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## **The Legality of Mandatory Detention as a Deterrent**

The Australian Constitution entrenches the separation of powers of Government into three separate arms - Legislative, Executive and Judicial. The powers of one arm of Government may not be exercised by another arm of Government. Accordingly, the Parliament, established under Chapter I of the Australian Constitution cannot exercise the powers of the Executive Government, which is established under Chapter II. Courts established under Chapter III of the Constitution may not use powers reserved for Parliament, namely passing laws. The separation of powers is a fundamental principle of our democracy which protects the rights of the people.

Punishment is central to the judicial powers. Accordingly, only a Chapter III court can inflict punishment on a person. Locking a person up is generally regarded as punishment. However, the High Court has acknowledged that there are circumstances where detention is necessary for the discharge of an executive function. In those limited circumstances, detention imposed directly and without the intervention of a Chapter III court will be constitutionally valid. This holds good only as long as the detention goes no further than can reasonably be seen as necessary to the executive purpose which it supports.

If the policy of mandatory detention is promoted as a deterrent then it appears that mandatory detention is designed to be punitive in order to act as a deterrent. If it is used to punish and deter, it is a breach of the separation of powers and is therefore constitutionally invalid. Certainly, if the Migration Act imposed mandatory detention specifically as a means of deterring others from seeking asylum in Australia, that would be unconstitutional.

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