v ABT(no 2)* (1988) 84 ALR 646.

[610] Australian Government Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014), 99 at [14.7].

[611] *General Comment No 17: Article 24 (Rights of the Child)*, 35th Sess, UN Doc HRI/GEN/17 (1989), 1 [1] - [2].

[612] *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990).

[613] *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990) article 3(1).

[614] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention - 28 August 2012*, 60th Sess, UN Doc CRC/C/AUS/CO/4 (29 May–15 June 2012) 8 [31] - [32].

[615] Charter s 26.

[616] Charter s 26.

[617] *General Comment No 17: Article 24 (Rights of the Child)*, 35th Sess, UN Doc HRI/GEN/17 (1989), 2 [5].

[618] *General Comment No 17: Article 24 (Rights of the Child)*, 35th Sess, UN Doc HRI/GEN/17 (1989), 1 [3].

[619] *General Comment No 17: Article 24 (Rights of the Child)*, 35th Sess, UN Doc HRI/GEN/17 (1989), 1 [2].

[620] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention - 28 August 2012*, 60th Sess, UN Doc CRC/C/AUS/CO/4 (29 May–15 June 2012) 19, [80].

[621] *General Comment No 17: Article 24 (Rights of the Child)*, 35th Sess, UN Doc HRI/GEN/17 (1989), 3 [8].

[622] *General Comment No 17: Article 24 (Rights of the Child)*, 35th Sess, UN Doc HRI/GEN/17 (1989), 1 [3].

[623] The Charter s 9.

[624] The Charter s 20.

[625] UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 1.

[626] *The Charter* s 2(3); Ibid, s 9: The list of non-derogable and absolute rights is drawn primarily from the submissions of the Human Rights Law Centre, 'National Human Rights Consultation: Submission on a Human Rights Act for All Australians (May 2009)', 15 June 2009 <http://hrlc.org.au/a-human-rights-act-for-all-australians/>, 83–87, with further guidance from the *ICCPR*, Arts 4, 5(2), 6(3).

[627] The Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Human Rights, *Migration (Regional Processing) package of legislation*, 31 January 2013, 33-34;

National Council for Civil Liberties, *Right to Liberty* <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-5-right-liberty>.

[628] The Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Human Rights, *Migration (Regional Processing) package of legislation*, 31 January 2013, 33-34.

[629] *The Charter* s 9(2).

[630] UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 1 (emphasis added).

[631] [2015] HCA 41.

[632] *NAAJA* [11] (French CJ, Kiefel and Bell JJ), [94] (Gageler J) quoting: William Blackstone, *Commentaries on the Laws of England,* (1765), Bk 1, 131–133, cited in *NAAJA* [2015] HCA 1 [95]–[96].

[633] Ibid.

[634] (1986) 161 CLR 278.

[635] *Williams v The Queen* (1986)161 CLR 278, at [9].

[636] *The Charter,* s12

[637] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement),* (2 November 1999) <http://www.refworld.org/docid/45139c394.html>.

[638] *The Charter, s12.*

[639] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement),* (2 November 1999) <http://www.refworld.org/docid/45139c394.html> [5].

[640] Ibid [8].

[641] Ibid [11].

[642] Ibid [13].

[643] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13(a).

[644] *International Covenant on Civil and Political Rights,* signed 16 December 1966, United Nations Treaty Series, vol 99923 March 1976 art 17. Charter, s13.

[645] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, (8 April 1988), <http://www.refworld.org/docid/453883f922.html.> [7].

[646] Ibid.

[647] Ibid.

[648] Ibid.

[649] Ibid [8].

[650] Ibid [10].

[651] *The Charter,* s29.

[652] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, available at: http://www.refworld.org/docid/47b17b5b39c.html [accessed 26 August 2016].

[653] Ibid.