



The High Court and indefinite detention: towards a national bill of rights?

In August 2004 Australia's High Court declared by 4:3 that failed asylum seekers who have nowhere to go can be kept in immigration detention indefinitely. In *Al-Khateb and Al Khafaji*, the majority said that provided the Immigration Minister retained the intention of eventually deporting such people, detention would remain valid. These cases will be cited by those who argue that basic freedoms for people within Australia's jurisdiction are not adequately protected and there is a need for a national 'bill of rights'.

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Executive summary

In August 2004 Australia's High Court declared by a bare majority (4:3) that failed asylum seekers who have nowhere to go and who pose no danger to the community can be kept in immigration detention indefinitely.

In *Al-Kateb v. Godwin*¹ and *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji*,² the majority of the High Court said that provided the Immigration Minister retained the intention of eventually deporting such people, the detention would be valid even if it was potentially indefinite. The minority judges, however, said that once there was no reasonable prospect in the foreseeable future that a failed asylum seeker could be deported, continued detention would no longer be for a purpose within the 'aliens' power in the Constitution. In this situation, detention would become 'punishment' that under the Constitution can only be imposed by the courts (through charge and trial) not by government order.

The majority indicated that the principle in *Lim's case* (1992)³—limiting immigration detention to what was 'reasonably necessary' for a valid purpose—had been misunderstood. The *Lim* principle applied when a person was detained under the government's general executive power (e.g. for quarantine, mental health reasons, arrest pending trial etc). In contrast, Parliament had unlimited power to detain 'aliens' unless otherwise prohibited by the Constitution.

Al-Khateb and *Al Khafaji* will be cited by those who argue that basic freedoms for people within Australia's jurisdiction are not adequately protected and there is a need for a national 'bill of rights'. Proponents will focus on Justice McHugh's contention that the outcome for Mr Al-Khateb and Mr Al Khafaji may be 'tragic' but without a bill of rights the High Court could do little.

The majority's rejection of the *Lim* principle may be correct in terms of strict constitutional interpretation. As the United Nations Human Rights Commission said in *A v. Australia* (1997),⁴ however, courts should be able to consider in a particular case whether detention is necessary. This could occur through the adoption of provisions ensuring freedom from arbitrary detention along the lines of the International Covenant on Civil and Political Rights or the new ACT Human Rights Act. Alternatively, this could happen under current Australian law if it is accepted that the notion of 'proportionality' is relevant to whether detention is for a valid purpose under the 'aliens' power.

There is some prospect a future case could overturn the decision in *Al-Kateb* and *Al Khafaji*, not least because the High Court was seriously divided over important constitutional issues. Only three of the majority judges provided substantive reasons, and there were strong minority judgments, including from the Chief Justice.

Introduction

Three High Court judgments on immigration detention in August 2004 may well be seen as a watershed in Australian legal history. In *Al-Kateb*⁵ and *Al Khafaji*⁶ Australia's High Court declared that people who pose no danger to the community and have committed no crime can be detained indefinitely. In *Behrooz*⁷ the High Court said that even if a detainee were treated in a 'harsh or inhumane' way, the detention itself would still be authorised by the *Migration Act 1958*. The decisions prompted calls for a national bill of rights and changes to the Constitution. And despite winning the cases, the Federal Government's response indicated discomfort with the High Court's position.

This paper considers the issue of indefinite detention in *Al-Kateb* and *Al Khafaji*. A further paper will look at the judgment in *Behrooz* and the legality of 'harsh and inhumane' treatment of detainees.

Conflict on the High Court

In *Al-Kateb* and *Al Khafaji*, the High Court decided by a bare majority (4:3) that keeping an 'unlawful non-citizen' in 'immigration detention' indefinitely was not unconstitutional. Each of the judges, except Justice Dyson Heydon, gave detailed reasons for their decision. The cases involved 'an unusually combative series of judgments',⁸ highlighted in particular by strong attacks from Justices McHugh and Kirby on each other's reasoning.⁹

The cases involved two failed asylum seekers who have been unable to leave Australia. Ahmed Ali Al-Kateb, a stateless Palestinian, arrived in Australia by boat in December 2000. After legal appeals failed, he asked to be returned to Kuwait (his birthplace) or Gaza. But this needed cooperation from other countries (including in the latter case Israel) which was not forthcoming. After the Federal Court's April 2003 decision in *Al Masri* (see below) Mr Al-Kateb was released to live in Sydney—despite objections from the Federal Government—pending the High Court's verdict on his continued detention.

Abbas Al Khafaji is an Iraqi national who grew up in Syria and arrived in Australia without documents in January 2000. He met the criteria in the Migration Act for refugee status, but was denied asylum because changes to the Act in 1999 removed any protection obligation where sanctuary could have been sought from a third country, in this case Syria. However after the Federal Court found that despite his request to go back there was no real prospect of Syria or any other country accepting Mr Al Khafaji, it ordered his release (citing the *Al Masri* case) subject to reporting and other conditions.

After the High Court decision overruling their release, the Immigration Minister ordered a review of all cases involving long-term detainees. Despite being successful in *Al-Kateb* and *Al Khafaji*, the Minister appeared uncomfortable with the outcome:

It (detention) is not for life; there is a ministerial discretion and there is the opportunity for people to be given relief and stay in Australia ... I have asked for a review of all the long-

term detention cases to come to me. I will have a look at them and see if they warrant intervention.¹⁰

The review was completed in a matter of weeks. The Minister used her discretionary power under the Migration Act to grant Mr Al-Kateb and Mr Al Khafaji bridging visas, giving them temporary permission to live in the Australian community. However the claims of 13 others, including an asylum seeker who had been held in detention for six years, were rejected.¹¹

Immigration detention and the Constitution

Commonwealth legislation—including immigration detention laws—cannot contravene prohibitions in the Constitution.

Under the current Migration Act, people who arrive in Australia without a valid visa are ‘unlawful non-citizens’ but—importantly—do not commit a criminal offence. Since they have committed no crime, they cannot be ‘punished’. Under the Australian Constitution, punishment can only be imposed *by the courts* after determining guilt for a particular crime.¹² At the heart of the debate in *Al-Kateb* and *Al Khafaji* was whether indefinite detention by immigration authorities—i.e. *by the federal government*—would amount to ‘punishment’ and therefore be unconstitutional.

Until 1994 it was a crime to enter Australia in contravention of the Migration Act, punishable by six months in prison and deportation. The Act also provided for detention by the government ‘*without adjudication of criminal guilt pending deportation and ... determination of status*’.¹³ The High Court said in *Koon Wing Lau* (1949) that provisions of the latter type were valid because they did ‘not create or purport to create a power to keep a deportee in custody for an unlimited period’.¹⁴ Instead they implied that ‘unless within a reasonable time [the deportee] is placed on board a vessel he would be entitled to his release ...’¹⁵

Since 1994 the Migration Act has provided for mandatory detention by the government of any unlawful non-citizen.¹⁶ While entry without a visa is no longer a crime, such a person ‘*must be kept in immigration detention until he or she is removed, deported or granted a visa*’.¹⁷ Removal must occur ‘as soon as reasonably practicable’,¹⁸ but no time limit is specified for this to be achieved.

Detention and the ‘aliens’ power

In addition, the Commonwealth only has power under the Constitution to make laws on specific subjects.¹⁹ Commonwealth legislation must be sufficiently connected with or, in the words of the Constitution, be ‘with respect to’ one of these subjects to be valid.

In *Lim* (1992) the High Court (Justices Brennan, Deane and Dawson) said it had long been accepted that the Commonwealth’s power under the Constitution to make laws *with respect to* ‘aliens’:²⁰

... includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody *to the extent necessary to make the deportation effective*.²¹

On this basis detention of an alien without intervention by a court would be within the 'aliens' power if it was 'reasonably capable of being seen as necessary' for deportation or consideration of an entry application.²² Similarly Justice Gaudron said that if detention laws were 'appropriate and adapted' for such purposes they would be within the 'aliens' power.²³ However if a detention provision was not 'appropriate and adapted' to regulating the entry or facilitating the removal of non-citizens²⁴ it would not be a law *with respect to* the subject of 'aliens' and would be invalid.²⁵

The particular provisions in the Migration Act considered in *Lim* included a 273 day limit on detention²⁶ and enabled detainees (in theory) to end their own detention by requesting removal from Australia. The Court in *Lim* concluded therefore that the detention did not go beyond what was 'appropriate and adapted' or 'reasonably capable of being seen as necessary' for deportation or regulating entry.²⁷

In *Al Masri* (2003), the Federal Court applied the principle laid down by the High Court in *Lim*. It approved the release (subject to reporting and other conditions) of a person who had been refused refugee status, and like Mr Al-Kateb had then asked to be returned to Gaza. On the day of his departure he was informed that permission from neighbouring countries could not be obtained. The Federal Court said that if a deportee had nowhere to go and there was no 'real likelihood or prospect of removal in the reasonably foreseeable future',²⁸ continued detention may not be 'reasonably capable of being seen as necessary' and 'a serious question of invalidity would arise'.²⁹ If there were no real prospect of removal, the detention would have a 'tenuous' connection at best with the purpose of deportation and would essentially amount to punishment.³⁰

However not all members of the High Court agreed with the *Lim* principle. Justice McHugh said in *Lim* that:

If a law of the Parliament can be characterized as a law with respect to aliens, it is valid *whatever its terms*, provided that the law does not infringe any express or implied prohibition in the Constitution.³¹

Even if detention 'went beyond what was reasonably necessary' for deportation or regulating entry it would still be a law 'with respect to' aliens.³² In a particular case it might be invalid because it amounted to 'punishment' that could be imposed only by the courts.³³ But beyond this there was nothing to limit the Commonwealth's power to detain aliens. Justice McHugh's position—accepted by the majority in *Al-Kateb* and *Al Khafaji*—is consistent with orthodox constitutional theory which says that a court will not look at the merits of legislation if a law has a 'sufficient connection' with a subject in the Constitution.³⁴ As Justice Dawson explained in *Leask* (1996):

if that connection is established, it matters not how ill-adapted, inappropriate or disproportionate a law is or may be thought to be.³⁵

The minority view

The minority in *Al-Khateb* and *Al Khafaji* (Chief Justice Gleeson and Justices Gummow and Kirby) upheld the Federal Court's approach in *Al Masri*.

Chief Justice Gleeson emphasised that the authority of the Federal Government under the Constitution 'to detain an alien in custody' was limited to the purpose of removal or considering an application to enter Australia.³⁶ In addition a fundamental principle of legality came into play where indefinite detention by the executive government was possible, namely that:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.³⁷

Since the Migration Act did not say what was to happen to people like Mr Al-Kateb and Mr Khafaji if (through no fault of their own) they could not be deported, they were entitled to be released—subject to conditions to ensure they could be removed if this became 'reasonably practicable'.³⁸ Chief Justice Gleeson said a power to detain people indefinitely was more likely to be valid if this was discretionary not mandatory, with individual circumstances able to be taken into account—especially the 'danger to the community and likelihood of absconding'.³⁹

Justice Gummow noted the US Supreme Court decision in *Hamdi v. Rumsfeld* (2004) where Justice Scalia stated:

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.⁴⁰

Like Chief Justice Gleeson, Justice Gummow said that it was important if possible to avoid an interpretation of the Migration Act that authorised detention for an unlimited time.⁴¹ The Act required removal of unlawful non-citizens 'as soon as reasonably practicable', with detention until this occurred. Once it became unlikely that Mr Al-Kateb or Mr Al Khafaji could be removed there was no basis under the Act for detaining them. Continued detention was not justified 'by the hope of the Minister, triumphing over present experience' that at some time in the future some country might accept the detainees.⁴² This would allow the executive government to declare that detention was still for the constitutionally permissible purpose of deportation. As the landmark *Communist Party Case* (1951)⁴³ established, it is for the courts not the executive to decide the constitutional validity of government actions.⁴⁴ According to eminent constitutional lawyer Professor Leslie Zines:

... no law can give power to any person (other than a court) to determine conclusively any issue upon which the constitutional validity of the law depends. The second doctrine is sometimes metaphorically summed up in the maxim 'the stream cannot rise above its source'
...⁴⁵

Justice Gummow said the key issue was not whether immigration detention was 'punitive' or 'non-punitive' but what its purpose was. 'Aliens' could not be deprived of their liberty for unlimited purposes.⁴⁶ If there was no criminal offence, detention would only be valid if it was for 'the entry, investigation, admission or deportation of aliens.'⁴⁷

Justice Kirby strongly backed the relevance of the *Communist Party Case*, declaring 'I would not have this Court surrender the power of unlimited executive detention to a Minister's intention'.⁴⁸ Stating that 'indefinite detention at the will of the Executive ... is alien to Australia's constitutional arrangements',⁴⁹ he went beyond the words of the Migration Act to find constraints in international law on detention without charge or trial.⁵⁰ In his view, the High Court:

... should be no less vigilant in defending those arrangements ... than the United States Supreme Court has lately been in responding to similar Executive assertions in that country.⁵¹

While Australia has no equivalent of the US Fifth Amendment (prohibiting deprivation of liberty without 'due process of law') he said the requirement in our Constitution that only courts can impose punishment has a similar effect.⁵² Citing cases from the United Kingdom and Hong Kong as well as the United States,⁵³ he said:

... the common thread that runs through all these cases is that judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law.⁵⁴

In Justice Kirby's view, the isolation of Australian constitutional law 'from the dynamic impact of international law is neither possible nor desirable'.⁵⁵ National courts have a duty to interpret legislation such as the Migration Act as far as possible to be consistent with 'human rights and fundamental freedoms of humanity' as stated in international law.⁵⁶ A failure to do so would lead to decisions that would be viewed in the future 'with a mixture of curiosity and embarrassment'.⁵⁷

The majority view

In contrast, the majority judges rejected the approach in *Al Masri*. Far from requiring the release of detainees if there was no real prospect they could leave Australia, Justices McHugh, Hayne and Callinan (supported by Justice Heydon) said the Migration Act clearly stated they must be detained until they were removed or given a visa—however long that might take.⁵⁸ Since the Act was unambiguous, there was no room for finding an intention not to abrogate basic freedoms or for resorting to international law.⁵⁹

Justice McHugh indicated that the principle in *Lim*—limiting detention to what was ‘reasonably necessary’ for a valid purpose—had been misunderstood. The *Lim* principle applied when a person was detained under the government’s general executive power (e.g. for quarantine, mental health reasons, arrest pending trial etc)⁶⁰ or where detention was merely ‘incidental’ to some other constitutional head of power.⁶¹ But it was not relevant when a specific provision in the Constitution such as the ‘aliens’ power authorised detention. Parliament had *unlimited* power to make laws affecting aliens unless the Constitution otherwise prohibited this.⁶² In other words, provided detention was for a purpose relevant to the ‘aliens’ power it would be valid—unless it became ‘punishment’ that only courts could impose.

In his view immigration detention would cease to be for the valid purpose of deportation only if it continued after removal had become ‘reasonably practicable’.⁶³ Moreover detention for the purpose of deportation or to prevent aliens entering the Australian community was ‘protective’ and did not amount to punishment.⁶⁴

It was ‘not true’ that indefinite detention at the will of the executive government was an alien concept in this country. In the First and Second World Wars many people had been detained under National Security Regulations because the government considered them disloyal or a threat to the security of the country.⁶⁵ This ‘protective’ detention was not limited to people born overseas. It had been upheld by the High Court, and ‘there was no reason to think that this Court would strike down similar regulations if Australia was again at war ...’⁶⁶

Justice McHugh said Justice Kirby’s view that the Australian Constitution should be read consistently with international law was ‘heretical’.⁶⁷ He accepted that ambiguous *legislation* should be interpreted in conformity with the rules of international law that existed *when the law was enacted*.⁶⁸ And he agreed that political, social and economic developments inside and outside Australia since 1900 could help elucidate the meaning of particular provisions in the Constitution.⁶⁹ But he refused to accept that the meaning of the *Constitution* could be altered when, for example, the Australian Government signed a new international treaty, much less that it could be ‘affected by rules created by the agreements and practices of other countries’.⁷⁰ Making the Constitution subject to the rules of international law would in turn make the Australian Parliament subject to international rules and conventions. This would be contrary to autonomous national government, and would amount in practice to amending the Constitution without consulting the people.⁷¹

Justice McHugh said the outcome for Mr Al-Khateb and Mr Al Khafaji was ‘tragic’⁷² and suggested the remedy lay in adopting a bill of rights for Australia. Without this there was little the High Court could do about indefinite detention:

As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights.⁷³

Justice Hayne said more directly than Justice McHugh that the principle from *Lim's case* was wrong. He said that the power to make laws with respect to 'aliens' and 'immigration' extends to:

... permitting exclusion from the Australian community—by prevention of entry, by removal from Australia, *and* by segregation from the community by detention in the meantime.⁷⁴

On this basis, there was no need to ask whether provisions in the Migration Act authorising indefinite detention were 'appropriate and adapted' or 'reasonably necessary' or 'reasonably capable of being seen as necessary'.⁷⁵ He accepted that there was 'no real likelihood or prospect' of Mr Al-Kateb's deportation in the foreseeable future, but this did not mean removal would never occur:

Whether and when it occurs depends largely, if not entirely, upon not only the course of events in the Middle East ... but also upon the willingness of other countries to receive stateless Palestinians.⁷⁶

Justice Hayne said there must be doubt whether mandatory detention of unlawful non-citizens complies with the International Covenant on Civil and Political Rights (ICCPR).⁷⁷ But the meaning of the Migration Act was clear so there was no basis for referring to 'opinions expressed by the (United Nations) Human Rights Committee' or other sources of international law.⁷⁸

Justice Hayne also said there was no existing statutory basis for allowing conditional release of immigration detainees.⁷⁹ He noted, however, that no objection had been raised with the court about the introduction of legislation to permit this.⁸⁰

Justice Callinan rejected the approach of the United States Supreme Court in *Zadvydas v. Davis* (2001)⁸¹ which said that under current US law 'aliens' could only be 'held in confinement until ... there is no significant likelihood of removal in the reasonably foreseeable future'.⁸² Justice Callinan said Australia did not have the constitutional 'complication' of the US Fifth Amendment and that in any case he preferred the view of the minority in *Zadvydas*, which affirmed that:

Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.⁸³

Justice Callinan said the reasoning in *Al Masri* was 'flawed'.⁸⁴ It would only be if the government 'formally and unequivocally abandoned' the aim of removing a particular individual that detention would no longer be for the valid purpose of deportation.⁸⁵

The fact that deportation may not be imminent, or even that no current prediction as to a date and place of it can be made, does not mean that the purpose of the detention, deportation, has been or should be regarded as abandoned.⁸⁶

The test for constitutional validity was ‘whether the Minister ... continues to have the intention of removing the appellant from the country’.⁸⁷

Justice Callinan agreed that the common law’s protection of liberty was ‘both fundamental and ancient’, and that personal liberty should never be infringed ‘without sufficient cause’.⁸⁸ In his view, however, ‘the statutory purpose of deportation provides sufficient cause here’.⁸⁹ Since the Migration Act set no time limit for immigration detention, ‘a very great deal of time’ might elapse before detainees could be deported.⁹⁰ But that did not allow a court ‘to hold that a person who has no right to enter and reside in the community must be released into it.’⁹¹

Analysis

The majority’s rejection (most plainly in Justice Hayne’s judgment) of the *Lim* principle may be correct in terms of strict constitutional interpretation. If constitutional authority for immigration detention comes directly from the ‘aliens’ provision, the relevant law does not need to be ‘appropriate and adapted’, ‘reasonably necessary’ or ‘reasonably capable of being seen as necessary’ to be within power.⁹² However, as Justice Gummow pointed out:

... it could not seriously be doubted that a law providing for the administrative detention of bankrupts in order to protect the community would be a law with respect to bankruptcy and insolvency⁹³ ... or that a law providing for the involuntary detention of all persons within their homes on census night would be a law with respect to census and statistics.⁹⁴

As he suggested, the fact that Parliament under section 51 of the Constitution has power to make legislation on these subjects does not by itself make such laws valid.⁹⁵

Purpose and validity

Both the majority and minority judges agreed that immigration detention had to be for a valid *purpose* related to the ‘aliens’ or immigration powers. Otherwise detention could amount to the type of imprisonment that could only be imposed by the courts. This raises two issues.

Firstly, when assessing the *purpose* of continued detention, the majority judges—unlike the minority—deferred to the view of the government. As Justice Callinan said, the test was whether the government continued to have the ‘intention’ of removing the detainee:

So long as the purpose of deportation has not been abandoned [by the government] ... it is the obligation of the courts to ensure that any detention for that purpose is neither obstructed nor frustrated.⁹⁶

In theory courts could test whether government authorities genuinely retained the intention of deporting a person. As the minority pointed out, however, in practice this allows the government to declare that detention is for a valid constitutional purpose. This appears to be contrary to the ‘stream cannot rise above its source’ doctrine in the *Communist Party Case*.

As Justice Gummow said, ‘the continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government.’⁹⁷

Purpose and proportionality

Secondly, the emphasis by both sides on the need for a relevant *purpose* for immigration detention suggests the test for constitutional validity should arguably be the same as for laws based on ‘purposive’ powers in the Constitution.⁹⁸ In such cases validity depends on whether the law is ‘proportionate’ or ‘appropriate and adapted’ or ‘reasonably necessary’ for the particular purpose.⁹⁹ As Justice Deane explained in the *Franklin Dam case* (1983), there must be ‘reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it’.¹⁰⁰

Since the early 1990s the test of proportionality has become ‘increasingly important’.¹⁰¹ As Professor Zines explains, its use has not been confined to a set list of powers in the Constitution:

More attention has been paid in recent years to the question whether a law is disproportionate to a legitimate end *in all cases ... where the notion of purpose is relevant*.¹⁰² (emphasis added)

Professor Zines notes¹⁰³ that the High Court in the 1990s rejected the broad principle stated by Justice Kitto in *Herald and Weekly Times* (1966) that when a law is directed at an end or purpose ‘within power’, how far the law could go:

... was a question of degree for the parliament to decide, and the fact that the parliament has chosen to go to great lengths—even the fact, if it be so, that for many persons difficulties are created which are out of all proportion to the advantage gained—affords no ground of constitutional attack.¹⁰⁴

In *Cunliffe* (1994)¹⁰⁵ Justice Brennan, according to Professor Zines, ‘seemed to confine the principle expressed by Kitto J to circumstances where the effect and operation of the law established the connection with power *without regard to its purpose*’.¹⁰⁶

Both sides in *Al-Kateb* and *Al Khafaji* plainly saw the ‘notion of purpose’ (to use Professor Zines’ words) as central to the validity or otherwise of the detention provisions of the Migration Act. Continued detention would only be valid under the Constitution if it were for the purposes of enabling deportation, assessing an entry application or exclusion from the community in the meantime. If, as Professor Zines suggests, the Australian Constitution does not authorise governments to employ whatever means they choose and the validity of a law depends on it being ‘proportionate’ to a legitimate purpose, then the constitutional legality of indefinite detention will depend on whether in a particular case it is ‘proportionate’ or ‘reasonably necessary’ for deportation, assessment or exclusion.¹⁰⁷

On this basis, it would be open for a court to find, as in *Al Masri*, that where there is no real prospect of removal within a reasonable time, and where an individual satisfies the court that if released he or she will comply with appropriate conditions, then continued and potentially indefinite detention may be ‘disproportionate’ or not ‘reasonably necessary’ for the purpose of deportation and removal etc.

The position of the majority in *Al-Kateb* and *Al Khafaji* may offer some support for such an approach. Justices McHugh and Hayne said that detention *legislation*, i.e. the ‘law itself’, does not need to be ‘proportionate’ or ‘reasonably necessary’ for a ‘non-punitive’ purpose.¹⁰⁸ However even if legislation is valid, a particular application of the law may not be. Justice McHugh has consistently stated that if the actual *imprisonment or detention* ‘goes beyond what is reasonably necessary’ for a ‘non-punitive object’, it will amount to ‘punishment’ in contravention of the Constitution.¹⁰⁹ In *Re Woolley* (2004) he said, for example, that if the purpose of detention was to exclude a person from the community while their visa application was being processed, this must be done within a ‘reasonable time’ otherwise ‘the proper inference will ordinarily be’ that the detention is punitive.¹¹⁰ In *Al-Kateb* and *Al Khafaji*, however, Justice McHugh was unable to find any similar time limit on the detention of a person for the purpose of their subsequent removal.

Towards a national bill of rights?

The decision of the High Court in *Al-Kateb* and *Al Khafaji* to allow potentially indefinite immigration detention where deportation is not feasible seems likely to add to the impetus for a national bill of rights. Proponents will focus on Justice McHugh’s statement that:

Eminent lawyers who have studied the question firmly 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.¹¹¹

Immediately following the decision, the Federal President of the Australian Labor Party,¹¹² the Australian Democrats and the Greens¹¹³ all called for a bill of rights to override the Migration Act. Democrats leader Senator Andrew Bartlett called on the Australian Government to:

... investigate the implications of the High Court’s interpretation of the Australian Constitution that allows for lifetime administrative detention, with a view to enacting a Bill of Rights in order to protect people within the jurisdiction of Australia from such abuse of basic human rights.¹¹⁴

There were similar calls in the media. An editorial in *The Age* said:

By ruling that the Government has the right to indefinitely detain individuals who have not been charged with an offence and who have nowhere else to go, the High Court has set a dangerous precedent ... *The Age* has argued in the past that Australia should adopt a bill of

rights and needs to debate whether it be part of the Constitution, as in the US, or legislated, as in Britain and Canada. Such a bill would proclaim and protect the fundamental rights and freedoms to which our citizens are entitled.¹¹⁵

There has been a longstanding belief that Australia has no need for a bill of rights. In 1967 former Prime Minister Robert Menzies argued that ‘the rights of Australians are as adequately protected as they are in any other country in the world’.¹¹⁶ Similarly in June 2004 Commonwealth Attorney-General Phillip Ruddock said he believed that the Constitution, the rule of law and the nation’s democratic institutions did enough to protect the rights of the Australian people.¹¹⁷ New South Wales Premier Bob Carr stated that under the Australian tradition parliaments are elected to make laws involving judgments about the rights and interests of the public. If their decisions are unacceptable, ‘the community can make its views known at regular elections’.¹¹⁸ In his opinion:

A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe that we have failed.¹¹⁹

Al-Khateb and *Al Khafaji* will be cited by those who argue on the contrary that basic freedoms of the Australian people are not adequately protected. According to constitutional law expert Professor George Williams:

The protection the constitution gives to human rights is deficient. Constitutional freedoms are few, and many basic rights receive no protection ... As well as failing to protect many basic rights, the constitution fails to guarantee that all Australians are entitled to the rights it does offer.¹²⁰

Likewise, Monash University human rights specialists Melissa Castan and Sarah Joseph contend that:

The Constitution currently fails to protect the basic human rights standards that contemporary Australians might (wrongly) assume are recognised, protected and enforced ... the federal Constitution guarantees few fundamental rights and freedoms.¹²¹

Arbitrary detention features strongly in examples given by such commentators of the Constitution’s failure to protect fundamental rights. Castan and Joseph note that in *Kable* (1996)¹²² the High Court said that the NSW Parliament could not give the NSW Supreme Court power to order the detention without trial of a particular individual as a danger to community. But there was nothing to stop State parliament authorising a Minister or a police chief to detain people without charge:

Detention at behest of an administrator would have been a greater infringement on *Kable*’s liberty ... Administrators are more likely to have been influenced by public opprobrium against *Kable*.¹²³

In *Kruger* (1997)¹²⁴—the ‘stolen generation’ case—the High Court ruled that the forced removal of Aboriginal children and compulsory detention of Aborigines on reserves by the

Chief Protector of the Northern Territory between 1918 and 1953 did not amount to ‘punishment’ in contravention of the Constitution because it was for their own welfare and protection. As Castan and Joseph say, ‘bigotry and ignorance of Aboriginal culture prevailed’ at the time so that ‘judgments regarding Aboriginal welfare would have been made in an ill-informed manner’.¹²⁵ But there was nothing in the Constitution that prevented such a policy. As Chief Justice Brennan said:

It can be accepted that the detention of Aboriginal children and keeping them away from their mothers and families in Aboriginal institutions or reserves might well have caused mental harm at least in some cases ... In retrospect many would say the risk ... was too great to permit even a well-intentioned policy of separation to be implemented. But the existence of that risk did not deny the legislative power to make the laws which permitted the implementation of that policy.¹²⁶

The High Court’s ruling in *Al-Khateb* and *Al Khafaji* adds to the examples of detention without charge or trial that advocates of a bill of rights for Australia can point to. The argument for introducing a bill of rights is clearly strengthened by the court’s finding that the government can indefinitely detain failed asylum seekers who are not guilty of any crime even if there is no risk that they may abscond or pose a threat to the community.

Merits of legislation

However the cases also highlight a broader and more significant issue supporting the case for a bill of rights. As the University of Canberra’s Bede Harris says:

It is assumed that most Australians would recoil from the proposition that a law, even one enacted by a democratically elected Parliament, should be valid irrespective of its substantive content.¹²⁷

But as Harris points out there is no doubt that with limited exceptions ‘this proposition is correct’.¹²⁸ He notes the exchange before the High Court in *Kartinyeri*¹²⁹ (1998)—the Hindmarsh Island Bridge case—in which the Solicitor-General for the Commonwealth suggested (in response to questioning by Justice Kirby) that Nuremberg type race laws or South African apartheid laws would be permissible under the ‘race’ power¹³⁰ in Australia’s Constitution.¹³¹ As Harris says, this extreme example shows how ‘Parliament is free to legislate as unjustly as it pleases (so long as it stays within the heads of power conferred by the Constitution) ...’¹³²

This is confirmed by the decision in *Al-Khateb* and *Al Khafaji*. The majority rejected the idea that immigration detention laws were limited to what was ‘reasonably capable of being seen as necessary’. As long as the laws were for a purpose related to the ‘aliens’ or immigration powers in the Constitution, it did not matter whether they were ‘unjust or contrary to basic human rights’ (Justice McHugh), contravened the ICCPR (Justice Hayne) or infringed the common law’s ‘fundamental and ancient’ protection of personal liberty (Justice Callinan).

As Harris says in relation to *Kartinyeri*, the High Court's inability or unwillingness to review the merits of Australia's detention laws 'does at least focus our attention on the reason why we should have a Bill of Rights'.¹³³

Indefinite detention and a bill of rights

Justice Kirby said that the cases from the United States, the United Kingdom and Hong Kong¹³⁴ that he referred to in his judgment in *Al-Khateb* and *Al Khafaji*:

... illustrate singly, and even more forcefully in combination, the resistance of the judges of the common law, since early times and until the present age, to the notion of unlimited executive power to deprive individuals of liberty.¹³⁵

As Chief Justice Gleeson pointed out, however, in those countries 'the constitutional and statutory context is controlling, and differs'.¹³⁶ Significantly each of these countries has a bill of rights.¹³⁷ As Justice McHugh noted, the United States Supreme Court in *Zadvydas* (2001) said the existence of the Fifth Amendment in that country meant that a law 'permitting indefinite detention of an alien would raise a serious constitutional problem'.¹³⁸

Australia's first bill of rights is the Australian Capital Territory's *Human Rights Act 2004*.¹³⁹ It states that '*everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.*'¹⁴⁰ This provision is taken from the ICCPR.¹⁴¹ As the law of an Australian territory, the ACT Human Rights Act is overridden by contradictory Commonwealth legislation, such as the detention provisions in the Migration Act. However the provisions on personal liberty in the ACT legislation might be seen as a model for those advocating a national bill of rights. In the context of *Al-Kateb* and *Al Khafaji*, the issue is whether a prohibition on 'arbitrary detention' would, if adopted nationally, prevent indefinite detention of failed asylum seekers.¹⁴²

This question was considered by the United Nations Human Rights Committee (UNHRC) in *A v. Australia* (1997).¹⁴³ The UNHRC declared that detention for a period of four years while the applicant's¹⁴⁴ refugee status was being decided was 'arbitrary detention' and contravened the ICCPR. The UNHRC's finding emphasised the need to consider individual circumstances and for detention to be 'proportionate'. The Committee said that:

... remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.¹⁴⁵

While the UNHRC stated that detention of individuals requesting asylum was not in itself 'arbitrary', it said that 'detention should not continue beyond the period for which the State can provide appropriate justification'.¹⁴⁶ The decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention could be assessed:

For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of

cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.¹⁴⁷

The UNHRC noted that:

In the instant case, the State party has not advanced any grounds particular to the author's [the applicant's] case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of four years was arbitrary within the meaning of [the ICCPR].¹⁴⁸

Australian courts, however, are not obliged to accept the UNHRC's view that continued detention of a person without supporting grounds amounts to 'arbitrary detention.' As Bede Harris suggests, an alternative to the ACT model—which would avoid any debate over whether prolonged detention was 'arbitrary'—would be to include in a bill of rights 'a blanket provision to the effect that no person may be deprived of their liberty'.¹⁴⁹ The bill of rights would also permit restrictions on human rights 'performed under law and which were reasonable in a free and democratic society'.¹⁵⁰ This would ensure that for continued detention to be lawful it would need to be justified in the particular circumstances of the case.

Conclusion—the necessity of detention

In his judgment, Justice McHugh referred to the use of indefinite detention on security grounds in Australia during the two world wars. To the extent that Australia's wartime experience is relevant, it is also instructive to note the advice from British Prime Minister Sir Winston Churchill to his Home Secretary in November 1943—at the height of World War Two—anticipating public opposition to the planned release of British fascist Sir Oswald Mosley:

You might ... consider whether you should unfold as a background the great principle of *habeas corpus* and trial by jury, which are the supreme protection invented by the British people for ordinary individuals against the State. The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him judgment by his peers for an indefinite period, is in the highest degree odious, and is the foundation of all totalitarian regimes, whether Nazi or Communist. It is only when extreme danger to the State can be pleaded that this power may be temporarily assumed by the Executive, and even so its working must be interpreted with the utmost vigilance by a Free Parliament. As the danger passes, persons so imprisoned, against whom there is no charge which courts and juries would accept, should be released ... Extraordinary powers assumed by the Executive with the consent of Parliament in emergencies should be yielded up when and as the emergency declines. Nothing can be more abhorrent to democracy than to imprison a person or keep him in prison because he is unpopular. This is really the test of civilisation.¹⁵¹

What the quote from Sir Winston Churchill emphasises is the issue of necessity. A person must not be imprisoned or detained without trial or charge unless there is an overriding

necessity to do so to prevent a real danger to the nation or to achieve some other legitimate purpose which is sufficient to outweigh the individual's basic right to freedom. As the UNHRC held in *A v. Australia* and Chief Justice Gleeson suggested in *Al-Kateb* and *Al Khafaji*, unless the law allows individual circumstances to be considered the question of whether continued detention is 'necessary' in a particular case cannot be properly decided.

Where a crime has been committed under Australian law, a court must decide if a person is guilty and whether imprisonment is appropriate. And where a person is held under 'executive detention' for quarantine or mental health purposes etc, the detention must be 'reasonably necessary' for the particular purpose. In *Al-Kateb* and *Al Khafaji*, however, Australia's High Court has said that where an immigrant or an alien (such as an asylum seeker) is concerned, detention does not need to be 'reasonably necessary', or 'appropriate' or 'proportionate'. As long as the government has the intention of eventually removing the person from Australia, the detention will remain legal, however long it may last and whether it is necessary in the particular case or not. According to the majority of the High Court, that is the current state of Australian law.

Parliament's intention

The majority's view is that it was the clear intention of Parliament in the Migration Act that all 'unlawful non-citizens' must be kept in detention until they are removed, deported, or granted a visa. But there is no indication that in proposing mandatory detention in the *Migration Reform Act 1992* the then Federal Labor government took into account that it may not be practicable to deport particular individuals.¹⁵² As Immigration Minister Gerry Hand said:

The Bill will provide for a uniform regime for detention and removal of persons illegally in Australia. Non-citizens who are in Australia without a valid visa will be unlawful and will have to be held in detention...Depending on their circumstances, they will be immediately removed from Australia or will be subject to detention until any claim they wish to make has been resolved. When a person who is in Australia unlawfully has exhausted all available application and merits review entitlements, the law will require that person to be removed as soon as practicable.¹⁵³

Clearly it will be impossible for Parliament in formulating legislation to be aware of all situations and circumstances. However not only was the situation of failed asylum seekers with nowhere to go not considered by Parliament, but no requirement was included in the legislation for the necessity of detention to be reviewed in unusual cases. Immigration authorities and the Refugee Review Tribunal (RRT) must determine whether an asylum seeker is entitled to refugee status. Courts can be involved if there is an error in this process. But there is no obligation on immigration officials, the RRT or the Minister to assess whether detention is necessary if refugee status is refused. After the publicity surrounding *Al-Kateb* and *Al Khafaji* the Minister did review long-term detention cases. But it is entirely a matter for the discretion of the Minister whether any such review occurs.

This supports the view of the Australian High Court in *Lim's case*, the UNHRC in *A v. Australia* and the minority in *Al-Kateb* and *Al Khafaji* that instead of mandatory detention of failed asylum seekers until deportation or grant of a visa, courts should be able to consider in a particular case whether detention is 'reasonably necessary', 'appropriate and adapted' or 'proportionate'. This could happen under current Australian law if it is accepted that even though detention of asylum seekers comes directly under the 'aliens' power in the Constitution, detention must be limited to what is suitable, appropriate or proportionate for the purposes of deportation, assessment or exclusion from the community in the meantime. Alternatively this could occur through the adoption of provisions ensuring freedom from arbitrary detention along the lines of the ICCPR or the ACT Human Rights Act. A further option, as the Australian Democrats proposed, is to amend the Migration Act to make it unlawful to detain a person indefinitely where there is no real likelihood that the person can be deported in the reasonably foreseeable future.¹⁵⁴

Adoption of a bill of rights would also address the broader issue about whether Commonwealth laws should be valid irrespective of their content.¹⁵⁵ There is a need to debate the full implications of the majority's view in *Al-Kateb* and *Al Khafaji* that it is not for federal courts to say whether Commonwealth legislation contravenes basic human rights. Prominent constitutional lawyer and refugee advocate Julian Burnside QC warned that a power of indefinite detention without trial could be used in areas besides migration: 'You can't just ignore the possibility of it being applied elsewhere ... The anti-terrorism area is an obvious possibility'.¹⁵⁶

Longevity of High Court decision

A central issue is the likely longevity of the High Court's decision in *Al-Kateb* and *Al Khafaji*. There is some prospect a future case could overturn the decision, not least because the High Court was seriously divided over important constitutional issues. The majority viewpoint—that failed asylum seekers can be detained indefinitely despite having nowhere to go—now represents the law in Australia. But only three of the majority judges provided substantive reasons, and there were strong minority judgments, including from the Chief Justice.

One of the four majority judges, Justice McHugh, is due to retire in 2005. In 2003 following the retirement of Justice Mary Gaudron the High Court reversed its position on another issue involving the 'aliens' power—the constitutional status of long-term British migrants—despite passing judgment on this only two years before.¹⁵⁷

Endnotes

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1. [2004] HCA 37.
 2. [2004] HCA 38.

3. *Chu Keng Lim v. Minister for Immigration* (1992) 176 CLR 1.
4. *A v. Australia*, (560/93) 3/4/97.
5. *Al-Kateb v. Godwin* [2004] HCA 37.
6. *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji* [2004] HCA 38.
7. *Behrooz v. Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36.
8. Roderick Campbell, 'Govt can imprison detainees for life', *Canberra Times*, 7 August 2004, p. 6.
9. As Professor George Williams from the Gilbert and Tobin Centre for Public Law at the University of New South Wales said:

'... those two judges disagreed on an amazing array of things. They disagreed on the relevance of international law, to the interpretation of the Constitution, the role of the people in amending the Constitution versus the role of the High Court to modernise it or have it as an evolving document. And what was unusual was not simply they disagreed, but they did so publicly and directly. In fact I'm not aware of any High Court case that's had such a direct level of disagreement and if you like, difference on key matters so publicly expressed as we've found in this High Court case.'

See: ABC Radio National, The Law Report, 'David Hicks; Sexual Assault; Indefinite Detention', 31 August 2004, at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1188812.htm>.
10. Kate Gauntlett, 'Vanstone offers detainees hope', *West Australian*, 10 August 2004, p. 15.
11. Meaghan Shaw, 'Stateless detainees get bridging visas in review', *The Age*, 1 September 2004, p. 7. The article noted that Australia's longest-serving detainee, Peter Qasim, held in detention for six years and who claims to be a stateless Kashmiri, was not released. See also Senator Amanda Vanstone, *Al-Masri decisions*, Media Release, VPS 126.04, 31 August 2004.
12. Chapter III of the Constitution. As the High Court has said (*Lim*, at 27, per Justices Brennan, Deane and Dawson):

'There are some functions which...have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth ... Ch.III of the Constitution precludes the enactment ... of any law purporting to vest any part of that function in the Commonwealth Executive.'
13. *Al-Kateb* [2004] HCA 37 at [87] (Justice Gummow) (emphasis added).
14. *Koon Wing Lau v. Calwell* (1949) 80 CLR 533 at 556, cited in *Al-Kateb* at [87].
15. *Koon Wing Lau* at 581.
16. Section 189.
17. Section 196 (emphasis added).

18. Section 198.
 19. Sections 51 and 52 of the Constitution.
 20. Section 51(19) of the Constitution.
 21. *Lim* (1992) 176 CLR 1 at 30-31 (per Justices Brennan, Deane and Dawson) (emphasis added).
 22. *ibid.*, at 33.
 23. *ibid.*, at 57.
 24. Justice Gaudron queried whether all ‘non-citizens’ were necessarily ‘aliens’ under Australian law, a fundamental issue determining whether the Migration Act applied (*ibid.* at 53). This question appears to have been finally resolved by the decision of the High Court on 9 September 2004 in *Singh v. Commonwealth of Australia* [2004] HCA 43.
 25. *ibid.*, at 57. Justices Brennan, Deane and Dawson expressed this slightly differently, saying that detention that went beyond what was ‘*reasonably necessary*’ would not be ‘an *incident* of the executive powers to exclude, admit and deport an alien’ and would amount to ‘punishment’ that could lawfully be imposed only by the courts not the government. (*Lim* (1992) 176 CLR 1 at 32—33). The practical effect, however, is the same as Justice Gaudron’s ‘appropriate and adapted’ formula. Justice Kirby adopted a similar approach in his dissenting judgment in *Leask* (1996) suggesting that the notion of *proportionality* ‘may provide a means to help the mind of the decision-maker to answer the question whether the impugned law is ‘in truth’ one *with respect to* a designated grant of power.’ In his view, a law ‘may be so disproportionate to the legitimate attainment of the subject matter of the grant of power as to take it outside that grant’. See *Leask v. The Commonwealth* (1996) 187 CLR 579 at 635-6 (emphasis added).
- Justices Brennan, Deane and Dawson might have chosen their words better to avoid confusion with an ‘incidental’ power. As Justice McHugh said in *Al-Kateb* [2004] HCA 37 at [37], their description of detention as an ‘incident’ of the aliens power ‘does not mean that the power to detain pending deportation is an incidental constitutional power, that is, a power merely incidental to the aliens power.’
26. The provisions applied to people who arrived by boat without a visa between 1989 and 1994. These provisions are still current: see Migration Act Part 2 Division 6.
 27. *Lim* (1992) 176 CLR 1 at 33-34.
 28. *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri* (2003) 197 ALR 241 at 243.
 29. *ibid.*, at 257.
 30. *ibid.*, at 258, see also Eloise Dias, ‘Punishment by another name? Detention of non-citizens and the separation of powers’, *Public Law Review* vol.15, 2004, p. 27.
 31. *Lim* (1992) 176 CLR 1 at 64 (emphasis added).
 32. *ibid.* at 65-66.
 33. *ibid.* at 65.

34. The exceptions are the ‘purposive’ powers in the Constitution: see endnote 98.
35. *Leask* (1996) 187 CLR 579 at 603.
36. *Al-Kateb* [2004] HCA 37 at [4].
37. *ibid.*, at [19].
38. *ibid.*, at [21] and [23].
39. *ibid.*, at [22].
40. 72 USLW 4607 at 4621, cited in *ibid.* at [137].
41. *Al-Kateb* [2004] HCA 37, at [117].
42. *ibid.*, at [125].
43. (1951) 83 CLR 1.
44. *Al-Kateb* [2004] HCA 37, at [140].
45. Leslie Zines, *The High Court and the Constitution*, 4th ed, Butterworths, 1997, p. 219.
46. *Al-Kateb* [2004] HCA 37 at [140].
47. *ibid.*
48. *ibid.*, at [149], [155].
49. *ibid.*, at [146].
50. Justice Kirby referred to the International Covenant on Civil and Political Rights, *Australian Treaty Series* No 23, Arts 7, 9, 10; the Convention relating to the Status of Stateless Persons, *Australian Treaty Series* No 20, Art 31; the Universal Declaration of Human Rights, Art 9; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Australian Treaty Series* No 21. See *ibid.* at [150], endnote 170.
51. *ibid.*, at [147].
52. *ibid.*
53. Referring to *Zadvydas v. Davis* 533 US 678 (United States); *R v. Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 (United Kingdom); *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97 (Hong Kong).
54. *Al-Kateb* [2004] HCA 37, at [161].
55. *ibid.*, at [175].
56. *ibid.*, at [172], [175].
57. *ibid.*, at [190].
58. *ibid.*, at [35] (McHugh), [231] (Hayne), [298] (Callinan)
59. *ibid.*, eg at [298] (Callinan).
60. Examples taken from *ibid.* at [287] (Callinan).

61. Justice McHugh gave the example [ibid. at 39] of the power to detain a person suspected of carrying a weapon on an overseas flight. Detaining such a person, he said, was not ‘trade and commerce’ and could only be justified ‘as incidental to’ the trade and commerce power in section 51(1) of the Constitution. As he explained, ‘incidental’ powers:

‘may only be exercised where they are *reasonably necessary* to facilitate the making of laws with respect to the head of power of which they are an incident ... If the power to detain aliens for the purpose of deportation was merely an incidental power, it would be impossible to justify the detention of an alien once it appeared that deportation could not be effected or could not be effected in the foreseeable future’. See *Al-Kateb* [2004] HCA 37, at [38] and [42].
62. *ibid.*, at [41].
63. *ibid.*, at [34] (McHugh), also at [251] (Hayne). Justice Callinan at [295] rejected even that time limit.
64. *ibid.*, at [45].
65. *ibid.*, at [55]-[60].
66. *ibid.*, at [61].
67. *ibid.*, at [62].
68. Although in his view this rule of construction was ‘based on a fiction’ and bore ‘no relationship to the reality of the modern legislative process’. Given the growth of international conventions, customs and principles, it was ‘impossible to believe’ that when Parliament legislates it could have in mind all the rules of international law. See *ibid.*, at [63]-[66].
69. *ibid.*, at [69] and [71].
70. *ibid.*, at [74].
71. *ibid.*, at [63]-[68].
72. *ibid.*, at [31], see also *Al Khafaji* [2004] HCA 38 at [3].
73. *Al-Kateb* [2004] HCA 37 at [75].
74. *ibid.*, at [255] (emphasis in original).
75. *ibid.*, at [256].
76. *ibid.*, at [230]
77. Article 9(1) states ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’
78. *ibid.*, at [239].
79. *ibid.*, at [243].

80. *ibid.*, at [219]. However Justice Hayne appeared to query how, for example, requiring a person to live at a particular place as a condition of release from detention would fit with s92 of the Constitution (freedom of trade and movement within Australia).
81. 533 US 678.
82. *ibid.*, at 701, cited in *Al-Kateb* [2004] HCA 37 at [283].
83. 533 US 678 at 703-5, citing *Shaughnessy v. United States ex rel Mezei* 345 US 206 (1953) at 222-3, see *Al-Kateb* [2004] HCA 37 at [284].
84. *Al-Kateb* [2004] HCA 37, at [300].
85. *ibid.*, at [291].
86. *ibid.*, at [295].
87. *ibid.*, at [299].
88. *Al Khafaji* [2004] HCA 38 at [46].
89. *ibid.*, at [47].
90. *Al-Kateb* [2004] HCA 37 at [299].
91. *ibid.*
92. See Sarah Joseph and Melissa Castan, *Federal Constitutional Law, A Contemporary View*, 2001, p. 57, noting the High Court's finding in *Leask* (1996) that 'proportionality was an irrelevant issue with regard to direct characterisation under most heads of power.' The exception being 'purposive' powers, see endnote 98 below.
93. Section 51(17) Constitution.
94. Section 51(11) Constitution. See *Al-Kateb* [2004] HCA 37 at [133].
95. *ibid.*, at [133]
96. *ibid.*, at [298].
97. *ibid.*, at [140].
98. 'Purposive' powers in the Constitution include s51(6) the 'defence' power; aspects of s51(29) the external affairs power; the 'nationhood' power derived from sections 61 and 51(39); and aspects of s51 (26) the 'race' power. See Joseph and Castan, *op. cit.*, pp 57, 58.
99. See *ibid.*, p. 57, citing the High Court in *Leask* (1996).
100. *Commonwealth v Tasmania* (1983) 158 CLR 1.
101. Bede Harris, *Essential Constitutional Law*, 2nd edition, p. 115. The High Court has used proportionality to test whether legislation or government action breaches certain constitutional guarantees, especially the 'implied freedom of political communication'. A law that restricts this implied constitutional freedom can nevertheless be valid if it is 'reasonably appropriate and adapted for a legitimate purpose'. See *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106 at 143 (per Mason CJ). The High Court has also said that proportionality is a relevant factor in deciding the validity of 'incidental' uses of the

- Commonwealth's legislative power. See generally the discussion in Joseph and Castan, *op. cit.*, pp. 376-83.
102. Zines, *op. cit.*, p. 44.
 103. *ibid.*, at pp. 43-44.
 104. 115 CLR 418 at 437.
 105. 182 CLR 272 at 317-18.
 106. Zines, *op. cit.*, at p. 45 (emphasis added).
 107. As suggested by Justice Hayne, the purpose of 'exclusion' does not mean exclusion for its own sake, but exclusion 'in the meantime', i.e. pending removal or assessment of entry. See *Al-Kateb* [2004] HCA 37 at [255].
 108. *Al-Kateb* [2004] HCA 37 at [49] (Justice McHugh) and [256] (Justice Hayne); see also *Re Kit Woolley ex parte Applicants M276/2003* [2004] HCA 49 (7 October 2004) at [77] (Justice McHugh). While Justices McHugh and Hayne argue that proportionality is not relevant if a detention law has a 'legitimate non-punitive purpose', Joseph and Castan warn that:
'...while a Judge might convey that he/she is 'merely' assessing the objective purpose of a law, it is possible and even likely that sub-conscious considerations of necessity and balancing influence the decision regarding the law's suitability in achieving its purported purpose.' See Joseph and Castan, *op.cit.*, p. 383.
 109. *Lim* (1992) 176 CLR 1 at 71, quoted in *Re Woolley* [2004] HCA 49 at [65] and [77]; see also *Al-Kateb* [2004] HCA 37 at [49].
 110. *Re Woolley* [2004] HCA 49 at [88] and [94].
 111. *Al-Kateb* [2004] HCA 37 at [73], referring to George Williams, *The case for an Australian Bill of Rights: freedom in the war on terror*, UNSW Press, 2004.
 112. ALP President Carmen Lawrence said the High Court's decision 'should shock all Australians because it shows that in this so-called advanced democracy, we have no effective protections against arbitrary imprisonment by the state'. She called for a bill of rights 'to protect citizens and those who come to our shores'. See Meaghan Shaw, 'Ban indefinite detention: Lawrence', *The Age*, 12 August 2004, p. 4.
 113. Greens member Michael Organ said that 'in the absence of abolishing mandatory detention ... a Bill of Rights would override punitive laws that allow for people to be locked up forever ...'. Such laws, he said, '... make every immigration detention centre in Australia another Guantanamo Bay—at least there though the US Courts gave detainees the right to challenge their detention—and all because of the US bill of rights, so it's a lesson for Australia.' See *Bill of Rights one way to defeat indefinite detention*, Media Release, 6 August 2004.
 114. Senate, *Debates*, 12 August 2004, p. 25 950.
 115. Editorial, 'The tragic fate of asylum seekers', *The Age*, 9 August 2004, p. 12.
 116. See George Williams, *A bill of rights for Australia*, UNSW Press, 2000, p. 36.
 117. 'Bill of Rights not top of list: Ruddock', *Canberra Times*, 9 June 2004, p. 7.

118. Bob Carr, 'The Rights Trap: How a Bill of Rights Could Undermine Freedom', *Policy*, vol.17, no. 2, Winter 2001, p. 21.
119. *ibid.*
120. George Williams, *The case for an Australian Bill of Rights: freedom in the war on terror*, UNSW Press, 2004, 45.
121. Joseph and Castan, *op. cit.*, p. 365.
122. *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
123. Joseph and Castan, *op. cit.*, p. 146. For further discussion on the issue of detention for the protection of the community of people who have finished a criminal sentence, see Thomas John, 'Detention for the protection of the community: the next chapter', *Research Note*, no. 16, Parliamentary Library, Canberra, 2004–05.
124. *Kruger v. Commonwealth* (1997) 190 CLR 1.
125. Joseph and Castan, *op. cit.*, p. 153.
126. (1997) 190 CLR 1 at 40.
127. Bede Harris, *a new constitution for Australia*, Cavendish Publishing Limited, p. 7.
128. *ibid.*
129. (1998) 195 CLR 337.
130. Section 51(26).
131. Harris, *op. cit.*, p. 7.
132. *ibid.*, p. 7.
133. *ibid.*, p. 8.
134. See endnote 53 above.
135. *Al-Kateb* [2004] HCA 37 at [157].
136. *ibid.*, at [3].
137. The United States adopted a bill of rights in 1791 in the form of the first ten amendments to its 1789 Constitution. The United Kingdom introduced a statutory bill of rights in 1998 in the form of the *Human Rights Act 1998*. In 1991 Hong Kong gained a constitutionally entrenched bill of rights based on the International Covenant of Civil and Political Rights (ICCPR). This was originally included in the British Letters Patent for the government of Hong Kong. With the resumption of Chinese sovereignty over Hong Kong in 1997, equivalent provisions were inserted in Article 39 of the Basic Law of the Hong Kong Special Administrative Region. The terms of the ICCPR are also included in statutory form in the *Hong Kong Bill of Rights Ordinance 1991*, which after 1997 continued to apply to pre-1991 legislation (see Andrew Byrnes, 'Hong Kong's Bill of Rights Experience and its (Ir)Relevance to the ACT Debate over a Bill of Rights', in Christine Debono and Tania Colwell, *Comparative Perspectives on Bills of Rights*, ANU National Institute of Social Sciences and Law 2004, 33.
138. *Al-Kateb* [2004] HCA 37, at [52], citing *Zadvydas* 533 US 678 at 693.

139. This Act commenced on 1 July 2004.
140. Section 18(1). Section 18(2) states further that ‘No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law’.
141. Article 9(1) of the ICCPR states ‘Everyone has a right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’
142. The ICCPR (including Article 9) is annexed to Australia’s *Human Rights and Equal Opportunity Act 1986*. Under this Act, the Human Rights and Equal Opportunity Commission (HREOC) can inquire into and report on breaches of human rights, and make recommendations on what action Australia needs to take to comply better with the ICCPR (section 11). It can also recommend compensation for breach of a human right (section 29). However HREOC’s recommendations, including on implementation of the ICCPR, are not enforceable in Australia, and may or may not be accepted by the government of the day.
143. *A v. Australia* (560/93) 3/4/97.
144. The same applicant as in *Lim’s case*.
145. *A v. Australia*, (560/93) 3/4/97 at [9.2], see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press 2000, p. 216.
146. *A v. Australia*, (560/93) 3/4/97 at [9.4], see *ibid.*, p. 216.
147. *ibid.* pp. 216–217.
148. *ibid.* p. 217.
149. Harris, *op. cit.*, p. 30.
150. *ibid.*
151. Winston S. Churchill, *The Second World War, Vol. V. Closing the Ring*, Cassell, 1952, p. 635.
152. See, for example, Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, pp. 9 (Detention, Deportation and Removal of Unlawful Non-citizens), 52 (Section 54ZD Period of detention) and 53 (Section 54ZF Removal from Australia of uncleared unlawful non-citizens). Government member Dr R Catley noted that ‘we will have a refugee processing system under this reform Bill that is clear, predictable, fair and quick’ (Second Reading Speech, Migration Reform Bill 1992, House of Representatives, *Debates*, 11 November 1992, p. 3147). The Opposition spokesman and future Immigration Minister Phillip Ruddock referred to the ‘large numbers’ of people undergoing assessment for refugee status, expressing concern at the problems caused by immigration detention for long periods and noting the need for an ‘appropriate’ response:

‘The fact is that this crisis has now been with us for almost three years. Some people remain held in detention. I am not one who complains about the quality of that detention in terms of its ability to deal with situations of relatively short periods of duration, but some people have been held in detention for a very long time. The fact that some people are held in detention for that length of time is now having a very disastrous effect upon some of those people who have been so detained. In other words, it is the detention that is now

impacting upon them and mitigating against our ability to handle their circumstances in a way that might otherwise be seen at any other time as being reasonable and appropriate.’

See Second Reading Speech, Migration Reform Bill 1992, House of Representatives, Debates, 11 November 1992, p. 3142.

153. Second Reading Speech, Migration Reform Bill 1992, House of Representatives, *Debates*, 4 November 1992, p. 2620.
154. Senator Bartlett, Matters of Urgency: Immigration: Detainees, Senate, *Debates*, 9 August 2004, p. 25 901.
155. The practical effect of a bill of rights would depend on the form it took and its content. As regards form, Justice McHugh believes (*Al-Kateb* [2004] HCA 37 at [73]):
- ‘If Australia is to have a Bill of Rights, it must be done in a constitutional way—hard though its achievement may be—by persuading the people to amend the Constitution by inserting such a Bill.’
- Professor Williams, on the other hand, thinks that (*Freedom in the war on terror*, p. 78):
- ‘... any move to bring about a Bill of Rights should be gradual. Certain rights should be protected initially in legislation, with further rights being added over time, before any constitutional change in the longer term.’
156. Meaghan Shaw, ‘Democrats to fight “eternal jail” power’, *The Age*, 9 August 2004, p. 8.
157. See Peter Prince, ‘[Deporting British Settlers](#)’, *Research Note*, no. 33, Parliamentary Library, Canberra, 2003/04, at <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn33.pdf>. Such a change in the court’s position, of course, raises questions about the ability to rely on High Court decisions in constitutional matters.

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