IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M45 of 2015

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED (ACN 118 017 842)
First Plaintiff

and

MIRANDA MARIA BOWDEN
Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA
Defendant

PROPOSED SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO INTERVENE (ANNOTATED)

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis of intervention

2. By summons filed on 13 July 2015, the Australian Human Rights Commission (**the Commission**) seeks leave to intervene, or alternatively appear as *amicus curiae*, in this proceeding.

3. The Commission seeks leave to make submissions on the following issues that arise in relation to question 1 in the Special Case, which it will address in the following order:

   a. the relevance of the right to liberty in international human rights law, including as it relates to pre-trial executive detention, to the concepts of judicial power and the judicial process contemplated by Ch III of the Constitution and to the institutional integrity of courts protected by the principle in *Kable v Director of Public Prosecutions (NSW)*;[1]

   b. the content of the right to liberty in international human rights law and the role of an independent judiciary in protecting that right;

   c. the purpose or purposes of the detention authorised by the impugned provisions of the *Police Administration Act* (NT) and whether the impugned provisions permit such detention for no longer

[1] (1996) 189 CLR 51 (***Kable***).

Australian Human Rights Commission
Level 3, 175 Pitt Street
SYDNEY NSW 2000

Telephone (02) 8231 4205
Fax (02) 9284 9787
Ref: Graeme Edgerton

than is reasonably capable of being seen as necessary to achieve that purpose.

4. In relation to the third issue identified above, the Commission seeks leave to intervene in support of the plaintiffs. The Commission does not seek to make submissions on the question of the application of the separation of powers enshrined in Ch III of the Constitution to the legislative power of the Parliament under s 122 of the Constitution or to the legislative power of the Legislative Assembly of the Northern Territory.

5. These submissions are the submissions of the Commission and not of the Commonwealth Government.

Part III: Why leave to intervene should be granted

6. The Commission is an independent body established by the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) which has the statutory function of intervening in legal proceedings that involve human rights issues, where the Commission considers it appropriate to do so and with the leave of the court hearing the proceeding, subject to any conditions imposed by the court.[2] The term 'human rights' is defined in s 3 of the AHRC Act to include the rights and freedoms recognised in the International Covenant on Civil and Political Rights (**ICCPR**).[3]

7. Question 1 in the Special Case involves consideration of concepts for which the ICCPR makes provision, in particular the right to liberty, including the right of a person arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorized by law to exercise judicial power.

8. The Commission has expertise in relation to the interpretation and application of Australia's international human rights obligations, including those arising under the ICCPR. The Commission's relevant expertise is described in the affidavit of Professor Gillian Triggs sworn 13 July 2015 at paragraphs 9 to 17.

9. In dealing with the validity of police powers of detention exercised throughout the Northern Territory for a range of offences, the proceeding involves issues of general principle and public importance which may affect, to a significant extent, persons other than the second plaintiff and the clients of the first plaintiff.[4]

---

2 Section 11(1)(o) of the AHRC Act.

3 ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

4 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534.

10. In addressing those matters, the Commission's submissions aim to assist the Court in a way that it may not otherwise be assisted.[5] Question 1 in the Special Case, as developed in the plaintiffs' submissions filed 6 July 2015, is concerned with the punitive character of the impugned provisions (said to constitute an exercise or incident of judicial power) and with the role of judicial oversight of executive detention as an aspect of the institutional integrity of State and Territory courts. Those submissions implicate the fundamental common law right to liberty (which right is recognised in article 9(1) of the ICCPR). The plaintiffs' submissions do not address international human rights principles concerning the importance of the judicial role in protecting the right to liberty.

11. The Commission does not contend that the ICCPR or other international human rights principles concerning the right to liberty are binding in domestic law, or that the Constitution must be read to conform to, or so far as possible with, the rules of international law.[6] Nonetheless, the Commission's experience may provide some insight into international human rights principles as developed in international human rights jurisprudence. Such jurisprudence is relevant at least insofar as it is consistent with the common law which, in turn, informs the concepts of judicial power, the judicial process and the institutional integrity of courts for the purposes of Ch III.

12. Should the Commission be granted leave, its intervention will neither delay nor unduly prolong the proceedings, nor lead to the parties incurring additional costs in a manner that would be disproportionate to the assistance that is proffered.[7]

Part IV: Applicable provisions

13. The Commission adopts the list of applicable provisions contained in Annexure A to the written submissions of the plaintiffs.

Part V: Issues addressed

Right to liberty at common law and its relationship to judicial power

14. Personal liberty is recognised as amongst the most fundamental common law rights.[8] Justice Fullagar described it as 'the most elementary and important of all common law rights'.[9] In *Williams v The Queen*, Mason and

---

5 *Levy v State of Victoria* (1997) 189 CLR 579 at 604 (Brennan CJ).

6 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 592-594 [69] and [71] (McHugh J).

7 *Levy v State of Victoria* (1997) 189 CLR 579 at 605 (Brennan CJ).

8 See, eg, *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J); *Williams v The Queen* (1986) 161 CLR 278 (***Williams***) at 292 (Mason and Brennan JJ); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-523 (Brennan J); *Michaels v The Queen* (1995) 184 CLR 117 at 129 (Gaudron J); *McGarry v The Queen* (2001) 207 CLR 121 at 140-142 [59]-[61] (Kirby J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] (Gleeson CJ); *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at 155-156 [423] (Crennan and Bell JJ).

9 *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

Brennan JJ referred to Blackstone's *Commentaries* for the proposition that personal liberty was 'an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause"'.[10] While Ch III of the Constitution does not contain express guarantees of personal liberty,[11] it nevertheless 'gives practical effect to the rule of law on which the Constitution depends for its efficacy'.[12] The rule of law's 'abhorrence of arbitrary detention or imprisonment'[13] is well established. Furthermore, the guarantee of liberty has been described as a 'constitutional objective' advanced by the separation of judicial power embodied in Ch III.[14]

15. The experience of democratic states, and particularly the development and working of the system of government in England, led the framers of the Australian Constitution to the proposition that it is necessary for the protection of the individual liberty of the citizen that the functions of the three branches of government should be dispersed.[15] In the structure adopted by the framers:

> The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges.[16]

16. The right to liberty is one of the 'basic rights' which is protected by ensuring that its deprivation is determined by an independent judiciary, whose judges thereby serve as 'the bulwark of freedom'.[17] Loss of liberty is 'ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide'.[18] The fundamental importance of the guarantee of liberty and the presumption against its deprivation without just cause at common law is evidenced by the judicial vindication of the guarantee via:

> ... the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark

---

10 *Williams v The Queen* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ).
11 *Totani* at 155-156 [423], citing *Kruger v Commonwealth* (1997) 190 CLR 1 at 61.
12 *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ).
13 *Commonwealth v Fernando* (2012) 200 FCR 1 at [99] (the Court).
14 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
15 *R v Davison* (1954) 90 CLR 353 at 380-381 (Kitto J). See also *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (Jacobs J).
16 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
17 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (Jacobs J).
18 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 178-179 [56] (Kirby J).

decisions down the centuries and embodied in the substance and procedure of the law to our own day.[19]

17. The common law 'does not recognise any executive warrant authorising arbitrary detention'.[20] Consistent with the rule of law's abhorrence of arbitrary detention, under the Constitution '[w]hat begins as lawful custody under a valid statutory provision can cease to be so'.[21]

18. While consideration of the effect of impugned legislation on personal liberty is, in the context of a constitutional challenge, commonly subsumed by conclusions as to whether the legislation conflicts with constitutional requirements,[22] common law principles and historical practices are relevant to determining the content of judicial power and the judicial process and discerning the defining characteristics of courts for Ch III purposes.[23]

19. Notwithstanding French CJ and Gageler J's observation that '[v]ery few common law rules were the manifestation of some fundamental characteristic of judicial power',[24] consideration of common law principles and practices remains useful and is potentially necessary when determining essential attributes of judicial process and the nature of judicial power for the purpose of Ch III analysis. That is particularly so where, as in the present case, the relevant common law principles and practices concern one of the most important and ancient common law rights.[25]

20. As will be developed below, relevant principles of international human rights law are grounded in, and largely consistent with, the common law's guarantee of personal liberty. Further, it has long been recognised that international law is a 'legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[26]

---

19 *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [36] (Lord Bingham CJ).

20 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 370 [139] (Crennan, Bell and Gageler JJ).

21 Ibid.

22 *Totani* at [424] (Crennan and Bell JJ).

23 As to historical practices and the content of judicial power, see *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ); *R v Davison* (1954) 90 CLR 353 at 382 (Kitto J); *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11 (Jacobs J); *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48]-[49] (Gummow, Hayne and Crennan JJ); *Saraceni v Jones* (2012) 246 CLR 251 at 256 [2] (the Court).

24 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2012) 251 CLR 533 (***TCL***) at [35].

25 See *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 (Jacobs J). By contrast, the common law rule at issue in *TCL* had obscure origins, operated 'haphazardly' and had been described as 'an accident of legal history': at [38] (French CJ and Gageler J).

26 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 (Brennan J, with whom Mason CJ and McHugh J agreed); see also *Dietrich v The Queen* (1992) 177 CLR 292 at 306-307 (Mason CJ and McHugh J), 319-321 (Brennan J), 337 (Deane J), 360 (Toohey J).

Detention and the administration of criminal justice

21. The process of criminal justice at common law begins either with the arrest of a person suspected of committing an offence (with or without a warrant), or the issuing of a summons for the person to appear at court. The purpose of an arrest is to enable a person suspected of having committed a crime to be brought before a court as soon as practicable, to be dealt with according to law.[27] The underlying rationale for the principle in *Christie v Leachinsky*[28] that persons are entitled to know why they are being arrested is the right to liberty: a person is not to be deprived of his or her liberty without lawful cause.[29]

22. At common law, constables have the power to arrest without warrant on suspicion of felony and the duty to take the person arrested before a justice as soon as practicable.[30] Further, there is no scope to extend the time in custody for the purpose of questioning the person or investigating the offence.[31]

23. In *Williams*, this Court emphasised that if a different balance between personal liberty and the exigencies of criminal investigation were to be struck, that would be a matter for the legislature.[32] That is, it is open to the legislature to provide for a period of pre-trial detention for the purpose of questioning the person arrested and investigating the alleged criminal conduct.

24. However, Wilson and Dawson JJ considered that if the common law position was modified, 'there must be safeguards, if necessary in the form of time limits'. In the absence of such safeguards, in some cases a power might be used to detain persons for longer periods than could be justified having regard to their basic right to freedom.[33]

25. Justice Deane has also emphasised the importance of precisely limited purposes for police powers of arrest and detention. In *Donaldson v Broomby*, his Honour said:

> Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial

---

27 *Williams* at 284-285 (Gibbs CJ), at 305 (Wilson and Dawson JJ).

28 [1947] AC 573.

29 *Johnstone v New South Wales* (2010) 202 A Crim R 422 at [43] (Beazley JA, McColl and Young JJ agreeing).

30 *Williams* at 292-293, 299 (Mason and Brennan JJ), at 303, 313 (Wilson and Dawson JJ).

31 *Williams* at 283 (Gibbs CJ), at 293-294 (Mason and Brennan JJ), at 305 (Wilson and Dawson JJ).

32 *Williams* at 292, 296 (Mason and Brennan JJ) at 313 (Wilson and Dawson JJ).

33 *Williams* at 312-313 (Wilson and Dawson JJ).

> warrant, arrest or detain an individual should be *strictly confined, plainly stated and readily ascertainable.*[34] [emphasis added]

26. The common law recognises the desirability of avoiding arbitrary arrest, which encompasses arrests that are inappropriate because the issue and service of a summons would suffice to bring the person before a court.[35]

Right to liberty in international human rights law

27. The expression of the right to liberty in article 3 of the Universal Declaration of Human Rights reflects the inalienable nature of the right described by Blackstone.[36] The common law conception of liberty formed the basis for the later articulation of the right to liberty in article 9 of the ICCPR.[37]

Arbitrary arrest or detention

28. Article 9(1) of the ICCPR provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

29. The text of article 9 is primarily based on the initial draft proposed by the United Kingdom to the first session of the Drafting Committee, a sub-organ of the United Nations Commission on Human Rights, in June 1947. Paragraph 1 of the original UK draft provided:

> No person shall be deprived of his liberty save by an arrest which is effected *for the purpose of bringing him before a court* on a reasonable suspicion of having committed a crime or which is reasonably considered to be immediately necessary to prevent his committing a crime or breach of the peace.[38] [emphasis added]

30. Limited exceptions to the prohibition on deprivation of liberty were set out in paragraph 4 of the draft (detention after sentence by a court, detention of people of unsound mind, lawful custody of minors, and lawful arrest and detention to prevent unauthorised entry into a country). Subsequently a number of other countries made further proposed limitations covering around

---

[34] *Donaldson v Broomby* (1982) 60 FLR 124 at 126 [1].

[35] See eg *Fleet v District Court* [1999] NSWCA 363 at [74] (Mason P, Priestley and Handley JJ), citing *O'Brien v Brabner* (1885) 49 JP 227; *R v Thompson* [1909] 2 KB 614 at 617, *Dumbrell v Roberts* [1944] 1 All ER 326 at 332 and *Chung v Elder* (1991) 31 FCR 43.

[36] The preamble to the Universal Declaration of Human Rights recites that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

[37] See paragraphs [29] to [31] and [41] to [43] below. See also the comments of Lord Hoffmann in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [88] in relation to the common law genesis of the right to liberty in the European Convention on Human Rights.

[38] UN Doc E/CN.4/21, annex B (United Kingdom). See MJ Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights* (1987), p 187.

40 grounds.[39] However, the Drafting Committee considered that it was undesirable to attempt a catalogue of permissible restrictions on liberty in a human rights instrument.

31. Ultimately, this issue was resolved by a proposed amendment from Australia which suggested the use of the term 'arbitrary' to cover unjustifiable deprivations of liberty, rather than seeking to list exhaustively all permissible cases of deprivation of liberty.[40] This proposal was adopted unanimously.[41]

32. As French J (as his Honour then was) has explained, article 9 is an 'indication of the value placed by Australia, as part of the international community, on the liberty of the individual and the presumption in favour of that liberty', albeit that for statutory construction purposes, the presumption gives way to specific contrary provisions.[42]

33. The prohibition of 'arbitrary' detention in article 9(1) of the ICCPR acknowledges that administrative detention will be occasionally be permissible in order to achieve particular aims. However, given the importance of the right to liberty, any restriction must be necessary to achieve a particular legitimate aim, and the degree to which the right to liberty is infringed must be proportionate to achieving that aim.[43] This entails consideration of whether there are 'less invasive means' of achieving the aim.[44] In analysing the proportionality of detention for the purposes of the equivalent provision to article 9 in the European Convention on Human Rights (**ECHR**) (Article 5),[45] the European Court has recognised that the detention of an individual is justified only as a 'last resort where other, less severe measures have been considered and found to be insufficient to safeguard the end or public interest which might require that the person concerned be detained'.[46]

34. It is not necessary for a person's initial arrest to be arbitrary in order for a subsequent period of detention to breach article 9(1).[47] A period of detention may become arbitrary over time, in the absence of appropriate justification for

---

39 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), p 216.
40 UN Doc E/CN.4/SR.95, p 4.
41 UN Doc E/CN.4/SR.95, p 7.
42 *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70 at 75.
43 United Nations Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004), at [6]; United Nations Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at [10]-[12].
44 *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 at [8.2].
45 *Convention for the Protection of Human Rights and Fundamental Freedoms*, commonly referred to as the European Convention on Human Rights, opened for signature by the member States of the Council of Europe 4 November 1950, entered into force 3 September 1953.
46 *Ladent v Poland*, Application no. 11036/03, 18 March 2008 at [54]. See generally R Clayton and R Tomlinson, *The Law of Human Rights* (2nd ed, 2009) at [6.68]-[6.70] (noting some inconsistency in the approach taken by the European Court of Human Rights to proportionality).
47 See eg *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995.

its continuance.[48] The Human Rights Committee has recorded its view that detention not in contemplation of prosecution on a criminal charge presents 'severe risks' of arbitrary deprivation of liberty.[49]

35. The protection against arbitrariness in article 9(1) of the ICCPR reflects the common law and its historical concern to protect the right to liberty from arbitrary interference[50] via an independent judiciary. Used in connection with the protective role of judicial oversight, arbitrariness is more than a 'disapproving epithet'.[51] Justice Gaudron in *Kable* described the protection of the individual from arbitrary punishment and the arbitrary abrogation of rights as 'one of the central purposes' of the judicial process.[52] Considering the equivalent provision to article 9 in the ECHR, the European Court of Human Rights noted that the purpose of Article 5 was 'to protect the individual from arbitrariness'.[53]

36. The Human Rights Committee has held that detention may be lawful and yet still in breach the right to liberty in article 9(1) of the ICCPR because it is arbitrary. In particular:

> The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law'; but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[54]

37. This test for arbitrariness has been described as part of the Human Rights Committee's 'constant jurisprudence'.[55] To the extent that the test involves consideration of the inappropriateness and injustice of an individual's detention pursuant to international law standards, it would appear to exceed the limits of the common law's concern with arbitrariness in the context of detention. It is, however, consistent with the common law's concern that detention without a judicial order be lawful and subject to judicial oversight to enable assessment of its necessity in the circumstances and, as noted above

---

48 See *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 at [8.2].

49 United Nations Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at [15].

50 See *Re Nolan; ex parte Young* (1991) 172 CLR 460 at 497 (Gaudron J).

51 Cf *Magaming v The Queen* (2013) 252 CLR 381 at [45] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

52 *Kable* at 106-107.

53 *Witold Litwa v Poland*, Application no. 26629/95, 4 April 2000; (2001) 33 EHRR 53 at [73].

54 *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 at [5.8]. See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 at [9.2].

55 *Marques de Morais v Angola*, Communication No. 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005) at [6.1].

(at [26]), arrests have been described as arbitrary by reference to concepts of appropriateness and necessity. As set out above, the Commission does not suggest that the ICCPR is binding in domestic law or that the Constitution should be read to conform to international law. Rather, the Commission submits that the principles contained in article 9 and the subsequent application of those principles are a useful point of comparison when considering the development of congruent common law principles in Australia.[56]

38. The necessity of pre-trial detention for minor offences and its proportionality to the purpose of detention, namely securing the proper conduct of criminal proceedings was considered by the European Court of Human Rights in the case of *Ladent v Poland*.[57] The case involved article 5(1)(c) of the ECHR. Article 5(1)(c) provides that a person may be deprived of liberty in the case of lawful arrest or detention effected for the purpose of bringing the person before a court of competent authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent the person committing an offence or fleeing after having done so.

39. In *Ladent v Poland*, the applicant had been a defendant in a private prosecution for slander. He was alleged to have addressed the administrator of the building where his wife had a flat using obscene language. The alleged offence carried a fine or penalty in the nature of a community service order, but not a custodial sentence. After a failure to serve a summons on the applicant, the District Court ordered that he be remanded in custody for three months and issued a wanted notice for him. The applicant was subsequently arrested and detained for 7 days until the District Court quashed the detention order and replaced it with non-custodial preventative measures. The European Court of Human Rights accepted that the applicant had not been evading justice and that his failure to appear in response to the summons had not been intentional.

40. The European Court held that article 5(1)(c) contained a proportionality requirement. In its proportionality analysis the Court considered the minor nature of the alleged offence, the lack of foundation for the conclusion that the applicant was evading justice, and the availability of alternative, less stringent measures than detention. It held that 'the detention order imposed on the applicant ... could not be considered a proportionate measure to achieve the stated aim of securing the proper conduct of criminal proceedings, having regard in particular to the petty nature of the offence

---

[56] See, for example, the references to the ICCPR in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 687-688 (Toohey J).

[57] *Ladent v Poland*, Application no. 11036/03, 18 March 2008.

which he was alleged to have committed'.[58] Accordingly, the applicant's detention in these circumstances amounted to a breach of his right to liberty.

Pre-trial detention

41. The particular principles dealing with pre-trial detention in article 9(3) of the ICCPR are also derived from the common law and recognise the importance of supervision of the criminal justice process by courts for the protection of the right to liberty. Article 9(3) of the ICCPR relevantly provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before *a judge or other officer authorized by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody ... [emphasis added]

42. Again, this paragraph was based on the initial United Kingdom draft which provided:

> Every person arrested and detained shall be brought without delay before a judge, who shall either try the case or decide, after hearing evidence, whether there is sufficient case to justify that person's trial and if so whether his liberty shall be restored to him on bail.[59]

43. Article 9(3) deals specifically with deprivations of liberty arising from arrest on a criminal charge. It applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.[60] The paragraph has been described as applying to people 'who have been arrested or detained for the purposes of criminal justice'.[61] It reflects a specific understanding, consistent with the common law, of the importance of judicial independence in the criminal justice system.

44. The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control.[62] If a person is arrested on a criminal charge, that person must be brought promptly before a court. Article 9(3) explicitly recognises that an exercise of judicial power is necessary to determine whether the person is to be detained. When a person is brought before the court, the court will determine whether the

---

58 *Ladent v Poland*, Application no. 11036/03, 18 March 2008 at [45], [55] and [56].

59 UN Doc E/CN.4/21, annex B (Great Britain).

60 United Nations Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at [32], citing *Marques de Morais v Angola*, Communication No. 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005) at [6.3]-[6.4] and *Kurbanova v Tajikistan*, Communication No. 1096/2002, UN Doc CCPR/C/79/D/1096/2002 (2003) at [7.2].

61 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (2nd ed, 2005), p 230.

62 United Nations Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at [32]; *Kulomin v Hungary*, Communication No. 521/1992, UN Doc CCPR/C/56/D/521/1992 (1996) at [11.2].

person is to be tried (and whether he or she is to be kept in remand pending trial or released on bail) or whether the person is to be released without trial.

45. The second sentence of article 9(3) requires that detention pending trial be based on an individualised determination that such detention is reasonable and necessary, taking into account all of the circumstances, for purposes such as to prevent flight, interference with evidence or recurrence of crime.[63]

46. Article 9(3) was considered by the Human Rights Committee in *Kulomin v Hungary*, which involved a Russian citizen who was detained for nine months before he was brought to trial on murder charges. His detention was regulated by legislation which gave the public prosecutor the authority to extend a person's pre-trial detention, which occurred several times. The Committee found that the public prosecutor was not sufficiently independent to constitute an officer 'authorized to exercise judicial power':

> ... article 9(3), first sentence, is intended to bring the detention of a person charged with a criminal offense under judicial control. A failure to do so at the beginning of someone's detention, would thus lead to a continuing violation of article 9(3), until cured.
>
> ... The Committee considers that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3).[64]

47. The principle identified in *Kulomin v Hungary* has been followed in a number of other cases.[65]

48. Addressing the first sentence of article 5(3) of the ECHR, which is equivalently worded to the first sentence of article 9(3) of the ICCPR and applies where a person is arrested or detained in connection with a criminal offence in accordance with article 5(1)(c), the European Court of Human Rights explained that judicial control of the initial stage of detention:

---

[63] United Nations Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) at [38]; *Kozulin v Belarus*, Communication No. 1773/2008, UN Doc CCPR/C/112/D/1773/2008 (2015) at [9.7] (collecting earlier statements).

[64] *Kulomin v Hungary*, Communication No. 521/1992, UN Doc CCPR/C/56/D/521/1992 (1996) at [11.2]-[11.3].

[65] United Nation Human Rights Committee, *Platonov v Russian Federation*, Communication No. 1218/2003, UN Doc CCPR/C/85/D/1218/2003 (2005) at [7.2]; *Sultanova v Uzbekistan*, Communication No. 915/2000, UN Doc CCPR/C/86/D/915/2000 (2006) at [7.7]; *Bandajevsky v Belarus*, Communication No. 1100/2002, UN Doc CCPR/C/86/D/1100/2002 (2006) at [10.3]; *Ashurov v Tajikistan*, Communication No. 1348/2005, UN Doc CCPR/C/89/D/1348/2005 (2007) at [6.5]; *Ismailov v Uzbekistan*, Communication No. 1769/2008, UN Doc CCPR/C/101/D/1769/2008 (2011) at [7.3]; *Kozulin v Belarus*, Communication No. 1773/2008, UN Doc CCPR/C/112/D/1773/2008 (2015) at [9.7].

> ... serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the requirements of promptness and be automatic.[66]

49. The requirements of articles 5(3) and (4) of the ECHR reinforce the primary protection against arbitrary deprivation of liberty and are intended to 'minimise the risks of arbitrariness' by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by 'securing the accountability of the authorities for that act'. This is done in order to ensure that the rule of law is not subverted and detainees are not placed beyond the 'most rudimentary forms of judicial protection'.[67]

50. The requirement of 'promptness' in bringing a detained person before a court pursuant to article 5(3) of the ECHR has been said to involve little flexibility in interpretation in order not to impair 'the very essence of the right protected',[68] with no exceptions to the requirement possible.[69] The European Court of Human Rights has also emphasised that the review provided for in article 5(3) cannot depend on the accused person having made an application (by contrast to article 5(4), which is equivalent to article 9(4) of the ICCPR).[70]

Review of deprivation of liberty

51. The importance of judicial control in protecting the right to liberty is reinforced by article 9(4), providing that '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'. The initial drafts of this paragraph referred to a right to an effective remedy in the nature of *habeas corpus*.[71] The right stems from the common law principle and exists regardless of whether deprivation of liberty is actually unlawful.[72] Judicial review of the lawfulness of detention under article 9(4) is not limited to

---

66 *Ladent v Poland*, Application no. 11036/03, 18 March 2008 at [72].

67 *Kurt v Turkey*, Application no. 24276/94, 25 May 1998; (1998) 27 EHRR 373 at [123]; see also *Brogan v United Kingdom*, Application no. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988; (1989) 11 EHRR 117 at [58].

68 *Brogan v United Kingdom*, Application no. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988; (1988) 11 EHRR 117 at [53].

69 *Ladent v Poland*, Application no. 11036/03, 18 March 2008 at [73], [75].

70 *Ladent v Poland*, Application no. 11036/03, 18 March 2008 at [74]; *TW v Malta* Application no. 25644/94, 29 April 1999; (1999) 29 EHRR 185 at [43].

71 UN Doc E/CN.4/21, annex B (Great Britain) (Art. 10(5)); E/800.

72 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (2nd ed, 2005), p 218, 235.

compliance with domestic law, but includes compatibility with the requirements of the ICCPR, particularly article 9(1).[73]

Operation of the Police Administration Act (NT) prior to the impugned amendments

52. A police officer in the Northern Territory (both before and after the commencement of Division 4AA of Part VII of the *Police Administration Act* (NT)) has the power to arrest a person without a warrant and take the person into custody if the officer believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.[74]

53. Under s 137 of the *Police Administration Act*, if a person is taken into custody, the police must bring the person before a court 'as soon as is practicable after being taken into custody', unless the person is sooner granted bail under the *Bail Act* (NT) or is released from custody.[75] These provisions reflect the common law position in *Williams*.

54. However, the police may continue to hold a person for 'a reasonable period' after the person has been taken into custody in order to enable the person to be questioned or investigations to be carried out in order to obtain evidence in relation to certain kinds of offences that the officer considers may involve the person.[76] A person may only be held for questioning in relation to an offence if the maximum penalty for the offence involves a period of imprisonment.[77]

55. This limited extension of the period of detention for the purposes of questioning and investigation is a modification of the common law position, given the exigencies of criminal investigation. Subject only to that limited period of detention related to the specified statutory purpose, the person must be brought before a court as soon as practicable.[78]

56. The fact that detention for questioning and investigation is limited to offences in respect of which a person convicted would be liable to a term of imprisonment ensures that the right to liberty is not infringed where such

---

[73] See eg *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993, at [8.3]; *Badan v Australia*, Communication No 1014/01, UN Doc CCPR/C/78/D/1014/2001 at [7.2]; see also S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights* (3rd ed, 2013) at [11.92] suggesting that 'lawful' in article 9(4) seems to equate with 'not arbitrary'.

[74] *Police Administration Act* (NT), s 123.

[75] *Police Administration Act* (NT), s 137(1).

[76] *Police Administration Act* (NT), s 137(2).

[77] *Police Administration Act* (NT), s 137(3). If the person is questioned about an offence other than the offence in respect of which they were taken into custody, the offence must have a maximum penalty of imprisonment of at least 5 years.

[78] See also, by way of comparison, s 23C of the *Crimes Act 1914* (Cth). This section is headed 'Period of investigation if arrested for a non-terrorism offence' and the express purpose of detention is for investigating whether the person committed a relevant offence. The validity of s 23C was upheld by Crispin J in *R v McKay* (1998) 135 ACTR 29.

detention could be disproportionate to the gravity of the offence being investigated.

Operation of the Police Administration Act (NT) after the impugned amendments

57. The key provision in Division 4AA of Part VII of the *Police Administration Act* (NT) is s 133AB, which applies if a person was arrested because the police officer believed on reasonable grounds that the person had committed, was committing or was about to commit, an 'infringement notice offence'.

58. Infringement notice offences are prescribed by regulation[79] and include offences which, whether dealt with by way of infringement notice or not, do not include any term of imprisonment in the penalty for the offence.[80] In the case of each of the prescribed offences, if a police officer issues an infringement notice then payment of the penalty shown in the notice in accordance with the terms of the notice will be deemed to have expiated the offence.

59. If s 133AB applies, then a police officer may take the person into custody and hold the person for a period of up to 4 hours (or longer if the person is intoxicated).[81] At the end of that period, the officer may either:[82]

    a. release the person unconditionally;

    b. release the person and issue them with an infringement notice;

    c. release the person on bail; or

    d. under s 137, bring the person before a justice or a court for the infringement notice offence or another offence.

60. Thus the critical differences between the regime applicable to infringement notice offences under Division 4AA of Part VII and the pre-existing regime that applies to arrests without a warrant are that under the impugned provisions:

    a. there is no requirement to bring the person before a court as soon as is practicable;

    b. there is no requirement that the period of detention be a reasonable period for questioning the person in relation to a relevant offence; and

---

79 Police Administration Regulations (NT), reg 19A.

80 Special Case at [23] (Special Case Book at 45). See Attachment D to the Special Case (Special Case Book at 161-163) for a schedule of these offences.

81 *Police Administration Act* (NT), s 133AB(2).

82 *Police Administration Act* (NT), s 133AB(3).

c. the powers apply to some offences that are not punishable by a period of imprisonment.

Application of relevant principles to the impugned provisions

61. Question 1(a) of the Special Case asks whether Division 4AA of Part VII of the *Police Administration Act* (NT) (or any part of it) is invalid on the ground that it purports to confer on the executive of the Northern Territory a power which is penal or punitive in character.[83]

62. Answering that question requires consideration of the purposes for which the impugned provisions authorise detention.[84] A consideration of relevant international human rights jurisprudence indicates that, consistent with the common law, detention may arbitrary where its purpose is not sufficiently related either to the investigation of criminal offences or to making a person available to be dealt with by a court. That is a concern in relation to Division 4AA of Part VII.

63. Second, Division 4AA of Part VII does not include any requirement of judicial oversight while a person is in custody under s 133AB(2).[85] While detention without judicial order has been recognised as consistent with the separation of powers in a number of 'exceptional cases',[86] in those cases, the period of detention which the law authorises must be 'reasonably capable of being seen as necessary' to achieve the identified purpose.[87] This requires an assessment of proportionality between the purpose of detention and the authorised period of detention. Depending on its purpose, the period of detention authorised under s 133AB(2) may not satisfy this requirement.

64. If the purpose of detention relates to proceedings for an offence, jurisprudence in the European Court of Human Rights supports reference to the maximum penalty for that offence when assessing the necessity of pre-

---

[83] See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). Justice Gummow subequently suggested that the key concern of Ch III is with deprivation of liberty otherwise than consequent upon some form of judicial process, and not necessarily that such detention is exclusively penal or punitive in character: *Al-Kateb v Godwin* (2004) 219 CLR 562 at 611-613 [135]-[138] (Gummow J, dissenting); *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 612 [80]-[81] (Gummow J). See also *Totani* at 83 [209]-[210] (Hayne J), and *Haskins v Commonwealth* (2011) 244 CLR 22 at 57 [96] (Heydon J, dissenting).

[84] See eg *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60] (McHugh J).

[85] Any judicial review proceedings that were commenced would appear to be limited to considering whether the conditions in s 133AB(1) are satisfied.

[86] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28 (Brennan, Deane and Dawson JJ).

[87] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847 at [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ), citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ), at 53 (Gaudron J) and at 65-66 (McHugh J). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369–370 [138]–[139] (Crennan, Bell and Gageler JJ).

trial detention to secure the proper conduct of those proceedings and the proportionality of the period of detention to the purpose of detention.

Purpose of detention

65. The text and context of s 133AB do not limit the purpose for which a person can be detained for the period authorised in s 133AB(2).

66. In its Defence,[88] the Northern Territory sets out a non-exhaustive list of purposes which may give rise to the detention of a person under s 133AB. Revealingly, one of the asserted purposes is 'to determine how best to deal with the person detained under s 133AB(3) of the *Police Administration Act* (NT)'. This suggests (and the terms of s 133AB indicate) that a person could be detained, not for the purpose of questioning the person or investigating whether the person has committed an offence, but for the purpose of determining whether the person should be:

    a. held in custody for up to 4 hours and then released unconditionally; or

    b. held in custody for up to 4 hours and then released on bail or with an infringement notice.

67. No criteria are set out for how such a determination is to be made. The period of detention is not related to whether or not the discretion under s 133AB(4) to question a person in order to decide 'how to deal' with them is exercised. Detention is not a prerequisite for the issuing of an infringement notice. A person will already have been arrested in order for s 133AB to apply. It would appear that holding a person in custody for a limited period under s 133AB(2), without any requirement to bring the person before a justice or a court during that period, could be an end in itself: that is, the purpose of the provision is nothing more than its own achievement.[89] Alternatively, a purpose of the detention authorised by the law may be to postpone the decision as to which of the options under s 133AB(3) is to be adopted.

68. It is evident that the purposes for which the power of detention in s 133AB may be exercised are not strictly confined, plainly stated or readily ascertainable. Nor does the text or context of s 133AB demonstrate that the purpose of detention is sufficiently related either to the investigation of criminal offences or to making a person available to be dealt with by a court to avoid detention under the section being potentially arbitrary.

---

[88] At [28], Special Case Book at 33.

[89] See, in a different statutory context, *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

Proportionality

69. If the purpose of detention authorised by s 133AB is as posited above (at [67]), that may forestall an assessment of the proportionality between the purpose of detention and the authorised period of detention.[90] Alternatively, it is not clear that in each case in which the power could be used the period of detention authorised is reasonably capable of being seen as necessary for one or more of the purposes nominated by the Northern Territory in its Defence. Section 133AB may thus authorise detention in circumstances where it is not reasonably capable of being seen as necessary for a nominated purpose or purposes.

70. In making this assessment, it is relevant to consider the context in which the power may be used. This context includes the range of prescribed infringement notice offences and the penalties set for those offences. Given that s 133AB permits detention in connection with the alleged commission of an offence for which the maximum penalty is not a term of imprisonment, the section may also permit detention that is disproportionate to the gravity of the offence as determined by the Legislative Assembly of the Northern Territory.

71. Chapter III has not been held to require that any period of pre-trial detention in connection with the alleged commission of an offence be proportionate to the maximum penalty for that offence. However, as noted above, in *Ladent v Poland*, the European Court of Human Rights had particular regard to the petty nature of the offence (which did not carry a custodial sentence) in determining whether the applicant's detention was proportionate to achieving the stated aim of that detention, namely securing the proper conduct of criminal proceedings. The Commission submits that similar regard should be paid to whether an offence attracts a custodial sentence in considering whether a period of executive detention in connection with an alleged offence is reasonably capable of being seen as necessary to achieve the purpose of that detention.

72. By contrast to the application of proportionality reasoning to Ch III of the type rejected in *Magaming v The Queen*, this would not involve mixing 'two radically different ideas' or a resort to standards outside the relevantly applicable statutory provisions.[91] The analysis of whether the duration of detention is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose is accepted, at least in respect of Commonwealth statutes, in the Ch III context.

73. Given the fundamental importance of the right to liberty at common law and the potentially punitive nature of pre-trial detention, particularly for minor

---

[90] As was the case (in the different context of the second limb of the *Lange* test) in *Unions NSW v New South Wales* at [60].

[91] *Magaming v The Queen* (2013) 252 CLR 381 at [51]-[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

offences attracting no custodial sentence, there are real questions about whether at least the Commonwealth Parliament can validly provide for detention by the executive without any requirement of judicial oversight following arrest for offences for which the judiciary is not permitted to punish by way of imprisonment.

Part VI: Timing of oral submissions

74. The Commission seeks leave to intervene by filing these written submissions, and also briefly to address the Court. If permitted, any oral submissions would not exceed 15 minutes.

10 Dated: 13 July 2015

Sarah Pritchard
Telephone: 02 9223 8594
Facsimile: 02 9232 7626
E: spritchard@elevenwentworth.com

Joanna Davidson
Telephone: 02 8915 2625
Facsimile: 02 9232 1069
E: jdavidson@sixthfloor.com.au

20