Australian Human Rights Commission

President
Emeritus Professor Rosalind Croucher AM

30 November 2023

Senator the Hon Sue Lines
President of the Senate
Parliament House
CANBERRA ACT 2600

Dear President

Order for production of documents number 414

I write in relation to the motion moved by Senator Cash on 29 November 2023, requiring the Australian Human Rights Commission to table certain documents related to the High Court proceeding of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (order number 414 of 2023).

Enclosed at Schedule A is a bundle of documents in response to the order.

In addition to this bundle, the Commission has identified a number of other documents that may fall within the scope of the order but are not appropriate to produce because to do so would be contrary to the public interest.

The additional documents include communications between the Commission and its legal advisers made for the dominant purpose of use in the *NZYQ* proceeding in the High Court. They also include opinion, advice and recommendations obtained, and consultation or deliberations that have taken place, for the purposes of the deliberative processes involved in the Commission's statutory intervention function. It may be, on a proper reading of the order for production, that such documents are not in fact called for.

Absent exceptional circumstances, it is essential that privileged legal advice provided to independent statutory authorities such as the Commission remain confidential. Access to such confidential advice is, in practical terms, critical to the development of sound policy and robust decision-making. This is particularly the case with material subject to litigation privilege, where the harm sought to be prevented includes the harm to the administration of justice that would result from the disclosure of confidential information between lawyer and client.

It is critical to the operations of the Commission that the President and Commissioners be able to conduct deliberations in relation to the important statutory function of intervening in legal proceedings that raise human rights issues, to ensure its decisions are appropriately informed, considered and robust. Any reduction in the ability to do that will have a significant adverse effect on the exercise of this function by the Commission with consequent harm to the public interest.

Some minor redactions have been applied to the documents at Schedule A to remove personal information such as signatures and contact details of individuals.

Yours sincerely

Emeritus Professor Rosalind Croucher AM
President

T:
F:
E:

cc: Attorney-General
Senate Parliamentary Liaison Office
Attorney-General's DLO
Human Rights Unit, Attorney-General's Department

Graeme Edgerton

From:	Rosalind Croucher
Sent:	Monday, 22 May 2023 12:10 PM
To:	@ag.gov.au
Cc:	Human Rights;
Subject:	Proposed intervention by AHRC [SEC=OFFICIAL]
Attachments:	2023 05 22 Ltr to AG re proposed intervention NZYQ v Minister for Immigration.pdf

Dear Attorney,

I have attached a letter regarding a proposed intervention by the Australian Human Rights Commission and a request to use inhouse counsel.

Sincerely

Rosalind Croucher

Emeritus Professor Rosalind Croucher AM FAAL FRSA FACLM(Hon)
President
Australian Human Rights Commission
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
T [redacted]
E [redacted] | **W** humanrights.gov.au

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We acknowledge the traditional custodians of this land, the Gadigal peoples of the Eora Nation, and pay our respects to their Elders, past, present and future.

Australian Human Rights Commission

President
Emeritus Professor Rosalind Croucher AM

22 May 2023

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

By email: [redacted]@ag.gov.au

Dear Attorney

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs
High Court proceeding S28/2023

The Commission has made a decision to seek leave to intervene or appear as *amicus curiae* in the above proceeding, exercising our statutory function under s 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

That intervention is likely to involve tied constitutional law work. I seek your approval under paragraph 3B of Appendix A of the Legal Services Directions 2017 to use in-house lawyers and external counsel for the conduct of any necessary constitutional law work to enable the Commission to make submissions to the High Court and to appear at the hearing of the proceeding if granted leave by the Court.

Background

The defendants to this proceeding are the Minister for Immigration and the Commonwealth. The plaintiff intends to the ask the High Court to either overrule or distinguish its previous decision in *Al-Kateb v Godwin* (2004) 219 CLR 562. The defendants consider there is a reasonable prospect that the parties will be able to agree a special case, including ultimate facts that would raise the correctness of *Al-Kateb* if leave were granted to reopen that decision.

As you know, in *Al-Kateb* the High Court held by a 4:3 majority that ss 189, 196 and 198 of the *Migration Act 1958* (Cth) authorised and required the detention of an unlawful non-citizen even if his removal from Australia was not reasonably

practicable in the foreseeable future. The decision is controversial from a human rights perspective because of the potential it creates for arbitrary and indefinite detention, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). The majority of human rights reports provided by the Commission to you and your predecessors as Attorney-General, pursuant to our statutory function under ss 11(1)(f), 20 and 20A of the AHRC Act relate to claims of arbitrary detention by people held in immigration detention facilities.

The Commission has formed the view that this proceeding meets its intervention guidelines.[1] The proceeding involves an 'intervention issue' because it deals with the right to liberty and, in particular, freedom from arbitrary detention under article 9 of the ICCPR. The intervention issue is central to the proceeding because the proceeding involves the interpretation of sections of the Migration Act that provide for the mandatory detention of unlawful non-citizens. The resolution of this issue will have implications not only for this plaintiff but for other people who have been kept in immigration detention for prolonged periods and who have been denied a visa but cannot be removed from Australia.

Experience of the Commission

The High Court has shown that it is assisted by the Commission's submissions by regularly granting us leave to appear as *amicus curiae* in the limited number cases where such applications are made.

The Commission was granted leave by the Court to appear in *Al-Kateb*, and also in two contemporaneous cases that dealt with related issues: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 and *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1.

More recently, the Court has granted the Commission leave to appear in a number of other cases that also involve the right to liberty in the context of immigration detention. These include: *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; and *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

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[1] Australian Human Rights Commission, *Intervention in court proceedings: The Australian Human Rights Commission Guidelines* (2009). At https://www.humanrights.gov.au/intervention-court-proceedings-australian-human-rights-commission-guidelines.

The Commission's intervention function under s 11(1)(o) of the AHRC Act may only be exercised in proceedings that involve human rights issues. We are judicious in the exercise of this function. Since 2010, for example, we have sought leave to intervene in two to three cases per year, on average, across all jurisdictions. In that period, we have appeared in 13 cases in the High Court, approximately one per year. Not all of those High Court cases involved constitutional law issues.

The Commission takes the position that it will only seek leave to intervene in a proceeding if it will contribute something useful and different from the other parties and interveners. If it appears during the Commission's preparation that the issues it proposes to raise have been adequately and fully addressed by the parties or other interveners, the Commission will not seek leave to intervene or alternatively may not utilise leave granted to it.

Legal services directions

The Commission has a general approval pursuant to paragraph 3B of Appendix A to the Legal Services Directions 2017 to allow it to undertake tied public international law and constitutional law work, subject to certain conditions. The current approval to undertake constitutional law work was granted by the Hon Robert McClelland MP on 8 June 2010 and has remained in the same form since then.

Relevantly, the general approval to undertake tied constitutional law work is limited to forums other than the High Court. In order to use in-house lawyers, rather than the Australian Government Solicitor, for constitutional law work in the High Court, a further approval is required on a case-by-case basis.

Since at least 2010, the consistent practice of Attorneys-General on both sides of politics has been to grant the Commission approval to use its own lawyers, rather than AGS, to undertake the necessary tied constitutional law work to intervene in human rights cases in the High Court that involve constitutional law issues. This has included cases with high political sensitivities for the Australian Government such as: the validity of a regulation requiring an ASIO security clearance as a criterion for a protection visa (*Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1), the validity of mandatory minimum sentences for people smuggling (*Magaming v The Queen* (2013) 252 CLR 381), the detention of asylum seekers at sea (*CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514), the scope of free speech protections for Commonwealth public servants (*Comcare v Banerji* (2019) 267 CLR 373), and the validity of a warrant relied on to raid the home of a journalist (*Smethurst v Commissioner of Police* (2020) 272 CLR 177).

In all of these cases another Commonwealth party was involved and the AGS was already engaged in acting for them. In all of these cases, the High Court granted the Commission leave to intervene or appear as *amicus curiae*, and the then Attorney-General approved the Commission's use of its internal lawyers and external counsel to do the necessary constitutional law work.

In two cases in 2019 and 2022, for the first time in the institutional memory of the Commission, the Commission was refused approval by the then Attorney-General to use its own lawyers for constitutional law work. In each of those cases, the Commission still sought leave to appear pursuant to its statutory function, that leave was granted by the High Court, and the Commission limited its submissions to non-constitutional law issues.

The first case in which approval under the Legal Services Directions was refused was *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285. That case also involved a proposed challenge to *Al-Kateb*, although the issue was not ultimately reached by the Court in its reasons for decision. It was not suggested by the then Attorney-General that the proceeding did not involve human rights issues, or that the Commission was not properly seeking to exercise its statutory intervention function. Instead, in a letter to me on 4 January 2019, the then Attorney-General, the Hon Christian Porter MP, raised the concern that, if leave were granted, the Commission may 'argue positions on constitutional issues that may diverge from the Commonwealth's general position' and that this would not assist the Court.

I was particularly concerned by this response because it seemed to misunderstand both the role of the Commission as an independent statutory agency with a mandate grounded in human rights, and the Commission's statutory intervention function. In that case, the Commission *did* intend to make submissions that were different from those of the Australian Government. It is clear, for example from the 4:3 decision in *Al-Kateb*, that there is scope for different views on constitutional issues properly to be formed. The (non-constitutional) submissions ultimately made by the Commission, like all of our submissions, made clear that they were not made on behalf of the Commonwealth. Further, the question of whether those submissions were, or might be, of assistance was, pursuant to the AHRC Act, one for the Court to decide. I set out those concerns in a letter to the then Attorney-General on 7 January 2019.

The second case in which approval was refused was *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, High Court proceeding S192/2021. As you know, the Commonwealth ultimately

discontinued that proceeding. Our request for approval to use our own lawyers in that case referred to our statutory intervention function and also to the particular statutory role given to the Aboriginal and Torres Strait Islander Social Justice Commissioner. On 4 March 2022 the then Attorney-General, Senator the Hon Michaelia Cash, refused the approval sought by the Commission. Senator Cash, surprisingly, said that her decision was consistent with longstanding practice. I replied to Senator Cash's letter on 8 March 2022.

Request for approval

As noted at the outset of this letter, I seek your approval to use in-house lawyers and external counsel for the conduct of the necessary constitutional law work to enable the Commission to make submissions to the High Court and to appear at the hearing of this proceeding.

More generally, I would welcome the opportunity to discuss with you in more detail the nature of the current approvals given to the Commission to do tied work, and whether any amendment to those arrangements is required.

The plaintiff in the present proceeding has proposed that written submissions from interveners in support of the plaintiff be due by 23 June 2023. I would appreciate your response to the Commission's request by 9 June 2023.

Yours sincerely

[redacted]

Emeritus Professor Rosalind Croucher AM
President

T: [redacted]
E: [redacted]

Cc: Civil Law Unit, Attorney-General's Department (AGD)
Office of Legal Services Coordination

Graeme Edgerton

From: Ministerial Correspondence < @ag.gov.au>
Sent: Tuesday, 6 June 2023 12:09 PM
To: Rosalind Croucher
Subject: Correspondence from the Attorney-General and Cabinet Secretary, The Hon Mark Dreyfus KC MP - MS23-000656 [SEC=OFFICIAL]
Attachments: MS23-000656.pdf

OFFICIAL

Dear Emeritus Professor Croucher,

Please find attached signed correspondence from the Attorney-General and Cabinet Secretary, the Hon Mark Dreyfus KC MP.

The correspondence is provided in Adobe Portable Document Format (PDF). If you do not have software capable of reading PDF documents, you may download a free version from http://get.adobe.com/reader/.

Please do not respond to this email as this mailbox is not monitored. If you wish to provide further correspondence, please use the following details:

Email
@ag.gov.au

Postal Address
The Hon Mark Dreyfus KC MP
Attorney-General and Cabinet Secretary
Parliament House
CANBERRA ACT 2600

Kind regards

Ministerial Correspondence Unit
Attorney-General's Department

OFFICIAL

Attorney-General

Reference: MS23-000656

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

By email: [redacted]

Dear Emeritus Professor Croucher

Thank you for your letter of 22 May 2023 seeking my approval to use in-house lawyers and external counsel to perform tied constitutional law work in the matter of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (NYZQ matter) that is being heard in the High Court, in the event that the Australian Human Rights Commission (AHRC) receives leave to intervene or appear as *amicus curiae* in the proceeding.

I approve, under paragraph 3B of Appendix A to the *Legal Services Directions 2017* (Directions), the AHRC undertaking constitutional law work in the High Court in the NYZQ matter on the following condition:

(a) the AHRC must make clear in any written or oral submissions that those submissions are submissions of the AHRC and not submissions on behalf of the Commonwealth.

For the purposes of this approval, the approved non-tied providers are:

(a) the AHRC's in-house lawyers, and

(b) external counsel engaged by the AHRC.

The AHRC's standing exemption under the Directions allows it, subject to conditions, to undertake constitutional law work in forums other than the High Court. The carve-out to the exemption for constitutional matters in the High Court acknowledges the increased sensitivity when constitutional matters are argued in the High Court, and allows the balancing of relevant considerations to occur on a case-by-case basis. Whilst I have concluded that the considerations in the NYZQ matter weigh in favour of granting approval, future requests will equally be assessed on a case-by-case basis.

I also note the invitation in your letter to discuss the application of the tied work regime under the *Legal Services Directions 2017* to the AHRC more generally. I would be pleased to meet you to consider these issues further.

Yours sincerely

[redacted]

THE HON MARK DREYFUS KC MP
5 / 6 /2023

Graeme Edgerton

From: Patrick Knowles [redacted]
Sent: Friday, 4 August 2023 1:51 PM
To: Graeme Edgerton
Cc: Louisa Wong
Subject: Re: NZYQ v Minister for Immigration - directions [SEC=OFFICIAL:Sensitive]

Dear Graeme

I have spoken with Megan. She is available and happy to be involved. She has one court commitment in the first week of November, but I think that it is a bit optimistic that this case will make it into the November sittings. Even if it does, it might not clash with the 2 days she is unavailable. It would be great if you could send her a brief.

Enjoy your weekend.

Pat

Patrick Knowles SC
Tenth Floor Chambers
10/180 Phillip Street, Sydney NSW 2000
Telephone: [redacted]
[redacted] I www.tenthfloor.org

From: Graeme Edgerton [redacted]
Date: Thursday, 3 August 2023 at 6:59 am
To: Patrick Knowles [redacted]
Cc: Louisa Wong [redacted]
Subject: RE: NZYQ v Minister for Immigration - directions [SEC=OFFICIAL:Sensitive]

Dear Patrick,

Thanks for touching base about this matter. It would be good to get a draft submission by 8 September. Hopefully that will provide enough time to prepare and then modify in the light of the plaintiff's submissions.

More than happy to extend the brief to Megan Caristo on the basis you have identified. If you want to have an initial conversation with her to confirm her availability, we can then put together a bundle of material so that she has a copy of what we've briefed you with.

Kind regards,
Graeme

Graeme Edgerton
Deputy General Counsel

Australian Human Rights Commission
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T [redacted]
E [redacted] | **W** humanrights.gov.au

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We acknowledge the traditional custodians of this land, the Gadigal peoples of the Eora Nation, and pay our respects to their Elders, past, present and future.

From: Patrick Knowles [redacted]
Sent: Wednesday, August 2, 2023 12:13 PM
To: Graeme Edgerton [redacted]
Cc: Louisa Wong [redacted]
Subject: Re: NZYQ v Minister for Immigration - directions [SEC=OFFICIAL:Sensitive]

Dear Graeme and Louisa

On the Court's current orders, our submissions are due on 15 September 2023. I just wanted to check how far in advance of that date you would like a draft to allow for the HRC's input and instructions. I don't have any particular problem with timing, but thought I would check with you sooner rather than later. We will not get the plaintiff's submissions until 1 September and we will have to review them carefully to make sure we are not repetitious.

Also, subject to your views, I have been thinking of getting a junior involved in the case. The person I had in mind is Megan Caristo at Banco Chambers. She is very bright and a pleasure to work with. If you are happy with that I would propose that my brief be modified so that the fee cap (which I think was $10,000 incl GST) be halved. I would propose, subject to her agreement, that Megan and I would cap our fees at $5,000 each (including GST). If you have other suggested juniors, I would also be happy to consider them. Of course, having a junior would involve some additional travel and accommodation costs, so you will of course need to consider that. I am happy to discuss.

Best wishes,

Patrick

Patrick Knowles SC
Tenth Floor Chambers
10/180 Phillip Street, Sydney NSW 2000
Telephone: [redacted] | www.tenthfloor.org

TENTH FLOOR CHAMBERS

From: Graeme Edgerton [redacted]
Date: Friday, 2 June 2023 at 2:22 pm
To: Patrick Knowles [redacted]
Cc: Louisa Wong [redacted]
Subject: NZYQ v Minister for Immigration - directions [SEC=OFFICIAL:Sensitive]

Dear Patrick,

At the directions hearing this morning, Gleeson J made the following orders:

Special case

1 The questions of law stated in the Special Case agreed between the parties and filed on 31 May 2023 be referred for consideration by the Full Court.

2 The Special Case be set down for hearing by a Full Court on a date to be fixed not before the November 2023 sittings.

3 By 4.00pm on 18 August 2023, the Plaintiff file an agreed special case book.

4 By 4.00pm on 1 September 2023, the Plaintiff file and serve written submissions of no more than 20 pages.

5 By 4.00pm on 15 September 2023, any interveners in support of the Plaintiff file and serve written submissions of no more than 20 pages.

6 By 4.00pm on 3 October 2023, the Defendants file and serve written submissions of no more than 20 pages.

7 By 4.00pm on 17 October 2023, any interveners in support of the Defendants file and serve written submissions of no more than 20 pages.

8 By 4.00pm on 24 October 2023, the Plaintiff file and serve a reply of no more than 5 pages.

9 By 4.00pm on 27 October 2023, the Defendants file and serve a joint book of authorities prepared in accordance with Practice Direction No 1 of 2019.

10 Subject to any further order, Part 44 of the *High Court Rules 2004* (Cth) apply, with necessary adaption, to this proceeding.

11 The parties have liberty to apply on three days' written notice.

12 Costs reserved.

Non-publication orders

13 An order assigning the Plaintiff the pseudonym 'NZYQ' for the purpose of this proceeding.

14 An order, on the ground set out in section 77RF(1)(c) of the *Judiciary Act 1903* (Cth), that publication of the Plaintiff's name or information which tends to reveal the identity of the Plaintiff be prohibited under section 77RE of that Act until further order.

The transcript will be published next week.

Kind regards,
Graeme

Graeme Edgerton
Deputy General Counsel

Australian Human Rights Commission
GPO Box 5218, Sydney NSW 2001
T [redacted]
E [redacted] | W humanrights.gov.au

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Graeme Edgerton

From:	Rosalind Croucher
Sent:	Wednesday, 29 November 2023 8:57 AM
To:	Commissioners
Cc:	Graeme Edgerton
Subject:	FW: NZYQ v Minister for Immigration - judgment [SEC=OFFICIAL:Sensitive]
Attachments:	NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (S28-2023) [2023] HCA 37.pdf

FYI,
I have saved Graeme's email summaries plus the PDF of the decision in the Commissioners' dedicated site, and linked them at the end of the notes that I sent to you yesterday

Regards
Ros

Emeritus Professor Rosalind Croucher AM FAAL FRSA FACLM(Hon)
President

Australian Human Rights Commission
Level 3, 175 Pitt Street, Sydney NSW 2000
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From: Graeme Edgerton [redacted]
Sent: Tuesday, November 28, 2023 7:44 PM
To: Requests for Approval [redacted]
Cc: Louisa Wong [redacted]; Rachel Holt [redacted]; Steven Caruana [redacted]; Peter Alliott [redacted]
Subject: NZYQ v Minister for Immigration - judgment [SEC=OFFICIAL:Sensitive]

Dear President and Commissioners,

The High Court has now given unanimous reasons for holding that indefinite immigration detention is unconstitutional. A copy of those reasons is attached again.

The fact that the reasons are unanimous is very significant, particularly in a case that overturns a previous constitutional decision. It effectively ensures that this issue has now conclusively been settled. The reasons suggest that some work was done to ensure unanimity. The initial orders were pronounced by 'at least a majority' of the Court. Justices Gleeson and Jagot said that they needed more time to consider the matter but eventually agreed both with the orders made and with the attached reasons. In one aspect of the Court's reasons, Edelman J adopted a 'slightly different' approach to reach the same result. That approach is set out at [51]-[54] of the joint reasons. However, in all other respects Edelman J joined in the reasons of the Court.

The previous decision of *Al-Kateb* stood for two propositions, both decided by a bare majority of four Justices:

- First, that on their proper construction ss 189(1) and 196(1) of the Migration Act required an unlawful non-citizen to be held in immigration detention, even if there was no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future (the **statutory construction issue**).
- Secondly, that this interpretation of the Migration Act was not contrary to the separation of judicial power from executive and legislative power required by Ch III of the *Constitution* (the **constitutional issue**).

The Court in *NZYQ* observed that, unless *Al-Kateb* was overruled, it stood as 'an implacable obstacle' to the plaintiff's claims. In order for a previous decision of the High Court to be overruled, the Court must first grant leave for it to be reopened. Leave was required to reopen each of the statutory construction issue and the constitutional issue, and they were dealt with separately. The outcome of the case was that:

- the Court did not grant leave for the statutory construction issue to be reopened
- the Court granted leave for the constitutional issue to be reopened, and then overruled *Al-Kateb* to that extent.

Statutory construction issue

As noted in my email below following the hearing, the High Court had heard argument on three previous occasions that *Al-Kateb* should be reopened, and the Commission appeared in two of those previous cases. Different views were expressed by different Justices about the merits of reopening, but *NZYQ* was the first occasion where the facts of the case squarely raised the question of whether *Al-Kateb* was correct.

Usually the High Court adopts a cautious approach to reopening its previous decisions, 'informed by a strongly conservative cautionary principle'. This principle reflects the value of consistency and certainty in the law. Relying on this principle, the Court said that it was not appropriate to reopen the statutory construction issue. This was for a number of reasons:

- First, the statutory construction arguments relied on by the plaintiff and the amici in this case (including the Commission), had been considered in some form by the Court in *Al-Kateb*.
- Secondly, in almost 20 years since *Al-Kateb*, Parliament had not altered the text of the provisions.
- Thirdly, the Parliament had legislated in other ways to 'ameliorate the harshness' of the construction adopted in *Al-Kateb*, including by giving the Minister a discretionary power to grant a visa to a person in immigration detention (even if they did not meet the criteria for it), or to place a person into community detention. This suggested an 'implicit legislative endorsement' of the construction given in *Al-Kateb*.
- Fourthly, in the 2021 decision of *AJL20* the High Court 'endorsed key aspects of the reasoning of the majority [in *Al-Kateb*] on the issue of statutory construction'.

Constitutional issue

Reopening

While issues of legislative reliance and administrative convenience can be strong reasons not to reopen a question of statutory construction that has previously been answered, they are less important when it comes to correcting an previous statement of constitutional principle. This is because the High Court has a duty to enforce the *Constitution* and to proceed in accordance with law in giving effect to it.

The Court said that *Al-Kateb* must now be seen as inconsistent with a canonical case of *Chu Kheng Lim*, a case regarded by the Court both in *Al-Kateb* itself and in a series of cases since *Al-Kateb* as authoritative.

In summary, the Court identified 'three statements of background principle' from *Lim*:

- executive detention of an 'alien' without judicial mandate is lawful only to the extent that it is justified by a valid statute
- one effect of Ch III of the Constitution is that, generally, 'involuntary detention ... is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'
- the relevant difference between an alien and a non-alien for the purposes of Ch III 'lies in the vulnerability of the alien to exclusion or deportation'.

As a result of those principles, the Court in *Lim* held that laws authorising executive immigration detention will be valid only if the detention authorised is 'limited to what is reasonably capable of being seen as necessary' for non-punitive immigration purposes. Those purposes are: assessing an application for a visa, or removal from Australia of someone who has had a visa refused or cancelled.

The majority's reasons in *Al-Kateb* that an unlawful non-citizen could continue to be detained, even if there was no real prospect of removal in the reasonably foreseeable future, were 'difficult to reconcile' with the principle from *Lim*, endorsed repeatedly in subsequent cases,

that detention must be limited to the period reasonably necessary to achieve legitimate non-punitive purposes.

Reconsideration

Having decided to reopen *Al-Kateb* on the constitutional issue, the unanimous Court restated the *Lim* principle as follows:

> [A] law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified as otherwise.

In particular, the *duration* of detention must be limited 'to what is reasonably to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved'.

In *Al-Kateb*, McHugh J in the majority said that: '[a]s long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive'. The unanimous Court in *NZYQ* said that this was an incomplete, and therefore inaccurate, statement of principle.

Following *Lim*, six Justices said that if there was no real prospect of removing an alien from Australia, then the purpose of detention could no longer be:

- to prevent the alien from entering the Australian community pending the making of a decision about whether to grant them a visa; or
- to make the alien available for deportation

and, as a result, it could not be said that continued detention was for a legitimate non-punitive purpose.

A primary submission of the Commonwealth was that 'segregation' of an alien from the Australian community, pending their removal (if ever) was a legitimate non-punitive purpose.

Six Justices rejected this submission at [59]-[60]. Segregation could not be a legitimate purpose by itself. It was only permissible as an 'incident' of either of the two legitimate purposes (considering whether to grant a visa, or removing someone from Australia).

It is always difficult to assess the impact that the Commission has as an intervener in High Court cases, but this is a point that the Commission made strongly in its written submissions at [50] and our counsel's oral outline of submissions at [5(a)]. The plaintiff had raised a similar point in his primary submissions and then expanded on it in more detail in his reply submissions at [13], including by reference to what the Commission had said.

Justice Edelman approached the issue 'slightly differently' (at [51]-[54]). His Honour treated the claimed purpose ('detention pending removal' so that a non-citizen would be 'available for deportation when that becomes practicable') as legitimate. His Honour then concluded that the majority in *Al-Kateb* paid insufficient attention to the 'proportionality requirement of *Lim*'. That is, if there was no real prospect of removal of an alien becoming practicable in the reasonably foreseeable future, then it is not 'reasonably capable of being seen as necessary' to continue to detain them to ensure that they are available for removal when practicable.

Key constitutional finding and decision

All members of the Court held that there was a constitutional limit to the duration of immigration detention by the executive. Detention would no longer be lawful if an alien has had a visa refused or cancelled, and there is no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future (at [55]).

Here, the parties agreed that as at 30 May 2023 there was no real prospect of the plaintiff being removed from Australia in the reasonably foreseeable future. While the Commonwealth subsequently put on evidence that an officer of the US State Department had agreed to 'consider' the plaintiff's case and 'have a hard look' at it, this was subject to discussions with a number of US agencies and would have required the exercise of a multiple statutory discretions, some involving the waiver of statutory prohibitions. The High Court was not satisfied that as at the date of the hearing there was any realistic prospect of removal to the US.

As a result, the Court held that the plaintiff was entitled to 'his common law liberty' and it issued a writ of *habeas corpus* requiring his release.

Next steps

The Court noted that release from detention is not the same as a right to remain in Australia. People in the plaintiff's position could be retained if it becomes practicable to remove them from Australia.

Further, the Court also noted that it was open to the Parliament to pass laws requiring detention of people who pose a risk to the community, for example 'a law providing for preventative detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody' (at [72]).

This comment from the Court has now become the focus of a proposed legislative response by the Government. Media reports quote the Minister for Home Affairs announcing in the House of Representatives this afternoon that the Government was 'moving quickly to finalise a tough preventative detention regime before Parliament rises'.

The Commission has previously made submissions about post-sentence preventative detention order regimes. The most recent summary is in a submission to the Independent National Security Legislation Monitor in February 2022. We noted at [55] that there were

regimes in each State and Territory other than the ACT which permitted a court to order that a person who had committed certain sex offences continue to be detained in custody at the end of their sentence if they continued to pose an unacceptable risk to the community. However, my understanding is that these regimes do not extend to making orders in relation to people who have already served their sentence of imprisonment and have been released.

It appears that if a preventative detention regime is proposed for the NZYQ cohort, or some of them, new legislation would be required.

Please let me know if you would like any further information about the judgment or current or proposed legislative responses.

Kind regards,
Graeme

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From: Graeme Edgerton [redacted]
Sent: Thursday, November 9, 2023 4:36 PM
To: Requests for Approval [redacted]
Cc: Louisa Wong [redacted]; Rachel Holt [redacted]; Steven Caruana [redacted]; Peter Alliott [redacted]
Subject: NZYQ v Minister for Immigration - case report [SEC=OFFICIAL:Sensitive]

Dear President and Commissioners,

As I'm sure you have seen from media reporting, yesterday the High Court handed down a landmark judgment, holding that indefinite immigration detention was unlawful. The

judgment overturned *Al-Kateb v Godwin*, one of the most notorious High Court cases from a human rights perspective.

This is an amazing outcome that will have a practical impact for up to 92 people who are currently in immigration detention, and may allow many former detainees to seek compensation for unlawful detention. Equally importantly, it will change the way that Australia deals with asylum seekers in the future.

The Commission was granted leave to appear as *amicus curiae* and made submissions to the Court from a human rights perspective. We were represented by Patrick Knowles SC and Megan Caristo.

Legal issues

In *Al-Kateb*, decided in 2004, the High Court held that it was not unlawful to continue to hold a stateless Palestinian asylum seeker in immigration detention, even if there was no real prospect of him being removed from Australia in the foreseeable future. That has continued to be the law for almost 20 years.

In *NZYQ v Minister for Immigration*, decided yesterday, the High Court declared that the plaintiff's detention was *not* lawful, precisely because there was 'no real prospect of [his removal] from Australia becoming practicable in the reasonably foreseeable future'. The Court ordered that a writ of *habeas corpus* should issue requiring the plaintiff to be released forthwith.

The orders made by the High Court were made by 'at least a majority' of the Court. It is possible that the decision will be unanimous. It is also possible that all members of the Court will overturn *Al-Kateb*, but for different reasons. Based on the answers that the Court gave to particular questions of law that the parties asked it to determine, we can infer that at least a majority of the Court considers that sections 189(1) and 196(1) of the *Migration Act 1958* (Cth) are beyond the legislative power of the Commonwealth and need to be read down in order to be valid. These sections:

- require 'unlawful non-citizens' (that is, non-citizens without a visa) to be detained; and
- require that they be kept in immigration detention until they are granted a visa or removed from Australia.

The key question has always been what happens if a person is refused a visa, but cannot be removed from Australia. The Commonwealth says that the person must continue to be detained until they are in fact removed, if ever. The plaintiff, supported by the Commission, the Human Rights Law Centre and the Kaldor Centre for International Refugee Law said that there must be a limit to the period of detention. There are limited purposes for which a person can be detained, and if these purposes cannot be achieved (or are unlikely to be achieved), then ongoing detention ceases to be authorised.

For the majority in *NZYQ*, it appears that there is a limit imposed by the separation of powers in the Constitution between the judiciary and the executive. In the case of *Chu Kheng Lim* in 1992, the High Court said that one function that is 'exclusively judicial' is 'the adjudgment and punishment of criminal guilt'. It appears that at least a majority of the High Court has now concluded that continuing to hold someone in immigration detention, ostensibly for the purposes of removal, but where removal is not possible, amounts to punishment. That is not something that the executive can do. Subject to some limited exceptions that are not relevant here, punishment may only be imposed by a court.

The Court made orders yesterday but we will need to wait for it to publish its reasons to fully understand why it made the orders it did and what all of the implications are.

The work of the Commission

The Commission has been actively involved with the human rights impacts of immigration detention both before and after *Al-Kateb* in 2004. The Commission intervened and made submissions to the Court in *Al-Kateb*. We were also granted leave to intervene in three of the four cases since then that have sought to challenge *Al-Kateb*. Those cases were:

- *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1
- *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285
- *NZYQ v Minister for Immigration.*

Policy teams at the Commission have produced significant reports on the impacts of immigration detention, particularly on children, including:

- A last resort? National Inquiry into Children in Immigration Detention (2004)
- The Forgotten Children: National Inquiry into Children in Immigration Detention (2014).

The reports have led to important policy changes by Government, including changes that sought to ameliorate some of the adverse consequences of *Al-Kateb*.

Cross-Commission teams have visited places of immigration detention around Australia and spoken directly with people detained about the impacts that immigration detention has had on them. I know that staff members who have been part of these teams have found it to be some of the most difficult but also some of the most significant work they have done.

The Investigation and Conciliation Section has received hundreds of complaints from people in immigration detention and inquired into those complaints with diligence and empathy. The most common complaints are about arbitrary detention, inhumane conditions of detention, and separation of families. Some of those complaints make their way to the legal section for further detailed analysis and possible reporting by the President.

So many people who have been affected by this work of the Commission will also be affected by the judgment yesterday.

Important decisions like this do not happen in a vacuum. They are built on incremental work done by human rights defenders at the Commission, in NGOs and in civil society; by community lawyers and other lawyers working pro bono; by community groups and individuals who are motivated to advocate for positive changes to improve human rights. Everyone at the Commission can be proud of the contribution that we have collectively made to the outcome in this case.

Next steps

I will provide a further update once we have the reasons for decision.

In the meantime, we will reach out to the Department of Home Affairs through our regular channels to understand how it intends to respond to the decision. It seems likely that, at the least, we can expect relevant Ministers to intervene at an earlier stage to grant visas to detainees or to place them into community detention arrangements. It is important that the Commission remains involved in ongoing scrutiny of how the decision of the Court is implemented.

Kind regards,
Graeme

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