*John Eldridge**

'PAPERLESS ARRESTS': *NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LTD v NORTHERN TERRITORY* (2015) 326 ALR 16

I Introduction

In *North Australian Aboriginal Justice Agency Ltd v Northern Territory*,[1] an unsuccessful challenge was mounted to the constitutional validity of div 4AA of pt VII of the *Police Administration Act 1978* (NT) ('*PA Act*').

The principal provision in div 4AA is s 133AB. It applies where a person is arrested without warrant on the basis of a reasonable belief that he or she has committed, was committing, or was about to commit an 'infringement notice offence'.[2] It provides that a person arrested in these circumstances may be held in custody for a period of up to four hours, or, if the person is intoxicated, until such time as the arresting officer reasonably believes the person no longer to be intoxicated.[3]

Miranda Maria Bowden, the second plaintiff in the proceedings, was arrested in Katherine early in the evening of 19 March 2015.[4] She was taken into custody under s 133AB and held for nearly 12 hours.[5] Upon her release she was issued with an infringement notice which alleged the commission of two offences.[6]

The North Australian Aboriginal Justice Agency Ltd and Ms Bowden (the first and second plaintiffs respectively) commenced proceedings in the original jurisdiction of the High Court, contending that div 4AA was invalid and sought a declaration

---

* BA LLB (Hons) (Adelaide); Lecturer, Sydney Law School, University of Sydney; PhD Candidate, Adelaide Law School, University of Adelaide. Thanks are due to Matthew Stubbs, Adam Webster, and Bethany Moore for their insightful comments. All errors remain the author's own.

1 (2015) 326 ALR 16 ('*NAAJA v NT*').

2 An 'infringement notice offence' is defined not in the *PA Act*, but in the *Fines and Penalties (Recovery) Act 2001* (NT) s 9: 'An infringement notice is a notice issued under a law of the Territory to the effect that the person to whom it is directed has committed a specified offence and that the person may expiate the offence by paying the penalty specified in the notice in the manner and within the time specified.'

3 *PA Act* s 133AB(2).

4 *NAAJA v NT* (2015) 326 ALR 16, 17 [1].

5 Ibid 18 [3].

6 Ibid.

to that effect.[7] The second plaintiff also sought to make out an action in false imprisonment.[8]

The plaintiffs contended that div 4AA was invalid on two alternative bases. First, it was argued that div 4AA purports to confer on the Northern Territory executive a power of detention which is punitive in character, and which therefore offends the constitutionally-mandated separation of powers which the plaintiffs contended operates in the Northern Territory.[9] In advancing this argument, the plaintiffs relied upon the well-settled principle that, subject to certain limited exceptions, 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[10]

The plaintiffs further argued that in purporting to confer on the Northern Territory executive a power of detention which is punitive in character, div 4AA interferes with the institutional integrity of the courts of the Northern Territory in a manner which offends the principle in *Kable v Director of Public Prosecutions (NSW)*.[11]

II Construing the Impugned Provisions

A *The Competing Constructions*

Division 4AA of the *PA Act* was introduced by the *Police Administration Amendment Act 2014* (NT). The principal provision in div 4AA, s 133AB, is engaged where a person is arrested without warrant (under *PA Act* s 123) on the basis of a reasonable belief that he or she has committed, was committing, or was about to commit an infringement notice offence. It provides, in s 133AB(2), that a person arrested in these circumstances may be held in custody for a period of up to four hours, or, if the person is intoxicated, until such time as the arresting officer reasonably believes the person no longer to be intoxicated. Section 133AB(3) provides that the arresting officer, or any other member of the Northern Territory Police Force, may 'on the expiry of the period mentioned in subsection (2)':

> (a) release the person unconditionally; or
>
> (b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or
>
> (c) release the person on bail; or

---

7 Ibid 18 [4].

8 Ibid 18 [5].

9 Ibid 18–19 [8].

10 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 ('*Chu Kheng Lim v Minister for Immigration*').

11 (1996) 189 CLR 51 ('*Kable*'). See *NAAJA v NT* (2015) 326 ALR 16, 19 [9].

(d) under section 137, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

The parties advanced competing constructions of s 133AB. The plaintiffs contended that the period of detention authorised by s 133AB(2) served simply to delay, for up to four hours, the making of a decision in respect of how a person taken into custody ought to be dealt with.[12] The plaintiffs described this as amounting to a 'superadded four hour period of detention', and argued that the detention authorised by s 133AB was thus punitive in character.[13]

The Northern Territory submitted that s 133AB, properly construed, did not authorise the detention for four hours of every person taken into custody without warrant in connection with the commission of an infringement notice offence.[14] In the Northern Territory's submission, the power of detention conferred by s 133AB was subject to a number of limitations which were not made explicit in div 4AA.[15]

In this connection, the defendant argued that s 133AB was subject to the *PA Act* s 137. Section 137(1), which mirrors an equivalent requirement at common law, provides that a person taken into custody under a provision of the *PA Act* or any other Act must be brought before a justice or court as soon as is reasonably practicable.[16]

This provision is itself subject to ss 137(2) and 137(3), which provide that a person may, in some circumstances, be held for a reasonable period for the purposes of questioning and investigation. The defendant contended that the 'overarching' requirement provided for in s 137(1) operated where a person was detained under s 133AB(2).[17]

Further, the defendant contended that div 4AA was confined in its operation to those circumstances in which arrest under s 123 was appropriate, in order to:

(a) ensure the person is available to be dealt with in respect of an offence if considered appropriate;

(b) preserve public order;

---

12 North Australian Aboriginal Justice Agency Ltd and Miranda Maria Bowden, 'Plaintiffs' Submissions', Submission in *NAAJA v NT*, M45/2015, 6 July 2015, 14–15.

13 Ibid 15.

14 Northern Territory, 'Defendant's Submissions', Submission in *NAAJA v NT*, M45/2015, 6 August 2015, 13.

15 Ibid 13–15.

16 For a discussion of the position at common law, see *Williams v The Queen* (1986) 161 CLR 278, 292–4; *John Lewis & Co Ltd v Tims* [1952] AC 676, 691; *R v Iorlano* (1983) 151 CLR 678, 680; *Drymalik v Feldman* [1966] SASR 227, 234.

17 Northern Territory, 'Defendant's Submissions', Submission in *NAAJA v NT*, M45/2015, 6 August 2015, 11.

(c) prevent the completion, continuation or repetition of the offence or the commission of another offence;

(d) prevent the concealment, loss or destruction of evidence relating to the offence;

(e) prevent the harassment of, or interference with, persons in the vicinity;

(f) prevent the fabrication of evidence in respect of the offence; and/or

(g) preserve the safety or welfare of the public or the person detained.[18]

B *The Court's Approach*

Chief Justice French and Justices Kiefel and Bell commenced their analysis of the provisions by affirming the centrality of the common law principle of legality.[19] Though the scope and rationale of the principle of legality is a matter of some debate,[20] it is at least well-settled that the principle requires legislation to be construed, so far as is possible, in a manner which minimises its intrusion upon fundamental common law rights.[21]

Upon this footing, French CJ, Kiefel and Bell JJ accepted the defendant's construction. However, their Honours did not offer a concluded view as to whether div 4AA was subject to s 137(1), as they were of the view that '[e]ven if s 137(1) did not apply, the common law obligations, which operate in the absence of clear words to the contrary, would require the police officer taking a person into custody under s 133AB to bring that person before a justice of the peace or a court as soon as practicable'.[22] Their Honours explicitly accepted the defendant's argument that the

---

18 Ibid 13–14 (citations omitted).

19 *NAAJA v NT* (2015) 326 ALR 16, 19–20 [11].

20 See, eg, J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769; James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008); Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449; Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2013) 36 *Sydney Law Review* 413; Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372.

21 *Potter v Minahan* (1908) 7 CLR 277, 304; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523; *Bropho v Western Australia* (1990) 171 CLR 1, 18; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 12; *Coco v The Queen* (1994) 179 CLR 427, 437–8; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 519–20; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622; *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117, 135.

22 *NAAJA v NT* (2015) 326 ALR 16, 26 [28].

operation of div 4AA was confined to the circumstances set out in (a)–(g) of the defendant's written submission (though some doubt was expressed as to the applicability of paragraphs (d) and (f) in respect of an infringement notice offence).[23] Their Honours concluded that 'thus confined in its operation … Div 4AA does not disclose a punitive purpose'.[24]

Justice Keane did not offer a view as to the proper construction of div 4AA. His Honour was of the opinion that the manner in which the matter was argued made it an inappropriate vehicle for the resolution of the difficult questions of construction presented by div 4AA.[25] As will be observed below, his Honour was also of the view that the answers to the constitutional questions did not turn upon the resolution of the differences between the parties as to the construction of div 4AA, and were 'readily resolved in the light of existing authority'.[26]

Like French CJ, Kiefel and Bell JJ, Nettle and Gordon JJ rested their conclusion in favour of the defendant's construction in part upon the common law principle of legality.[27] Their Honours also noted the desirability of giving div 4AA an operation which is consonant with s 137 and with s 16(2) of the *Bail Act 1982* (NT),[28] and cited the object of preferring a construction which would avoid giving div 4AA an 'irrational and capricious' operation.[29]

---

23 Ibid 28 [35]. The circumstances are set out above: see above n 18 and accompanying text.

24 Ibid 28 [36].

25 Ibid 54−6 [149]−[154]. See also the observation of Gageler J (at 37 [75]):

> The arguments divide along battlelines not unfamiliar where questions about the constitutional validity of a law are abstracted from questions about the concrete application of that law to determine the rights and liabilities of the parties. The party seeking to challenge validity advances a literal and draconian construction, even though the construction would be detrimental to that party were the law to be held valid. The party seeking to support validity advances a strained but benign construction, even though the construction is less efficacious from the perspective of that party than the literal construction embraced by the challenger. The constructions advanced reflect forensic choices: one designed to maximise the prospect of constitutional invalidity; the other to sidestep, or at least minimise, the prospect of constitutional invalidity. A court should be wary.

26 Ibid 54 [149].

27 Ibid 70−1 [222].

28 Ibid 69 [215], 71 [225].

29 Ibid 70 [221]. In this respect, Nettle and Gordon JJ observed:

> [If] the stipulation of a period of up to four hours were to override the duty in s 137(1), it would have the irrational and capricious consequence that a person arrested under s 123 on suspicion of committing, having committed or being about to commit a very serious offence … must be brought before a justice or court under s 137(1) as soon as practicable unless sooner granted bail or released, but a person arrested under s 123 for a relatively trivial infringement notice offence … could be detained for longer than the time when it becomes practicable to grant the person bail, release the person unconditionally or with an infringement notice, or bring the person before a justice or court.

Justice Gageler alone accepted the plaintiffs' construction of div 4AA. Though Gageler J rested his conclusion upon a number of considerations,[30] his Honour was plainly influenced by the extrinsic materials upon which the plaintiffs relied.[31] In particular, his Honour quoted a passage of Hansard in which the Attorney-General for the Northern Territory described div 4AA as effecting a scheme of 'catch and release',[32] and described the provisions as:

> restor[ing] a simple idea that when a police officer arrests a person for a street offence, they have taken that person out of commission. They bring them to the watch house, drop them off at the watch house, write out the summary infringement notice – so it is not entirely paperless – which goes into the property bag of the person who is then placed in the cells for the next four hours. In four hours' time, they come out, collect their property, collect their summary infringement notice, and if they wish to contest the allegations in the summary infringement notice, then there are processes for that to occur. Those processes are explained on the back of the summary infringement notice.[33]

Justice Gageler concluded that the detention authorised by div 4AA was neither 'reasonably necessary to effectuate a purpose which is identified in the statute' nor of a duration which 'is capable of objective determination by a court at any time and from time to time', and was therefore punitive.[34]

---

30 It is worth noting that his Honour cited recent United States scholarship which is critical of the practice of adopting strained interpretations of impugned statutes in an effort to avoid constitutional difficulty: Ibid 38 [78]. See Neal Kumar Katyal and Thomas P Schmidt, 'Active Avoidance: The Modern Supreme Court and Legal Change' (2015) 128 *Harvard Law Review* 2109.

31 It is worth noting that Gageler J dismissed the common law principle of legality as being of 'little assistance given that the evident statutory object is to authorise a deprivation of liberty and that the statutory language in question is squarely addressed to the duration of that deprivation of liberty': *NAAJA v NT* (2015) 326 ALR 16, 38–9 [81]. Apparently in response to this observation, French CJ and Kiefel and Bell JJ quoted (at 20 [11]) T R S Allan's observation that

> [l]iberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.

See T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 148.

32 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014 (Johan Elferink).

33 Ibid.

34 *NAAJA v NT* (2015) 326 ALR 16, 43 [99]. In support of these two tests, his Honour relied upon three cases: *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 369–70; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231–2; *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, 83.

III Separation of Powers

Only Gageler and Keane JJ found it necessary to engage with the question of whether a constitutionally-mandated separation of powers operates in the Northern Territory.

In this connection, Gageler J first observed that the plaintiffs' argument that div 4AA offended the doctrine of separation of powers depended upon the proposition 'that the judicial power which is conferred by a law enacted in the exercise of a distinct legislative power conferred by the Parliament under s 122 is judicial power of the Commonwealth'.[35]

Justice Gageler then observed that making good this proposition would require disturbing the holdings in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 and *Kruger v Commonwealth* (1997) 190 CLR 1. His Honour concluded that the length of time for which these decisions have stood, along with the far-reaching implications which would flow from the acceptance of the plaintiffs' submissions, compelled the conclusion that a constitutionally-mandated separation of powers does not operate in the Northern Territory.[36] The conclusion of Gageler J in respect of the plaintiffs' separation of powers arguments thus appears to rest principally upon an acknowledgment of the undesirability of defeating settled expectations and disturbing settled understandings.

The judgment of Keane J took up these points, but also engaged with the substantive merits of the plaintiffs' contentions and found them wanting.[37] His Honour observed:

> [C]onsiderations of constitutional text and structure securely undergird the Court's decision in *Kruger*. In contrast, the arguments of the plaintiffs appeal to a vague notion of symmetry as requiring that the power exercised by the courts of the Northern Territory be subject to the same limits as that exercised by the courts of the Commonwealth; but this line of argument fails to recognise that the governmental institutions of the Territories have never been thought to be miniature versions of their Commonwealth counterparts … The Territories are dependencies of the Commonwealth, not small-scale versions of it, or participants in the federal compact between the Commonwealth and the States. A wide range of Territories may be administered by the Commonwealth under s 122. No distinction is made between Territories which are internal and those which are external. They may be remote and sparsely populated island communities, or regions of uncertain political stability. The notion that the arrangements for the government of each of such disparate dependencies must mirror those applicable to the Commonwealth has nothing to commend it.[38]

35 *NAAJA v NT* (2015) 326 ALR 16, 44 [106].

36 Ibid 47 [117].

37 Ibid 57 [162], 59 [169], 61 [175].

38 Ibid 58 [166]−[167].

Justice Keane then proceeded to observe that, given the settled understanding that a separation of powers does not operate at State level,[39] the plaintiffs' argument 'did not explain why residents of the Territories should be in a better position in relation to immunity against executive detention than residents of the States'.[40]

Finally, Keane J considered and rejected the plaintiffs' contention that 'territory courts always and only exercise federal jurisdiction … because all matters which territory courts adjudicate arise under a Commonwealth law either immediately (where the applicable law is a Commonwealth statute) or mediately (where the applicable law is a Territory statute supported ultimately by s 122)'.[41] Indeed, Keane J stated unequivocally that if 'the Northern Territory Legislative Assembly had purported to vest the judicial power of the Commonwealth in the courts and tribunals of the Territory, the attempt would have been futile'.[42]

IV *Kable*

Given div 4AA does not, in terms, confer any power or function upon the courts of the Northern Territory, nor explicitly interfere with their functions, the plaintiffs' argument in respect of the *Kable* principle was attended by difficulty from the outset. The plaintiffs' *Kable* argument consisted of two propositions. First, the plaintiffs contended that a person detained under div 4AA has no 'real possibility of … approaching a court during the period of detention'.[43] Second, 'even if a person were able to approach a court, the court would be limited to reviewing the legislative criteria' and would be precluded from 'taking into account the factors it would ordinarily consider when a person detained in custody and not yet convicted of any crime is brought before it'.[44]

---

39 His Honour cited in support of this settled proposition: *Gilbertson v South Australia* [1978] AC 772, 783; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381, 401, 409–12; *Mabo v Queensland* (1988) 166 CLR 186, 202; *Kable* (1996) 189 CLR 51, 96–8, 99–105, 111–119; *H* A *Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561–2.

40 *NAAJA v NT* (2015) 326 ALR 16, 59 [168].

41 North Australian Aboriginal Justice Agency Limited and Miranda Maria Bowden, 'Plaintiffs' Submissions', Submission in *NAAJA v NT*, M45/2015, 6 July 2015, 10. This argument, owes a great deal to the writings of Leslie Zines: see Leslie Zines, *Cowen and Zines' Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) 177–86.

42 *NAAJA v NT* (2015) 326 ALR 16, 62 [178].

43 North Australian Aboriginal Justice Agency Limited and Miranda Maria Bowden, 'Plaintiffs' Submissions', Submission in *NAAJA v NT*, M45/2015, 6 July 2015, 18.

44 Ibid.

Chief Justice French and Justices Kiefel and Bell did not engage with the plaintiffs' *Kable* argument at length.[45] Indeed, after observing that the plaintiffs' argument 'seemed to proceed on the premise that div 4AA did not impose any duty to bring a person arrested before a justice of the peace or a court as soon as practicable after arrest',[46] their Honours simply referred to their earlier conclusions in respect of the relationship between div 4AA and s 137(1).[47]

Justice Keane disposed of the plaintiffs' *Kable* argument in almost as small a space. After making the point that div 4AA was directed to the executive of the Northern Territory, rather than its courts,[48] Keane J characterised the plaintiffs' *Kable* argument as 'in truth, a complaint that functions which ought to be performed by the judiciary are being performed by the executive'.[49] His Honour thus concluded that 'the plaintiffs' argument confuses the *Kable* principle with the requirements of the constitutional separation of powers at the level of the Commonwealth'.[50]

Justices Nettle and Gordon approached the *Kable* issue in much the same manner as in the leading judgment. After referring to their conclusion that, as a matter of construction, 'Div 4AA does not grant police a power to detain for a period longer than provided for by ss 123 and 137',[51] their Honours concluded that the provisions 'cannot be regarded as usurping or otherwise interfering with the exercise of judicial power by a court of the Territory once a person who has been arrested is brought before the court'.[52]

The conclusion of Gageler J stands in stark contrast to those of the other members of the Court. As already noted, his Honour approached the *Kable* principle having already concluded that div 4AA purported to confer on the executive of the Northern Territory a power of detention which is punitive in character.

Critically, however, Gageler J was of the view that div 4AA offended the *Kable* principle not in consequence of the Northern Territory courts 'being kept out of the

45 It is worth noting that their Honours did observe that '[i]t has not been established, and the plaintiffs did not argue, that public confidence in the courts is a touchstone of invalidity': *NAAJA v NT* (2015) 326 ALR 16, 30 [40]. The notion that an apprehended undermining of 'public confidence' ought to serve as a 'touchstone of invalidity' in this context has been the subject of considerable criticism: see, eg, Jeffrey Goldsworthy, '*Kable*, *Kirk*, and Judicial Statesmanship' (2014) 40 *Monash University Law Review* 75, 79–81; Elisabeth Handsley, 'Do Hard Laws Make Bad Cases? — The High Court's Decision in *Kable v Director of Public Prosecutions (NSW)*' (1997) 25 *Federal Law Review* 171, 175–7; Sir Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in Geoffrey Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason* (Federation Press, 2007) 144, 157.

46 *NAAJA v NT* (2015) 326 ALR 16, 31 [43].

47 Ibid.

48 Ibid 63–4 [186].

49 Ibid 64 [187].

50 Ibid.

51 Ibid 74 [239].

52 Ibid.

process of punitive detention for which s 133AB(2)(a) provides',[53] but instead by their being 'brought into the further processes which Div 4AA contemplates will occur after that period of punitive detention is over'.[54] As his Honour explained:

> Courts of the Northern Territory are … made support players in a scheme the purpose of which is to facilitate punitive executive detention. They are made to stand in the wings during a period when arbitrary executive detention is being played out. They are then ushered onstage to act out the next scene. That role is antithetical to their status as institutions established for the administration of justice.[55]

V Conclusion

The human rights concerns which arise in connection with the scheme effected by div 4AA means *NAAJA v NT* will likely be the subject of considerable analysis.[56] But if that commentary takes as its principal focus the constitutional dimensions of the matter, a troubling concern which emerges from the Court's approach to the construction of div 4AA may escape notice.

The construction of div 4AA adopted by the majority leaves the provisions with a very limited operation. As noted above, the provisions were described in Parliament as effecting a scheme of 'catch and release', under which the executive are at liberty to detain a person for up to four hours before making a decision as to how they ought to be further dealt with. The majority, however, concluded that a person detained under div 4AA must be brought before a court as soon as is reasonably practicable (if not sooner released), with the four-hour limit operating as merely a cap upon what amounts to a reasonable time. Once construed in this way, it is difficult to see what object div 4AA is intended to achieve: it appears merely to confirm the availability of a course of action which very likely existed prior to the division's introduction. Indeed, the Northern Territory sought to explain div 4AA as having the object of

---

53 Ibid 50 [132].

54 Ibid.

55 Ibid 50 [134]. His Honour added (at 50−1 [135]):

> [l]est it be thought incongruous that the constitutional defect in a legislative scheme of punitive executive detention is to be found at the periphery of that detention [that it] is important to recognise that a constitutional doctrine which limits legislative design has flow-on effects for political accountability. Were the provisions which contemplate a role for courts to be removed, the legislative scheme of Div 4AA would appear to be quite different. The legislative scheme would be starkly one of catch and release. The scheme would be reduced so as to appear on the face of the legislation implementing it to be one which authorises police to detain, and then release, persons arrested without warrant on belief of having committed or having been about to commit an offence. The political choice for the Legislative Assembly would be whether or not to enact a scheme providing for deprivation of liberty in that stark form.

56 In fact, the matter was the subject of commentary even prior to its being decided. See, eg, Anna Rienstra, 'The "Paperless Arrest": Chapter III and Police Detention Powers in the Northern Territory' on *AUSPUBLAW* (9 November 2015) <http://auspublaw.org/2015/11/the-paperless-arrest/>.

confirming the existence of a power to issue infringement notices upon release to persons arrested in respect of infringement notice offences.[57] It may well be that the narrowness of this object casts doubt upon the correctness of the majority's approach to the provisions' construction.

Yet whatever may be the relative merits of the conclusions of the majority and Gageler J as to the proper construction of div 4AA, it seems highly probable in light of the extrinsic materials quoted above that it is the construction adopted by Gageler J that is consonant with the understanding of the division held by those responsible for its enactment. Furthermore, the structure and operation of executive government means that those responsible for administering div 4AA have likely derived their understanding of its meaning from those who were responsible for its introduction.

It follows that while the construction adopted by the majority in *NAAJA v NT* appears to resolve the constitutional concerns which were before the Court, there is good reason to be concerned about the extent to which those responsible for administering the division will heed and give effect to what amounts in practice to a new understanding of its meaning.[58]

There is, of course, an obvious rejoinder to this concern: if the executive were to continue to implement the provisions according to their original understanding, any person who was as a result wrongfully detained could seek curial relief in respect of that detention. Though this is perfectly correct as an abstract proposition, it is predicated upon an assumption that the victims of such wrongful detention could avail themselves of access to courts and to legal assistance. When, as in the present case, the persons in question are likely to be residents of remote and disadvantaged communities, the soundness of this assumption is questionable.

Indeed, it is unfortunate that these practical considerations — of administrative responsiveness and inertia on the one hand, and of racial, economic, and geographic disadvantage on the other — did not figure prominently in the Court's reasoning. Far from being irrelevant, they go to the heart of the question of whether the remedial construction adopted by the Court will adequately protect the interests of those whom the provisions will affect.

It is therefore important that the decision in *NAAJA v NT* be scrutinised not only with a view to throwing light upon constitutional doctrine, but for the purpose of measuring the Court's construction of div 4AA against its real-world implementation in remote communities. If, in the wake of *NAAJA v NT*, the operation of the division, as elucidated by the majority, is at odds with the manner in which the provisions are executed, it will be difficult to escape the conclusion that the human rights concerns which animated the plaintiffs' contentions have yet to be meaningfully addressed.

---

57 Northern Territory, 'Defendant's Submissions', Submission in *NAAJA v NT*, M45/2015, 6 August 2015, 13.

58 This concern was adverted to in passing by Gageler J, where his Honour cited *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 349: *NAAJA v NT* (2015) 326 ALR 16, 38 [77].