



## A Constitutional Conundrum

Two essays sharing the award in this year's [Academy of Law](#) Essay competition take issue with aspects of a watershed decision made by the High Court of Australia.

In late 2023, the full Bench of the High Court overturned a 20-year legal principle dealing with the legality of indefinite immigration detention.

In *Al-Kateb v Godwin* (2004) 219 CLR 562 it was held, by majority, that the detention of non-citizens by the Executive government for the purpose of their removal from Australia, and their separation from the Australian community until that occurred, did not contravene Ch III of the *Constitution* even if the removal was not reasonably practicable in the foreseeable future. The detention was held not to be punitive and therefore one of the exceptions to the principle, recognised in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, that a law authorising the involuntary detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in adjudging and punishing criminal guilt, is invalid.

In [NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs](#) the High Court overruled *Al-Kateb* and held that where there is no likelihood of removal from Australia becoming practicable in the reasonably foreseeable future, the purpose of the involuntary detention of a non-citizen by the Executive is punitive and therefore unlawful.

The political and legal ramifications of the decision in *NZYQ* continue to reverberate and the Academy of Law's 2024 Essay Competition question focused on this complicated constitutional matter:

**“Taking into account the decision of the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 and the response by government to it, what is the law of preventative detention in Australia: Commonwealth, State and Territory? Is it fit for purpose? If not, how and by reference to what principles should it be reformed?”**

Both winning essays query aspects of the reasoning in *NZYQ* but from different perspectives. In her essay, ([view here](#)) UNSW Law academic and former Rhodes Scholar, Ashleigh Barnes focuses on the test formulated in *NZYQ* for the validity of laws authorising detention by the

Executive, namely, that the detention must be seen as reasonably capable of being seen as necessary for a legitimate and non-punitive purpose and that the legislative purpose must be capable of being achieved in fact.

She queries the workability of the test and how it is to be empirically grounded, including the sources of evidence and burden of proof.

Ashleigh asks how the HCA could ever determine such constitutional facts:

**“Following *NZYQ*, the question that arises is whether the HCA in adopting the requirement that ‘the legislative purpose must be *capable of being achieved in fact*’ proposes to undertake an inquiry that is equivalent or different to the application of suitability testing in other areas of Australian constitutional law.”**

The other winning essay ([view here](#)) is authored by three recent University of Sydney graduates, Zachary Gomes, Aryan Mohseni and Charlie Ward.\*

It argues that the key value underpinning the separation of judicial power in Ch III is the protection of liberty and queries whether *NZYQ*, or the laws authorising preventative detention that followed, give that value sufficient emphasis. It also contests the proposition that structured proportionality is a useful tool in this context:

**“Our argument is that *NZYQ* takes the wrong starting point by focusing upon whether preventative detention is punitive in character. Instead, there are fundamental rule-of-law considerations favouring a characterisation of detention *itself* as an exclusively judicial power which must be exercised through the criminal process.”**

The judging panel of former High Court Justice, the Hon William Gummow AC KC; former judge of the Victorian Court of Appeal, the Hon Pamela Tate AM KC; and Federal Court judge, the Hon Justice Stephen McDonald hope that the prize will encourage and assist the authors in their careers:

**“The two winning essays were chosen because of the high standard of scholarship they demonstrated and their intellectual rigour”.**

The winning essays will be published in an upcoming edition of the *Australian Law Journal*.

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