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Protecting human rights in Australian law

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Research Paper 1: Protecting human rights in Australian law

In my experience, the most accomplished and successful human rights lawyers are those who appreciate the need to refine legal skills and not simply to treat human rights law as aspirational or as comprising moral generalities. This is a new body of law.[1]

Contents

1. Introduction

This and the following research papers are about how human rights are protected in Australian law and what legal remedies are available for their violation both domestically and internationally. This is intended to serve as a guide to those who wish to use the law to defend or advance the human rights of individuals and groups in Australia.

In the absence of a Commonwealth constitutional Bill of Rights or comprehensive statutory regime for protecting human rights, the protection of human rights under Australian law is somewhat ad hoc. Various specific rights are protected through many sources of law at different levels. There is also some disjunction between human rights as articulated in international law and how they are defined and protected in Australian law. Nevertheless, as we seek to demonstrate, human rights protections are not insignificant. Moreover, they are constantly being developed and refined.

In this research paper we outline the context of the topics covered in the series of 11 research papers. We provide a basic introduction to the concept of legal human rights and their justiciability.

[1] Michael Kirby, Foreword to Adam McBeth, Justin Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011).

In research paper 2, we examine the implementation and use of international human rights law in Australian domestic law. We outline the method by which Australia ratifies international human rights treaties and the manner in which such treaties, and international laws generally, are able to be taken into account by Australian courts. This encompasses both the development of the common law, the interpretation of statutes and administrative decision-making. We also review the Commonwealth parliamentary regime for the scrutiny of human rights implications of new legislation.

In research paper 3, we examine the Commonwealth constitutional protections for human rights. This encompasses the limited express rights protected under the Australian Constitution, the evolving jurisprudence in relation to implied constitutional rights and the manner in which federal, state and territorial laws may be challenged on constitutional grounds. We also examine those rights which are protected at common law.

In research paper 4, we address the Commonwealth human rights statutory framework and judicial mechanisms for the determination of claims of discrimination, including on the grounds of race, sex, disability and age, as well as procedures for the resolution of human rights disputes through the Australian Human Rights Commission. There is also reference to other Commonwealth legislation that has implications for human rights.

The state and territory human rights frameworks are examined in research paper 5, with particular reference to the anti-discrimination and equal opportunity legislation. This encompasses the attributes that are protected, the exemptions and exceptions, complaint handling procedures and other remedies.

In research paper 6 we review the more comprehensive statutory human rights legislation that has to date been adopted in three jurisdictions: the Australian Capital Territory, Victoria and Queensland. This includes detailed analysis of the rights that are protected and the limitations on such rights; the human rights obligations of public authorities and public entities; the means by which statutes are interpreted in accordance with human rights; the relevance of international and foreign law and jurisprudence; the enforcement of human right obligations through proceedings; the referral of human rights issues to the Supreme Courts for determination and the role and function of the State and Territory human rights bodies.

The international human rights treaties that Australia is a party to, and the United Nations' Human Rights Council, also provide for international oversight as well as complaints mechanisms by which to bring Australia to account for breach of its international human rights obligations. Thus, we return to the international arena in research paper 7, examining the role of United Nations bodies in monitoring Australia's human rights obligations under treaties to which it is a party. We outline the procedures for making individual complaints to such bodies, the remedies available and discuss outcomes in a number of previous cases. The mechanism for bringing complaints against Australia through the International Labour Organization is also considered.

In research paper 8, we consider the extent to which there may be civil liability in Australia for human rights violations that occur outside Australia. Such liability may arise out of the involvement of Australian companies in human rights abuses and environmental damage in other jurisdictions. Questions of jurisdiction and choice of law are considered along with procedural mechanisms for obtaining redress in Australia. We also consider the United States as a possible forum for civil proceedings arising out of human rights abuses in other countries, along with developments in English and Canadian law.

In most jurisdictions, including Australia, there are common law, statutory and constitutional limitations on who may seek civil remedies in courts. In research paper 9 we look at the issue of 'standing' to bring legal proceedings. This encompasses a consideration of the standing of individuals or entities to challenge the validity of legislation and to raise constitutional questions for judicial determination. We also discuss some of the particular problems in relation to standing which arise in climate change litigation and its connection to human rights litigation.

Although the focus of the research papers is mainly on mechanisms for the resolution of human rights claims by those individuals or groups who may have personal claims, there are various circumstances in which human rights victims, interest groups or public interest advocates may seek to directly participate in litigation commenced by others in which human rights or public interest issues loom large. In research paper 10 , we examine the procedural mechanisms for non-party participation in human rights and public interest litigation.

In seeking to litigate human rights and public interest cases there are formidable substantive, procedural, economic, evidentiary and practical problems that may be encountered. We examine these in research paper 11. In terms of facilitating such litigation, we address the issues of legal representation, funding and financial support, as well as protection against adverse costs orders through protective costs orders at the inception of proceedings and principles that may preclude an adverse costs order at the conclusion of cases with a sufficient public interest dimension. There is some comparative reference to the position in other jurisdictions, particularly the United Kingdom and Canada. We examine a number of impediments to human rights and public interest litigation, including security for costs, adverse costs orders and confidentiality constraints that may prevent or inhibit access to relevant factual and evidentiary material. We also consider the use of non-litigious strategies as an adjunct to or as an alternative to court proceedings.

The focus of the research papers is necessarily selective, focusing on civil proceedings. However, we do address in research paper 6 human rights protections under state and territory legislation that can be invoked in criminal proceedings.

We do not examine in detail emerging economic, social and cultural rights[2], except insofar as they are enforceable in Australia by persons seeking legal or quasi-legal remedies.

[2] See generally: Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014).

We do consider how human rights issues arise in environmental law, including in respect of climate change, but not in depth.[3]

The progressive development of legal protections for human rights in Australian law, and their enforcement in Australian courts, has been a long and arduous process. This journey is not finished. Existing rights are of little, if any, value unless they are adhered to or able to be enforced if violated. There remain numerous procedural, economic and practical barriers to access to remedies for human rights violations. The work to expand and improve existing protections will no doubt continue.

2. What are 'human rights'?

The nature and dimensions of 'human rights' are the subject of extensive moral and philosophical inquiry and debate.[4] That debate includes the foundations of *legal* human rights, the nature of *moral* human rights, and the nature of the connection between the two.[5] It is not our purpose to contribute to that debate. Our more narrow concern is with how human rights are guaranteed, expressed in the law, and enforced, both in international law as it applies to Australia and in the Australian domestic legal system.

On one view, the modern project of recognising and entrenching human rights in law, in a manner of relevance to the entire international community, began with the drafting and adoption of the *Universal Declaration of Human Rights 1948* ('the *Universal Declaration*').

However, basic rights protections have existed, in various forms in law, in different countries, for centuries. Australian lawyers, with Australia's inheritance of the English legal tradition and common law, look to the English *Magna Carta Libertatum* of 1215. Amongst other things, this Charter prohibited arbitrary detention by guaranteeing that 'no free man shall be taken or imprisoned or dispossessed or outlawed, or banished, or in any way destroyed . . . except by the legal judgement of his peers or by the law of the land.'[6] Likewise, the English *Habeas Corpus Act 1641* prohibited arbitrary arrest by providing that no person could be put on trial except before the courts 'by due process and writ original according to the old law of the land.' The English *Bill of Rights 1688* also protected freedom of speech, free elections and freedom from cruel and unusual punishment.[7]

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[3] See research paper 9. More detailed analyses are contained in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015). This examines the complex relationships between human rights and environmental law.

[4] See James Griffin, *On Human Rights* (Oxford University Press, 2008).

[5] See Allen Buchanan, 'Why International Legal Human Rights?' and David Luban, 'Human Rights Pragmatism and Human Dignity' in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, *Philosophical Foundations of Human Rights* (Oxford University Press, 2015).

[6] British Library, *English Translation of Magna Carta 1215*, cl XXXIX <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

[7] *Bill of Rights [1688]* c 2 (Regnal 1 Will and Mar Sess 2).

Arising from the French Revolution in 1789,[8] France's *Declaration of the Rights of Man and the Citizen (La Déclaration des Droits de l'Homme et du Citoyen)* protected the right to freedom of expression,[9] whilst the United States' *Virginia Declaration of Rights* (1776) protected the freedom of the press.[10]

Before World War II, the treatment of nationals was seen primarily as an issue within the domestic jurisdiction and responsibility of states. The international human rights regime arose out of a consensus following the atrocities of the war that protecting the rights of individuals from state interference under international law, and making individual rights a matter of international concern, was necessary.[11] This concern was initially reflected in the purposes of the United Nations ('UN') described in its Charter. This included achieving the promotion and encouragement of 'respect for human rights and fundamental freedoms for all without discrimination as to race, sex, language or religion', and the Charter imposes obligations on the UN and its members to that end.[12]

The *Universal Declaration* was subsequently adopted by a resolution of the UN General Assembly on 10 December 1948.[13] It contains 30 articles comprising civil, political, economic, social and cultural rights declared to be 'fundamental human rights' and 'equal and inalienable'.[14] The significance of the *Universal Declaration* lies partially in its recognition that rights are universal, attaching equally to all individuals, being founded upon an 'inherent human dignity'.[15] This is a foundational principle of the international human rights system and human rights law.

As a declaration, the instrument itself has no binding force at international law.[16] Nevertheless, as observed by Dr Evatt, the Australian President of the UN General Assembly on its adoption, 'The Declaration has a moral power which is of enormous weight and influence. The statement of

[8] *Declaration of the Rights of Man* (1789) art 7: Frank Maloy Anderson (ed), *The Constitution and Other Select Documents Illustrative of the History of France, 1789-1907* (Russell and Russell, 1908) 59–61.
[9] *Declaration of the Rights of Man* (1789) arts 10, 11.
[10] *Virginia Declaration of Rights* (1776) s 12.
[11] See generally: Maryanne Glendon, *A World made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002).
[12] *Charter of the United Nations*, arts 3(1), 55, 56.
[13] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[14] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[15] Article 1 of the *Universal Declaration* states that '[a]ll humans are born equal in dignity and rights' and Article 2 that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind'.
[16] Some commentators have described all of the substance of the *Universal Declaration* as customary international law, and others particular articles of the declaration. Other commentators maintain that the declaration has no formal legal force: see Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1998 - 1989) 12 *Australian Year Book of International Law* 82, 84 – 85.

the rights represent a goal, or a standard, to which every man can look'.[17] The *Universal Declaration* has significant normative power and has been a touchstone for the development of other binding international human rights instruments, as well as domestic constitutions and human rights bills.

The process of implementing the *Universal Declaration* into international treaty obligations, legally binding on their state parties, was first achieved with the *International Covenant on Civil and Political Rights 1966 ('ICCPR')*[18] and the *International Covenant on Economic, Social and Cultural Rights 1966 ('ICESCR')*[19]. While the *Universal Declaration* recognised that all human rights are equal, the rights contained in it were divided into two categories for the purpose of 'juridification' in the Covenants.[20] Civil and political rights recognised in the *ICCPR*, include: the right to life; the prohibition upon torture; the right to liberty and security of the person; the right to liberty of movement; and the right to freedom of thought, conscience and religion. Social, economic and cultural rights recognised in the *ICESCR* include: the right to social security; the right to education; the right to the enjoyment of the highest standard of physical and mental health; and the right to take part in cultural life.

In 'generational' accounts of human rights law, which are not without criticism, the distinction between the categories of rights in the two Covenants accords generally with the concept of civil and political rights as 'first generation', and economic, social and cultural rights as 'second generation' rights.[21] At the time of the implementation of the *ICCPR* and *ICESCR*, civil and political rights were more familiar in national constitutions and domestic legal traditions – including in Australia in the inherited common law and some constitutional protections - so were viewed as 'first generation'.[22] Economic, social and cultural rights at law were arguably more novel and so considered sequentially as 'second generation'. Some accounts, more controversially, also refer to a 'third generation' of rights, encompassing rights to development and the environment.[23] Notwithstanding these accounts, and the division of rights enumerated in the *Universal Declaration* between the *ICCPR* and *ICESCR*, the preambles to both Covenants provide that the different categories of human rights are interdependent. The interdependency of human rights has been affirmed by UN member states on a number of occasions.[24]

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[17] An audio-visual copy of this statement may be downloaded from the United Nations Audiovisual Library: https://www.unmultimedia.org/avlibrary/asset/2016/2016503/.
[18] *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[19] *ICESCR*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).
[20] Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social, and Cultural Rights* ((Oxford University Press, 2014), 1.
[21] Ibid, 1.
[22] Ibid, 1.
[23] See, eg, Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29(3) *Netherlands International Law Review* 307.
[24] *Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st sess, 97th plen mtg, UN Doc A/RES/41/128 (1986); *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993).

Together, the *Universal Declaration*, the *ICCPR* and *ICESCR* are termed the 'International Bill of Rights'. In addition, there are now seven further core international human rights instruments. Those treaties impose obligations on state parties on specific issues of thematic concern (such as the prohibition of torture) or concern the protection of particular vulnerable groups (such as children). A number of other international treaties, while not specific to human rights, also include provisions relevant to the protection of human rights.

Separate to treaty obligations, a number of human rights protections are recognised as having become part of general international law (also known as customary international law). This status is derived, for example, from the outlawing of acts of genocide and the adoption of human rights principles relating to rights of protection from slavery and racial discrimination.[25] In research paper 2 we address international human rights law and its role in the Australian domestic legal system in more detail.

3. The implementation of human rights in domestic legal systems and their justiciability

The incorporation of human rights in international law, in treaties and customary law, imposes obligations on states (and sometimes on natural or other juridical persons) to respect, protect and fulfil the human rights of individuals and groups. In implementing these obligations, states are required both to refrain from doing certain acts, as well as to act in certain ways, including putting in place domestic measures necessary for the protection and realisation of rights. These measures may include modifying the domestic legal system to recognise human rights and to provide access to judicial mechanisms for their enforcement, as well as remedies for their violation.

In some accounts of human rights, civil and political rights are described as 'negative' freedoms or immunities from state interference, and economic, social and cultural rights as 'positive' rights to make claims upon the state as to how resources should be allocated and configured through policy.[26] The justiciability of these different 'categories' of rights is distinguished. 'Justiciability' refers to matters that may be 'appropriately resolved by the courts'.[27] In these accounts, civil and political rights are framed as more amenable to immediate implementation and thus judicial

[25] See *Barcelona Traction (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32. There are a number of rights from which no derogation is permitted.

[26] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014) 1. On the relationship between this characterisation of civil and political rights, and economic, social and cultural rights, and a Hohfeldian rights analysis, see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013).

[27] UN Committee on Economic, Social and Cultural Rights ('CESCR'), General Comment No 9: *The domestic application of the Covenant* E/C.12/1998/24, 3 December 1998, para 10.

determination and enforcement.[28] Whether the judiciary has the jurisdiction or capacity to determine the policy and budgetary decisions required to implement economic, social and cultural rights, and the appropriateness of their resolution by judges, are vexed questions.

Complex considerations are reflected in the way that the obligations that the *ICCPR* and *ICESCR* impose on state parties to implement their treaty obligations are described. Within their territories, states 'undertake to respect and to ensure to all individuals' the rights recognised in the *ICCPR*.[29] Article 2.3(b) obliges state parties to 'develop the possibilities of judicial remedies' for individuals whose rights and freedoms under the Covenant are violated. In contrast, article 2.1, the *ICESCR* requires parties to 'take steps' to the maximum of their 'available resources' for the progressive 'full realization' of the rights recognised in the Covenant 'by all appropriate means'. This enables the idiosyncrasies of each state party's systems and capacity to be taken into account.[30]

The *ICESCR* does not expressly require state parties to develop judicial remedies for violations of economic, social and cultural rights. Nevertheless, as the UN Committee on Economic, Social and Cultural Rights ('CESCR') has observed:

> 'a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary.'[31] Further, 'there is no Covenant right which could not' in many legal and administrative systems 'be considered to possess at least some justiciable dimensions.'[32]

As Ben Saul, David Kinley and Jacqueline Mowbray argue, distinctions between civil and political rights and economic, social and cultural rights as 'positive' and 'negative' or on the basis of their justiciability are overly simplistic[33]:

> Civil and political rights also involve positive demands on the state as much as negative freedoms from interference: they too can be expensive (for instance to run a prison

[28] See, eg, for an overview of the competing schools of analysis: Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014) 1.
[29] *ICCPR*, art 2(1).
[30] *ICESCR*, art 2(1); CESCR General Comment No 9: *The domestic application of the Covenant* E/C.12/1998/24, 3 December 1998, para 1.
[31] CESCR General Comment No 9: *The domestic application of the Covenant* E/C.12/1998/24, 3 December 1998, para 3. While the legal status of General Comments issued by the CESCR is ambiguous, they enjoy some legal weight: see Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012), 55.
[32] CESCR General Comment No 9: *The domestic application of the Covenant* E/C.12/1998/24, 3 December 1998, para 10.
[33] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014) 1.

system which ensures humane conditions of detention, or to fund an accessible law enforcement and judicial system capable of protecting rights from interference). On the other hand, many aspects of economic, social and cultural rights are immediately applicable and capable of judicial application or supervision (for example, protecting the freedom of association of trade unions and their members, prohibiting forced labour or unjustified dismissal, or guaranteeing non-discrimination in access to education or health services).

There remains, despite this, considerable variation between state jurisdictions in the availability of domestic judicial remedies for breaches of economic, social and cultural human rights recognised in international law. As will become apparent, in Australia rights that are justiciable tend to be civil and political rights, such as voting, and religious and legal process protections. In comparison, for example, currently the right to education recognised in the *ICESCR* is incorporated (in part) in legislation in only two sub-national jurisdictions, under the *Human Rights Act 2004* (ACT) and the *Human Rights Act 2019* (Qld).[34] The *Human Rights Act 2019* (Qld) also recognises the right to health services.[35]

There is also a disjunction between the way human rights are incorporated in international law and their expression in the Australian domestic legal system.[36] To some degree, this is accounted for by existing legal principles that protect human rights in, for example, the Australian Constitution and common law. It is sometimes argued that further protection is unnecessary. The translation of human rights as they are recognised at international law into justiciable rights and freedoms in domestic law also depends upon the willingness of the Commonwealth, state and territory legislatures to incorporate human rights protections into legislation, as we discuss in research paper 2. In this respect, Australia has been called 'Janus-faced' in its willingness to accept international human rights law treaty obligations, but recalcitrance in implementing them fully into domestic law.[37]

However, as others have observed, judicial determinations and the availability of legal remedies for human rights breaches are not necessarily the 'litmus test' of what is 'truly 'law'' in the field of rights protection. For example, '[m]any socio-economic rights are well advanced through national policies and action plans, and more often ably so than through the narrow aperture of the courts.'[38] Nevertheless, the availability of human rights principles in law provides a stronger

[34] *Human Rights Act 2004* (ACT) s 27A (under its section 27, the Act also protects cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities); *Human Rights Act 2019* (Qld) s 36.
[35] *Human Rights Act 2019* (Qld) s 37.
[36] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 8.
[37] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 436, citing Hilary Charlesworth, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia* (1995) 129.
[38] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press, 2014) 2.

framework for their enforcement, and also supports more general advocacy to advance the rights of individuals and groups.

4. Recent and current human rights litigation in Australia

Much of the focus of the research papers is on how human rights are protected through judicial mechanisms to enforce them and remedy their beach in Australian law, at both the federal and state and territory levels, as well as through the obligations that Australia has accepted under international law to submit to international mechanisms for resolving complaints.

Human rights are protected and justiciable at various levels of the Australian domestic legal system and through different sources of domestic law. This encompasses the Commonwealth Constitution, the common law, along with Commonwealth and state and territory legislation.

Our review of recent and current human rights litigation in Australia from 2015 to date provides an indication of the availability of judicial remedies for violations of different human rights across the entire framework of the domestic legal system. Complaints brought by individuals and groups to international human rights treaty bodies are addressed in research paper 7.

Human rights protection issues have arisen in a number of cases decided by the High Court in the period from 2015 to date, including in a number of Commonwealth constitutional cases. These are discussed in various parts of the research papers. They include:

- a challenge to the constitutional validity of a 'paperless arrest' statutory provision entitling Northern Territory police officers to arrest and hold a suspect for up to four hours without warrant, on the basis that it infringed Chapter III limitations of the Constitution on executive detention and impaired the integrity of Chapter III courts; [39]
- appeals concerning the application of procedural fairness to assessments of Australia's treaty obligations, including non-refoulement, in respect of asylum seekers held in Australian immigration detention whose identities were published online by the Department of Immigration in a data breach; [40]
- a challenge, arguing an invalid exercise of Chapter III judicial power, to that part of the 'character test' provision of the *Migration Act 1958* (Cth) requiring the Minister for Immigration to cancel visas of individuals where satisfied they have a substantial criminal record, a consequence of their visa cancellation being those individuals' detention as unlawful non-citizens; [41]
- a challenge to a provision of the *Migration Act* purporting to prevent the Minister for Immigration from divulging confidential information from intelligence or security agencies to a court reviewing an exercise of his power under the 'character test' provision as it applies to

[39] *North Australian Aboriginal Justice Agency v Northern Territory of Australia* (2016) 256 CLR 569.
[40] *Minister for Immigration v SZSSJ* (2016) 259 CLR 180.
[41] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 339.

members and associates of groups involved in criminal conduct, as denying a Court exercising jurisdiction under s75(v) of the Constitution evidence necessary to do so; [42]

- a constitutional challenge to the lawfulness of the Commonwealth's regional processing arrangements under which asylum seekers are detained on Nauru, as an exercise of judicial power by the executive beyond constitutionally permissible purposes for the detention of aliens; [43]
- a challenge to the lawfulness of Australia's regional processing arrangements with Papua New Guinea following a decision of the Supreme Court of Papua New Guinea finding the treatment of unauthorised maritime arrivals detained on Manus Island unconstitutional under Papua New Guinea law; [44]
- an appeal from a decision of the Federal Court that interpretation of a provision of the *Migration Act* consistent with the Refugee Convention would require a decision-maker not to have regard to the length, conditions, duration and consequences of detention of an individual asylum seeker in determining if they faced a 'threat to liberty' amounting to 'serious harm', thereby potentially giving rise to protection obligations; [45]
- a challenge to the validity of provisions of the *Migration Act* authorising the detention of asylum seekers brought to Australia from a regional processing country, for a temporary purpose, on the basis that they purported to authorise an invalid exercise of judicial power by the executive; [46]
- a challenge to provisions of New South Wales electoral funding legislation imposing caps on political donations in State elections, as well as prohibiting indirect campaign contributions and political donations by property developers in State and local elections, as an invalid burden on the implied freedom of political communication under the Commonwealth *Constitution*; [47]
- a challenge to provisions of Tasmanian legislation empowering police officers to direct protestors to leave and stay away from forestry lands for statutorily defined periods, at risk of arrest and criminal penalties, as imposing an unjustified limitation upon the implied freedom of political communication; [48]
- an appeal from a decision of the Supreme Court of the Northern Territory on the lawfulness and necessity of a public drunkenness arrest of an indigenous man, including consideration of the common law protection of the right to personal liberty and the operation of a 'reasonable grounds' test for protective custody, in the context of the potential for stereotyping; [49]

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[42] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.
[43] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.
[44] *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622.
[45] *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610.
[46] *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582.
[47] *McCloy v New South Wales* (2015) 257 CLR 178.
[48] *Brown v Tasmania* (2017) 261 CLR 328.
[49] *Prior v Mole* (2017) 261 CLR 265.

- a case challenging, as an impermissible burden on the implied freedom of political communication, Victorian legislation establishing safe access zones around abortion clinic premises; [50]
- a challenge to Tasmanian legislation establishing safe-access zones around abortion clinic premises, also on the basis of the operation of the implied freedom of political communication; [51]
- a challenge under the implied freedom of political communication the lawfulness of provisions of New South Wales electoral funding legislation imposing caps on the political expenditure of 'third-party campaigners' in State elections significantly lower than those imposed upon political parties and candidates, elected members and their associated entities; [52]
- the appeal of a decision finding the termination of a Commonwealth public servant's employment was constitutionally unlawful as in breach of the implied freedom of political communication, the termination occurring on the basis that the public servant breached the Australian Public Service Code of Conduct by anonymously tweeting criticisms of the government's refugee policy; [53]
- a challenge to legislation providing for a court to order that a person convicted of a terrorist offence be detained for a further period of imprisonment after the expiration of a sentence of imprisonment;[54]
- a challenge to the validity of a search warrant used to obtain information from a journalist on the grounds that it did not adequately disclose the object of the warrant with reference to the offence alleged;[55]
- a challenge, by persons born outside Australia who were of Aboriginal heritage, to decisions to cancel their visas rendering them liable to be removed from Australia;[56]
- an issue as to whether jurisdiction conferred on a Tribunal under a State Act to hear and determine a complaint of discrimination on the grounds of disability referred to it involved the exercise of judicial power by a body that was not a 'court of a State';[57]
- a recent successful challenge to the constitutional validity of indefinite immigration detention.[58]

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[50] *Clubb v Edwards* (2019) 267 CLR 171.
[51] *Preston v Avery*- heard with *Chubb v Edwards* (2019) 267 CLR 171.
[52] *Unions NSW v New South Wales* (2019) 264 CLR 595.
[53] *Comcare v Banerji* (2019) 267 CLR 373.
[54] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166
[55] *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502.
[56] *Love v Commonwealth* (2020) 270 CLR 152. See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and Anor v Montgomery* (S192/2021) argued before the High Court in April 2022.
[57] *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16; 276 CLR 216.
[58] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37; 97 ALJR 1005.

Whilst important, constitutional and human rights cases that arise for appellate determination, including by the High Court, represent only a small proportion of the human rights issues that are resolved throughout Australia, and internationally, by a variety of adjudicative and other mechanisms. We examine these other mechanisms in various research papers.

5. The COVID-19 pandemic and the legality of constraints on human rights.

Responding to the pandemic has tested the powers, resources and resolve of governments across the globe[59]

During the latter stages of writing these research papers an unanticipated and unprecedented international crisis eventuated with continuing impact. The COVID 19 crisis has highlighted the limitations of statutory, common law and constitutional human rights and the tension between such rights and the 'right' to health through the prevention and control of disease.

The COVID-19 pandemic has given rise to a plethora of legislative, regulatory and administrative measures. An electronic search of Australian law in September 2021 using the term COVID-19 elicited reference to 883 'legislative' measures and 8,253 'judgments'.

A subsequent electronic search in February 2014 identified over 20,000 cases and over 1,300 legislative or regulatory provisions.

At both state and federal level various laws have been introduced to prevent or inhibit the spread of the COVID 19 virus and to penalise those who do not comply. These laws restrict, in various ways, commercial activities, interstate and intra state travel, employment, education, freedom of movement, and various social and recreational activities, amongst other things.

For example, on 24 April 2020, the Victorian Parliament passed the *COVID-19 Omnibus (Emergency Measures) Act 2020*. This introduced a number of ostensibly temporary reforms as part of the State's response to the COVID-19 pandemic. The Act included a legislative override provision that would enable emergency regulations to be put in place to override justice-related laws without Parliament having to sit; more flexible remand arrangements; judge-only trials and greater use of audio-visual technology in the criminal justice system; new processes to safeguard prisons and isolation provisions for youth justice facilities.

A number of COVID 19 legal and regulatory measures have been the subject of legal challenges in courts in Australia and in other countries. The COVID-19 crisis has highlighted the tension between common law 'rights', statutory 'protections' and executive decision-making. A number of challenges to both purported exercises of statutory powers and determinations by the executive at both state and federal level have been framed in terms of common law rights and constitutional protections.

[59] *Borrowdale v Director-General of Health* [2020] NZHC 2090 [1].

In a Victorian case Niall JA made the following observations:

> At some point in early 2020, the COVID-19 virus entered the Australian community. COVID-19 is a highly infectious disease that has the potential to result in significant illness or death in humans who are infected. It is transmitted from person to person via airborne or aerosol particles exhaled from an infected person, and inhaled or introduced through contact with contaminated surfaces by a person who is susceptible to the disease. The disease has an incubation period of a few days, but a person may be infectious before the onset of symptoms. Once it takes hold within a community, the rate of infection may increase exponentially.
>
> There have been a variety of responses from both the State and Commonwealth governments to COVID-19. They have included encouraging and educating members of the community about the need for hygiene (e.g. frequent hand washing), social distancing, and the wearing of face masks. They have also involved, at the Commonwealth level, closing or heavily restricting access across the international border, so as to reduce the risk of infected persons coming into Australia. Many, if not all, persons arriving from overseas have been required to stay a period of time in quarantine.
>
> In Victoria, there have been, and continue to be at the time of the hearing of this proceeding, a variety of measures imposed to address the spread of COVID-19. They have included requiring people to wear face masks, to record their entry into buildings and other places by the use of a QR code, restricting the type of workplaces that may be open, capping the number of people who can be present at public gatherings and in certain premises based on floor space, and a curfew. Relevantly for this proceeding, the measures have included the making of mandatory directions under the *Public Health and Wellbeing Act* (the '*PHW Act*') that restrict movement of persons within the community.[60]

Legal challenges to such measures have been largely unsuccessful.

5.1 Border closures

Clive Palmer and his mining entity Minerology failed in their challenge to the closure of the Western Australian border. The High Court held that the legislative provisions relied upon by the Western Australian Government for closure of the border[61] were not invalid as they did not impermissibly infringe the protection of freedom of interstate trade, commerce and intercourse incorporated in section 92 of the *Constitution*.[62] Kiefel CJ and Keane J in a joint

[60] *Cotterill v Romanes and Sutton* [2021] VSC 498 [1]-[3].
[61] The *Emergency Management Act 2005* (WA) and/or the *Quarantine (Closing the Border) Directions* (WA)
[62] *Palmer v Western Australia* [2021] HCA 5, 95 ALJR 229.

judgment noted that no relevant distinction can be drawn as between the implied freedom of political communication and the freedoms sought to be protected by section 92.[63]

In their opinion:

> Section 92 may be understood to preclude a law which burdens any of the freedoms there stated, as subjects of constitutional protection, where the law discriminates against interstate trade, commerce or intercourse and the burden cannot be justified as proportionate to the non-discriminatory, legitimate purpose of the law which is sought to be achieved. Whether it is proportionate is to be determined by the tests of *structured proportionality* as explained by this Court.[64] (emphasis added)

> There can be no doubt that a law restricting the movement of persons into a State is suitable for the purpose of preventing persons infected with COVID-19 from bringing the disease into the community. Further, the matters necessary to be considered before such restrictions can be put in place, including with respect to an emergency declaration and the shortness of the period of an emergency declaration, suggest that these measures are a considered, proportionate response to an emergency such as an epidemic.[65]

Edelman J was also of the view that to avoid invalidity by offending the guarantee in respect of trade, commerce or intercourse the burden must be justified by a transparent analysis of *structured proportionality*.[66]

Although joining the other members of the Court in rejecting the claims of the plaintiffs, Gageler J also rejected the *structured proportionality* methodology adopted by Kiefel CJ, Keane and Edelman JJ. In his view:

> … the standard to be met for a differential burden on interstate trade or commerce or on interstate intercourse to be justified as a constitutionally permissible means of pursuing a constitutionally permissible non-discriminatory legislative end should remain the *standard of reasonable necessity* authoritatively determined [by the High Court in an earlier case].[67] (emphasis added).

Gordon J also adopted and applied the '*reasonable necessity*' or '*reasonable regulation*' test.[68] In her view, conducting the relevant legal inquiries is 'not assisted by adopting structured proportionality as a tool of analysis'.[69]

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[63] [61].
[64] [62].
[65] [77].
[66] [217]. See also [264]-[276].
[67] [94] referring to *Betfair Pty Ltd v Western Australia* [2008] HCA 11, 234 CLR 418. This was said [at 113] to be indistinguishable from the 'reasonably required' standard adopted by the majority of the Court in *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.
[68] [192].
[69] [198].

Importantly, because the parties could not agree on the facts, the matter was initially remitted to the Federal Court for the purpose of adducing evidence. On 25 August 2020 Rangiah J made findings of fact. These included the finding that at the time there was no known vaccine, and no treatment presently available to mitigate the risks of severe medical outcomes or mortality for a person who contracts COVID-19.[70] The existing border restrictions were found to have been effective to a 'very substantial extent' in reducing the probability of COVID-19 being imported into Western Australia from interstate.

However, times have changed. Vaccines became available and were administered to a large proportion of the Australian population. This may impact on whether various COVID-19 measures are reasonably necessary or proportionate. On the other hand, there are also now much more transmissible variants of the disease.

In May 2021, a Federal Court challenge was instituted against the Commonwealth Governments ban on Australian citizens returning from India.[71] This followed a directive under the *Biosecurity Act 2015* (Cth) whereby those in breach of the ban face fines or imprisonment. Under the *Biosecurity Act,* the Minister may issue directions 'if the requirement is no more restrictive or intrusive than is required in the circumstances' and 'the manner in which the requirement is to be applied is not more restrictive or intrusive than is required in the circumstances'.

The common law right of citizens to re-enter their country of citizenship[72] was invoked in the Federal Court challenge to the validity of a determination made by the federal Health Minister under s 477(1) of the *Biosecurity Act* prohibiting Australian citizens from returning to Australia on international flights if they had been in India for the preceding 14 days.[73]

Thawley J conveniently summarised the relevant approach adopted by courts in Australia to considerations of whether common law rights are abrogated by valid legislation.

His Honour restated the principle that legislation 'will not be construed to interfere with "fundamental common law rights", freedoms or principles in the absence of unmistakable and unambiguous language'.[74]

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[70] *Palmer* [18]
[71] *Gary Newman v Minister for Health and Aged Care* (Federal Court Case NSD388 of 2021, filed on 5 May 2021).
[72] See *Potter v Minehan* (1908) 7 CLR 277 at 289 (Griffith CJ); 293-294 (Barton J); 304-305 (O'Connor J); *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 469 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Re Minster for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at [22]; *Re Canvan* (2017) 263 CLR 284 at [131]; *Love v Commonwealth* (2020) 94 ALJR 198 at [94]-[95] (Gageler J), [273] (Nettle J), [325] (Gordon J), [440] (Edelman J); *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* (2013) 215 FCR 35 at [101]-[117] (Flick J) referred to by Thawley J in *Newman v Minister for Health and Aged Care* [2021] FCA 517 at [69]-[75].
[73] *Newman v Minister for Health and Aged Care* [2021] FCA 517.
[74] Ibid at [77]. He cited with approval the observations of members of the High Court in *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and Mc Hugh JJ), referred to above.

He also made reference to a number of other High Court decisions[75] concerning the approach to interpreting statutory provisions which purport to abrogate common law rights, citing[76] the observations of French CJ in *Momcilovic v The Queen*[77]:

> The principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law. The range of rights and freedoms covered by the principle has frequently been qualified by the adjective "fundamental". There are difficulties with that designation. It might be better to discard it altogether in this context. The principle of legality, after all, does not constrain legislative power. Nevertheless, the principle is a powerful one. It protects, within constitutional limits, commonly accepted "rights" and "freedoms". It applies to the rules of procedural fairness in the exercise of statutory powers. It applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power. It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.

Applying the abovementioned approach to the question of statutory interpretation before him, Thawley J held that a determination under the relevant provision of the *Biosecurity Act 2015* (Cth) may validly prevent citizens from returning to Australia and did so on the facts of the case before him.

As he observed, the determination of the 'preferred construction is reached through common law and statutory rules of construction, including the legality principle, the application of which involves the identification of a statutory purpose from any express statement in the statute, or by inference from the text and structure of the statute and by appropriate reference to extrinsic materials'.[78]

The Ministerial power in question in *Newman* was accepted as having limits and safeguards.[79] The terms of the statute were said to require what in substance was a 'proportionality analysis to ensure that there is a rational approach to the question of

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[75] *R v Independent Broad-based Anti-Corruption Commissioner* (2016) 256 CLR 459 at [40], (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ) and [76]-[77] (Gageler J); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26].
[76] *Newman v Minister for Health and Aged Care* [2021] FCA 517 at [78].
[77] (2011) 245 CLR 1 at [43].
[78] Citing *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44].
[79] *Newman v Minister for Health and Aged Care* [2021] FCA 517 at [93].

whether a particular encroachment upon rights can be justified'.[80] Other provisions of the legislation were said to reveal an intention to restrict the ability of persons to enter Australian territory at will, whether or not there was a human biosecurity emergency and such powers were not confined to the management of biosecurity risks. Other provisions were also said to suggest an intention on the part of Parliament to infringe upon fundamental common law rights.[81]

The legislation and ministerial determination were also challenged on the grounds that they impermissibly burdened the implied freedom of citizens to enter Australia under the Commonwealth *Constitution* and exceeded the legislative power of the Commonwealth Parliament granted under s 51 of the Commonwealth *Constitution*. Unlike the question of statutory interpretation, which was dealt with expeditiously, the constitutional questions were not determined in the initial decision.

5.2 Curfews and requirements to stay at home

In *Cotterill* the plaintiff was outside her home demonstrating against the lockdown, and purporting to engage in legally permissible exercise, when she was served with an infringement notice alleging a breach of a Direction to stay at home issued under the *Public Health and Wellbeing Act 2008* (Vic) (the *PHW Act*).

In proceedings in the Supreme Court, it was contended that the Directions and/or the legislation under which they were issued were invalid because they impermissibly burdened the implied *constitutional* right to freedom of political communication. As Niall JA noted, the principles and the applicable test are well settled.[82] The relevant questions for determination are: whether the provisions impose a burden on political communication; if so, whether the purpose compatible with the constitutionally prescribed system of representative government; and if so whether the provisions appropriate and adapted to the pursuit of that purpose?

It was held that the relevant test is to be applied with reference to the legislation in question, rather than the particular exercise of power made under it.[83] In doing so, Niall JA held that the legislative provisions were valid in all of their potential operations insofar as they impose a burden on political communication. This was because of the 'legitimate purpose' they serve.[84] In the alternative, Niall JA considered the challenge to the Directions and held that they were valid:

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[80] Ibid at [94].
[81] Ibid at [96].
[82] Ibid, [8] citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 200–1 [23]; [2015] HCA 34 (French CJ, Kiefel, Bell and Keane JJ); *LibertyWorks Inc v Commonwealth* [2021] HCA 18, [44] (Kiefel CJ, Keane and Gleeson JJ).
[83] Ibid [9].
[84] Ibid.

> As was the case in *Palmer*, "it cannot be denied that the importance of the protection of health and life amply justifies the severity of the measure" whether those measures are assessed at the level of the statute or the Directions [85]

In the proceeding the standing of the plaintiff was challenged given that the Directions under which the infringement notice had been given had been repealed and the infringement notice had been withdrawn. Niall JA accepted that the plaintiff had the requisite standing to bring the proceeding.[86]

In November 2020, a challenge to Victoria's COVID-19 lockdown measures, and in particular the 9pm to 5am curfew affecting all people in the greater Melbourne area, [87] was brought in the Supreme Court of Victoria. The curfew was purportedly imposed pursuant to statutory powers exercisable when a State of Emergency was in effect.[88] The day before the expedited hearing was due to commence the curfew was revoked on the basis of a determination by public health officials that it was no longer a proportionate measure.

The plaintiff was a restaurant owner alleging that her business income had been adversely impacted. It was contended, inter alia, that the decision unlawfully limited her human rights recognised by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and in particular her right to freedom of movement and liberty.

Ginnane J accepted that the evidence established that the limitation of, and restrictions on, human rights caused by the curfew were, at least in the case of the plaintiff, proportionate to the purpose of protecting public health. Such evidence was said to have established that there were no other reasonably available means to achieve that purpose in the emergency circumstances presented by the second wave of the pandemic.[89] None of the grounds relied upon by the plaintiff were accepted. It was, however, accepted that the plaintiff had standing to bring the proceeding.[90] Although the case was unsuccessful no order for costs was made against the plaintiff.[91]

In a further Victorian case, a business owner challenged the lockdown measures introduced by the State Government. These have encompassed notices issued by the Director General of Health, purportedly under s 70 of the *Health Act 1956* (Vic), and the exercise of 'emergency powers' under the *Public Health and Wellbeing Act 2008* (Vic).

A restaurant owner whose business was adversely affected by the lockdown measures commenced proceedings in the High Court seeking declarations that the directions issued were invalid as they infringed the implied freedom of movement in the *Constitution.* Such

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[85] Ibid [302] referring to *Palmer v Western Australia* [2021] HCA 5, [81] (Kiefel CJ and Keane J).
[86] Ibid [132]-[133], [142].
[87] Made pursuant to the *Public Health and Wellbeing Act 2008* (Vic).
[88] Declared pursuant to the *Emergency Management Act 2013* (Vic).
[89] *Loielo v Giles* [2020] VSC 722 at [21].
[90] [145], [265]. The decision of the Court of Appeal in *Maguire v Parks Victoria* [2020] VSCA 172 was said (at [136]) to summarise the relevant authorities on standing.
[91] *Loiello v Giles (No 2)* [2020] VSC 864.

freedom was said to be implied from the structure and text of the *Constitution*, as part of the implied freedom of political communication, or implied by the free trade between states provided for in s 92 of the *Constitution.* The High Court unanimously rejected all of the claims and clarified that there was no implied constitutional freedom of movement.[92]

Although these cases arose out of economic loss said to have been suffered as a result of the various COVID-19 measures that were challenged, they were not claims for damages. Insofar as the challenges were based on constitutional rights, as noted by Brennan CJ in *Kruger v the Commonwealth*:[93]

> The *Constitution* creates no private rights enforceable directly by an action for damages. It "is concerned with the powers and functions of government and the restraints upon their exercise", as Dixon J said of s 92 in *James v The Commonwealth*. The *Constitution* reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes. The causes of action enforceable by awards of damages are created by the common law (including for this purpose the doctrines of equity) supplemented by statutes which reveal an intention to create such a cause of action for breach of its provisions. If a government does or omits to do anything which, under the general law, would expose it or its servants or agents to a liability in damages, an attempt to deny or to escape that liability fails when justification for the act done or omission made depends on a statute or an action that is invalid for want of constitutional support. In such a case, liability is not incurred for breach of a constitutional right but by operation of the general law. But if a government does or omits to do something the doing or omission of which attracts no liability under the general law, no liability in damages for doing or omitting to do that thing is imposed on the government by the *Constitution*.

5.3 Public and religious gatherings

Subordinate legislative instruments made by the Commonwealth,[94] Victoria[95] and NSW[96] in connection with the COVID-19 pandemic were challenged in the Federal Court in order to enable Jewish religious observances to take place.

It was contended that the COVID-19 constraints did not preclude participation in religious services in NSW and Victoria relying upon the principle of legality and international treaties signed by Australia. The State and Commonwealth provisions were said to be invalid on the

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[92] *Gerner v Victoria* [2020] HCA 48 (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
[93] (1997) 190 CLR 1, 46.
[94] *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) made under s 475 of the *Biosecurity Act 2015* (Cth).
[95] *Restricted Activity Directions (Victoria) (No 26)* (Vic) made under s 200 of the *Public Health and Wellbeing Act 2008* (Vic).
[96] *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) made under s 7 of the *Public Health Act 2010* (NSW).

grounds of unreasonableness to the extent that they interfered with freedom of religion expressed in s 116 of the *Constitution*, or otherwise implied.

The proceeding encompassed claims for declaratory relief and interim injunctions. Griffiths J held that the applicants had failed to establish that there was a serious question to be tried and thus refused to grant the relief sought.

The reliance of the 'principle of legality' was said to be misconceived.[97] As Griffiths J noted, with reference to the judgment of French CJ in *Adelaide City Corporation*[98], where constructional choices are open, courts construe statutes so that they do not encroach upon fundamental common law rights and freedoms.[99] However, as Griffiths J went on to observe, this 'principle of legality' is problematic and 'can at most have limited application in the construction of legislation which has amongst its objects or purpose the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked'.[100] In the present case the very object of the two State legislative instruments was to regulate, abrogate or curtail a range of freedoms or rights. Griffiths J cited[101] with approval the observation by Gageler J that '…any common law principle or presumption of interpretation must surely have reached the limit of its operation where its application to read down legislation plain on its face would frustrate an object of that legislation or render means by which the legislation sets out to achieve that object inoperative or nonsensical …'[102]

Griffiths J proceeded to hold that the reliance on the Constitutional prohibition on making *laws* that prohibit the free exercise of religion was only relevant to the Commonwealth and inapplicable in any event. The Commonwealth legislative instrument in issue did not, on its face, prohibit the free exercise of any religion. As he observed, any such prohibition or restriction might flow from directions made by the Commonwealth Health Minister[103] but no such direction was challenged by the applicants in the proceeding. Moreover, any such direction would not be a 'legislative instrument' and the legal challenge in the case was to legislative instruments and not administrative decisions. Moreover, the reliance on s 116 of the *Constitution* was said to be inconsistent with case law which establishes that in determining whether a law is invalid, the focus is on the *purpose* of the law and not its *effect*.[104]

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[97] [79].
[98] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; 249 CLR 1 at [41]-[42].
[99] [80].
[100] [81] quoting Gageler and Keane JJ in *Lee v New South Wales Crime Commission* [2013] HCA 39; 251 CLR 196 at [313]-[314].
[101] At [82].
[102] *R v Independent Broad-Based Anti-Corruption Commissioner* [2016] HCA 8; 256 CLR 459 at [77].
[103] Under s 477(2) of the *Biosecurity Act.*
[104] At [87] citing *Kruger v Commonwealth* [1997] HCA 27; 190 CLR 1 at 160 per Gummow J, with whom Dawson J agreed.

The argument that there was an *implied* constitutional right of religious freedom was also rejected.[105]

The contention that the legislative instruments were open to challenge on the ground of 'legal unreasonableness' was also rejected.[106]

The challenge based on the notion of 'proportionality' was also rejected,[107] particularly given the 'high threshold' that this entails.

Griffiths J was also of the view that there was a fundamental problem with the *nature of the interlocutory relief* sought. An order was sought restraining the respondents from preventing the applicants from celebrating their religious observances on particular dates 'in accordance with social distancing rules'. This was said to be problematic in that it invited the Court to re-write the provisions in the two State instruments relating to exemptions to permit the proposed religious activities.[108]

Given the interlocutory nature of the relief sought Griffiths J proceeded to consider the question of the balance of convenience[109] and discretionary considerations.[110]

Although noting that it was important not to lose sight of the *public interest* context in which the proceeding was brought[111]in ordering the unsuccessful applicants to pay the respondents' costs Griffith J observed:

> That it is not public interest litigation is vividly illustrated by the fact that the terms of the interlocutory relief sought would benefit only three applicants (and their congregations) and not the broader religious community.[112]

5.4 Mandatory vaccinations

A number of cases have arisen out of the refusal of persons to agree to mandatory vaccinations.[113]

In other research papers there is reference to other cases arising out of the COVID-19 pandemic.

At the time of writing recent reported cases include:

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[105] [88]-[89].
[106] [91]-[97].
[107] [98]-[101].
[108] [102]-[103].
[109] [104]-[109].
[110] [110]-[114].
[111] [110].
[112] [117].
[113] See e.g., *Health Care Complaints Commission v Caruana* [2024] NSWCATOD 13; *Martsoukos v Secretary, Department of Education* [2024] NSWPIC 16; *Ogbonna v State of Queensland (Queensland Health)* [2024] QIRC 1.

- an application for judicial review of a penalty notice for breach of a Covid-19 public health order[114]
- an application by a plaintiff for a protective costs order (see research paper 11) in proceedings in the Northern Territory challenging the validity of directions for mandatory vaccination of workers made under the *Public and Environmental Health Act 2011* (NT). The application was refused;[115]

5.5 Damages proceedings

Apart from Covid-19 litigation which has explicit human rights dimensions, numerous proceedings for damages have been brought, including a number of class actions, arising out of personal injuries suffered by those who contracted Covid-19 as a result of allegedly inadequate infection control measures in various places, including cruise ships and nursing homes. **5.6 New Zealand cases**

In New Zealand there have been a number of civil and criminal cases in which the legality of COVID 19 measures have been challenged.[116]

In *Borrowdale,*[117] the High Court held that the requirement that New Zealanders stay at home for the nine-day period between 26 March and 3 April was justified but unlawful. At the time of judgment in that case COVID 19 had infected over 21.5 million people worldwide and had killed 760,000.[118] The stay-at-home orders were challenged on a number of legal grounds. It was accepted, subject to the question of legality, that the orders in j question were a necessary, reasonable and proportionate response to the public health emergency posed by COVID 19 at the relevant times.[119]

One issue resolved by the Court was whether the directions were *ultra vires* insofar as they went beyond the permissible limits of the legislation under which they were purportedly made. That challenge, along with a number of others failed. The challenge to the restrictive measures succeeded on a narrow technical point. The Court accepted that the Executive had the legal power to impose the restrictive measures but found that during the first nine days

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[114] *Kosciolek v Commissioner of Police* [2024] NSWSC 15.
[115] *Phillips v Chief Health Officer* [2022] NTSC 29.
[116] See e.g., *David Simon Barton v R* [2020] NZSC 24; *Sandhu v Gate Gourmet New Zealand Limited* [2021] NZCA 2013; *Nottingham v Arden* [2020] NZCA 144*; Fraser Wright Maddigan v New Zealand Police* [2021] NZHC 1035; *Christiansen v The Director-General of Health (reasons)* [2020] NZHC 887; *Cama Products Ltd v Power Parts (2018) Ltd* [2020] NZHC 802; *B v Arden* [202] NZHC 814; *A v Arden* [2020] NZHC 796; *Hikaka v New Zealand Police* [2020] NZHC 716; *Savill v AMFL Ltd* [2020] NZHC 655; *Prescott v New Zealand Government* [2020] NZHC 653; *R v Ekeroma and Fatu* [2020] NZHC 565; [2020] NZHC 562.
[117] *Borrowdale v Director-General of Health* [2020] NZHC 2090 (Thomas, Venning and Ellis JJ).
[118] World Health Organisation, *Coronavirus disease (COVID-19) Situation report – 250* (17 August 2020) cited at [1], note 1.
[119] Ibid [97].

of the lock-down had failed to exercise such power.[120] The restrictive measures were held to be limitations on rights under the New Zealand human right legislation[121] that were not prescribed by law.[122] Thus, it has held that the effect of statements made was that New Zealanders believed that they were required by law to stay at home for a none day period when this was not the case. A declaration to this effect was made.

In research paper 9 we refer to a number of recent cases in which issues of standing have arisen in proceedings seeking to challenge various public health measure introduced to deal with the COVID-19 pandemic.

5.7 Commentary

The failure, to date at least, of most legal challenges to various types of measures introduced, at state and federal level, to deal with the COVID 19 pandemic illustrates both the tension between different types of human rights and the limited ambit of numerous common law, statutory and constitutional protections of particular rights in the face of countervailing considerations.

Whilst *Palmer* was concerned with the constitutional right to 'free' interstate trade, commerce and intercourse, the judicial methodology for considering whether the infringement of rights is legally permissible is equally applicable to other constitutional rights, including the implied right to freedom of political communication.

In *Palmer* both the '*reasonable necessity*' test and the '*structured proportionality*' analysis by different justices led to the same conclusion that the statutory public health provisions justified the burden that the application of those provisions placed on interstate trade and commerce.

In comparing the 'test' or 'tool of analysis' of '*structured proportionality'* compared with '*reasonable necessity'* Gageler J noted that he was 'conscious of being drawn yet again into an abstracted debate about methodology more appropriate to the pages of a law review than to the pages of a law report.' [123] Whether for the purpose of a law review or a law report, it is difficult to envisage circumstances where the application of these ostensibly divergent judicial methodologies would lead to a different outcome.

In any event, judicial determination of the legality of COVID-19 measures and their impact on human rights is problematic. As Professor George Williams has noted[124], with reference to border closure measures: legal processes are slow; constitutional challenges in the High

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[120] [236].
[121] *New Zealand Bill of Rights Act 1990*, including the rights to freedom of movement, peaceful assembly and association.
[122] [240].
[123] [140].
[124] George Williams, 'Federal parliament has the power to rule on borders', *The Australian* 3 September 2021. Available at: https://www.theaustralian.com.au/commentary/federal-parliament-has-the-power-to-rule-on-borders/news-story/180d1be838e60cb4a8fba6064f4edd14.

Court often require remittal to the Federal Court for fact finding; the courts consider only a narrow range of factors that do not encompass broader social and economic considerations. Various COVID-19 measures, including border closures, necessitate the weighing up the public health, economic, social and political considerations which are more appropriately matters for Parliament rather than the courts.

However, parliamentary processes have their own limitations as is evident from the failure of successive federal governments to adopt a more comprehensive national human rights framework and the failure of state or territory governments, other than the ACT, Victoria and Queensland, to adopt wide-ranging human rights legislation.

Notwithstanding such legislative inertia Australian courts and human rights organisations will continue to play an important role in determining the ambit and enforceability of human rights.

We hope that these research papers may be of some assistance to those whose rights have been violated and to those who advocate and seek redress on their behalf.

They will be published at a later date in book form.

It should be borne in mind that human rights law in Australia is constantly evolving.

In a number of the research papers reference is made to electronic data bases which contain updated information on human rights law and also to climate change litigation in which remedies have been sought based on, inter alia, human rights provisions.

In general, we recommend refence to the *Guide to Human Rights Law* published online by the University of Melbourne which provides detailed and up to date information on most of the topics covered by our research papers.[125]

This provides detailed and updated information and electronic links to:

- Australian human rights law, including:
    - Starting Australian human rights research
    - Federal human rights framework
    - State & Territory human rights framework
        - Australian Capital Territory
        - New South Wales
        - Northern Territory
        - Queensland
        - South Australia
        - Tasmania
        - Victoria
        - Western Australia

[125] Available at https://unimelb.libguides.com/c.php?g=928011&p=6704332.

    - Finding Australian cases on legislative provisions
    - Finding Australian cases by topic
    - International law and Australian domestic law
    - UN treaties - Australia's ratification status
    - Monitoring compliance with international human rights obligations
    - Human rights ranking in the Rule of Law Index
    - Books
    - Finding journal articles
    - Human Rights Associations & Centres
    - Human rights blogs
- Comparative information is available in respect of other jurisdictions as well as more general detailed information including on:
    - scholarly journal articles on human rights law
    - international, comparative and global human rights journals
    - recent print and e-books on international and comparative human rights law
    - Oxford bibliographies online-human rights law
    - reference and encyclopaedic books on human rights
    - national civil society organisations and national human rights institutions
    - human rights documents available online

The links provide access to various relevant databases and other resources.

This includes links to legislation and treaties and to official sources including government information websites.

The Research Guide is maintained by the Law Library, Melbourne Law School.