

# HUMAN RIGHTS AND THE OVERREACH OF EXECUTIVE DISCRETION: CITIZENSHIP, ASYLUM SEEKERS AND WHISTLEBLOWERS

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I

It is a special pleasure for me to speak in honour of Professor Blackshield, who is a long time colleague of mine in the law. He is a constitutional law scholar of the highest order and one of the most influential figures in Australian legal education over the last 50 years.

I have two memories of Professor Blackshield that stand out. One is of Professor Blackshield striding up and down the lecture theatre, being both entertaining and provocative for the benefit of his students, displaying his superb knowledge of constitutional law and the common law. He is a lecturer without peer in his ability to engage and challenge students. Another is from when I was Dean of the Sydney University law school, proudly showing off Sydney's new law school building to a visitor. I found Professor Blackshield buried in books in the library, on a general desk with all the students. He is a modest man who would not have dreamt of asking for his own office or for any special privileges.

It was typical of Professor Blackshield that when discussing the topic for tonight's lecture with him, he observed that this 5 November is the 410<sup>th</sup> anniversary of the Gunpowder Plot in London of 1605. The Gunpowder Plot is so called because of the attempt by the catholic Guy Fawkes (and others) to blow up the houses of Parliament and kill the protestant King James I.

While such violent intentions can hardly be condoned, my theme tonight also challenges Australia's Parliaments by observing that they have, over the last few years, passed laws that explicitly, or in their effect, breach fundamental human rights. Not only have our Parliaments failed to exercise their traditional restraint to protect our common law freedoms and liberties, they also have allowed the executive government to expand its discretionary powers and, increasingly, to limit the courts' exercise of judicial scrutiny. The doctrine of the separation of powers is too often ignored by Parliament, and the rule of law, international law and Australia's obligations under human rights treaties are often trumped by the government's uncontested assessment of national interest and security.

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## II

For the Australian Human Rights Commission ('the Commission'), this has been a 'year of living dangerously', as we have drawn attention to the erosion of our human rights and to the diminution of the checks and balances that preserve our democracy; all in the year in which we also celebrate the 800<sup>th</sup> anniversary of the *Magna Carta* and the 70<sup>th</sup> anniversaries of both the *Charter of the United Nations* and creation of the Nuremberg tribunals. The *Magna Carta* was, at its heart, an attempt by the feudal barons to constrain the power of 'bad King John', and to ensure that the sovereign is always subject to the rule of law, in particular to the common law and to the scrutiny of an independent judiciary.

Let us fast forward from 1215 to a few weeks ago, when a number of government agencies planned to implement Operation Fortitude. Operation Fortitude provides a powerful example of executive overreach in civilian affairs. You will recall that the recently merged Australian Border Force ('ABF') announced Operation Fortitude under which a 'coalition of the willing' (including Victoria Police, Yarra Trams, Metro Trains, the Sherriff's Office, Taxi Services Commission and the ABF) agreed to target crimes ranging from 'anti-social behaviour' to outstanding warrants of arrest.<sup>1</sup> The now notorious media release states that the intention was to position ABF officers, 'at various locations around the Melbourne CBD speaking with any individual we cross paths with.'<sup>2</sup> The focus of this strategy was revealed by the warning that 'if you commit visa fraud, you should know it's only a matter of time before you are caught.'<sup>3</sup>

It is true that there are people in the Australian community who do not have a valid visa or who have overstayed their visa. It is also true that a nation has the sovereign right to arrest and deport those who are in Australia unlawfully. Indeed, officials require evidence of lawful status from non-citizens regularly, if quietly under s 188 of the *Migration Act 1958* (Cth) ('*Migration Act*'), which requires an officer to know or reasonably suspect that the person is not a citizen. But never before have we had ABF officers planning to stop people in shopping malls for questioning, apparently at random. Quite apart from the legal fact that the ABF do not have the power to do so, it is a reasonable assumption that those chosen for questioning will be those that fit a racial profile, contrary to the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*').

Melbournians reacted to the media release by demonstrating on the steps of Flinders Street Station, blocking traffic. Within hours, Operation Fortitude had been cancelled and all concerned have since run for cover, blaming low-level officials for making the statement on the operation.<sup>4</sup>

Operation Fortitude raises many questions. My question is: how it is that public officials within the ABF, the Victoria Police and all the other agencies, whether senior or not, did not ask whether such an operation was consistent with Australian liberties? Are we as a

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<sup>1</sup> Australian Border Force, 'ABF Joining Inter-Agency Outfit to Target Crime in Melbourne CBD' (Media Release, 28 August 2015).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Australian Border Force, 'Statement by ABF Commissioner Roman Quaedvlieg on the ABF's Role in Operation Fortitude' (Media Release, 28 August 2015).

nation and are our government officials so ill informed about human rights under the *Constitution*, the common law and international law that no one thought to question so obvious a violation of our freedom to walk the streets without fear of being stopped and questioned by border protection officers?

Operation Fortitude is but one example of the tendency to increase executive power and to criminalise behaviour that, in the past, might have attracted a civil fine. Australian governments have introduced, and Parliaments have passed, scores of laws that infringe our common law freedoms of speech, of association and movement, the right to a fair trial and the prohibition on arbitrary detention. These new laws undermine a healthy, robust democracy, especially when they grant discretionary powers to executive governments in the absence of meaningful judicial scrutiny.

What explains Australia's move to restrictive approaches to our fundamental freedoms and human rights over the last few years? I suggest that there is a conflation in the public mind of the events of 2001 — the Tampa Crisis on 26 August, the 'children overboard' affair on 7 October and a month following Tampa, the 9/11 terrorist attacks on the United States. Since these events 14 years ago, governments and political leaders have played on community fears of terrorism and the unauthorised entry of refugees to concentrate power in the hands of the executive to the detriment of Australian liberty.

### III

I would like to discuss the overreach of executive discretion in the dozens of new federal, state and territory laws introduced by recent governments and passed by compliant and complicit Parliaments. These laws have the effect of restricting the powers of our judiciary and threatening the core democratic principles of the separation of powers and the independence of the courts.

Particularly troubling has been the phenomenon of the major political parties agreeing with each other to pass laws that threaten fundamental rights and freedoms that we have inherited from our common law tradition. Indeed, respective governments have been remarkably successful in persuading Parliaments to pass laws that are contrary, even explicitly contrary, to common law rights and to the international human rights regime to which Australia is a party. Compounding the concentration of power in the hands of the executive is the recent phenomenon of criminalisation of behavior that has not hitherto been the subject of criminal penalties. Let me give you some examples:

1. Counter-terrorism laws, including laws that mandate the retention of metadata and access to that data by law enforcement agencies, without a warrant or independent or judicial authorisation and oversight;<sup>5</sup>
2. The criminalisation of Australians who enter 'declared areas' in Syria and Iran through provisions that place the burden of providing a legitimate reason for presence in those areas on the accused;<sup>6</sup>
3. The cancellation of visas and mandatory detention of those who become unlawful non-citizens by, for example, failing the new character test<sup>7</sup> — a test that depends

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<sup>5</sup> *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).

<sup>6</sup> *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

on the Minister's suspicion that even minor criminal offences have occurred — all this coupled by a power of the Minister to overturn the decisions of the Administrative Appeals Tribunal;<sup>8</sup>

4. Lengthy administrative detention of the mentally ill or unfit to plead without trial;<sup>9</sup>
5. Operation Sovereign Borders and secrecy of 'on water activities';
6. Secrecy provisions under the *Australian Border Force Act 2015* (Cth) ('*Border Force Act*') that allow for the prosecution of immigration workers who disclose 'protected information', an offence that attracts a penalty of two years imprisonment;<sup>10</sup> and
7. Legislative exclusion from the *Administrative Decisions (Administrative Review) Act 1977* (Cth) of decisions made under national security<sup>11</sup> and migration laws.<sup>12</sup>

The legislation I have briefly described has been assented to by Parliaments. This is an obvious but vital point, for it leads us to the question: what are the proper limits on the power of Parliament? This question remains a live one for contemporary Australian democracy.

What are the safeguards of democratic liberties if Parliament itself is compliant and complicit in expanding executive power to the detriment of the judiciary and ultimately of all Australian citizens? What are the options for democracy when both major parties, in government and opposition, agree upon laws that explicitly violate fundamental freedoms under the common law and breach Australia's obligations under international treaties?

#### IV

Over the last 15 years or so, Australia has become increasingly isolationist and exceptional in its approach to the protection of human rights.

The *Constitution* protects freedom of religion, the right to compensation for the acquisition of property,<sup>13</sup> the right to vote,<sup>14</sup> to trial by jury<sup>15</sup> and an implied right of political communication,<sup>16</sup> but very little more. As is well known, unlike every other

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<sup>7</sup> *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth); *Migration Act 1958* (Cth) s 501.

<sup>8</sup> *Migration Act 1958* (Cth) ss 133A, 133C, 501BA.

<sup>9</sup> See Australian Human Rights Commission, Submission No 6 to Senate Community Affairs References Committee, *Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, 31 March 2016.

<sup>10</sup> *Australian Border Force Act 2015* (Cth) s 42.

<sup>11</sup> See *Australian Security Intelligence Organisation Act 1979* (Cth); *Criminal Code* (Cth) s 104.2, div 5.

<sup>12</sup> See, eg, *Maritime Powers Act 2013* (Cth) ss 75D, 75F, 75H.

<sup>13</sup> *Constitution* s 51 (xxxii).

<sup>14</sup> *Ibid* s 40.

<sup>15</sup> *Ibid* s 80.

<sup>16</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

common law country and most civil law countries in the world, Australia has no Charter or Bill of Rights. This means that we do not have the core benchmarks against which to measure or challenge laws that breach fundamental freedoms. It is notable, for example, that the United States Supreme Court can employ the jurisprudence of the 14<sup>th</sup> Amendment on equality before the law to decide that marriage is available to all people including those of the same sex.<sup>17</sup>

Despite what I have said about the lack of domestic Constitutional or legislative protections for human rights, it remains true that, in the past, Australia has been a good international citizen, playing an active role in negotiating the human rights treaties that form the international monitoring regime. However, it is vital for Australians to understand that these treaties have typically not been introduced into Australian law by Parliament. The lamentable consequence is that key instruments such as the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>18</sup> the *International Covenant on Economic and Social Rights* ('ICESCR')<sup>19</sup> and the *Convention on the Rights of the Child* ('CROC')<sup>20</sup> are not directly applicable by our courts. There are three important exceptions, being the conventions on discrimination on the grounds of race, sex and disability, where implementing legislation underpins the work of the Commission.

Not only are core human rights instruments not part of Australian law but also, over recent months, we have taken a major step backwards in stripping international laws from our domestic laws. The *Maritime Powers Act 2014* (Cth) removed references to the *Convention relating to the Status of Refugees* ('Refugee Convention')<sup>21</sup> from s 36 of the *Migration Act*, which sets out the criteria for grant of a protection visa. 'Refugee' is now defined in legislation itself, but not by reference to the international agreement. Section 197C of the *Migration Act* sets out that Australia's nonrefoulement obligations are now irrelevant to removal of unlawful non-citizens under s 198 of the *Migration Act*. It is especially worrying that the *Border Force Act* provides that an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under s 198 arises irrespective of whether there has been an assessment, according to law, of Australia's nonrefoulement obligations in respect of the non-citizen.

It is notable that the *Border Force Act* slipped through the federal House of Representatives in March 2015 without a single opposition party member speaking against it.

Compounding our isolation from international human rights jurisprudence, the Asia Pacific has no regional human rights treaty and no regional court to develop human rights law or to build a regional consensus, unlike Europe, North America, Africa, Latin America and the Arab states.

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<sup>17</sup> *Obergefell v Hodges* 576 U.S. \_\_\_\_ (2015).

<sup>18</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>19</sup> *International Covenant on Economic and Social Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

<sup>20</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>21</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

## V

It might be thought that we can rely on our courts to protect common law liberties. Judges have employed the principle of legality to adopt a restrictive interpretation of legislation to protect common law freedoms. Laws passed by Parliament are not to be construed as abrogating fundamental common law rights, privileges and immunities in the absence of clear words or ‘unmistakable and unambiguous language.’<sup>22</sup> It is also presumed that Parliament intends to act in conformity with international law and the treaties to which it is party.<sup>23</sup>

In practice, the principle of legality and the presumption of international law consistency have not provided as effective protection as hoped. There is a palpable reluctance by courts to refer to an international source of law where the international obligation or principle has not been implemented into domestic law by Parliament. Moreover, the principle of legality applies only if there is an ambiguity in the words of the legislation; the rationale being, of course, that Parliament is the law maker and the task of the courts is to interpret and to implement such laws.

As Kiefel J said in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*‘Malaysian Declaration Case’*):<sup>24</sup>

[A] statute is to be interpreted and applied... so that it is in conformity, and not in conflict, with established rules of international law... However, if it is not possible to construe a statute conformably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law.

But, as our laws today are drafted with such precision, or are so constantly amended, ambiguities are increasingly hard for the courts to find.

In the *Malaysian Declaration Case*, for example, the High Court found that, under s 98A of the *Migration Act*, the Minister could not send asylum seekers to Malaysia as that nation had not ratified the *Refugee Convention* and they would be at risk of return to the country of persecution and discrimination. The government immediately returned to Parliament to delete the offending clause, leaving open the possibility of further offshore processing arrangements with the Asian region, where so many states are not party to the relevant human rights treaties.

## VI

The *Malaysian Declaration Case* illustrates the phenomenon that time and again the High Court has limited executive discretion by reference to statutory principles of interpretation and the principle of legality. It also demonstrates that time and again, the government has been successful in requesting Parliament to tighten up legislation to permit what was hitherto illegal.

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<sup>22</sup> *Coco v The Queen* (1994) 179 CLR 427, 436.

<sup>23</sup> *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363.

<sup>24</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 2 (31 August 2011) [247].

In short, respective Parliaments over the last few years have failed to exercise their traditional self-restraint in protecting democratic rights. Historically, Parliament has been the bulwark against sovereign or executive power. Professor George Williams estimates that there are currently over 350 Australian laws that infringe fundamental freedoms.<sup>25</sup> He suggests that prioritising governmental power has become a 'routine part of the legislative process', with new laws stimulating little community or media response.<sup>26</sup> This assessment is supported by the interim report of the Australian Law Reform Commission in its inquiry into Commonwealth laws and traditional rights and freedoms, which provides evidence of an extensive body of federal laws that infringe rights and freedoms.<sup>27</sup>

Despite the disappointing failure of Parliaments to protect human rights, it can be observed that Australia's historical and current preference has been to rely on its Parliaments rather than the courts to determine the balance between individual rights and national security and public safety.

One of the most important mechanisms to ensure that Australian laws are consistent with fundamental rights and freedoms is that of scrutiny through Parliamentary Committees, such as the Parliamentary Joint Committee on Intelligence and Security and the Senate Committee on Legal and Constitutional Affairs. These Committees regularly review proposed and existing laws for their impact on migration, counter-terrorism and national security.

A welcome addition to these Committees has been Parliamentary Joint Committee on Human Rights established in 2011 ('the Committee').<sup>28</sup> The Committee has the primary mandate to examine current and proposed laws for compatibility with human rights and to report accordingly to Parliament. Human rights are specifically defined by reference to international human rights law as the rights and freedoms accepted by Australia in the treaties dealing with civil and political rights, economic, social and cultural rights, discrimination on the basis of sex, race, disability and torture and children's rights. In this way, Parliament has made a clear commitment to international human rights law. Indeed, as French CJ has pointed out:

It does not take a great stretch of the imagination to visualise intersections between these fundamental rights and freedoms, long recognised by the common law, and the fundamental rights and freedoms which are the subject of the *Universal Declaration of Human Rights* and subsequent international conventions to which Australia is a party.<sup>29</sup>

The Committee has in its early years produced consensus reports; no mean feat given that all political parties are represented. More recently, however, the Committee has split down political party lines to produce both majority and minority reports.

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<sup>25</sup> George Williams, 'The Legal Assault on Australian Democracy' (Paper presented at Sir Richard Blackburn Lecture, Pilgrim House Conference Centre, 12 May 2015) 350.

<sup>26</sup> Ibid.

<sup>27</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015).

<sup>28</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

<sup>29</sup> Chief Justice Robert French, 'Oil and Water? International Law and Domestic Law in Australia' (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009) 21.

It is not easy to determine the impact of the Committee in protecting and promoting human rights. It is clear that most Committee recommendations are not accepted by government and do not lead to significant amendments to the original Bill. Indeed, governments, unsurprisingly, remain reluctant to accept that a Bill it has introduced to Parliament fails to comply with human rights.

For example, in respect of amendments to the *Migration Act* regarding 'Unauthorised Maritime Arrivals' in 2012,<sup>30</sup> the Minister for Immigration and Citizenship concluded that the rights to freedom of movement and to family, the right not to be detained arbitrarily and the rights of the child were not engaged because the asylum seekers were 'unlawfully' in Australia.<sup>31</sup> The Committee in its 7<sup>th</sup> report of 2012 ('the Report') stated that:

...as a matter of international law persons who are not 'lawfully' present in Australian territory nonetheless enjoy a range of rights under the ICCPR and other relevant human rights treaties while they are ... under Australian jurisdiction. ... The committee considers that this Bill on its face give rise to issues of compatibility with human rights, [especially the holding of children in detention and their transfer to regional processing]. The Committee also considers that there may be issues of compatibility with the right not to be detained under Article 9 of the ICCPR....<sup>32</sup>

The Report, among most others, has not persuaded the government to amend the Bill to achieve compatibility with human rights.

Despite this and other disappointing responses by governments to its work, the Committee arguably improves the understanding of human rights among Parliamentarians. It can provide valuable advice to those drafting legislation and encourage a culture of human rights among public servants. The reports of the Committee may also inform the views of courts when interpreting the new laws.

## VII

Additional to Parliament, the Commission plays a central role in protecting human rights. The Commission was established in 1986, and is now coming up to its 30<sup>th</sup> anniversary. The constituting statute, the *Australian Human Rights Commission Act 1986* (Cth) creates an agency of government with corporate legal status. It is one of 110 national human rights institutions in the world and is accredited with 'A' status under the United Nations *Paris Principles*.<sup>33</sup> Its most important characteristic is the

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<sup>30</sup> Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).

<sup>31</sup> Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, Attachment A: Statement of Compatibility with Human Rights, 2–3.

<sup>32</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Seventh Report of 2012: Bills Introduced 29 October – 1 November 2012; Legislative Instruments Registered with the Federal Register of Legislative Instruments 17 October – 16 November 2012* (2012) 20–21.

<sup>33</sup> ICC Sub-Committee on Accreditation, *Chart of the Status of National Institutions* (23 May 2014) International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights

<<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf>>.



independence of its President and seven Commissioners from government influence. The Commission has many functions including:

1. Investigating and conciliating complaints of violations of human rights and anti-discrimination laws;
2. Inquiring into acts or practices that may be inconsistent with human rights;
3. Promoting an understanding of human rights through education;
4. Reporting to the Minister on laws that Parliament should be made to comply with human rights; and
5. Intervening, with leave of the court, in judicial proceedings where a human rights perspective is relevant.

The statutory definition of human rights, as contained in the ICCPR or other relevant treaties, is critical to the role of the Commission. As you will understand from my earlier remarks about Australian exceptionalism, the *ICCPR*, the *ICESCR* and the *CROC* are not directly part of Australian law. This places the Commission in a delicate position with the government of the day, because while we give our advice on the basis of international law, government officials and the courts apply Australian domestic law. In the absence of domestic laws protecting human rights, where Parliament fails to exercise its traditional restraint to protect fundamental freedoms and where the courts have a limited opportunity to apply the principle of legality, the Commission has a greater role in our democratic system than its founders may have intended.

In summary, Australia has not developed the legal or Parliamentary tools for protection of human rights that are available in comparable legal systems. It is for this reason that the executive government, with the support of Parliament, is able to pass laws that threaten our democratic freedoms with apparent impunity.

## VIII

Expanded counter-terrorism laws stand as an example of this executive overreach. Counter-terrorism laws have been significantly extended over recent years to modernise our existing laws. The strength of the rule of law is more truly tested when security is threatened than in times of peace. When Australia is threatened by terrorism, the need to protect our traditional liberties assumes an even greater urgency.

Many counter-terrorism laws, introduced with unseemly haste before last Christmas, go well beyond what might be deemed to be proportionate, creating a chilling effect on freedom of speech and the press and breaching the right of individuals to privacy.

Three tranches of new counter-terrorism laws have been passed:

1. *National Security Legislation Amendment Act (No. 1) 2014* (Cth) creates new Australian Security Intelligence Organisation ('ASIO') powers for intelligence gathering;
2. The *Counter-Terrorism Legislation Amendment (Foreign Fights) Act 2014* (Cth) establishes 'declared areas' in Iraq and Syria and creates an offence for

Australians to enter these areas or to fight abroad. Problematically, the evidentiary burden is placed on the accused to provide a legitimate reason;<sup>34</sup> and

3. The mandatory data retention scheme enacted by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) requires telecom providers to retain data of all Australians for two years. Data is available to security agencies without a prior warrant, or judicial or independent supervision and authorisation.<sup>35</sup> A similar law of the European Union has recently been ruled invalid by the European Court of Justice as disproportionate interference with privacy and freedom of expression.<sup>36</sup>

A fourth tranche of legislation has been introduced but is yet to be passed. The Australian Citizenship (Allegiance to Australia) Bill 2015 (Cth) ('the Bill') has recently been introduced to ensure that Australian citizens who engage in specific terrorist related conduct, even in the absence of any conviction, fight in the service of a declared terrorist organisation, or are convicted of a specified terrorism offence, will lose their citizenship automatically if they are a dual national.<sup>37</sup> The loss of citizenship for dual nationals, including those who have spent most (if not all) of their lives in Australia, strikes at the heart of Australia's successful migrant and multi-cultural nation and threatens our social cohesion.

Under current law, the power of the Minister to revoke citizenship arises in limited circumstances, such as a conviction for specified offences related to false information in connection with their citizenship application.<sup>38</sup>

It is now proposed that the revocation should arise by operation of law rather than the initially proposed subjective Ministerial discretion. In short, no decision is required by the Minister, though it is implicit that an official somewhere will make the decision. But it is also proposed that the Minister be granted a non compellable discretion to exempt the citizen from the automaticity of the loss of citizenship, if he considers it in the public interest to do so.<sup>39</sup> The Minister does not have a duty to consider whether he will exercise this discretion and if he makes any mistakes is not bound by the rules of natural justice.<sup>40</sup>

The *Magna Carta* provides that no man is to be exiled except by the lawful judgment of his equals or the law of the land. This ancient principle raises the question whether it is consistent with the rule of law for Parliament to pass legislation to withdraw citizenship automatically, subject to the discretion of the Minister. I suggest that to strip a person of their citizenship in these circumstances is likely to be contrary to Article 12(4) of the *ICCPR*, which protects the right to enter and remain in one's own country. In effect, Parliament has elevated the subjective views of a Minister above an evidence based determination by a judge.

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<sup>34</sup> *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

<sup>35</sup> *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).

<sup>36</sup> *Maximillian Schrems v Data Protection Commissioner* (C-362/14) [2015] ECR 351.

<sup>37</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) cls 33AA, 35, 35A.

<sup>38</sup> *Australian Citizenship Act 2007* (Cth) Pt 2 Div 3.

<sup>39</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) cl 33AA(7).

<sup>40</sup> *Ibid* cls 33AA(8), 35(7), 35A(7), 33AA(10), 35(9), 35A(9).

The government argues that the right to a fair trial over loss of citizenship is not threatened by the Bill, because there can be judicial review of any decision made by the Minister not to exempt a person from the automatic loss of citizenship.<sup>41</sup> This is true. A court could review whether the power under the *Australian Citizenship Act 2007* (Cth) has been exercised according to the law. But if all the law requires is that the Minister can exercise his discretion as he considers appropriate, in practice, the courts have nothing to review, rendering the exercise futile. The Bill, I suggest, diminishes the judicial power to make determinations, and will be, if passed, an arbitrary overreach of executive discretion facilitated by a compliant Parliament.

While there are few details yet available, a fifth tranche of laws is expected to be introduced shortly,<sup>42</sup> and will:

1. Create a new offence of inciting genocide, which already exists as a crime against humanity under our war crimes legislation;<sup>43</sup>
2. The control order regime will be extended to lower the age at which a person can be subject to a control order from 16 to 14 years. Currently a control order applies to 16–18 year olds for up to 3 months subject to some safeguards;<sup>44</sup>
3. Monitoring of individuals subject to control orders will also be facilitated by the proposed law by relaxing controls over searches, telecommunications interception and surveillance devices;<sup>45</sup> and
4. Make it more difficult for the subject to understand the reasons for the order or to challenge it in the courts.<sup>46</sup>

## IX

A second example of the overreach of executive discretion and power lies in the expansion of executive powers to order the arbitrary and indefinite detention of individuals. The enduring words of the *Magna Carta* are, ‘no freeman is to be imprisoned except by the lawful judgment of his equals or by the law of the land.’

Over recent years, respective Parliaments have granted governments the power to lawfully detain indefinitely various classes of persons, including most notably refugees and asylum seekers, along with those less well known who have infectious diseases, or who are mentally ill and unfit to plead to criminal charges, or who are subject to mandatory admission to drug and alcohol rehabilitation facilities or indefinite detention of serious sex offenders. Few of those detained under such laws have meaningful access to legal advice or regular independent judicial or administrative review.

The Commission is particularly concerned by the growing instances of detention in prisons of those with cognitive disabilities for lengthy periods without releasing them into more appropriate facilities and in the absence of regular review by an independent

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<sup>41</sup> Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), Attachment A: Statement of Compatibility with Human Rights, 31.

<sup>42</sup> Commonwealth, *Parliamentary Debates*, Senate, 13 October 2015, 7434 (George Brandis, Attorney-General).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

tribunal.<sup>47</sup> In a recent complaint, the Commission found that four Aboriginal men with intellectual and cognitive disabilities had been held for many years in a maximum security prison in the Northern Territory.<sup>48</sup> Each complainant had been found unfit to stand trial or found not guilty by reason of insanity. In respect of two of these men, they would have received a maximum sentence of 12 months had they been duly convicted. Instead, they were imprisoned for four and a half years and six years, respectively. The Commission found that the failure by the Commonwealth was a violation of the right not to be detained arbitrarily under Article 9 of the *ICCPR*, a provision in the spirit of the *Magna Carta*.

Detention powers of the executive have also been expanded to detain asylum seekers and refugees indefinitely; powers that were found to be valid by the High Court in *Al Kateb v Godwin*<sup>49</sup> in 2007. Most egregiously, those with adverse security assessments issued by the ASIO are detained indefinitely. Many, including children, are detained for some years without meaningful access to legal advice or independent review. About 2044 people, including 113 children, remain in closed detention in Australia and 934 males remain on Manus Island and 631 refugees on Nauru, including 92 children.<sup>50</sup> Many have been held for well over a year in conditions that have been criticised by the United Nations as breaching the *Convention against Torture*.<sup>51</sup>

The mandatory detention provisions of the *Migration Act* have also been activated by s 501 the *Migrations Amendment (Character and General Visa Cancellation) Act 2014* (Cth) which allows the Minister to cancel visas on character grounds, on the basis of his reasonable suspicion that the person does not pass the character test, where the person is not able to satisfy the Minister that they pass the character test.<sup>52</sup> That is any possible risk of committing certain offences including disruptive activities or inciting discord in the community. While earlier law required a criminal conviction by a court of law, the new provisions give the Minister personal, non-delegable, non-compellable and non-merits reviewable powers to cancel a visa.<sup>53</sup>

The Commission has expressed concerns that these powers increase the likelihood of arbitrary detention and unjustified interference with families and the rights of

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<sup>47</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2012' (Report, Australian Human Rights Commission, 26 October 2012) 62–70; Australian Human Rights Commission, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' (Report, Australian Human Rights Commission, 2008); Australian Human Rights Commission, 'Equal before the Law: Towards Disability Justice Strategies' (Report, February 2014) 26.

<sup>48</sup> Australian Human Rights Commission, 'KA, KB, KC and KD v Commonwealth of Australia' (Report No 80, 2014).

<sup>49</sup> (2004) 219 CLR 562.

<sup>50</sup> Department of Immigration and Border Protection, *Immigration Detention Statistics for 30 September 2015* (September 2015) <<http://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention>>.

<sup>51</sup> Juan E Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68 and Add.1 (6 March 2015) [19], [26]; *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>52</sup> *Migration Act 1958* (Cth) s 501(2).

<sup>53</sup> Australian Human Rights Commission, Submission No 8 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 28 October 2014, [4].

children.<sup>54</sup> Even more worryingly, the Minister has the power to overturn a decision of the Administrative Appeals Tribunal that revokes a decision to cancel a visa under s 501 (3A) of the *Migration Act*, without any need to satisfy the principles of natural justice.<sup>55</sup>

## X

Some recent cases shine rays of legal light on the unconstrained right of Parliaments to give the executive the power to detain. In 2014, in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,<sup>56</sup> the High Court decided unanimously that the executive discretion to detain was limited to three purposes – deportation, determining a visa application, or determining whether to allow the plaintiff to apply for a visa.<sup>57</sup> The Court qualified the executive’s power to detain, holding that the *Migration Act* does not authorise the detention of an asylum seeker ‘at the unconstrained discretion’ of the Minister.<sup>58</sup> It found that an alien is not an ‘outlaw’ and that the Minister must make a decision, one way or the other, as soon as is practicable.<sup>59</sup>

This decision was followed by a High Court writ of peremptory mandamus against the Minister for Immigration and Border Protection – a rare phenomenon under our law. Earlier this year in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*,<sup>60</sup> the Court considered a matter in which it had previously issued a writ of mandamus ordering the Minister to decide to either grant or refuse a protection visa application made by an asylum seeker held in closed detention for three years.<sup>61</sup> On return to the court, having determined that the Minister had failed to make the required decision in accordance with law, the Court unanimously issued a peremptory writ of mandamus, requiring the Minister to make a decision to *grant* a permanent protection visa to the plaintiff asylum seeker refugee held in closed detention for three years.<sup>62</sup>

As punitive detention is for the courts alone, I suggest that the prolonged and indefinite administrative detention by the executive risks becoming punitive. If so, it violates the principle of separation of powers.

An aspect of enforcing international human rights law is the United Nations monitoring system through the Human Rights Council and the Human Rights Committee. Both institutions have been clear in voicing their concerns about policies of immigration detention and offshore processing, as have the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees. Additionally, the United Nations Subcommittee on Prevention of Torture raised concerns that conditions on Nauru raised a pressing need for increased monitoring of compliance with the *Convention against Torture*,<sup>63</sup> and the Special Rapporteur on Migration cancelled a

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<sup>54</sup> *Ibid.*

<sup>55</sup> Migration Amendment (Character and General Visa Cancellation) Bill 2014 cl 133A.

<sup>56</sup> [2014] HCA 34 (11 September 2014).

<sup>57</sup> *Ibid* [26].

<sup>58</sup> *Ibid* [22].

<sup>59</sup> *Ibid* [24], [9].

<sup>60</sup> [2015] HCA 3 (11 February 2015).

<sup>61</sup> [2014] HCA 24 (20 June 2014) [69].

<sup>62</sup> [2015] HCA 3 (11 February 2015) [48].

<sup>63</sup> Office of the High Commissioner for Human Rights, ‘UN Torture Prevention Body Urges Nauru to Set Up Detention Monitoring Mechanism’ (Media Release, 6 May 2015).

visit to Nauru because of secrecy laws.<sup>64</sup> Finally, concerns have been raised by civil society including Amnesty International, Human Rights Watch, the Human Rights Council of Australia, the Refugee Advice and Casework Service and the Andrew & Renata Kaldor Centre for International Refugee Law.

I will shortly leave for Geneva to be present at Australia's Universal Periodic Review before the United Nations Human Rights Council. Concerns of the international community in respect of the mandatory detention and offshore processing policies will almost certainly be expressed at the Review next week. The outcome may well affect the strength and credibility of Australia's bid for a seat on the Human Rights Council in 2018–20.

## XI

One of many lessons I have learned over my three years as President of the Commission is that one of the most effective safeguards of human rights is the cultural expectation of Australians that our freedoms will be protected. While most Australians are unlikely to be able to describe the doctrine of the separation of powers, they are quick to assert their liberties under the rubric of a 'fair go' — a phrase that is as close to a Bill of Rights in this country as we are likely to get. This cultural expectation is what keeps our freedoms alive today, as was illustrated by the overwhelming community response to Operation Fortitude and to preserve s 18C of the *Racial Discrimination Act*.

The scores of laws passed recently that infringe our rights has confirmed my view that Australia needs a legislated charter of rights. If such a law were to fail or be defective, it can easily be repealed or amended. We must prioritise the education of young Australians, so they better understand and value our Constitutional protections for democracy and the rule of law. We also need to invest in Parliament as a vital institution to protect the rights and freedoms of citizens, through stronger powers for the Joint Parliamentary Committee on Human Rights.

I hope that, despite challenging the power of the executive and Parliament, as an English migrant and a dual citizen, I can keep my Australian passport and eventually retire to smell the roses in peace.

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<sup>64</sup> Office of the High Commissioner for Human Rights, 'Migrants/Human Rights: Official Visit to Australia Postponed Due to Protection Concerns' (Media Release, 25 September 2015).