



Australian Government

Australian Law Reform Commission

Starting the conversation on law reform

Where next for law reform?

We are asking you: where next for law reform in Australia? What areas of law should be the subject of an ALRC Inquiry?

The ALRC has initiated a national conversation about what should be the priorities for law reform over the next three to five years (Priorities for Law Reform). This conversation is about giving Australians a say in what areas of law should be the focus of a law reform inquiry by the ALRC.

Through an online survey (**now open!**), individuals and organisations will have the opportunity to provide comments on potential law reform topics and make their own suggestions about areas of law they believe are in need of reform. The ALRC will also hold consultations with key stakeholders and conduct public seminars.

This national conversation forms part of the ALRC's longstanding commitment to broad public participation in law reform.

Priorities for Law Reform will culminate in a proposed three to five year programme of law reform projects that the ALRC will submit to the Commonwealth Attorney-General for consideration in mid to late 2019. While it is the responsibility of the Attorney-General to determine which matters are to be examined by the ALRC, the ALRC may make suggestions. By hosting this national conversation the ALRC is asking the public what suggestions it should make to the Attorney-General.

The information below describes the types of problem the ALRC investigates, identifies how the ALRC will select which law reform projects to propose as part of its Priorities for Law Reform, and outlines a number of potential law reform topics so that stakeholders and the general public can comment on those ideas. Additionally, the topics set out in this Paper may assist stakeholders and the public to develop their own law reform topic suggestions. All suggestions will be considered by the ALRC in developing its proposed Priorities for Law Reform.

What types of law reform inquiry will the ALRC conduct?

The ALRC is an independent, non-political Commonwealth agency. Its mandate is to make recommendations to government in order to inform the development, reform, and harmonisation of Australian laws and related processes through research, analysis, community consultation, and reports.

The ALRC is required by law to make recommendations for reform that:

- bring the law into line with current conditions and needs;
- remove defects in the law;

- simplify the law;
- adopt new or more effective methods for administering the law and dispensing justice; and
- provide improved access to justice.

The ALRC can make recommendations that government should make or consolidate particular Commonwealth laws, repeal unnecessary laws, work towards uniformity between state and territory laws, or facilitate complementary Commonwealth, state, and territory laws.

The ALRC makes recommendations regarding policy development, but does not conduct inquiries into matters which are primarily matters for political judgement. In addition, the ALRC does not have investigative powers and does not conduct inquiries into alleged wrongdoing.

Selection Criteria

In deciding which projects to propose to the Attorney-General as part of its three-year Priorities for Law Reform, the ALRC will apply the following criteria:

- **Importance**
 - To what extent is the law problematic? Consider eg whether it is unfair, unduly complex, inaccessible, or outdated.
- **Impact**
 - What are the potential benefits of reform? Consider eg the nature and depth of the impact, the number of people and organisations affected, and the costs and benefits (financial or otherwise) of reform.
- **Suitability**
 - Is the independent, non-political ALRC the most suitable body to conduct the project?
 - Is there a commitment by Government to reform the law in this area?
 - Has the topic been covered by a recent inquiry (eg a Royal Commission, Parliamentary Committee, Expert Panel)?
- **Effectiveness**
 - Does the nature, scale, and scope of the project make it an appropriate and efficient use of the ALRC's resources?
- **Jurisdiction**
 - Does the project relate to an area of Commonwealth law?
 - Does the project identify a need for uniform or complementary state and territory laws?

Potential Topics for Reform

In addition to inviting individuals and organisations to share their own proposals for law reform projects, the ALRC sets out below a number of potential topics for public comment. Some of these topics became evident during the ALRC's work on past inquiries, whereas others have been brought to the ALRC's attention through the work of other individuals and organisations.

In developing its proposed Priorities for Law Reform, the ALRC will weigh all projects equally against the criteria for selection — whether the topic is suggested below or is raised during public consultations.

Potential Topic One: The Australian Constitution

Over the course of 40 years, the ALRC has released 91 reports. Having undertaken a review of this body of work, the ALRC has identified that 56 of those reports raised constitutional issues. In a significant number of these inquiries, the *Australian Constitution* has imposed technical limitations on the options for reform. Given the onerous difficulties in amending the *Australian Constitution*, ALRC reports have almost never recommended constitutional amendments in relation to individual inquiry topics. It may therefore be beneficial to consider broader constitutional reforms in a dedicated inquiry.

Further information about the constitutional barriers encountered in the ALRC's prior work is available [here](#).

Potential Topic Two: Banking, Superannuation, and Financial Services

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry resulted in 76 recommendations that seek to reduce misconduct and ensure consumers are treated fairly. The recommendations set out changes to be made to Acts including the *National Consumer Credit Protection Act 2009* (Cth), the *Corporations Act 2001* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Insurance Contracts Act 1984* (Cth). These amendments seek to simplify existing laws and improve the procedures consumers may rely on where a dispute with a large financial institution arises.

The Royal Commission's findings have received widespread media coverage and the Australian community is currently invested in understanding their rights as consumers. Most, if not all, Australians have had dealings with the banks, superannuation funds, or other financial institutions criticised in the course of the Royal Commission. Serious and widespread misconduct was identified. As such, there is community support for law reform that will increase accountability and integrity within the financial sector.

The scale of the law reform required is large, as the recommendations apply to numerous Acts, as well as industry specific codes, standards, and regulations. It will require cooperation between government regulators, industry associations, law reform commissions, and the government itself for the Royal Commission recommendations to be fully implemented.

Potential Topic Three: Environmental Law

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('the *EPBC Act*') provides a legal framework to protect and manage important flora, fauna, ecological communities, and heritage places of national environmental significance. There is concern that the *EPBC Act* is outdated and fails to account for climate change. Some have suggested a complete overhaul of the legislative framework and enforcement mechanisms is required.

In June 2018, the Senate referred an inquiry on Australia's faunal extinction crisis to the Environment and Communications References Committee. This inquiry is looking into the ecological impact of faunal extinction, the adequacy of Commonwealth environment laws, and the adequacy of monitoring practices, assessment process, and compliance mechanisms for enforcing Commonwealth environmental law.

In order to adequately protect Australia's environment, a broader approach to law reform may be required to complement the work being done in the Senate on faunal extinction.

Potential Topic Four: Commonwealth Anti-Corruption Measures

The current framework for dealing with corruption in the Commonwealth is fragmented. In contrast, the states and territories have been establishing overarching anti-corruption bodies. There is bi-partisan support for establishing a Commonwealth Integrity Commission to investigate corruption; however, there is disagreement about what powers the Commission should have.

The National Integrity Commission Bill 2018 was introduced into the House of Representatives in late 2018 but recently lapsed. The Bill would have established a national integrity commission as an independent public sector anti-corruption commission for the Commonwealth. However, the Bill was criticised for lacking power and resources, as well as its focus on criminal conduct rather than general corruption. There was significant debate as to whether the commission should have power to publish public findings in relation to investigations.

There have also been arguments made that a wider range of reforms are required to combat corruption in the Commonwealth. These include, for example, law reform to: cap political advertising expenditure during election campaigns; strengthen disclosure regime for political donations; make lobbying more transparent; and set clearer standards on potential conflicts of interest for politicians.

Potential Topic Five: Immigration law

The *Migration Act 1958* (Cth) seeks to strike a balance between a number of objectives, including national security and broad economic considerations. There is wide concern with the application of, and deficiencies in, the *Migration Act*. The Act and related regulatory instruments provide an unwieldy legal framework. The Act itself contains over 500 sections and is one of the largest pieces of Commonwealth legislation.

Further adding to the complexity is the fact that the law in this area changes frequently — with some describing it as an 'ever-shifting' system. The *Migration Act* has been amended over 30 times since 2010, resulting in a legal framework that is arguably no longer fit for purpose. In addition, many suggest that law reform may be necessary to bring Australia in line with its international obligations.

This law reform project would provide a considered and thorough review of Australia's overarching approach to immigration.

Potential Topic Six: Tax law

Following a recent White Paper on tax reform, the Australian Government Treasury concluded that 'there is evidence that the economic costs of Australia's tax system are higher than they need to be'. In particular, there are concerns that the current tax system does not reflect the modern (and future) economy that operates in a dynamic global marketplace across new digital and technological frontiers.

Some of these problems are routed in the federal structure established in the constitution. Australia's current tax system raises over \$525 billion annually — primarily through personal income tax and company

tax. The Commonwealth Government collects 81% of taxes while the states and territories deliver the majority of public services, including in the health, education, and transport sectors. Roughly 45% of state and territory revenue comes from the Commonwealth Government. This creates a vertical fiscal imbalance whereby the taxing authority and spending responsibilities are not properly aligned. This creates economic inefficiency and reduces transparency.

The issues in need of tax reform extend beyond the constitution. For example, charitable tax concessions are one area of tax law ripe for reform. Under Australian tax law some not-for-profit organisations benefit from tax concessions, a policy tool intended to provide support for activities that generate a community benefit. However, a number of reviews — including the *Australia's Future Tax System Review* and the Australian Productivity Commission's *Contribution of the Not-for-Profit Sector Research Report* — have identified tax concessions as inefficient, complex, and administratively costly. Recent discussion has also highlighted concern with a number of categories of NFPs, and specifically how the legislation defines 'charity'.

Law reform may be required to simplify the tax system, improve its fairness, harmonise and modernise definitions, ensure accountability and compliance, and improve overall effectiveness.

Potential Topic Seven: Defamation

There has been significant recent public debate on the appropriate balance to be struck between the right to maintain one's reputation, and the right to free speech. These conversations are not limited to Australia — defamation has been recently examined by law reform bodies in a number of overseas jurisdictions including the UK, Ireland, and Canada.

Defamation law is widely regarded as complex, technical, and arcane. Additional complexity has arisen in the context of the availability of digital publication and social media. More specific issues include whether Australia should adopt a public interest defence, the scope of the defence of contextual truth, and the effectiveness of remedies.

An inquiry on related topics has recently been announced by the NSW Law Reform Commission. However, the issues have ramifications across the country. The last review of defamation law by the ALRC was almost 40 years ago.

Other potential topics for consideration:

In the interest of stimulating further ideas, we set out below some issues that have recently been addressed by law reform bodies in other jurisdictions.

Technology/ Digital Rights

- Access to digital assets upon death or incapacity (NSW Law Reform Commission)
- Automated vehicles (UK Law Commission)
- Electronic signatures (UK Law Commission)
- Smart contracts (UK Law Commission)

- Digital rights [*eg digital inclusion and access, smart cities, digital due process, regulatory sandboxing, social scoring and algorithmic black boxing, digital democracy, and new frameworks for informed online consent*] (Law Commission of Ontario, CA)
- Search and surveillance (NZ Law Commission)

Corporate/ Consumer

- Review of laws relating to beneficiaries of trusts (NSW Law Reform Commission)
- Intermediated securities (UK Law Commission)
- Bills of sale (UK Law Commission)
- Protecting consumer prepayments on retailer insolvency (UK Law Commission)

Procedure

- Administrative review (UK Law Commission)
- Employment law hearing structures (UK Law Commission)
- Sentencing procedure (UK Law Commission)
- Costs in arbitration (Singapore Law Reform Committee)
- Hague Convention Choice of Court Agreements (Singapore Law Reform Committee)