Safeguarding Rights to Liberty and Security where People with Disability are Subject to Detention and Restraint: A Practical Approach to the Adjudication, Interpretation and Making of Law (Part Two)

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This is the second article in a two-part series that establishes a framework for evaluating law as it affects the rights to liberty and security for people with intellectual and cognitive impairments. This article uses the rights-based approach developed in the first article to establish a methodology to evaluate the range of ways in which law can be made or interpreted in this area. The methodology considers the adjudication of common law rights by courts, judicial interpretation of statute and the making of laws. Key areas of law considered are those that permit the detention and use of restrictive practices for ‘challenging behaviours’ or ‘behaviours of concern’. The article concludes by arguing that a rights-based approach and a method to assess how law applies it is essential to ensure that a ‘thick’ rule of law can protect and promote the rights and interests of people with intellectual and cognitive impairments.

Keywords: intellectual and cognitive impairments; liberty; restraint; restrictive interventions; role of law; seclusion; security.

Introduction

This article is the second of a two-part series aimed at outlining and applying a rights-based approach to the law that the authors hope can be useful for securing the rights of liberty and security for people with intellectual and cognitive impairments. Collectively, the articles advance a doctrinal approach and methodology for the adjudication of common law rights, the interpretation of statute and the making of laws that will help to ensure the equal realisation of these rights. The authors’ particular concern is with the failure of these rights to liberty and security, of central importance to the rule of law, to be

realised in the everyday living arrangements of many people with intellectual and cognitive impairments in aged care services, disability services and other health facilities. The use of restrictive practices (such as deprivations of liberty, physical and chemical restraints and seclusion) as part of the living and support arrangements of many people with intellectual and cognitive impairments, often without lawful authorisation, is indicative of this failure.

Part One

Part One of this article¹ outlined the doctrinal approach for a rights-based approach to the

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law for protecting the rights to liberty and security. The foundation of this doctrinal approach was the rule of law, integral to ensuring fair and equal treatment, procedural due processes and checks and balances on the arbitrary exercise of power, and as such, particularly important for those vulnerable to abuses of power. Yet a rights-based approach to the law incorporated further requirements, due to the recognition that while the law may apply equally to all, not all people start from an equal position. First, it added the content requirement of human rights alongside common law rights as necessary to be protected by the rule of law. Second, it added the normative requirement of the principle of justice, which in this rights-based approach to the law was composed of two related elements. The first element was the prioritisation of rights over other social policy imperatives. The second element was equal concern and respect.

While formal equality was an important starting point, a rights-based approach to the law sought an approach to equality that was not dependent on having a certain physical, intellectual or cognitive status. This approach, called a rights-based approach to equality, was argued to be integral to the Convention on the Rights of Persons with Disabilities (CPRD).² Adopting this rights-based approach to equality, alongside the principle of justice as additions to a formal or procedural approach to the rule of law, it was described how the doctrinal approach could also be characterised as a substantive or ‘thick’ approach to the rule of law.

Part Two

This second article describes a methodology, derived from the doctrinal approach outlined in the earlier article, for the adjudication of common law rights, the interpretation of legislation and the making of legislation. This article does not purport to provide a comprehensive framework for adjudication, statutory interpretation or regulation, but rather illustrates how a rights-based approach can influence these three domains. It also

demonstrates how the absence of a rights-based approach to the law continues to leave people with disability vulnerable to abuses of power and the use of restrictive practices without appropriate safeguards.

The Adjudication of Common Law Rights

In simple terms, in common law jurisdictions, adjudication of common law rights (or the exercise of judicial power) concerns the process by which courts search for the relevant principles to apply to the facts of a case to determine the parties’ existing rights and obligations.³

The methodology for the adjudication of common law rights begins with the requirements of the rule of law, at a formal or procedural level. Consistent with the doctrinal approach in Part One, it then draws on the principle of justice to provide a guide to the adjudication of common law rights, which is consistent with the prioritisation of rights and equal concern and respect (the two requirements of the principle of justice). It will be argued that a rights-based approach to the law becomes particularly important when cases seemingly raise new issues not previously considered with respect to the rights of people with intellectual and cognitive impairment. Without such a commitment, there is a danger that rights become too readily traded off when weighed against other social imperatives (such as the expense of providing care for people with disability) or even underlying prejudices about people with disability. Finally, this section describes the relevance of human rights to the adjudication of common law rights and the particular benefits of considering (with requisite caution) human rights jurisprudence on the rights to liberty and security for people with intellectual and cognitive impairments.

The Rule of Law – A Limit on Discretion

At a formal, or procedural level, the rule of law requires the consistent application of the

law and that judges treat like cases alike.⁴ It limits the discretion of judges by ‘forcing them to justify the distinctions made between persons by reference to the relevant rules and principles’.⁵ Therefore, when adjudicating individual rights, judges should observe fidelity to the law, ‘that is, the inherited, enacted and judge-made law’⁶ and not create the law according to their own personal values and beliefs, or even what they think the community may want. Judges should not be influenced by their own or others’ opinions about people with intellectual or cognitive impairments and apply the law differently to them because of any impairments they may have. Any constraints on the liberty and security of a person with intellectual or cognitive impairment should only be those authorised, justified or excused by law.

The Demands of Justice – The Prioritisation of Rights and Equal Concern and Respect

While acknowledging the importance of the procedural elements of the rule of law to protecting those vulnerable to abuses of power, the doctrinal approach in Part One also questioned whether it was sufficient to really ensure the equality of rights for people with disability, in particular people with intellectual and cognitive impairment who are particularly vulnerable to prejudice and discrimination in the application of the law. It was described how the contemporary substantive liberal legal theorists Dworkin and Rawls had a commitment, not only to equality (or equal concern and respect) but also a related commitment to the prioritisation or weighting of rights over other collective social-policy goals or moral judgements about what rights other people are entitled to (what Dworkin called external preferences).⁷

This section will draw out two key concepts from Dworkin’s early work⁸ that provide particular assistance in implementing a rights-based approach to adjudicating common law rights consistent with the principles of justice. The first is Dworkin’s distinction

between principles and policy. The second is the value Dworkin places on integrity in the law.

(i) Dworkin – The Distinction between Principles and Policy

Related to Dworkin’s prioritisation of rights (discussed in Part One) was the important distinction Dworkin made between principles and policy. In adjudicating the common law, judges must show fidelity with questions of principle (that is, the scope and content of individual rights)⁹ rather than be concerned with issues of policy which is about the expression of collective goals,¹⁰ such as economic efficiency, for example, or ‘generally an improvement in some economic, political or social feature of the community’.¹¹

Consistent with the separation of powers, as required by the rule of law, questions of principle are the particular province of the courts, while questions of policy are the concerns of the executive and legislature.¹² From a rights-based approach, and as argued by Dworkin, judicial decisions should enforce existing rights, ‘creatures of both history and morality: what an individual is entitled to have, in civil society’,¹³ rather than engage in ‘trade-offs of benefits and burdens within a community in order to produce some overall benefit of the community as a whole’.¹⁴

Consistency with this approach would mean not only treating like cases alike, but when called on to weigh conflicting rights and interests, giving appropriate weight to principles, or individual rights of people (including people with intellectual and cognitive impairment), over and above other competing policy interests and other moral judgements about what rights other people are entitled to (Dworkin’s category of ‘external preferences’).

(ii) Dworkin – Integrity

This importance of maintaining integrity in the common law was also important to Dworkin’s theory of a rights-based approach to the law. Building on the previous idea that

the law is composed of principles, which must trump considerations of policy and other external preferences, law as integrity 'supposes that people are entitled to a coherent and principled extension of past political decisions'.¹⁵

Dworkin asks judges, like his fictional Judge Hercules, to ensure the law and their decisions are structured around a coherent set of principles about justice, equality and fairness.¹⁶ Hercules is so named because he is expected to perform a herculean task, that is, '[h]e must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents'.¹⁷ For judges that adjudicate the common law, integrity demanded judges interpret hard cases (that is, cases where there is seemingly no precedent) 'by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community'.¹⁸

Whereas an opposite approach would assume that in 'hard cases' the judge has discretion to decide the case either way. Dworkin argues when a judge does this '[h]is opinion is written in a language that seems to assume that one of the other party had a pre-existing right to win the suit', but in reality what the judge has done is 'legislated new legal rights, and then applied them retrospectively to the case at hand'.¹⁹

The importance of the approach to common law adjudication outlined above for people with intellectual and cognitive impairments can be illustrated by the two case examples described below.

(iii) *The Principle of Justice, Adjudication of Common Law Rights and People with Intellectual and Cognitive Impairment*

These two cases were decided in the closing decades of the twentieth century in the United Kingdom, where the courts were faced with seemingly novel scenarios (or what Dworkin would describe as 'hard cases'). Common law authorisation was being sought for

practices involving the care and treatment of people with intellectual impairment, treatment that in the words of Lord Goff, 'for centuries ... must have been given to such persons, without any suggestion that it was unlawful to do so'.²⁰ This was complicated by the fact that these cases were decided in a particular legal context unfamiliar in Australia and the United States. That is, the House of Lords found that there was no power of the court to consent to involuntary treatment of adults with intellectual and cognitive impairments under the *parens patriae* jurisdiction.²¹ This meant the lawfulness of involuntary treatment had to be authorised, justified or excused at common law, not under the courts' inherent jurisdiction to authorise treatment of adults without capacity to consent.

In *In re F (Mental Patient: Sterilisation)*²² the House of Lords considered the lawfulness of the sterilisation of a woman with an intellectual disability without capacity to consent. Faced with no power under the *parens patriae* jurisdiction to consent to the sterilisation of F, the House of Lords ultimately found authority at common law by extending the common law doctrine of necessity.

The doctrine of necessity, as it has been traditionally applied in English (and also Australian) common law, applies as an excuse to civil or criminal liability where an act (that would usually be criminal or tortious) is done in a situation of imminent peril or absolute emergency to avoid imminent peril to life or serious injury.²³ However, in *Re F*, Lord Goff adapted the doctrine so that it applied to medical treatment without consent where the following requirements were met: there was a necessity to act when it was not practicable to communicate with the person; and the action must be that of a reasonable person in all the circumstances who acts in the best interests of the person.²⁴

It was the extension of the common law in this way which laid the foundations for the

use of the doctrine to later justify the detention of a man with autism in *R v Bournewood ex parte L*.²⁵ L, a 48-year-old man with autism and a learning disability, had become agitated when in attendance at a day centre and his carers could not be contacted. He was sedated and taken by ambulance to Bournewood Hospital where he was kept as an inpatient (but not formally admitted) and the staff there forbade his carers to visit him or take him home. While he was not kept in a locked ward, he was kept under constant observation and closely monitored.²⁶ An application was made for a writ of *habeas corpus* and damages for false imprisonment. While disagreeing on whether L had been in fact detained, the House of Lords found the doctrine of necessity justified his admission into hospital and any deprivation of liberty that occurred in the process.²⁷

As we have argued previously, the use of necessity to authorise treatment and detention of people with intellectual impairments involved the extension of the doctrine from an *excuse* (as it had traditionally been applied) to a *justification*.²⁸ As a justification, the doctrine is less about excusing a wrong but understandable action, committed in an emergency, and more about weighing up whether on balance the act is right or wrong. As a justification, it involves the court taking a policy approach, considering alongside rights and principles a range of other factors and interests and ultimately deciding what action would be the 'lesser of two evils'. In this context, the right action, as Fletcher has argued, is essentially the one that maximises the overall utility.²⁹

While eventually legislation has provided the framework for the treatment and detention of people without the capacity to consent, responding to the so-called 'lacuna' in the law,³⁰ what is questionable is whether it was the role of the courts to try and fill this 'gap'. The extension of the doctrine in this way, the authors have argued, imported a discriminatory approach into the law, applied to people with intellectual and cognitive impairments

who do not have the capacity to consent to detention or treatment.³¹ It means they could not rely on the same foundational principles and rights that others have.

Human Rights as a Legitimate Influence on the Adjudication of Common Law

It was in the European Court of Human Rights (ECHR), applying the rights to liberty and security as human rights (reflected in the European Convention on Human Rights and as enacted in the United Kingdom's Human Rights Act 1998 (UK)) that L's right to liberty (on the same basis as others) was finally upheld. This decision of the ECHR also prompted legislative reform.

On appeal to the ECHR, it was found that L had been deprived of his liberty in violation of article 5(1) of the European Convention and that the doctrine of necessity (as a lawful justification for his detention) offered insufficient procedural safeguards (when compared to detention under the Mental Health Act 1983 (UK)), to protect against arbitrary deprivations of liberty.³² While considering liberty and security as human rights, the ECHR also observed the majority of the House of Lords had constrained their conclusions to the legal test of restraint based on false imprisonment rather than the Convention's conception of 'deprivation of liberty' in article 5(1). The ECHR did not consider itself constrained by such a distinction between 'actual restraint' (which would amount to false imprisonment) and restraint (which was not conditional upon L seeking leave),³³ commenting that:

The Court reiterates that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.³⁴

Rather, when considering whether L had been deprived of his liberty, the court asked

whether L was ‘under continuous supervision and control and was not free to leave’.³⁵

Although L’s case was resolved in this way, the position in Australia is different, particularly in relation to recognition of human rights, as only a minority of jurisdictions currently have Human Rights Acts or Charters.³⁶ This makes the situation here more uncertain, as the role of the human rights of people with intellectual and cognitive impairment in the adjudication of common law rights is less clear. Nevertheless, it will be argued below, human rights jurisprudence can and should be relevant.

(i) *The Legitimate Influence Principle*

In practice, international human rights have been recognised as a legitimate influence on the adjudication of the common law in Australia.³⁷ In the landmark case of *Mabo v Queensland (No 2)*³⁸ Brennan J recognised that Australia’s accession to international human rights covenants such as the International Covenant on Civil and Political Rights (ICCPR),³⁹ ‘brings to bear on the common law the powerful influence of the Covenant and the international standards it imports’,⁴⁰ explaining that:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when an international law declares the existence of universal human rights.⁴¹

The ‘legitimate influence principle’ was later affirmed by Brennan J in *Dietrich v R* and by Mason CJ and Deane in *Minister for Immigration and Ethnic Affairs v Teoh*.⁴² As Lacey points out, however, in this later case their honours also cautioned against the use of the principle in facilitating some sort of ‘back door’ incorporation of international human rights into Australia’s domestic law.⁴³ Such an approach would not only offend the principle in *Walker v Baird*,⁴⁴ but would also be inconsistent with the rule of law and the

separation of powers.⁴⁵ Rather the better approach, as acknowledged by Brennan in his extra-judicial writings, is to recognise that the values encapsulated in the common law ‘which is the basis of our legal system’⁴⁶ are not dissimilar to those recognised in international human rights.⁴⁷

(ii) *Human Rights, Adjudication and People with Intellectual and Cognitive Impairments*

While acknowledging the importance of the need for caution in adopting international jurisprudence on human rights and the decisions of foreign courts to the adjudication of the common law in Australia,⁴⁸ particularly given the different legal and constitutional environments from which this jurisprudence emerges,⁴⁹ there are at least two important benefits to people with disability of looking to human rights jurisprudence.

First, human rights jurisprudence emphasises that rights belong to people with disability on the basis of their common humanity and inherent dignity. For example, in the landmark case of *Department of Health & Community Services v JWB & SMB (Marion’s Case)*,⁵⁰ Brennan J declined to authorise the sterilisation of a child with intellectual disability (under the *parens patriae* jurisdiction). Brennan J (in his dissenting opinion) commented on both the importance of the common law right to personal security, but also, drawing on the values underpinning international human rights law,⁵¹ commented that ‘[o]ur law admits of no discrimination against the weak and disadvantaged in their human dignity. Intellectual disability justifies no impairment of human dignity, no invasion of the right to personal integrity’.⁵²

Further, human rights jurisprudence can also be of great assistance in concretising the rights to liberty and security for people with disability, particularly in ways that are directly relevant to the living and support arrangements for many people with intellectual and cognitive impairments. As argued in Part One, in the United Kingdom, for

example, there has been significant consideration of the right to liberty and security of people with disability in environments such as hospitals, residential facilities and other health facilities.⁵³

In *Cheshire West and Chester Council v P*, for example, the UK Supreme Court considered whether the living conditions and support arrangements of several people with intellectual disabilities could amount to a deprivation of liberty for the purposes of the Human Rights Act 1998 (UK),⁵⁴ none of whom lived in a secure facility that would ordinarily be associated with detention. MIG and MEG were two sisters, aged 17 and 18 years. MIG lived with a foster carer, in a home environment, but under constant supervision. MEG lived in a facility for adults with disabilities, but also under constant supervision and control and subject to medication and physical restraint to control her behaviour. P, a 39-year-old man with cerebral palsy and Down Syndrome, lived in a bungalow with three other residents. He was similarly under close supervision and was subject to restrictive practices including the use of a full body suit to prevent him from interfering with his incontinence pads. The majority of the Supreme Court found all three had been deprived of their liberty. Lady Hale found that while any deprivation of liberty may have been in their own best interests, their living conditions amounted to a deprivation of liberty.⁵⁵ As Lady Hale has explained in her extra-judicial writings:

The acid test was whether they were under the complete control and supervision of the staff and not free to leave. Their situation had to be compared, not with the situation of someone with disabilities, but with the situation of an ordinary, normal person of their age. This is because the right to liberty is the same for everyone. The whole point about human rights is their universal quality, based as they are upon the ringing declaration in article 1 of the Universal Declaration of Human Rights, that 'All human beings are born free and equal in dignity and rights'.⁵⁶

In *Antunovic v Dawson*, Bell J of the Victorian Supreme Court arguably applied a similar test to determine whether a mental health patient had been deprived of her liberty.⁵⁷ Although decided in a human rights charter jurisdiction,⁵⁸ Bell J was considering the types of restraints amenable to the writ of *habeas corpus*, acknowledging that '[q]uite apart from the Charter, the ICCPR is an important source for understanding the nature of interests protected by common law *habeas corpus*'.⁵⁹ Bell further acknowledged that, as Australia was a signatory to the ICCPR, 'it has a certain significance under Australian domestic law including the common law'.⁶⁰

Although not detained under the Mental Health Act 1986 (Vic), Ms Antunovic had been required by her treating doctor to reside in a treatment facility. While she was able to leave the facility during the day, she was required to return at night. She wanted to leave the facility and return to live with her mother but was not permitted. Bell J found Ms Antunovic felt 'unable to go home without the permission of Dr Dawson and the unit because of the authority which the doctor holds over her' and that she was being subjected to "'power' and 'control' within the applicable legal test of restraint".⁶¹ Although acknowledging that on one view such an interpretation may seem to extend the application of the writ, Bell J held nevertheless that 'the underlying principle of personal liberty which this remedy protects, covers a case where the applicant's freedom of movement and freedom to choose where to live are being restrained, even if only partially, and the principle takes the remedy with it'.⁶²

Summary

In summary, in the adjudication of the common law rights of a person with an intellectual or cognitive impairment, where their common law rights to liberty or security are engaged, a rights-based approach would require the court to:

- *Show consistency*: with decisions involving the engagement of the liberty and security rights of people without intellectual or cognitive impairment (rather than make arbitrary distinctions on the basis of the individual's impairment);
- *Accord appropriate weight to rights*: where rights to liberty and security are engaged, according these rights and associated principles appropriate weight, particularly when they conflict with more abstract rights, other policy imperatives (such as limited resources or convenience of support staff), or prejudices about people with disability;
- *Take a principled approach*: where there is seemingly no precedent (that is, a hard case), the court should seek the answer in the identification of relevant principles (or rights) underlying the law;
- *Utilise human rights jurisprudence*: (with requisite caution) courts should consider any relevant application of international law (including the UDHR, ICCPR, CPRD; their interpretive materials; and relevant international jurisprudence). This would include, but not be limited to:
 - recognising that rights such as liberty and security belong to all people, including people with intellectual and cognitive impairments because of their common humanity and inherent dignity; and
 - utilising human rights jurisprudence to understand what it means in practice for people with intellectual and cognitive impairments to be deprived of their rights to liberty and security.

The Interpretation of Statute

This part discusses how statutory interpretation can be informed by a rights-based approach to the law.

A rights-based approach to the interpretation of statute, consistent with a formal

approach to the rule of law, begins with the recognition of the important constitutional framework provided by the common law. The principle of legality reflects this approach, requiring that where fundamental rights are engaged by statute, their abrogation or derogation can only be determined by clear and unambiguous words. With the addition of the principle of justice, the significant weight of common law rights such as liberty and security are recognised, and as such, a stronger presumption is applied and stricter scrutiny applied to statutory provisions purportedly relied upon to authorise restrictive practices.

Human rights, particularly where they are also common law rights can also have a significant impact, specifically through the principles of statutory interpretation known as the principle of consistency and the principle of legality.

The Rule of Law and the Common Law Constitution

As Allan argues, no statute can be interpreted in isolation from the legal system in which it operates.⁶³ In the case of the exercise of legislative power in Australia, as French has noted, it takes place in the constitutional setting of a 'liberal democracy founded on the principles and traditions of the common law'.⁶⁴ Therefore, the common law, as Dixon has also described, provides an 'ultimate constitutional foundation',⁶⁵ with its settled doctrines and assumptions constituting a framework into which legislation must be fitted.⁶⁶ The principle of legality, a common law principle of statutory interpretation, is consistent with this approach.

The Principle of Legality

The principle of legality is expressed as a presumption that Parliament does not intend to interfere with fundamental common law rights and freedoms and this presumption can only be rebutted by clear and unequivocal language.⁶⁷ As Chen explains, the High Court

has drawn a specific link between the principle of legality and the rule of law, with Gleeson CJ, for example, stating that '[i]n a free society, under the rule of law, it is an expression of a legal value, respected by the courts, to be acknowledged by the Parliament'.⁶⁸

The concept of the principle of legality has a long history in English common law,⁶⁹ but one of the first statements of the principle in Australia was in *Potter v Minahan* where it was stated by O'Connor J that:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in the widest, or usual, or natural sense, would be to give them a meaning in which they are not really used.⁷⁰

The principle has been emphatically adopted in numerous High Court decisions⁷¹ with the authoritative statement (as Spigelman J has described it)⁷² in a unanimous judgement in *Coco v The Queen*,⁷³ where Mason CJ, Brennan, Gaudron and McHugh JJ described the principle as follows:

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights ((8) See *Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1 at [12] per Mason CJ).⁷⁴

In practice, as Meagher explains,⁷⁵ the principle comes into play when it is identified by a court that the statute under consideration engages a common law fundamental right or freedom – for example, the right to personal liberty. Once the engagement of these rights or freedoms is identified, then except to the extent

that clear statutory language is used, the principle is applied so that the legislation is given a 'rights protection construction'.⁷⁶ It operates as a presumption against the fact that the legislation sought to abrogate the identified right or freedom.

The Demands of Justice and the Weight of the Common Law

As discussed in Part One, a rights-based approach to the law, incorporating the principle of justice (in particular the prioritisation of rights) recognises the significant weight in the principles underlying the common law and associated rights. Consistent with this approach, it will be argued, a more scrupulous, or stronger, application of the presumption associated with the principle of legality should be applied.

(i) Applying a Stronger Presumption

A substantive approach to the rule of law would recognise, as Allan does, that the common law framework, composed as it is of a 'corpus of principle' has greater weight than statutes, which consist only of rules.⁷⁷ In this regard, Allan argues, legislation must be understood 'not as a simple expression of the wishes of the majority of legislators ... but something to be reconciled, so far as possible, with the values which underpin the rule of law'.⁷⁸

A more substantive approach to the rule of law would also place great significance on the nature of the right that is being curtailed. While there may sometimes be ambiguity about what particular common law rights and freedoms are 'fundamental' and thus attract the protection of the principle of legality,⁷⁹ the right to liberty is clearly recognised as a fundamentally important common law right.⁸⁰ Therefore, as Allan argues, '[d]rastic invasions of liberty call for more urgent appraisal',⁸¹ and, as such, a stronger presumption against radical changes in the common law when interpreting statutes that impact on this right.⁸²

Therefore, the context of the statute, including the nature of the right, should have an important role to play in statutory interpretation, including in the relative 'strength' of the application principle of legality.⁸³ This was acknowledged by the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri (Al Masri)*,⁸⁴ where it was also recognised that the more extensive the restriction of liberty is, 'the clearer the expression of intention to bring about the interference must be'.⁸⁵

While it has been identified that the principle of legality does not constitute legislative power,⁸⁶ nevertheless, as French CJ has acknowledged, the principle is powerful.⁸⁷

When interpreting statutory provisions purportedly relied upon to curtail the rights to liberty for people with intellectual and cognitive impairment, in particular the use of practices such as detention, seclusion and physical and chemical restraint, consistent with the rule of law and the principles of justice, a particular and rigorous scrutiny is called for. In practice, this may mean a reluctance to read into provisions purportedly relied upon to restrict liberty, certain powers by implication and may even mean when interpreting a statutory provision, a willingness to depart from the ordinary grammatical meaning of that provision.

(ii) *The Principle of Legality, People with Intellectual and Cognitive Impairments and Australian Guardianship Tribunals*

Given the lack of legislative frameworks in Australia addressed specifically at authorising such practices, particularly outside of state-funded disability services,⁸⁸ legal authorisation is often sought elsewhere. This can mean construing or interpreting the terms of more general legislation to search for a lawful basis on which to authorise these practices. As the authors have discussed in more detail elsewhere, the legal basis for the use of restrictive practices is often sought in the state and territory guardianship regimes.⁸⁹

All Australian states and territories have legislation that provides for a tribunal or board to appoint substitute decision-makers who can make both financial and personal (including health) decisions on behalf of those adults who do not have capacity to make these decisions for themselves.⁹⁰ Only a minority of jurisdictions, however, specifically provide for guardians or guardianship tribunals or boards to authorise restrictive practices. A question that sometimes arises, therefore, is whether these substitute decision-makers can be authorised to consent to restrictive practices in the absence of specific legislative authority, relying instead on interpretation of the meaning of more general terms such as *medical treatment*, *health care* and *accommodation*.

State tribunals have taken an inconsistent and varied approach to this issue. In *Re WCM*, for example, the question for the Queensland Tribunal was whether the use of seclusion and medication to sedate a 45-year-old man with an intellectual disability in response to aggressive behaviours could be considered *health care*.⁹¹ As the Tribunal considered that WCM's aggression could be viewed as a manifestation of his intellectual disability and therefore a medical condition,⁹² the use of seclusion and sedation, used to calm his aggressive behaviour, could be considered 'health care'.⁹³

By contrast, in *ADP*,⁹⁴ the Western Australian tribunal took a different approach when considering the administration of a psychotropic medication to a nursing home resident with dementia who was exhibiting unmanageable behaviours. The tribunal found that the stated purpose of the medication (that the resident had a psychosis) was not corroborated by a current specialist psychiatric assessment and that, further, the dosage used (the level of restriction) indicated that a level of restraint was intended.⁹⁵ The nursing home staff had also indicated that the medication was necessary so that ADP's behaviour would not be 'unmanageable' and not jeopardise his place in the nursing

home.⁹⁶ The tribunal concluded therefore that the medication was not administered solely as 'medical treatment' and that the guardian needed specific authority to consent to its administration.⁹⁷

A similarly inconsistent approach has been taken with respect to interpretation of guardians' 'accommodation powers'. In *NLA (Guardianship)*, the Victorian Tribunal considered whether a guardian's power to make *accommodation* decisions could extend to keeping a 70-year-old man with Parkinson's Disease and a cognitive disability in a locked facility.⁹⁸ The tribunal found that the term *accommodation* (or where a person lives), should be given its 'ordinary meaning' which could, in the tribunal's opinion, extend to living in a locked facility.⁹⁹

However, in *MLI*,¹⁰⁰ the Queensland Tribunal had to consider if a guardian's accommodation power could extend to keeping an 18-year-old man with an intellectual disability involuntarily confined in a particular accommodation. The Tribunal noted that 'if the staff are totally controlling MLI's movements, not just when there are violent outbursts, and if his freedom of movement has been totally taken away then this could amount to detention'.¹⁰¹ If MLI was subject to detention, the Tribunal agreed that it would require express legislative authority and that such authority 'is not found within the guardianship regime and is not contained in the Guardianship and Administration Act 2000 or the Powers of Attorney Act 1998'.¹⁰²

It is inevitable perhaps, that where general words are relied upon to authorise significant curtailment of the right to liberty and security, inconsistencies should arise. We have argued elsewhere¹⁰³ that relying on general words to authorise restrictive practices not only offends the principle of legality, but also means that people with intellectual and cognitive impairments do not have the benefit of safeguards provided under specific regulatory frameworks for restrictive practices, or those associated

with other civil commitment and involuntary treatment statutory regimes.

Human Rights and Interpretation of Statute

Given the importance of the common law right to liberty, there is arguably also a stronger role for the use of human rights in the interpretation of statute (albeit cautiously). While human rights can have an influence on statutory interpretation, the starting point is that treaties or conventions will not have a direct effect on domestic law unless they are validly incorporated through domestic legislation.¹⁰⁴ The reasons for this rule (known as the rule in *Walker v Baird*) are the doctrines of separation of powers and parliamentary supremacy.¹⁰⁵ While the executive has the exclusive power to enter into treaties and bind the state, the executive cannot enact domestic law, as this is purely the role of the legislature.¹⁰⁶ In *Polites v Commonwealth*, the High Court also affirmed that the legislative power of the Parliament is plenary and that a valid law of the Parliament must be applied regardless of whether or not it contravenes international law (the *Polites* principle).¹⁰⁷

Nevertheless, despite both the rule in *Walker v Baird* and the *Polites* principle, there are a number of common law principles of statutory interpretation that recognise the importance of human rights including the *principle of consistency* and the *principle of legality*.

(i) The Principle of Consistency

In the case of the *principle of consistency*, there is a presumption that legislation should be read consistently with the established rules of international law.¹⁰⁸ It is based on the presumption that Parliament did not intend to legislate to override Australia's human rights obligations.¹⁰⁹ While there is some difference of opinion on the degree of ambiguity needed to apply the principle,¹¹⁰ it has been summarised as follows:

[T]he provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty.¹¹¹

In *Al Masri*, for example, the Federal Court acknowledged that international law, to which Australia is a party, including its underlying values, could provide a backdrop for statutory interpretation because '[a]lthough not incorporated into domestic law, the nature and subject matter of the ICCPR, the universal recognition of the inherent dignity of the human person (recited in its preamble) as the source from which human rights are derived, and the reference to and relevance of its principles in domestic law gives the ICCPR a special significance in the application of the principle of statutory construction now being considered'.¹¹²

The *principle of legality* was discussed above in relation to the presumption that in the absence of clear intent, legislation does not override fundamental common law rights. The same principle has also been extended more broadly to a presumption that, absent a clear intent, parliament did not intend to curtail fundamental rights and freedoms,¹¹³ including to a presumption that parliament did not intend to abrogate or curtail fundamental human rights.¹¹⁴ But this is subject to the important limitation that such rights are also recognised in the common law.¹¹⁵ In practice, as Lacey points out, this means first identifying the human rights engaged by the statute, and then articulating those equivalent rights and freedoms implicit or explicit in Australia's common law.¹¹⁶

(ii) *Charters of Human Rights*

In addition, in some Australian jurisdictions there is also a statutory obligation on courts to interpret legislation compatibly with certain human rights. In Victoria, the Charter of Human Rights and Responsibilities Act 2006

(the Victorian Charter) requires that courts interpret legislative provisions in a way that is compatible with the human rights enumerated in the Victorian Charter.¹¹⁷ Similarly, in the Australian Capital Territory, the Human Rights Act 2004 (the ACT Human Rights Act) also requires a Territory law to be interpreted in a way that is compatible with human rights.¹¹⁸ Both the Victorian Charter and the ACT Human Rights Act also provide that international law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be taken into account when interpreting a statutory provision.¹¹⁹

Therefore, when questions of construction arise with respect to statutory provisions relied upon to curtail the rights to liberty and security for people with intellectual and cognitive impairment, a rights-based approach would have regard to relevant treaties and the specific obligations under those treaties.¹²⁰ In the case of restrictive practices, this would include, for example, the CPRD, the ICCPR and the Convention Against Torture as well as interpretative materials and commentary from relevant expert bodies.¹²¹

(iii) *Re Beth: And the Reluctance to Rely on General Provisions to Authorise Restrictive Practices*

Decided in a Charter jurisdiction,¹²² the decision of the Victorian Supreme Court in *Re Beth* illustrates this approach.

In *Re Beth*, authorisation was being sought for the secure long-term detention and the use of restrictive interventions (including the use of reasonable force to apply such interventions) with respect to a 16-year-old girl with an intellectual disability. One option, for legal authorisation, was to rely on the provisions for protection orders in the Child, Youth and Families Act 2005 (Vic) (CYFA), which would facilitate the *custody and guardianship* of Beth to the Secretary of the relevant department. The question was whether the terms *custody* and *guardianship* could extend to authorising the type of living

conditions in which Beth's liberty was severely restricted.

Under the CYFA, guardianship of a child encompassed the 'responsibility for the long-term welfare of the child' and included 'all the powers, rights and duties ... vested by law or custom in the guardian of a child' except for the right and responsibility to make decisions concerning the daily care and control of the child.¹²³ These later powers, however, were granted with custody of the child.¹²⁴

It was submitted by the Secretary that such provisions, when read against the context of the CYFA (and applying the Victorian Charter), could not be construed as allowing for the long-term detention of a child with disability under these conditions.¹²⁵ After examining the relevant statutory provisions, the court agreed that the 'Secretary's powers as guardian or custodian would not extend to indefinite or extended confinement of a 16 year old',¹²⁶ and that the 'orders sought do not fall within the legislative scheme which ordinarily governs the secure detention of children'.¹²⁷

The result was that Beth's detention and the use of restrictive practices was authorised by the Court under the Court's inherent *parens patriae* jurisdiction. After taking submissions from various expert practitioners and visiting Beth at her residence, the court made orders that arguably imposed more significant safeguards for Beth than would have been available under a child protection order under the CYFA. In particular, the orders included the requirement for independent monitoring and review of the use of detention and restrictive practices by the department. This included regular reports back to the court on the progress or otherwise that Beth had made against her Behaviour Support Plan and Care and Support Plan. The Court also undertook subsequent reviews of the order for detention and the use of restrictive practices and ordered that Beth receive separate representation at these reviews. That is, the use of restrictive practices was the subject of specific authorisation, monitoring and review.

Summary

In summary, in the interpretation of statutes that are purportedly relied upon to authorise the use of restrictive practices on people with intellectual and cognitive impairments, a rights-based approach would require:

- *Application of a presumption*: that in the absence of clear and unambiguous words, parliament did not intend to curtail these rights;
- *Consideration of the nature of the right and its curtailment*: so that where statutory provisions are purportedly authorising significant curtailments of the liberty of a person with intellectual or cognitive impairment, a court or tribunal should:
 - consider the extent and nature of the curtailment of the right;
 - apply a stronger presumption that parliament did not intend to curtail that right; and
 - relative to the extent of the curtailment of the right, apply a stricter interpretation, that may, while consistent with the overall purpose of the statute, be prepared to read the words of a statute in a way that does not correspond with the literal or grammatical meaning;
- *Consideration of Australia's human rights obligations* by applying the following principles:
 - *The principle of consistency*: in the interpretation of a statute that engages certain human rights, to identify the relevant international treaty and to read the provisions in a way, as far as possible, consistent with the overall purpose of the statute, that is, consistent with the underlying values of and the rights contained in relevant human rights instruments (e.g. ICCPR, CRPD);
 - *The principle of legality*: To presume that in the absence of clear words, Parliament did not intend for legislation to abrogate the human rights of persons with intellectual and cognitive impairments,

particularly where those human rights are also common law rights.

The Making of Laws

The final part of this methodology of a rights-based approach to the law considers the making of laws, or regulation.

It begins, as for adjudication and interpretation, with the formulistic requirements of the rule of law for clear, public, relatively stable law which applies prospectively and not retrospectively. A rights-based approach to the making of law then also adds the requirements of the principle of justice and the content requirements of human rights. In the domain of law-making however, there are some key differences. Unlike the courts, the role of the legislature is to make laws that give expression to public policy with the aim to advance a conception of the common good. As will be discussed below, while this discretion may be wide, from a rights-based approach, it is not limitless. The principle of justice requires that legislation reflects integrity, not only with the community of principles underlying our system of law and government, but also internal integrity, avoiding arbitrary differences across the statute book. Human rights also bring certain methodological demands, including that any restriction of the right to liberty and security is proportionate and free from other characteristics of arbitrariness. Finally, a rights-based approach to equality, derived from the CPRD, imposes obligations on the state to support people with intellectual and cognitive impairments to realise their rights to liberty and security. These obligations, it is argued, must be a mandatory component of any regulatory framework for the authorisation of restrictive practices.

The Rule of Law – Formulistic Requirements

From the perspective of the purely procedural or formal version of the rule of law,

legislation should meet a number of criteria. For example, according to Raz, law should be clear and ‘capable of guiding the behaviour of its subjects’,¹²⁸ as well as prospective, public and relatively stable.¹²⁹ Similarly, in Fuller’s view, the rule of law required law to be general, clear, publically promulgated, stable over time, prospective and not contradictory.¹³⁰ As Tamanaha points out, Raz, Fuller, Hayek, Unger and others who adopt the formal version of the rule of law, agree that the purpose of these requirements is that it allows people to plan their activities with certainty.¹³¹ This type of approach also views laws that abide by the standards described above as necessary to check excessive and arbitrary exercise of power.¹³²

The Demands of Justice

As was discussed in Part One, these formulistic requirements for laws, like the formal theories of the rule of law, generally have no content requirements. Therefore, if a law is clear, accessible, predictable and not retrospective in its operation, then it would most probably satisfy those rule of law requirements. This approach however, from a rights-based perspective, would not ensure equal protection of the rights to liberty and security for people with disability. For example, a law that was clear in its application and prospective, but authorised the detention of people with disability solely on the grounds of disability, could arguably be consistent with this procedural requirements of the rule of law.

Given the separation of powers, as required by the rule of law, adjudication and the interpretative role of the courts, it was argued, should not be driven by questions of policy. Rather, a rights-based approach to the law emphasised the importance of the distinction between principles and policy, and how courts should show integrity with principles, rather than consider competing policy interests. Such a distinction, however, is not a requirement for the legislature (and the executive). Unlike the courts, the legislature

properly makes laws that give expression to the public policy (as developed by the executive) with the aim to advance a conception of the common good.¹³³ The legislature will take into account other competing interests, other than the rights of individuals.

This category (of the common good) is potentially very broad and can encompass a wide range of interests, including, for example, national security, maintaining public order, or even maintaining the continued existence of the state as a democracy.¹³⁴ Barak describes the public interest (or the public good) as 'any consideration justifying a limitation of a constitutional right and which is not included within the category of the protection of the rights of others'.¹³⁵ While the discretionary role of the legislature to make laws for the common good may be wide, consistent with a more substantive approach to the rule of law, this discretion would not be limitless.¹³⁶

In the context of a rights-based approach to the making of laws, a more substantive approach to the rule of law would, as for the adjudication of common law rights and the interpretation of statute, add the requirements of justice, comprising both a commitment to prioritisation of rights and equal concern and respect.

(i) Integrity

First, consistent with the prioritisation of rights, legislation should show integrity, which includes not only internal integrity (with other laws) but also with the community of principle underlying our system of law and government.

With respect to the common law, as was discussed above, integrity demanded not only that like cases be treated alike, but that individuals' rights are decided according to a coherent and principled extension of common law principles.¹³⁷ As Allan points out, the commitment Dworkin had to integrity in legislation also derives from Dworkin's view of the legal order as an integrated whole, with both common law and legislation as

harmonious aspirations of a 'community of principle'.¹³⁸ Dworkin was therefore opposed to what he termed 'checkerboard legislation', that is, laws that treat similar issues differently on arbitrary grounds.¹³⁹ The overwhelming reason why we should reject 'checkerboard' statutes, or internal compromises, argues Dworkin, is because it results in the state lacking integrity because 'it must endorse principles to justify part of what it has done that it must respect to justify the rest'.¹⁴⁰

(ii) Equality

Related to this is that, consistent with the requirement of equal concern and respect, laws should not discriminate arbitrarily in their approach to different people. Laws advancing any conception of the common good must include one that means all people are secured their rights to the maximum degree possible, on an equal footing, to give all human beings the chance to flourish.

As Allan describes, if laws reflect an overall coherence, this also results in people being treated as equals (the second, related principle of justice).¹⁴¹ That is, the content of the positive law should not reflect arbitrary differences and unequal treatment of people based on irrational reasons or prejudices and biases.¹⁴² Allan points out that the legislature 'is confined by the requirements of constitutional rights intended to guarantee the basic liberties of each and every citizen, excluding unfair or arbitrary discrimination',¹⁴³ and comments that:

If the citizen of a democratic state is entitled to the protection of a rule of law on the basis of equal dignity, particular laws may only discriminate between persons for good reasons: the relevant distinctions must be shown to relate to government objectives that all could acknowledge as legitimate, consistent with their self-respect as equal citizens.¹⁴⁴

(iii) The Principle of Justice and Statutory Frameworks for Restrictive Practices

Consistent with the requirements of justice, laws for the regulation of any civil detention, restraint and involuntary treatment should be reasonably consistent across all areas of society and not make arbitrary distinctions.

In reality however, as the authors have discussed elsewhere,¹⁴⁵ what has emerged from an analysis of statutory frameworks for restrictive practices (which authorise the detention, seclusion, physical and chemical restraint of people with disabilities) in Australia, is that such practices are governed by a variety of regulatory approaches. Only four jurisdictions have legislative frameworks to provide lawful authorisation for these practices (Victoria, Queensland, Tasmania and the Northern Territory).

Not only, therefore, is there inconsistency across jurisdictions, but also within jurisdictions. While some states may have regulatory regimes for the use of restrictive practices for people with intellectual and cognitive impairments in state-funded disability services, these do not extend to people with the same disabilities who reside in rehabilitation services, hospitals and other health services or aged care facilities. The different approach is not based on any legitimate basis, but rather on accident of residence, including what state or territory the person resides in, or from what type of health, aged care or disability service they receive their support and care. This was also the view of the Queensland Law Reform Commission who stated that:

[T]here can be no justification, in principle, of the current two-tiered system in relation to the use of restrictive practices, under which different groups of adults have the benefit (or disadvantage, as the case may be) of differential levels of protection.¹⁴⁶

Such an approach is also in stark contrast to other regimes for restrictive practices and civil commitment for people with psychosocial disabilities. For example, all states and territories have legislative frameworks for the involuntary detention and treatment, including use of restrictive practices such as

seclusion, on people with mental illness. These regimes also tend to impose much stricter requirements and procedural safeguards, including professional assessments, regular reviews of involuntary treatment and detention by independent tribunals and access to appeal to a higher court.

Human Rights and Legislation

The final addition to a rights-based approach to making legislation is human rights. As discussed above and in Part One, any engagement of human rights brings further methodological requirements. Unlike common law rights to liberty and security, which tend to be understood as absolute rights, as human rights, liberty and security are less concrete, more abstract and not necessarily absolute.¹⁴⁷ The abstract nature of human rights also means that they can be subject to limitations, and must be balanced against other rights and interests. The method by which this justification occurs is known as the *principle of proportionality*. Further, a human rights approach, consistent with the right to liberty and security as understood in the ICCPR, also requires laws that curtail a person's liberty to have qualities that are certain, clear and predictable, that is, lacking any arbitrariness.

(i) Proportionality

There may be circumstances where the state may seek to curtail or limit the human rights of people with intellectual impairment. In the case of restrictive practices, for example, this may be to protect the person or others from harm. Whatever the policy reasons for the state to seek to enact legislation that curtails or limits the rights and freedom of people with disability, human rights jurisprudence places an onus on the state to justify the curtailment or limitation of fundamental rights and freedoms. The criterion for measuring this justification is the principle of proportionality.¹⁴⁸ With origins in German constitutional law,¹⁴⁹ the principle of proportionality asks the state to justify the restrictions on the

liberties of its subjects,¹⁵⁰ including in the making of laws. As Kiefel explains:

The concept or ideal of proportionality may be seen to pervade our laws. Proportionality or reasonableness of action is clearly considered by legislatures to be an appropriate requirement of citizens in our society. A question which may be thought to arise with respect to legislatures themselves is whether legislative responses to perceived problems and to the attainment of legislative objectives ought to be proportional.¹⁵¹

There are four basic components of the principle of proportionality.

First, the limitation of the right must be for a *proper purpose*.¹⁵² Not all purposes can justify the limitation of a right by a law.¹⁵³ Rights may be limited, for example, to secure the rights of others.¹⁵⁴ While administrative convenience or budgetary considerations, as Barak argues, cannot be completely ruled out,¹⁵⁵ they would have a limited application where the rights to be protected are so central or important. As Barak argues, generally the more important or central the right, the less likely administrative convenience can justify a restraint. Dworkin also emphasises that rights have a certain threshold weight against other collective goals and cannot be defeated, for example, by any of the 'ordinary goals of political administration'¹⁵⁶ but only by a goal of 'special urgency'.

The second and related requirement is that there must be a *rational connection between the law (the means used) and the purpose*.¹⁵⁷ That is, at the very least, the law that limits the individual's liberty and security must increase the likelihood of achieving the purpose.¹⁵⁸

The third requirement of proportionality is *the requirement of necessity*, or, in other words, the *least restrictive means*.¹⁵⁹ The law (or the means chosen), for example, must be the one that would least limit the human right.

Finally, proportionality requires there must be a *proper relation* between the

benefits gained by fulfilling the purpose and the harm caused to the right.¹⁶⁰ This is proportionality *stricto sensu*¹⁶¹ and entails a balancing between the benefits gained due to the implementation of the law and the harm caused to the right.

(ii) *Procedural Safeguards, Clarity and Predictability*

A procedural approach to the rule of law required laws that were clear, transparent and predictable. This approach is also reflected in the scope of the right to liberty and security in the ICCPR. While article 9 (Liberty and Security of Person) of the ICCPR requires any detention to be lawful,¹⁶² not just any law will justify the detention of a person, including the detention of a person with a disability. Article 9 also prohibits arbitrary detention, that is, detention under a law that has 'elements of inappropriateness, injustice, lacking of predictability and due process of the law'.¹⁶³ Rather than being based on vague or subjective criteria of 'best interests', criteria for detention should be 'defined with sufficient precision to avoid overly broad or arbitrary interpretation or application'.¹⁶⁴ Further, there should be a right to seek a review of the lawfulness of your detention before an independent court or tribunal.¹⁶⁵

(iii) *Human Rights and Statutory Frameworks for Restrictive Practices*

Where legislation is enacted to regulate the use of restrictive practices, a rights-based approach to the law, consistent with human rights, would therefore ask whether such laws were proportionate and free from other characteristics of arbitrariness.

As liberty and security are foundational values underpinning our system of law and government, there must be a particularly compelling purpose to justify the curtailment of such rights.¹⁶⁶ Given the importance of these rights, convenience, cost and administrative efficiency could not be proper

purposes. Such restrictions could also not rest solely on the basis that a person had a disability.¹⁶⁷ Consistent with other laws for civil commitment and involuntary restraint and treatment, a more justifiable basis could be to protect the person or others from serious harm and to enhance their well-being.¹⁶⁸

In practice, preventing harm to the person or others is central to most restrictive practices statutory frameworks.¹⁶⁹ In most cases however, it is only necessary to show the potential for harm to the adult or others in the future.¹⁷⁰ Queensland is the only jurisdiction to require both evidence of harm to the adult or others in the past as well as a reasonable likelihood that harm will occur in the future.¹⁷¹ Tasmania requires that the relevant decision-maker consider factors such as ‘the consequences to the person with disability, or other persons, if restrictive intervention of that type is not carried out’,¹⁷² and ‘whether, and the extent to which, carrying out the restrictive intervention will promote or reduce the safety, health and wellbeing of the person with disability’.¹⁷³

Some kind of benefit to the person subject to restrictive practices must also be demonstrated in most jurisdictions. While the actual term ‘benefit’ is not usually used, the concept of benefit is most often associated with the preparation of a behaviour support plan. In Victoria, for example, it is a requirement that the behaviour support plan explain how the use of restraint or seclusion will be of benefit to the person,¹⁷⁴ and Queensland requires that if the plan is implemented, not only will the risk of the adult’s behaviour causing harm be reduced or eliminated, but that the adult’s quality of life will be improved in the long term.¹⁷⁵ Similarly, in the Northern Territory, the behaviour support plan must include proactive strategies to build on the person’s strengths and increase the person’s life skills.¹⁷⁶

Tasmania does not require the preparation of a behaviour support plan, but the primary purpose of carrying out the restrictive intervention must be for ensuring the safety,

health or wellbeing of the person or other persons.¹⁷⁷

There should then, consistent with the principle of proportionality, be a rational connection between the legal framework and that proper purpose. That is, a law that simply allowed for detention and restraint without strategies to enhance the person’s well-being could not be viewed as achieving the purpose of the legislation that was aimed at both preventing harm and ensuring the well-being of a person. Importantly, the Human Rights Committee has stated that state parties must offer to institutionalised persons programs of treatment and rehabilitation ‘that serve to the purpose that are asserted to justify the detention’.¹⁷⁸

As discussed above, the way this requirement is fulfilled in most jurisdictions is with the need for a behaviour support plan to be developed that requires strategies for increasing the person’s quality of life.¹⁷⁹ The requirement, however, should not end at the development of the plan. There should also be a requirement to implement the plan, with regular monitoring and review of the effectiveness of the strategies incorporated in the plan for enhancing the person’s safety, the safety of others and the person’s well-being.

The law should also curtail the person’s liberty and security in the least restrictive way possible. For example, the Human Rights Committee has said that, with respect to detention and other restrictive practices, the law should apply such practices as a last resort, for the shortest time possible.¹⁸⁰ The use of such practices should be continually re-evaluated as to their continuing necessity,¹⁸¹ that is, with regular assessments and independent reviews.

Yet, only Queensland and Tasmania’s legislation imposes time limits during which a restrictive practice can be used. In Queensland, an approval for containment and seclusion by QCAT is limited to a maximum of 12 months.¹⁸² An appointment of a guardian for restrictive practices is limited to two years.¹⁸³ In Tasmania, the Secretary’s approval of

environmental restrictions and the Guardianship and Administration Board's approval of personal restrictions are limited to a maximum of 90 days,¹⁸⁴ (or six months if a hearing has taken place in the case of the Guardianship and Administration Board).¹⁸⁵ While time limits are not imposed in Victoria, time limitation could be a condition placed on the authorised program officer's approval.¹⁸⁶

Further, if there were another means that could achieve the purpose (for example, keeping the person and others safe) that imposes less of a limitation on the person's liberty and security, then that means should be chosen. All jurisdictions require that the restrictive practices used are the least restrictive necessary in the circumstances,¹⁸⁷ although there is no guidance in legislation about what, in practice, this might mean. In the context of the use of restrictive practices, this could mean, for example, rather than subjecting an adult to seclusion, arranging for their environment to be quieter, with staff and other residents retreating to another area of the facility. Yet this type of detail is lacking from statutory frameworks for restrictive practices.

The final requirement of a proportionate law is that the overall benefits gained by implementing the law, with the severity of the restriction on the right to liberty and security, must be weighed to justify the limitations on the rights of people with intellectual impairment. Again, the more important and central the right, and the more severe the limitation, the greater the public interest must be to justify its limit.¹⁸⁸ The outcome of this overall balancing will depend on the characteristics of the individual statutory regime for restrictive practices.

A Rights-based Approach to Equality

Going to the 'thickest' part of the approach of the rule of law, a rights-based approach to equality demands more from statutes that regulate restrictive practices than appropriate procedural safeguards, including a lack of

arbitrariness. While vitally important, as was argued in Part One, these still do not guarantee that people with intellectual and cognitive impairment will secure their rights to liberty and security on an equal basis with others. First, consistent with the approach underpinning the CPRD, a rights-based approach to equality demands reasonable accommodations by the state so that people with intellectual impairment can realise their rights to liberty and security on an equal basis to others. In fact, the requirement to make reasonable accommodations is specifically included in article 14 of the CPRD, dealing with the right to liberty and security. Second, and related to the requirement to make reasonable accommodations, a rights-based approach to equality also challenges the divisibility of rights and the somewhat artificial distinction between civil and political rights (such as liberty and security) and social, economic and cultural rights. As Charlesworth argues, many civil and political rights have social and economic implications.¹⁸⁹ A rights-based approach to equality, as Charlesworth suggests, would explore other mechanisms, involving the realisation of social, economic and political rights, that may actually operate as restraints on the arbitrary exercise of power.¹⁹⁰

Implications of a Rights-based Approach for Restrictive Practices Regulatory Frameworks

In the context of the regulation of restrictive practices, procedural safeguards (while important), do little by themselves to address the conditions in health- and aged care facilities or disability services that may lead to the use of restrictive practices.

For example, the precursor or justification for the use of restrictive practices in aged care facilities, disability residential facilities or other health facilities on people with intellectual and cognitive impairments is often described as 'challenging behaviours'.¹⁹¹ Emerson describes it as 'culturally abnormal behaviour of such an intensity, frequency or duration that the physical safety of the person

or others is likely to be placed in serious jeopardy, or ... result in the person being denied access to, ordinary community facilities'.¹⁹² The term *behaviours of concern* is preferred by some, which, it is argued, carries less of a social stigma and also points to the appropriate response by professionals.¹⁹³ The literature uses generic terms to describe these behaviours, including physical aggression, anti-social behaviour, self-harm, inappropriate sexual behaviour and destructiveness.¹⁹⁴

As discussed above, this criterion is also usually reflected in statutory frameworks for restrictive practices where key criteria for the use of such practices include that they are necessary to prevent harm, either to the person themselves, to others or to property.¹⁹⁵

There is a growing body of work, however, that highlights that restrictive practices are often used in lieu of appropriate supports.¹⁹⁶ The extensive literature on this subject recognises that there are a large number of well-understood factors that can contribute to 'behaviours of concern' that lead to the use of restrictive practices such as the person's environment (including their physical accommodation and other residents); the behaviour of support staff; lack of professional expertise amongst support staff; resource constraints; reactive or crisis responses as opposed to preventative and positive strategies; undiagnosed and untreated mental and physical health issues; and communication difficulties, to name but a few.¹⁹⁷

With roots in applied behavioural analysis and education, positive behaviour support has emerged as a relatively new approach to restrictive practices. Rather than accepting the need to use restrictive practices in response to 'behaviours of concern,' this approach focuses on the functions of the problematic behaviour, teaching the person functionally equivalent adaptive skills to replace the behaviour, whilst also addressing environmental deficits that may contribute to it.¹⁹⁸ The overall aim is to reduce the reliance on and the need to use restrictive practices, to give both the person with disability and their

supporters, carers, parents and teachers a better quality of life.¹⁹⁹

This approach, that is, the use of alternative strategies to address the underlying reasons for behaviours of concern, is consistent with how the CPRD expresses the right to civil and political rights such as liberty and security. Article 14 of the CPRD states that state parties must ensure that people with disabilities enjoy liberty and security on the same basis as others. It also states that in no case should having a disability be justification for being deprived of liberty or security. Read with the overarching responsibility of non-discrimination, or the obligation to make reasonable accommodations in article 5, this could involve, for example, providing for habilitation and rehabilitation (as demanded by article 26, which obliges state parties to 'enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life'). As French, Chan and Carracher have indicated, for people with cognitive impairment who engage in 'behaviours of concern', realising the right to liberty and security (which are civil and political rights) may also include strategies such as the availability of skilled support staff 'to assist the person to realize their positive developmental potential'²⁰⁰ (that is, the realisation of social and economic rights).

The exact strategies that should be employed to ensure people with disabilities can realise their potential, so that restrictive practices can be avoided, is beyond the scope of this article, and the discipline of law. Yet law can and should be an important vehicle to ensure these issues are addressed before resorting to the use of detention and chemical and physical restraint. Cross-disciplinary collaborations between lawyers and those with expertise and experience in working with people with disabilities and importantly, people with disability themselves, can help design policy and law that goes beyond statements of principle (such as best interests and

least restrictive way) and a requirement for a behaviour support plan to be in place.

A rights-based approach would therefore demand that laws that authorise the use of restrictive practices must also mandate that appropriate supports are provided, with opportunities for habilitation, in environments that also allow for safe socialisation and access to the community. These requirements should be met (except in emergency situations) before restrictive practices can be utilised, or support or health staff provided with protection from civil or criminal liability for the use of such practices. Anything less, from the point of view of a rights-based approach to equality (as reflected in the CPRD) would incorporate a discriminatory approach to the law for people with intellectual and cognitive impairments.

The question could be asked, of course, whether such laws might be too costly for our society to implement. But as Barak has stated, '[a] society that places human rights atop all other protected values must also be willing to pay for them',²⁰¹ and further (citing his own judgement in *Botzer v Macabim-Re'ut Regional Municipality*) that '[t]he guaranteeing of equal opportunities for the disabled is an expensive endeavour. However a society based on the values of human dignity, liberty and equality is willing to pay that price'.²⁰²

Summary

In summary, legislation that curtails the right to liberty and security of people with intellectual or cognitive impairments should:

- I. *Provide for clarity and predictability*: so that the law restricts the rights to liberty and security in a way that is clear and unambiguous, including clear criteria for civil commitment and restraint that are transparent and bring about certainty and predictability in the way the laws will be exercised;
- II. *Demonstrate integrity*: including a consistent approach to the regulation

of restrictive practices both across and within jurisdictions; and a consistent approach with other laws that provide for civil commitment, detention, involuntary treatment and restrictive practices of those with mental illness;

III. *Be proportionate in the limitation of the rights to liberty and security*: that is, ensure that the law authorising any limitation:

- a. is for a *proper purpose*;
- b. illustrates a *rational connection* between the law (or means chosen) and the purpose;
- c. utilises the *least restrictive* means to achieve the purpose;
- d. illustrates a *proper relation* between the benefits gained due to the implementation of the law and the harm done to the rights of liberty and security;

IV. *Provide for reasonable accommodations*: that is, not only authorise restrictive practices but place obligations on states to support people with disability to realise their rights to liberty and security through obligations to provide, for example: habilitation and rehabilitation; appropriate support and accommodation and access to and inclusion in the community; and

V. *Reflect cross-disciplinary collaborations*: between lawyers, people with disability and professionals with experience and expertise in working with people with intellectual and cognitive impairments.

Conclusion

Part One of this article outlined a doctrinal approach for a rights-based approach to the law with the aim of protecting the rights to liberty and security for people with disability, in particular people with intellectual and cognitive impairments. This doctrinal approach

was derived from the same political liberal origins from which those rights emerged, albeit a liberalism at the more substantive end of the ideological spectrum which also underpins a substantive or 'thick' version of the rule of law. The addition of the principles of justice and human rights to a procedural or formal version of the rule of law, it was argued, was important to ensure not only the rights to liberty and security for people with intellectual and cognitive impairments, but also to ensure that they can realise the benefits of the rule of law in their everyday lives.

Part Two, by outlining a methodological approach for a rights-based approach to the law in relation to the adjudication of common law rights, the interpretation of statute and the making of law, has borne this out in practice. It has been shown that without a rights-based approach to the law, people with disability not only remain at peril of being subject to the whims of 'transient psychological, sociological and economic theories' about people with disability,²⁰³ but also face significant curtailment of their liberty and security without sufficient safeguards or transparency of the use of such practices.

A rights-based approach can help address these limitations. A methodology for the adjudication, interpretation and regulation as a starting point for an approach that may do so has been outlined in this article.

Even the cursory examination of the authorisation of restrictive practices under the common law, and the reliance on generic legislation (such as guardianship law), has shown that there is great uncertainty about the lawful basis of restrictive practices outside of specific legislation. Therefore the regulation of restrictive practices takes on a great significance, not only in providing legal certainty for the use of such practices, but also for ensuring the use of such practices are proportionate and that there are appropriate safeguards.

But the simple authorisation of restrictive practices, with appropriate procedural safeguards, is not sufficient to realise the

rights to liberty and security of people with intellectual and cognitive impairment on the same basis as others. To truly transcend some of the limitations of liberalism, and related theories of justice as it relates to people with intellectual and cognitive impairment, it was argued, required more than integrity with common law principles or inclusion of procedural safeguards in laws authorising restrictive practices. Consistent with a rights-based approach to equality reflected in the CPRD, states also have a positive obligation to ensure people with intellectual and cognitive impairments who may be at risk of being subject to restrictive practices (through demonstrating behaviours of concern) should have access to appropriate support, including habitation and rehabilitation and appropriate environments, and support in accessing and being included in their communities. Drawing on the experiences of people with intellectual and cognitive impairment and those professionals who work with people with disabilities, these should be more than principle-based statements in legislation. They should impose real and concrete obligations. Only in this way can the artificial divide that has underpinned theories of rights and justice, between those with reason and those without (or those with capacity and those without capacity) be transcended so that people with intellectual and cognitive impairment can also realise the benefits of the rule of law.

Then perhaps, as Krygier would demand, when considering whether the rule of law has penetrated to aged care facilities, disability group homes, or health and rehabilitation facilities, we would look not just to the 'precision of legal rules',²⁰⁴ (including procedural safeguards) but also to the concrete situation of people with disabilities, and as such, find the rule of law embedded in 'the myriad law-affected everyday interactions of individuals and groups, which go nowhere near lawyers or officials but where law in a rule-of-law society does its most important work'.²⁰⁵

Notes

1. Kim Chandler, Ben White and Lindy Willmott, 'Safeguarding Rights to Liberty and Security where People with Disability are Subject to Detention and Restraint: A Rights-based Approach (Part One)' (2018) Psychiatry, Psychology and Law (forthcoming).
2. Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007 [2008] ATS12 (entered into force 3 May 2008).
3. *Precision Data Holdings Ltd v Wills* [1992] 173 CLR 167 at [21]–[23] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ).
4. TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 26.
5. Allan, *Law, Liberty, and Justice* (n 4) 27.
6. Allan, *Law, Liberty, and Justice* (n 4) 27.
7. External preferences are those that do not value equal concern and respect, but 'value the assignment of goods or opportunities to some and not to others: Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1991) 274.
8. That is, Dworkin, *Taking Rights Seriously* (n 7) and Ronald Dworkin, *Law's Empire*, (Harvard University Press 1986).
9. Allan, *Law, Liberty, and Justice* (n 4) 6.
10. Dworkin, *Taking Rights Seriously* (n 7) 90.
11. Dworkin, *Taking Rights Seriously* (n 7) 90.
12. Dworkin, *Taking Rights Seriously* (n 7) 90; Allan, *Law, Liberty, and Justice* (n 4) 6.
13. Dworkin, *Taking Rights Seriously* (n 7) 86.
14. Dworkin, *Taking Rights Seriously* (n 7) 90.
15. Dworkin, *Law's Empire* (n 8) 134.
16. Dworkin, *Law's Empire* (n 8) 225, 227.
17. Dworkin, *Taking Rights Seriously* (n 7) 116.
18. Dworkin, *Law's Empire* (n 8) 255.
19. Dworkin, *Taking Rights Seriously* (n 7) 81.
20. *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 72 (Lord Goff).
21. This is because it was found that the last Royal Warrant under the Sign Manual (the instrument by which the Queen delegated her responsibility for welfare of her subjects to the courts) had been revoked on 1 November 1960 'possibly in the mistaken belief the court had all necessary powers under the Mental Health Act 1959': *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 71 (Lord Goff).
22. *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.
23. *R v Davidson* [1969] VR 667; *R v Loughnan* [1981] VR 443.
24. *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 75 (Lord Goff). See a fuller discussion of this in Kim Chandler, Ben White and Lindy Willmott, 'The Doctrine of Necessity and the Detention and Restraint of People with Intellectual Impairment: Is there Any Justification?' (2016) 23(3) Psychiatry, Psychology and Law 361.
25. *R v Bournemouth Community and Mental Health NHS Trust, ex parte L* [1999] 1 AC 458.
26. *R v Bournemouth Community and Mental Health NHS Trust, ex parte L* [1999] 1 AC 458, 495 (Lord Steyn).
27. *R v Bournemouth Community and Mental Health NHS Trust, ex parte L* [1999] 1 AC 458, 488 (Lord Goff), 490 (Lord Lloyd), 492 (Lord Nolan), 497 (Lord Steyn).
28. Chandler, White and Willmott, 'Doctrine of Necessity' (n 24) 368.
29. George Fletcher, 'The Individualization of Excusing Conditions' (1973–74) 47 Southern California Law Review 1269, 1274.
30. See, for example, the Mental Capacity Act 2005 (UK) and the Deprivation of Liberty Safeguards (DoLS) (made under the Mental Capacity Act 2005 (UK) which came into force in 2009).
31. Chandler, White and Willmott, 'Doctrine of Necessity' (n 24).
32. *HL v United Kingdom* (2005) 40 EHRR 32 at [124].
33. *HL v United Kingdom* (2005) 40 EHRR 32 at [90].
34. *HL v United Kingdom* (2005) 40 EHRR 32 at [90].
35. *HL v United Kingdom* (2005) 40 EHRR 32 at [91].
36. That is, Victoria (Charter of Human Rights and Responsibilities Act 2006 (Vic)) and the Australian Capital Territory (Human Rights Act 2004 (ACT)).
37. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at [42] (Brennan J); *Dietrich v R* (1992) 177 CLR 292, 321 (Brennan J); *Dietrich v The Queen* (1992) 177 CLR 1, 42, 305 (Mason ACJ and McHugh J), 337 (Deane J), 349 (Dawson J), 360 (Toohey J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J); Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions* (Presidian 2008) 109; Alexander Reilly and others, *Australian Public Law* (Oxford 2011) 254–55.
38. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

39. International Covenant on Civil and Political Rights, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969, entered into force in Australia on 28 January 1993) ('ICCPR').
40. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at [42] (Brennan J).
41. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at [42] (Brennan J).
42. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ, Deane J).
43. Lacey (n 37) 117.
44. *Walker v Baird* [1892] AC 491. (This rule is that unincorporated treaties will have no direct effect on domestic law.)
45. In the sense that both the rule of law and the separation of powers recognises Parliamentary sovereignty.
46. Sir Gerard Brennan, 'Principle and Independence: The Guardians of Freedom' (2000) 4(2) Australian Law Journal 749, 757.
47. Brennan (n 46) 757.
48. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).
49. *Momcilovic v The Queen* (2011) 245 CLR 1 at [18] (French CJ).
50. *Department of Health and Community Services v JWB & SMB (Marion's Case)* (1992) 175 CLR 218.
51. Brennan J included the ICCPR, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.
52. *Department of Health and Community Services v JWB & SMB (Marion's Case)* (1992) 175 CLR 218, 266 (Brennan J).
53. Therefore, the meaning of deprivation of liberty (to determine if the DoLS or requirement for authorisation by the Court of Protection is required) has been developed in case law. See, for example, *P v Cheshire West and Chester Council and P and Q v Surrey County Council* [2014] UKSC 19.
54. The right to liberty and security in sch 1 of the United Kingdom's Human Rights Act 1998 is derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is modeled on art 9 of the ICCPR.
55. *Cheshire West and Chester Council v P* [2014] 1 AC 869, 919.
56. Lady Hale, 'Psychiatry and the Law: An Enduring Interest for Lord Rodger' (The Lord Rodger Memorial Lecture, 31 October 2014) 24 <<https://www.supremecourt.uk/docs/speech-141031.pdf>>.
57. Note that the test of deprivation of liberty necessary for a writ of *habeas corpus* is different to the test for false imprisonment.
58. The Victorian Parliament has enacted the Charter of Human Rights and Responsibilities Act 2006 (Vic) which imposes an obligation on public entities to act in a way that is compatible with human rights, including the right to liberty and security as derived from art 9 of the ICCPR.
59. *Antunovic v Dawson* (2010) 30 VR 355 at [66] (Bell J).
60. *Antunovic v Dawson* at [60].
61. *Antunovic v Dawson* at [174].
62. *Antunovic v Dawson* at [177].
63. Allan, *Law, Liberty, and Justice* (n 4) 79.
64. Chief Justice Robert French, 'The Common Law and the Protection of Human Rights' (Speech delivered to the Anglo-Australian Lawyers Society, Sydney, 4 September 2009) 6 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>> citing *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587, accessed 28 November 2017.
65. Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 Australian Law Journal 240, cited in Allan, *Law, Liberty, and Justice* (n 4) 79.
66. Allan, *Law, Liberty, and Justice* (n 4) 79.
67. *Momcilovic v the Queen* (2011) 245 CLR 1 at [43] (French CJ).
68. *Al-Kateb v Goodwin* (2004) 219 CLR 562, 577 at [20] (Gleeson CJ), quoted in Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) Monash University Law Review 329, 334.
69. Spigelman J, 'The Common Law Bill of Rights: Statutory Interpretation and Human Rights' (Speech delivered at the McPherson Lectures, University of Queensland, 10 March 2008) in *Statutory Interpretation and Human Rights* (University of Queensland Press 2008) 34.
70. *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
71. *Bropho v Western Australia* (1990) 171 CLR 1, 18; *Wentworth v New South Wales Bar Association* (1992) 76 CLR 239, 252; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 53, 11; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523; *Plaintiff S157/2002 v*

- Commonwealth* (2003) 211 CLR 476, 492;
- Al-Kateb v Godwin* (2004) 219 CLR 562, 577.
72. Spigelman J (n 69) 25.
73. *Coco v The Queen* (1994) 179 CLR 427.
74. *Coco v The Queen* at [10] (Mason CJ, Brennan, Gaudron, McHugh JJ).
75. Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 Sydney Law Review 413, 423.
76. Meagher, 'The Principle of Legality' (n 75).
77. Allan, *Law, Liberty, and Justice* (n 4) 93.
78. Allan, *Law, Liberty, and Justice* (n 4) 12.
79. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70 at [86] (Black CJ, Sundberg and Weinberg JJ). Also see Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 Melbourne University Law Review 449, 456–59; Meagher, 'The Principle of Legality' (n 75) 430–35.
80. *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Al-Kateb v Godwin* (2004) 219 CLR 562.
81. Allan, *Law, liberty and Justice* (n4) 15.
82. Allan, *Law, Liberty, and Justice* (n 4) 90.
83. *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [312] (Gageler and Keane JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [19] (Gleeson J); Chen (n 83) 356–57.
84. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70.
85. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* at [92].
86. *Momcilovic v the Queen* (2011) 245 CLR 1 at [43] (French CJ).
87. *Momcilovic v the Queen* at [43].
88. Kim Chandler, Lindy Willmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis' (2014) 14(2) QUT Law Review 90.
89. Kim Chandler, Ben White and Lindy Willmott, 'What Role for Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) Monash University Law Review 492.
90. Chandler, White and Willmott, 'What Role for Adult Guardianship?' (n 89) 492; Nick O'Neill and Carmelle Pesiah, *Capacity and the Law* (Sydney University Press 2011) at [5.4] <<http://www.austlii.edu.au/au/journals/SydUPLawBk/2011/1.html>>.
91. *Re WCM* [2005] QGAAT 26.
92. *Re WCM* [2005] QGAAT 26 at [28].
93. *Re WCM* [2005] QGAAT 26 at [38].
94. *ADP* [2005] WASAT 131.
95. *ADP* [2005] WASAT 131 at [25]–[27].
96. *ADP* [2005] WASAT 131 at [15].
97. *ADP* [2005] WASAT 131 at [44].
98. *NLA (Guardianship)* [2015] VCAT 1104; Chandler, White and Willmott, 'What Role for Adult Guardianship?' (n 89).
99. *NLA (Guardianship)* [2015] VCAT 1104 at [125].
100. *Re MLI* [2006] QGAAT 31.
101. *Re MLI* [2006] QGAAT 31 at [69].
102. *Re MLI* [2006] QGAAT 31 at [70].
103. Chandler, White and Willmott, 'What Role for Adult Guardianship?' (n 89).
104. *Walker v Baird* [1892] AC 491; Lacey (n 37) 82.
105. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
106. *JH Rayner v Department of Trade* [1990] 2 AC 418, 476–77; Lacey (n 37) 86. The rule in *Walker v Baird* has been expressed in various Australian judicial statements: *Victoria v Commonwealth* (1996) 187 CLR 416, 480–82 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *R v Burgess; Ex parte Hendry* (1936) 55 CLR 608, 644 (Latham CJ); *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 55 (Brennan J, with Mason CJ, McHugh J concurring) 79 (Deane and Gaudron JJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
107. *Polites v Commonwealth* (1945) 70 CLR 60; Lacey (n 37) 90.
108. Meagher, 'The Common Law Principle' (n 79) 466; Hilary Charlesworth and others, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) Sydney Law Review 423, 457. See High Court authority in *Chu Keng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
109. Lacey (n 37) 94; Reilly and others (n 37) 248.
110. See *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 where Mason CJ and Deane J affirmed that ambiguity was needed, but did not take a strict view of ambiguity.
111. *Royal Womens Hospital v Medical Practitioners Board of Australia* [2006] VSCA 85 at [75] (Maxwell P), cited by Bell J in *Director of Public Prosecutions v Kaba* [2014] VSC 52 at [145].
112. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003]

- FCAFC 70 at [140]. This influence, the court noted, could also extend to interpretative comments by, for example, the Human Rights Committee.
113. *Potter v Minahan* (1908) 7 CLR 277, 304.
 114. *Minister for Foreign Affairs and Trade v Mango* (1992) 37 FCR 289; *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337, 417; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
 115. Reilly and others (n 37) 251.
 116. Lacey (n 37) 106.
 117. Charter of Human Rights and Responsibilities Act 2006 (Vic) s 32(1) ('the Victorian Charter').
 118. Human Rights Act 2004 (ACT) s 30.
 119. Charter of Human Rights and Responsibilities Act 2006 (Vic) s 32(2); Human Rights Act 2004 (ACT) s 31(1).
 120. *Director of Public Prosecutions v Kaba* [2014] VSC 52 at [146].
 121. Convention of the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); International Covenant on Civil and Political Rights, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
 122. Charter of Human Rights and Responsibilities Act 2006 (Vic).
 123. Child, Youth and Families Act 2005 (Vic) s 4.
 124. Child, Youth and Families Act 2005 (Vic) s 5.
 125. *Re Beth* [2013] VSC 189 at [31].
 126. *Re Beth* [2013] VSC 189 at [125].
 127. *Re Beth* [2013] VSC 189 at [126].
 128. Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 214, quoted in Brian Z Tamanaha, *On The Rule of Law: History, Politics and Theory* (CUP 2004) 93.
 129. Raz (n 128) 93.
 130. Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969), quoted in Tamanaha (n 128) 94.
 131. Tamanaha (n 128) 94.
 132. Justice Brian J Preston, 'The Enduring Importance of the Rule of Law in Times of Change' (2012) 86 Australian Law Journal 175, 182.
 133. Aharon Barak, *Proportionality* (CUP 2012) 380.
 134. Barak (n 133) 267–69.
 135. Barak (n 133) 265.
 136. Barak (n 133) 319; Allan, *Law, Liberty, and Justice* (n 4) 12.
 137. Dworkin, *Law's Empire* (n 8) 134; Allan, *Law, Liberty, and Justice* (n 4) 117.
 138. Allan, *Law, Liberty, and Justice* (n 4) 117.
 139. Dworkin, *Law's Empire* (n 8) 184–85.
 140. Dworkin, *Law's Empire* (n 8) 184.
 141. TRS Allan, 'Constitutional Rights and the Rule of Law' in Mathias Klatt (ed), *Institutionalised Reason: The Jurisprudence of Robert Alexy* (Oxford 2002) 144.
 142. Allan, 'Constitutional Rights and the Rule of Law' (n 141).
 143. Allan, 'Constitutional Rights and the Rule of Law' (n 141) 132.
 144. TRS Allan, 'Democracy, Legality and Proportionality' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 209.
 145. Chandler, White and Willmott, 'What Role for Adult Guardianship?' (n 89). See also Michael Williams, John Chesterman and Richard Laufer, 'Consent Versus Scrutiny: Restricting Liberties in Post-Bournewood Victoria' (2014) 21 Journal of Law and Medicine 641.
 146. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Law*, Report No 67 (2010) [19.136].
 147. Robert Alexy, 'The Absolute and the Relative Dimensions of Constitutional Rights' (2017) 37(1) Journal of Legal Studies 31, 34.
 148. Barak (n 133) 131.
 149. Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 Public Law Review 85, 85.
 150. Kiefel (n 149).
 151. Kiefel (n 149).
 152. Barak (n 133) 253; *R v Oakes* [1986] 1 SCR 103.
 153. Barak (n 133) 253.
 154. UDHR art 29(2).
 155. Barak (n 133) 269.
 156. Dworkin, *Taking Rights Seriously* (n 7) 92.
 157. Barak (n 133) 405.
 158. Barak (n 133) 303.
 159. Barak (n 133) 317.
 160. Barak (n 133) 340.
 161. Barak (n 133) 340.
 162. 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law': ICCPR art 9.
 163. Human Rights Committee, *General Comment No.35 Article 9 (Liberty and Security of Person)* UN Doc CCPR/C/GC/35 (16 December 2014) 3.
 164. Human Rights Committee (n 163) 7.
 165. Human Rights Committee (n 163) 13.

166. *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646; Phillip French, Jeffrey Chan and Rod Carracher, 'Realizing Human Rights in Clinical Practice and Service Delivery to Persons with Cognitive Impairment who Engage in Behaviours of Concern' (2010) 17(2) *Psychiatry, Psychology and Law* 245, 259.
167. Human Rights Committee (n 163) 6.
168. Human Rights Committee (n 163) 6.
169. Victoria, Queensland, Tasmania and the Northern Territory have statutory frameworks to regulate restrictive practices in disability services, see: Disability Act 2006 (Vic); Disability Services Act 2006 (Qld); Guardianship and Administration Act 2000 (Qld); Disability Services Act 2011 (Tas); Disability Services Act (NT).
170. See Disability Services Act 2006 (Vic) s 140(a); Disability Services Act (NT) s 41(2)(a).
171. Guardianship and Administration Act 2000 (Qld) s 80V(2)(b). This is the criterion for QCAT to approve containment and seclusion.
172. Disability Services Act 2011 (Tas) s 38(5)(c).
173. Disability Services Act 2011 (Tas) s 38(5)(f).
174. Disability Act 2006 (Vic) s 141(2)(b).
175. Guardianship and Administration Act 2000 (Qld) s 80V(2)(f).
176. Disability Services Act (NT) s 36(2).
177. Disability Services Act 2011 (Tas) ss 38(5)(f), 43(1)(a).
178. Human Rights Committee (n 163) 6.
179. Disability Services Act 2006 (Vic) s 140(c); Guardianship and Administration Act 2000 (Qld) ss 80V(2)(c), 80ZE(2); Disability Services Act (NT) s 36.
180. Human Rights Committee (n 163) 6.
181. Human Rights Committee (n 163) 6.
182. Guardianship and Administration Act 2000 (Qld) s 80Y(2).
183. Guardianship and Administration Act 2000 (Qld) s 80ZD(4).
184. Disability Services Act 2011 (Tas) ss 39(3), 44(3).
185. Disability Services Act 2011 (Tas) s 44(3).
186. Disability Act 2006 (Vic) s 145.
187. Disability Act 2006 (Vic) s 140(b); Disability Services Act (NT) s 37(2)(c); Guardianship and Administration Act 2000 (Qld) s 80V(2)(d); Disability Services Act 2011 (Tas) ss 38(4)(b), 43(1)(b).
188. Barak (n 133) 363; *R v Ministry of Defence, ex parte Smith* [1996] QB 517, 554 (Lord Bingham).
189. Hilary Charlesworth, 'Human Rights and the Rule of Law After Conflict' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-first Century* (Hart Publishing 2010) 56.
190. Charlesworth (n 189); Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2008).
191. William Carter, *Challenging Behaviour and Disability: A Targeted Response* (Report to Warren Pitt MP, Minister for Communities, Disability Services and Seniors) (July 2006) <<https://www.communities.qld.gov.au/resources/disability/centre-of-excellence/carter-report-full.pdf>>; Jeffrey Chan and others, 'Is it Time to Drop the Term "Challenging Behaviour"?' (2012) 15(5) *Learning Disability Practice* 36.
192. Eric Emerson, *Challenging Behaviour, Analysis and Intervention in People with Learning Difficulties* (CUP 1995); The Royal College of Psychiatrists, British Psychological Society and Royal College of Speech and Language Therapists, *Challenging Behaviour: A Unified Approach* (June 2007) Royal College of Psychiatrists <<http://www.rcpsych.ac.uk/files/pdfversion/cr144.pdf>> accessed 28 November 2017.
193. Disability Act 2006 (Vic) s 140(a); Guardianship and Administration Act 2000 (Qld) ss 80V, 80ZE(4).
194. E Emerson and others, 'Treatment and Management of Challenging Behaviours in Residential Settings' (2000) 13 *Journal of Applied Research in Intellectual Disabilities* 197.
195. Disability Act 2006 (Vic) s 140(a); Guardianship and Administration Act 2000 (Qld) ss 80V, 80ZE(4).
196. See, for example, Chan and others (n 191); Disability Rights Now, *Civil Society Report to the United Nation on the Rights of Persons with Disabilities* (August 2012) 91–110; K Hayes and E Hannold 'The Road to Empowerment: A Historical Perspective on the Medicalisation of Disability' (2007) 30 (3) *Journal of Health and Human Services Administration* 352, 352–72.
197. Keith McVilly, *Physical Restraint in Disability Services: Current Practices, Contemporary Concerns and Future Directions* (Department of Human Services, Victoria, March 2009); Carter (n 191).
198. MA Feldman and others, 'Formal Versus Informal Interventions for Challenging Behaviour in Persons with Intellectual Disabilities' (2004) 48(1) *Journal of Intellectual Disability Research* 60, 61.

199. Peter Sturmey, 'It is Time to Reduce and Safely Eliminate Restrictive Practices' (2009) 22 *Journal of Applied Research in Intellectual Disabilities* 105, 105–10.
200. French, Chan and Carracher (n 166) 265.
201. Barak (n 133) 271.
202. *Botzer v Macabim-Re'ut Regional Municipality* [1996] Isr SC 50(10) 19, 27; Barak (n 133) 271.
203. Robert J Cynkar, '*Buck v Bell* "Felt Necessities" v "Fundamental Values"' (1981) 81 *Columbia Law Review* 1418, 1459.
204. Krygier (n 190) 63.
205. Krygier (n 190) 64.

Ethical standards: Option 1 – Studies with no human participants

Declaration of conflicts of interest

Author A [Kim Chandler] has declared no conflicts of interest

Author B [Ben White] has declared no conflicts of interest

Author C [Lindy Willmott] has declared no conflicts of interest

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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