



**Section  
44**

**Section 501  
of the  
Migration Act**

**Royal  
Commissions  
and Human  
Rights**

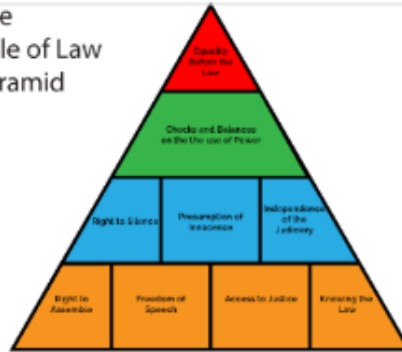
**Update on the Rule of Law :  
Migration Act and Royal Commissions**

**Living the Law - Toowoomba Feb 2018 -  
Jackie Charles [jackie@ruleoflaw.org.au](mailto:jackie@ruleoflaw.org.au)**

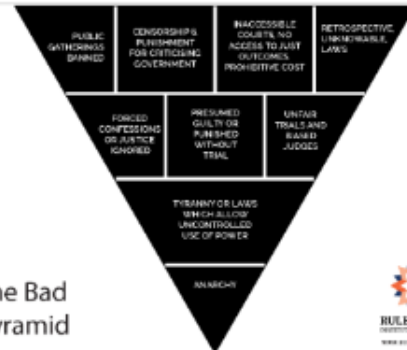


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### The Rule of Law Pyramid

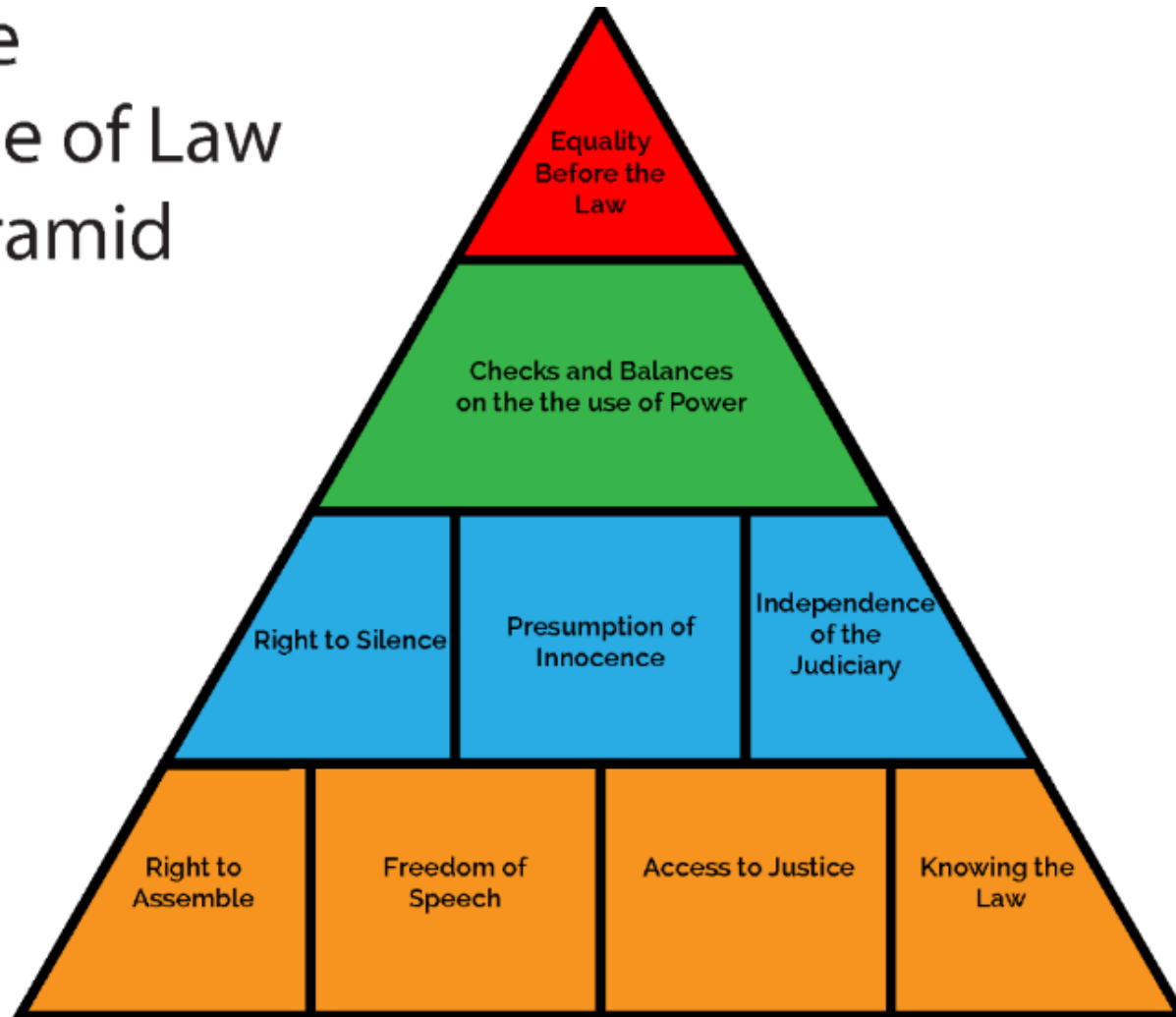


### The Bad Pyramid

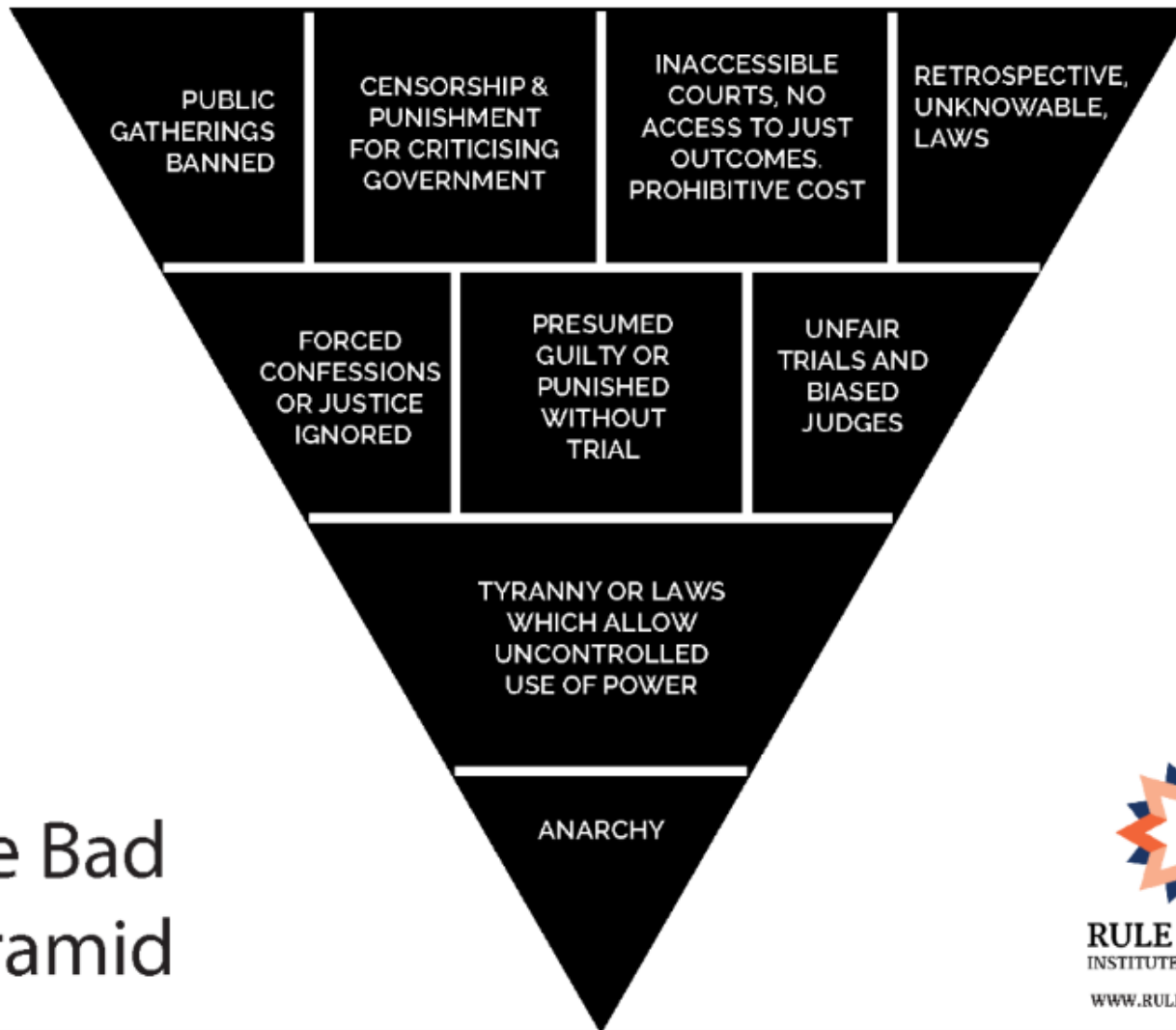


**Current  
Issues**

# The Rule of Law Pyramid



# The Bad Pyramid



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# Current Legal Issues

- Section 44 of The Australian Constitution- **Who can be a member of Parliament**
- Section 501 of the Migration Act - **Who can be an Australian resident**
- Royal Commissions into; **Institutional Responses to Child Sexual Abuse, Protection and Detention of Children in the Northern Territory and Banks and Financial Services**

# The Constitution

“Any person who:

(i) is under any **acknowledgment of allegiance**, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ... **shall be incapable of being chosen** or of sitting as a senator or a member of the House of Representatives.”

# High Court

**Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45**

- The High Court had to interpret the Constitution and make a decision about the eligibility of the politicians whose citizenship was in doubt.

## They found that

- A person has to be both an **Australian citizen, owing allegiance only to Australia** and also not entitled to any citizenship type rights from another country to be able to be **elected to Parliament**.

**Many politicians have had to  
either leave Parliament or  
stand to re-election**

# Section 501 of the Migration Act

## The Character Test

What is the  
Character  
Test?

Human  
Rights

What has  
been the  
result

The Falzon  
Case - Falzon v  
Minister for  
Immigrati...



# What is the Character Test?

Section 501 of the Migration Act 1958 (Cth).

MIGRATION ACT 1958 - SECT 501

Refusal or cancellation of visa on character grounds  
Decision of Minister or delegate--natural justice  
applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

**An applicant can fail the character test if they have been sentenced to jail for more than 12 months**



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**An applicant can fail the character test if they have been sentenced to jail for more than 12 months**

# Human Rights

Right to security of the person and freedom from arbitrary detention

The right to security of the person and freedom from arbitrary detention is contained in **Article 9 of the International Covenant on Civil and Political Rights (ICCPR)**.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and **in accordance with such procedure as are established by law.**
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest.

**If a person is NOT an Australian Citizen and they fail the character test they will be placed in immigration detention until they are deported back to their country of origin**

# What has been the result



Source: <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>

# The Falzon Case - Falzon v Minister for Immigration and Border Protection [2018] HCA 2

## Mr Falzon

- came to Australia at the age of three in 1956
- Never became an Australian citizen.
- Held an 'absorbed person visa' In 2008, was convicted of trafficking a large commercial quantity of cannabis,
- sentenced to imprisonment for 11 years with a non-parole period of 8 years.

When Mr Falzon left prison he was immediately put into Immigration Detention because he failed the character test in preparation for being deported. He challenged the decision in the High Court.

**The  
Falzon  
Decision**

# The Falzon Decision

The cancellation of Mr Falzon's visa and his detention and deportation was lawful because:

- Mr Falzon failed the character test
- people who are non-citizens who fail the character test become unlawful non-citizens
- The Migration Act s501(3A) requires the Minister to deport all people who are unlawful non-citizens
- While people are awaiting deportation they must be detained in immigration detention

**Nettle J says: " ...there is no constitutionally guaranteed freedom from executive detention"**

**" A sovereign state may ...decide to exclude non-citizens in the interest of protecting the peace, order and good government of the Commonwealth" [52]**

# Royal Commissions and Human Rights

Indigenous Australians

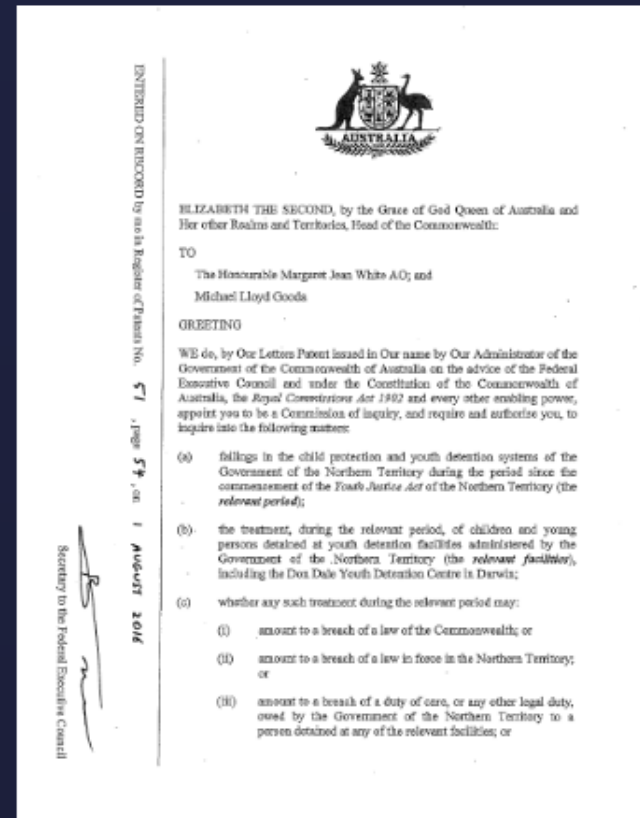
What is a Royal Commission?

What can a Royal Commission do?

Royal Commission into Youth Detention

# What is a Royal Commission?

- Public Inquiry established by the Executive Government - usually the Prime Minister
- Requires a Letters Patent signed by the Governor General under the Royal Commissions Act 1902 (Cth)
- Usually run by retired Judges
- Runs for a set period of time ( sometimes this gets extended)
- Always issues a written report







ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable Margaret Jean White AO; and

Michael Lloyd Gooda

GREETING

WE do, by Our Letters Patent issued in Our name by Our Administrator of the Government of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into the following matters:

- (a) failings in the child protection and youth detention systems of the Government of the Northern Territory during the period since the commencement of the *Youth Justice Act* of the Northern Territory (the *relevant period*);
- (b) the treatment, during the relevant period, of children and young persons detained at youth detention facilities administered by the Government of the Northern Territory (the *relevant facilities*), including the Don Dale Youth Detention Centre in Darwin;
- (c) whether any such treatment during the relevant period may:
  - (i) amount to a breach of a law of the Commonwealth; or
  - (ii) amount to a breach of a law in force in the Northern Territory; or
  - (iii) amount to a breach of a duty of care, or any other legal duty, owed by the Government of the Northern Territory to a person detained at any of the relevant facilities; or

ENTERED ON RECORD by me in Register of Patents No. 571, page 54, on 1 AUGUST 2016

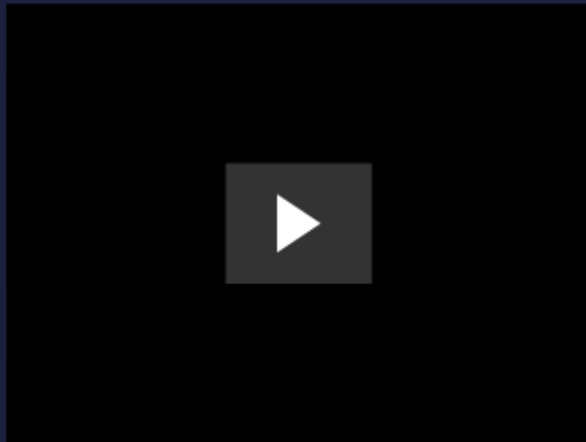
Secretary to the Federal Executive Council

# What can a Royal Commission do?

- Terms of Reference set by Executive Government
- Inquisitorial investigation
- Use coercive powers to have people appear before the commission
- **BUT**
- They cannot find someone guilty of an offence but they can find that they breached the law and recommend prosecutions
- Statements made in evidence are NOT admissible in court

# Royal Commission into Youth Detention

How children were treated in detention centres in the Northern Territory and to also look into the welfare system in the Northern Territory.



## COMMISSION FACTS AND FIGURES



**54**  
DAYS OF FORMAL  
PUBLIC HEARINGS



**214**  
WITNESSES



MORE THAN  
**1000**  
EXHIBITS, MANY OF  
WHICH INCLUDE  
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MORE THAN  
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**18**  
RECORDED  
PERSONAL STORIES



**12**  
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# Report of the Commission

- NT has the highest rate of children in detention in the country
- Most offences committed are administrative
- Children and young people should be protected from cruel, inhuman and degrading treatment
- Youth detention centres were not fit for accommodating, let alone rehabilitating, children and young people

**All the youth detention facilities the Commission looked at in the Northern Territory were not fit for purpose and should be closed.**

**Detention should be the last option for children who are in trouble with the law.**



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