# Submission to the ALRC Inquiry into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

*Jeremy Gans*

I am a Professor at Melbourne Law School, researching and teaching all areas of criminal justice. I am the author or co-author of several works on criminal justice, including a treatise on *Criminal Process and Human Rights* (Federation Press, 2011) and treatises on criminal law (especially the *Criminal Code Act 1995* (Cth)) and the uniform evidence law (including the *Evidence Act 1995* (Cth).) In 2007, I was appointed as the human rights advisor to the Parliament of Victoria’s Scrutiny of Acts and Regulations Committee, advising the Committee on the compatibility of Victorian Bills and new regulations and legislative instruments with Part 2 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). I was reappointed to that position in 2011 and also served as a consultant to the same committee in its statutory four-year review of the Charter in that year.

In this submission, I only address the questions posed in the Issues Paper relating to criminal process rights. (In some instances, my answers reflect a paper I will present at a conference on the principle of legality in Melbourne on 20th February.)

Although not the subject of a specific question in the Issues Paper, I start with two small observations on the Inquiry’s Terms of Reference as they relate to Commonwealth criminal legislation. I also make brief observations on particular Terms of Reference while answering the Issues Paper’s specific questions.

## The Inquiry’s Terms of Reference as they relate to criminal legislation

### State and territory criminal procedure laws

The Issues Paper (at [1.39], footnote 30) pointedly notes that ‘[i]t should be stressed that the ALRC is looking at Commonwealth laws, not state and territory laws’. But, when it comes to criminal procedure laws, it’s not that simple.

As the ALRC is aware, nearly all proceedings for Commonwealth criminal offences are heard in state or territory courts invested with federal jurisdiction by s68(2) of the *Judiciary Act 1903* (Cth). Section 68(1) of that Act applies state and territory laws on arrest, custody, charging and bail, and summary and indictable proceedings, convictions and appeals, to federal offences. As well, s68C picks up those laws in various ways for criminal proceedings in the Federal Court, s79(1) applies state or territory laws (‘including the laws relating to procedure, evidence, and the competency of witnesses’) to any court exercising federal jurisdictions, while s80 provides that those courts are ‘govern[ed]’ by ‘the common law of Australia’, as modified by local laws. All of these provisions only apply to the extent that they ‘not inconsistent with the Constitution and the laws of the Commonwealth’.

Given the breadth of the Inquiry’s Terms of Reference, it is understandable that the ALRC would prefer to treat these various state and territory laws (and Australia’s common law) as falling outside of the Inquiry’s scope. However, I don’t think such a view would be tenable, for three reasons. First, the various provisions of the *Judiciary Act* that pick up these laws (and other laws that do the same, such as the *Commonwealth Places (Application of Laws) Act 1970* (Cth)) are clearly Commonwealth laws that fall within the Terms of Reference. (The Parliamentary Joint Committee on Human Rights has taken the view that any analysis of those laws with respect to human rights must include an analysis of the state or territory laws they pick up: see its 6th Report of the 44th Parliament, reporting on the G20 (Safety and Security) Complementary Bill 2014, [1.73], [1.75].) Second, the picking up of these provisions is generally subject to contrary Commonwealth laws, so the absence of such a contrary Commonwealth law is also arguably within the Terms of Reference. Third, any other view would render at least some of the criminal process rights and freedoms in the Terms of Reference (for example, Commonwealth laws that ‘permit appeals from acquittal’) irrelevant, as those matters are largely, if not wholly, governed by picked-up state or territory laws (for example, state or territory appeal laws picked up by s68(1)(d) of the *Judiciary Act*.)

So, my view is that the Terms of Reference extend to examining whether Commonwealth laws pick-up non-Commonwealth laws that unjustifiability interfere with rights or freedoms, specifically criminal process rights. One way of avoiding the need to examine every such state or territory law individually would be to focus on the presence or absence of sufficient safeguards within provisions such as the *Judiciary Act* (or Commonwealth laws that may limit the scope of those provisions) to ensure that they do not unjustifiably pick-up state, territory or common laws that encroach on traditional rights and freedoms.

### Rights and freedoms of state agencies

As the Issues Paper observes (at [1.4]), the list of rights and freedoms in the Inquiry’s Terms of Reference appear to be drawn from discussions of the principle of legality. The Paper (at [1.25]-[1.27]) accordingly sets out ‘a few formulations of the principle of legality, with relatively minor variations’. However, it neglects an important gloss on the principle of legality as applied specifically to criminal laws. The gloss was set out by Deane J in *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119, 129:

[E]stablished principle of construction extends to require clear and unambiguous words before a statute will be construed as effecting, to the detriment of the subject, any fundamental alteration to the common law principles governing the administration of justice.

and was recently endorsed by the High Court in *Lacey v Attorney-General (Qld)* [2011] HCA 10, [18] which said that this formulation describes ‘[t]he effect of the common law on the interpretation of criminal statutes’.

The crucial difference between this formulation and the others the Issues Paper sets out is that the protection it offers to rights and freedoms is limited to laws that would otherwise operate ‘to the detriment of the subject’. That is, when it comes to criminal laws, traditional rights, freedoms and privileges should be understood as protecting lay people (be they defendants, victims, witnesses, etc), not state agencies (such as police, prosecutors and regulatory agencies.) In my view, the Inquiry’s Terms of Reference should be understood as similarly limited when it comes to Commonwealth criminal laws.

For example, any argument that s. 123 of the *Evidence Act 1995* (Cth) (an exception to client legal privilege in favour of criminal defendants) interferes with the Commonwealth DPP’s ‘right’ to client legal privilege would not fall within the Inquiry’s Terms of Reference (although it may be considered, like any other state interest, to the extent that it ‘justifies’ an encroachment on a subject’s rights, such as the accused’s right to a fair trial, discussed below.)

## Question 7–1 What general principles or criteria should be applied to help determine whether a law that retrospectively changes legal rights and obligations is justified?

This question addresses two rights or freedoms, against laws that ‘retrospectively change legal rights and obligations’ and laws that ‘create offences with retrospective application’. Here, I will only address the second right (other than to note that your decision to merge the two seems to be somewhat at the expense of the second, at least in the chapter heading and questions.)

The formulation of the second right in the Terms of Reference is narrower than the one originally announced by the Attorney-General in 2013 for laws that ‘retrospectively extend criminal law’. The original formulation more clearly covers retrospective changes that merely extend the scope of an offence, change the general rules of criminal responsibility in a way that extends the reach of the criminal law, or change a non-criminal law to a similar effect, without creating any new offence, e.g. the retrospective change addressed by the High Court in *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20. I assume, though, that no actual narrowing was intended (or, alternatively, that the broader formulation would, in any event, be caught by the catch-call Term of Reference for ‘similar’ rights addressed in Chapter 19 of the Issues Paper.)

Importantly, a criminal law can be given extended retrospective effect in two ways: via a formal retrospective commencement provision (as in *Keating*) or when the Commonwealth Parliament enacts a very vague law whose operation only becomes clear through subsequent judicial interpretation. An example (from the sphere of ‘commercial and corporate regulation’ highlighted in the Terms of Reference) is the ‘market manipulation’ offence in s1041A of the *Corporations Act 2001* (Cth), which bars actions that create or maintain an ‘artificial price’ in financial products. Last year, in *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30, the High Court gave ‘artificial price’ a broad definition that covered actions for the ‘sole or dominant purpose of creating or maintaining a particular price’ in a financial product. Although unanimous, the decision overturned a lower court’s ruling that limited the definition to certain forms of monopolist behaviour. The upshot was that the High Court, in 2013, determined the scope of the law after (and as applied to) its alleged breach by JM (Mervyn Jacobson, since convicted and currently subject to a prison sentence) in 2006.

Of course, I am not saying that there is anything improper or wrong about the High Court’s ruling, or that it is anything other than a standard example of judicial interpretation of a statute during proceedings applying that statute. However, at least when the Commonwealth law is quite vague and the Court’s reading is broad (which I do think is true in this instance), the Commonwealth law implicates the rationales for the rule against retrospectivity correctly outlined in the Issues Paper, i.e. retrospective laws ‘make the law less certain and reliable. A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively.’ Given that the Inquiry’s Terms of Reference require attention to how Commonwealth laws are ‘drafted, implemented and operate in practice’, this sort of retrospectivity should be considered in the current Inquiry.

The relevant general criterion that the ALRC should apply is whether current criminal offences are sufficiently certain, precise and accessible to give a reasonably informed lay person fair warning of what conduct is prohibited: see *Sunday Times v UK* [1979] ECHR 1, [49]. There are two particular issues to consider when it comes to Commonwealth laws. First, the drafting of the provision, e.g. the vagueness of its terms (such as ‘artificial price’, an inherently obscure concept when applied to prices set by a constructed market), and also the obscurity of the regime (e.g. Division 2 of Part 7.10 of the *Corporations Act 2001* (Cth) notoriously consists of an overlapping jumble of prohibitions, with any attempt to make sense of them as an interlocking regime itself prohibited by s. 1041J.) Second, the interpretation of the provisions, e.g. the interpretation of s. 1041B was made especially difficult by the tangled history of the provision and the Parliament’s failure when re-enacting it to either endorse or disclaim an earlier link to American jurisprudence set out in a previous explanatory memorandum. (As well, the High Court’s ‘test’ of ‘sole or dominant purpose’ itself appears to be open to multiple different interpretations and the Court itself disclaimed (at [76]) that this was the exclusive test for whether a price was ‘artificial’.)

## Question 7–2 Which Commonwealth laws retrospectively change legal rights and obligations without justification? Why are these laws unjustified?

In terms of formal retrospective commencement, the most important criterion for justification is the extent to which all offenders were on notice that their behaviour may be retrospectively criminalized. The two standard ways this can occur is where the offences are so inherently odious as to put all (sane) perpetrators on notice (e.g. *War Crimes Act 1945*, ss 6(6), 9) and where the government has made a clear prior announcement putting potential offenders (assuming they follow the media) on notice of (imminent) retrospective criminalisation (e.g. the *Criminal Code Amendment (Anti-Hoax and other Measures) Act 2002*.) In light of *Keating*, I am not aware of any other formal retrospective Commonwealth criminal legislation.

In the case of informal retrospectivity via judicial interpretation, a degree of deliberate imprecision, allowing for judicial development and to accommodate new circumstances, may be justifiable when it comes to fast-changing problems, including market misconduct of the sort discussed above (and, more generally, the commercial, corporate, environmental and workplace regulation that is emphasised in the Terms of Reference); as well, perfect precision is impossible. However, I suggest two safeguards to prevent unjustified imprecision.

First, courts interpreting criminal laws should be required to give foremost attention to ensuring that any reading given by a court is one that the accused had fair notice of. Section 15AB(3)(a) of the *Acts Interpretation Act 1901* (Cth) says that when considering extrinsic material regard should be given to ‘the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act’. While a good start, this rule could be improved in several ways when it comes to criminal offences: first, it should not be limited to considering extrinsic material, but instead to any interpretation of a criminal offence; second, express reference should be made to the accessibility of any interpretation (compare *Legislation Act 2001* (ACT), s. 141(2)(c)); third, in the case of criminal offences, the context and purpose of the Act should only be taken into account in favour of a criminal defendant, not against a defendant (see further my discussion of the interpretation of penal provisions at Question 19-1, below); A possible model is s. 1.02(3) of the United States *Model Penal Code*, which provides that ‘The provisions of the Code shall be construed according to the fair import of their terms’ (although that provision adds a proviso preserving purposive interpretation, contrary to the rule of lenity discussed at Question 19-1, below.)

Second, whenever imprecise language is necessary, an appropriate fault element should ensure that defendants are only criminally liable if they appreciate the wrongness of their behaviour. The standard fault elements in the *Criminal Code* are not always sufficient, for example, in *R v Tang* [2008] HCA 39, the High Court, after holding that the test for ‘slavery’ required the jury to apply a multi-factor test distinguishing between the presence and absence of ‘freedom’, held that a defendant would be responsible if she simply knew of the underlying circumstances relied upon by the jury, even if she was unaware that those circumstances amounted to possession of a slave (see paras [100]-[103] of Kirby J’s dissent.) One useful method for achieving this goal with commercial regulatory offences is the fault element of ‘dishonesty’ used throughout the *Criminal Code*, where the Commonwealth has appropriately adopted a protective test (requiring proof of the defendant’s subjective awareness that his or her actions would be regarded as dishonest by others) over the less protective one favoured by a majority of the High Court in *Peters v R* [1998] HCA 7. However, some Commonwealth laws that ought to include a dishonesty element fail to do so. The market manipulation offences discussed above are an example, as are the ‘cartel offences’ in Division 1 of Part IV of the *Competition and Consumer Act 2010* (Cth). The large issue is whether the (claimed) difficulties of enforcement that are said to arise from including dishonesty elements in these offences justify imposing significant criminal penalties for crimes whose meaning is very difficult to ascertain in the absence of a High Court ruling some years after the conduct that is alleged to be criminal.

## Question 8–1 What general principles or criteria should be applied to help determine whether a law that limits the right to a fair trial is justified?

This Term of Reference is specifically directed to Commonwealth laws that ‘alter criminal law practices based on the principle of a fair trial’. That is Spigelman’s wording too, but it’s odd in two ways. First, it seems to imply that the right to a fair trial doesn’t apply to civil matters, which (although not my concern in this submission) is surely wrong. Second, it seems to be limited to laws that ‘alter’ existing practices. But, as the Issues Paper eloquently explains, trial practices have been fluid for centuries and the current conception of fair criminal process is quite recent. So, surely the issue is simply whether or not Commonwealth laws permit or require unfair trials, rather than whether or not there is any alteration to ‘criminal law practices’? (Moreover, any assessment of such an alteration would involve defining what does and does not amount to a practice, and then what does and does not amount to an alteration. Yikes.)

In my view, the Issues Paper hits the nail on the head by emphasising the link between the principle of a fair trial and the avoidance of wrongful convictions. The relevant general criterion for assessing whether a Commonwealth law encroaches on the right to a fair trial is whether it increases the risk of a wrongful conviction (with the question of justification turning on whether it increases that risk either for an insufficient reason or to an unsupportable extent.) In particular, careful justification is needed for any Commonwealth law that limits the ability of a court to learn of potential evidence of innocence. A particular consideration is whether a Commonwealth (or picked-up) law may prevent the defendant from obtaining and adducing information necessary to make an effective defence. For a recent example of a court applying the principle of legality to read down a (non-Commonwealth) statutory privilege to preserve such a right, see *The Application of the Attorney General for New South Wales dated 4 April 2014* [2014] NSWCCA 251.

In assessing Commonwealth laws against this standard, it is important to factor-in a key protection provided in Australian law for the right to a fair trial: the inherent jurisdiction of any superior court to stay a proceeding on the ground of abuse of process. This protection is not derived from either international law, the constitution or the principle of legality (the main concern of the Issues Paper), but rather the inherent common law on the jurisdiction of the courts (something potentially preserved by Chapter 3 of the Constitution, as Gaudron notes in passing in the quote in the Issues Paper at [8.17].) In my view, a key criterion for determining whether a Commonwealth law limits the right to a fair trial is whether or not a court’s power to prevent an abuse of process is effective.

In this light, Commonwealth evidence laws (including state, territory or common laws of evidence picked-up by Commonwealth law) are a particular concern, because the High Court has said (albeit in a state context, and only during a special leave matter) that the remedy of abuse of process is not available where an evidence law statute causes unfairness. In *PJE v The Queen* S154/1995 [1996] HCATrans 353, a special leave application relating to NSW’s rape shield laws (which barred the defendant from adducing evidence said to be relevant to his innocence of sexual offence charges and that the Court unanimously held warrant further consideration by the legislature), a ‘majority’ of the panel said:

To grant special leave would elevate to the level of arguability the proposition that a court may decline to exercise its jurisdiction to try a criminal case because it forms the view that a law enacted by the Parliament is unfair. That is not a view to which a court is entitled to give effect in determining whether to exercise its jurisdiction when it is properly invoked.

If this is correct, then any Commonwealth law that restricts the defence from introducing evidence of innocence is potentially an unjustifiable encroachment of the right to a fair hearing. (For example, in the hearing, McHugh J endorsed counsel’s example of an old law barring Catholic witnesses as one that a court could not stay for abuse of process even if it barred a Catholic witness from testifying as to the accused’s guilt!)

## Question 8–2 Which Commonwealth laws unjustifiably limit the right to a fair trial, and why are these laws unjustified?

Given the above criteria, the relevant Commonwealth laws that the Inquiry should examine for unjustifiability are statutory privileges that potentially bar an accused person from obtaining or adducing evidence of his or her innocence. Such privileges (in contrast to most other rules of evidence, such as bans on prejudicial evidence) are not aimed at ascertaining truth, but rather at upholding other interests.

Of the privileges in Part 3.10 of the uniform evidence legislation (including, as discussed earlier, in state and territory versions of that law applicable to Commonwealth criminal proceedings and, in some cases, partially extended to preliminary proceedings, which are in turn picked up by the *Judiciary Act*.), the ones for journalists’ sources (see s. 126H(2)(a)), self-incrimination (see s. 128(4), except where the incrimination relates to a foreign offence)), public interest immunity (see s. 130(5)(b)), the privilege for judicial reasons (see s. 129(5), at least on appeal) and the privilege for settlement negotiations (see s. 131(2)(g)) all provide sufficient exceptions to allow a court to permit a defendant to adduce evidence of his or her innocence when necessary to preserve the right to a fair trial. On the other hand, client legal privilege (ss. 118-120) and the privilege for religious confessions (s. 127) do not, and hence need careful review for whether they unjustifiably breach the defendant’s right to a fair hearing.

In the case of client legal privilege, s. 123 of the uniform evidence law was intended by the ALRC (*Evidence (Interim)* [1985] ALRC 26, [885]) to be an appropriate exception for client legal privilege to preserve the rights of accused persons in criminal proceedings (other than a co-accused’s privilege.) However, s. 123 (in the Victorian legislation) was recently read down by the Victorian Court of Appeal in *DPP (Cth) v Galloway (a pseudonym) & Ors* [2014] VSCA 272, relying on (of all things!) the principle of legality to limit it to information already within the accused’s ‘possession or knowledge’. As I will outline in more detail in my paper the Melbourne conference on the principal of legality, this ruling ignores both the right to a fair trial and the ALRC’s decision to retain this exception (for trial procedures) even when it applies to police and prosecutors in 2005 (see *Uniform Evidence Law* [2005] ALRC 102, [14.165] & [14.169], compare [14.163].) While the reading down (or omission from pre-trial procedures) of this exception is consistent with a narrow decision of the High Court from 1995 (*Carter v Managing Partner Northmore Hale Davy & Leake* (1995) 183 CLR 121) and a decision from the House of Lords from 1996, it still needs review for justifiability, in light of a contrary ruling in Canada (*Smith v Jones* [1999] 1 SCR 455), contrary legislation in New Zealand (*Evidence Act 2006* (NZ), s. 67(2)) and acknowledgments in the High Court (*Carter* at 167) and the Privy Council (*B & Ors v. Auckland District Law Society (New Zealand)* [2003] UKPC 38, [56]) that the common law could be altered or developed to incorporate a robust exception for criminal defence evidence. As the ALRC noted in 1987, concerns about the confidentiality of police and prosecutorial records could be appropriately handled by the public interest immunity (see *Evidence (Interim)* [1985] ALRC 26, [886].) And, as the ALRC noted in 2007, there is reason to doubt that state disclosure obligations will preserve the defence’s right to a fair hearing (see, e.g., [2007] ALRC 107, [7.182].)

There are, of course, other privileges that may also limit defence fair hearing rights in other Commonwealth (and picked-up) statutes. In each case, the question of justifiably turns on whether a sufficient exception is available to preserve defence rights. Section 67(2) of the *Evidence Act 2006* (NZ) provides what strikes me as an appropriate general way of preserving the accused’s right to a fair hearing in all privilege matters. It provides:

A Judge may disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if the Judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence.

In examining the justifiability of any privilege, the ALRC should consider whether an exception along these lines (including the protection in s67(3) of the NZ Act) would be appropriate. As well, the ALRC should consider whether the *Judiciary Act* provisions for picking up state, territory and common law privileges should be made subject to a similar exception.

Finally, an alternative, still more general way to avoid this problem (and that posed by all rules of evidence that limit defendants) would be for the Commonwealth to enact a law giving courts exercising federal jurisdiction the power to decline to try a criminal case because it forms the view that a law enacted (or picked up) by the Commonwealth parliament is unfair. (It is an open question whether s11(2) of the various uniform evidence laws have this effect already, and also whether the *Kable/Kirk* doctrine perhaps also have this effect. But there’s no barrier to the Commonwealth parliament just providing for this outcome directly.) An example is s. 130(5)(f) of the *Evidence Act 1995* (Cth), which presumably implicitly provides such a power. In the absence of this, it is crucial to look closely at any Commonwealth law that bars a criminal defendant from obtaining evidence of his or her innocence.

## Question 9–1 What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

This question addresses Commonwealth laws that ‘reverse or shift the burden of proof.’ (It is presumably limited to criminal laws, as civil reverse onuses are rarely regarded as problematic.) However, the Issues Paper at [9.8], footnote 13, states: ‘This chapter is concerned with laws that reverse or shift the *legal* burden of proof’, as distinct from the evidential burden. It is not clear to me why the ALRC has read down its Terms of Reference (or at least limited its analysis) in this way. While a reversal or shift of the evidential burden is less serious than a reversal or shift of the legal burden, it may nevertheless engage the rationales of this right outlined in the Issues Paper at p. 68, especially where the reversal applies to a key culpability element of a serious criminal offence.

An example is s. 101.5 of the *Criminal Code* (Cth), which is an offence of collecting or making a document connected with preparation for or assistance in a terrorist act, knowing (sub-s(1)) of or reckless to (sub-s(2)) that connection, punishable by up to 15 years imprisonment. Sub-section (5) provides that these offences do not apply to acts that did not intend to facilitate preparation for a terrorist act. It is accompanied by a note stating that the accused bears the evidential burden on that issue. In 2008, Belal Saadallah Khazaal (a journalist who posted a collation of texts on jihad, including terrorist attack methods, on the internet) was convicted of this offence without the jury being asked to consider whether he intended to facilitate preparation for terrorism, because he failed to testify and therefore did not discharge the burden. (The High Court upheld this ruling in *The Queen v Khazaal* [2012] HCA 26, citing the abhorrent content of the document he posted.) By contrast, his jury was unable to reach a verdict on a further charge of attempting to urge a terrorist act (which requires proof an intent that the act will occur, with the legal and evidential burden on the prosecution.) This suggests that the shift in evidential burden allowed a conviction where the prosecution was otherwise unable to prove the relevant intent and that, if Khazaal had been charged with the equivalent offence in the UK (*Terrorism Act 2006*, s. 2), he would have been acquitted. My view is that such shifts in the evidential burden in Commonwealth laws should be examined for their justifiability in this Inquiry.

The Issues Paper addresses two important criteria for justifying shifts in burdens of proof: proof issues (prosecution difficulties, defence knowledge) and offence issues (serious offences, public safety.) In my view, a third, more important, criterion is whether the shift in burden relates to an essential issue of culpability (i.e. physical and fault elements that define acts and culpability to warrant the stigma and assigned punishment of the offence.) This is in contrast to shifts in the burden of proof on issues that are optional exceptions to criminal responsibility (to use the language of s.13.3(3) of the *Criminal Code* and similar state provisions, an ‘exception, exemption, excuse, qualification or justification provided by the law creating an offence’.) While this distinction is a difficult one, it is also critical in defining the rights issue and determining questions of justifiability.

For example, in the case of s. 101.5, an intent to facilitate terrorism is surely essential to culpability (or otherwise, as apparently recognised in the UK, the offence could catch entirely harmless dissemination, such as for educational or enforcement or political communication purposes), and hence any shift in the burden of proof needs close justification. By contrast, in most cases, a defence of reasonable excuse (e.g. throughout the *Defence Force Discipline Act 1982*) or due diligence (e.g. *Corporations Act 2001*, s. 731) to an otherwise fully defined offence (e.g. issuing deceptive prospectuses in s. 728) is provided as an optional exception to responsibility (on a matter that would ordinarily go to sentencing) where shifting the burden of proof is clearly justifiable (as prosecutorial disproof beyond reasonable doubt of due diligence is extremely difficult); indeed, the legislature could simply have omitted the defence altogether.

## Question 9–2 Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

A starting point for identifying Commonwealth offences that reverse the legal burden of proof is to search Commonewealth legislation using the phrase ‘bears a legal burden’. Note, though, that this is both under- and over-inclusive. It is under-inclusive because it may not capture shifts in evidential burdens on essential elements, and also because the drafter may not add the standard form explanatory note referring to s. 13.4 of the *Criminal Code*. As well (somewhat contrary to the Issues Paper at [9.8]) a burden of proof may also be shifted by ‘creating a presumption that a mater exists unless the contrary is proved’: 13.4(c). This search will also be over-inclusive, because a fair number of the reverse onuses in Commonwealth laws relate to optional defences, such as reasonable excuse or due discipline, rather than essential elements.

I obviously lack the time to trawl through all the relevant provisions here. Instead, I will simply note in passing some provisions I’ve come across (mostly in the subject areas referred to in the Terms of Reference) that at first glance appear to shift burdens on matters essential to culpability:

* *Australian Consumer Law*, s. 7(2): Defendant bears the legal burden of proving that he or she was not manufacturer of goods bearing the person’s name or mark (essential to culpability for any offence for manufacturers.) See also s. 3(10) and *Therapeutic Goods Act 1989*, ss. 19B(5), 32BA-BD(5), 41MI(6).
* *Australian Consumer Law*, s. 151(2): For offence of false or misleading representations relating to goods or services, defence has evidential burden on question of whether testimonials (or future statements – s. 4(2)) are misleading (even though clearly essential to culpability.)
* *Commonwealth Electoral Act 1918*, s. 101(4): Defendant bears legal burden of proving that non-enrolment was not due to defendant’s failure to send duly filled-out form to Electoral Commissioner.
* *Commonwealth Electoral Act 1918*, s. 347(5): Defendant bears legal burden of proving that he or she was authorised by the chair to return to a political meeting after being removed for disorderly behaviour.
* *Commonwealth Electoral Act 1918*, s. 351(3): Defendant bears the legal burden of proving that his or her organization did not publish election material that purports to be published by his or her organization.
* *Criminal Code,* s. 72.35: Defendant bears the legal burden of proving that a plastic explosive does not breach a marking requirement, once a sample is tested to show it isn’t a detecting agent.
* *Criminal Code,* s. 102.6(3): Defendant bears the legal burden of proving that funds to or from a terrorist organisation were solely to provide legal representation or assistance.
* *Criminal Code,* ss. 302.5(2), 303.7(2), 305.6(2), 306.5(2), 309.5(2): Defendant bears the legal burden of proving that he or she did not intend to traffic drugs; 372.1A(5), 376.3. (See also *Classifications (Publications, Films and Computer Games) Act 1995*, s. 103(4).)
* *Great Barrier Reef Marine Park Act 1975,* s. 59H(1): Defendant bears the legal burden of proving that entry into a compulsory pilotage area was unavoidable. (See also *Migration Act 1958*, ss. 219(a), 232(2)(c), 247(5); *Offshore Minerals Act 1994*, s. 404(4); *Torres Strait Fisheries Act 1984*, ss. 49(2), 49A(3)); *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, s.619, schedule 2A, s. 18.)
* *Work Health and Safety Act 2011*, s. 110: Defendant bears the legal burden of proving that discrimination was not the dominant reason for an adverse action, for offence s. 101 (essential to culpability: see s. 101(3).) (See also s88, Schedule 3, *Offshore Petroleum and Greenhouse Gas Storage Act 2006;* ss 142(2) 143(2), *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.)

In each case, the main issue is why these measures could not be dealt with without shifting a burden at all, or alternatively only shifting an evidential burden. For provisioins (including many of the above) that attract both civil and criminal liability, a further question is whether the reverse burden should be limited to civil liability only, e.g. the presumption in s70 of the *Australian Consumer Law*; the reverse onus in s. 166(3), (7) of the *Navigation Act 2012*.

## Question 10–1 What general principles or criteria should be applied to help determine whether a law that excludes the privilege against self-incrimination is justified?

This Term of Reference is, again, curiously phrased. Its concern is with laws that ‘exclude the right to claim the privilege against self-incrimination’. The Issues Paper accordingly focuses almost exclusively on why it is sometimes justifiable to require a person to disclose information despite attempting to claiming the privilege. As the Issues Paper notes, such disclosure is sometimes justified by the seriousness of the matter investigated, urgency, safety risks and the level of suspicion against that person.

However, the Term of Reference and Issues Paper neglects what happens after a person is required to disclose self-incriminatory information, i.e. whether or not the information is used against the person down the track. The right against self-incrimination is not necessarily breached when someone is blocked from claiming the privilege at the time of disclosure, so long as the person can claim the privilege if and when he or she is prosecuted (i.e. when the actual incrimination will occur.) For example, s. 128(4) of the *Evidence Act 1995* (Cth) does not encroach on the right (or does so justifiably) because it provides a derivative use immunity that means that prosecutors (as opposed to non-prosecutor regulators, and other beneficiaries of the suspect’s information) get no benefit from the disclosure and the accused, accordingly, loses nothing in terms of incrimination from making the disclosure. (See the US Supreme Court’s classic decision in *Kastigar v US* 406 US 441 (1972).) So, the key criterion for considering whether or not there has been an encroachment of the privilege against self-incrimination whether or not the law that bars people from claiming the privilege does so without providing derivative use immunity.

The ALRC’s 2007 Report *Privilege in Perspective* (innovatively drawing on lessons from self-incrimination, albeit generally finding them non-applicable to client legal privilege) usefully lists a number of matters to consider when determining whether the abrogation of derivative use immunity is justified:

* **The nature of the person incriminated**. Although the ALRC in 2007 rightly considered that the distinction between individuals and organisations was irrelevant to client legal privilege, it now seems settled (even though the point was only decided by a narrow majority of the High Court in 1993) that the privilege against self-incrimination does not apply to corporations (or other organisations). (Otherwise, s. 187 of the *Evidence Act 1995* (Cth) would clearly limit the privilege.) That being said, some attention is still needed to justifying organisational self-incrimination for two reasons. First, at least for small corporations, it is often hard to distinguish between the incrimination of the corporation and its officers, and the process for obtaining information from corporations via their proper officers has proven to be a puzzle. (See *R v Ronen* [2004] NSWCCA 67.) Second, the High Court’s modern concern for preserving the accusatorial process may mean that, despite the formal non-application of the privilege to organisations, some self-incriminatory processes that apply to such organisations may breach common law principles. (See *CFMEU v Grocon Constructors (Victoria) Pty Ltd & Ors; CFMEU v Boral Resources (Vic) Pty Ltd & Ors* [2014] VSCA 261, [505]: ‘*Caltex*, did, after all, represent a radical shift in the law as it had long been understood. Some of the implications of that decision are still to be fully grasped.’)

A further issue about the nature of the person incriminated is whether the person voluntarily opted to participate in a regulatory scheme that included a regulatory power to require participants to provide information. In such cases, there is a good argument that the decision to participate renders any subsequent self-incrimination voluntary, rather than compelled. A fairly clear example of such a scheme is one that requires company officers to maintain and supply financial information about a company, including information that might disclose that a company was trading while insolvent. But the issue is sometimes much less clear, for example where the regulatory scheme isn’t really optional (e.g. driving or owning a car, and hence being required to disclose information about accidents, or who was driving a car when it infringed a traffic law.)

* **The nature of the incriminatory information.** Although the ALRC in 2007 rightly considered the distinction between documentary and oral information to be irrelevant to client legal privilege, it is highly relevant to the right against self-incrimination. That is because the disclosure of a pre-existing document generally cannot amount to compelled self-incrimination, as the suspect was not compelled to create the document. Rather, as overseas courts (notably the Supreme Court of Canada) have reasoned, the compelled disclosure of pre-existing documents only limits rights against self-incrimination to the extent that the fact that the accused was able to locate and produce the document is itself incriminatory (e.g. by revealing that the accused knew of, and had access to, a document, where that knowledge or access is an element of an offence, or evidence of an element.) So, Commonwealth laws that abrogate the right against self-incrimination for pre-existing documents only need justification in the event that the suspect’s knowledge of or access to the document may be incriminatory (and lacks a derivative use immunity.) By contrast, the compelled incriminatory answering of questions (including the compelled creation of documents to answer those questions) without a derivative use immunity always requires justification.

A further issue about the nature of the disclosure is its subject-matter: is the information disclosed innocuous in itself, akin to a person’s appearance or a combination to a locker (e.g. a person’s name, their address, perhaps a computer password) or highly private and nuanced information (such as a person’s movements, associates, or state of mind.) This distinction is relevant because there is a good argument that citizens can be put on notice that certain discrete, pre-defined information is always liable to be obtained by state authorities in some circumstances (in much the same way that state authorities can search premises in some circumstances) and hence the disclosure of that information does not offend the balance between subjects and investigators that the privilege against self-incrimination is designed to maintain.

* **the nature of the body receiving the incriminatory information.** In its 2007 privilege inquiry, the ALRC concluded “There are difficulties in prescribing a ‘one-size fits all’ rule to be applied inflexibly to all federal bodies (including all Royal Commissions)—regardless of their particular exigencies or indeed the exigencies of particular inquiries or investigations. Equally, attempting to establish a taxonomy of federal investigatory bodies according to their objectives, functions, approach to enforcement, and subject matter of regulation—as a basis for creating harmonisation of approach to client legal privilege within certain spheres or sectors—is fraught with difficulty.” The same general remarks are probably true for the privilege against self-incrimination. However, in both cases, they raise a difficult question of how to decide what bodies should be permitted to extract such information. In the case of the privilege against self-incrimination, the nature of the body that receives the information is key because the principle does not only exist to protect suspects or criminals, but also to protect all citizens from the potentially tyranny that may arise when the state body has too easy access to apparent proof of anything deemed to be a crime. The danger is that removing barriers for prosecutors will also remove barriers to enforcement (or apparent enforcement) of unnecessary or abhorrent laws.

As the High Court has made clear in its recent rulings, the key issue is whether the body (or others who it interacts with) has prosecutorial functions and, in particular, whether the use of incriminatory information by prosecutors is clearly and tightly authorised. In *Lee No 1*, the Court emphasised the role of courts in controlling when incriminatory information is both disclosed and used.

## Question 10–2 Which Commonwealth laws unjustifiably exclude the privilege against self-incrimination, and why are these laws unjustified?

In its 2007 privilege report, referring to the debate in the 1990s about whether the abrogation of the privilege against self-incrimination for ASIC investigations should be subject to derivative use immunity, the ALRC said that it ‘tends to agree that derivative use immunity can operate as a ‘poisoned chalice’, present genuine practical obstacles to enforcement action, and render virtually worthless the effect of abrogation of privilege.’ ([2007] ALRC 107, [7.144].) However, the 1990s rejection of derivative use immunity was reached by a parliamentary committee and a one-person statutory review, rather than the more independent, comprehensive and consultative inquiries that the ALRC typically pursues. The ALRC’s 2007 inquiry was concerned with client legal privilege, rather than the privilege against self-incrimination So, the present inquiry presents the first opportunity for the ALRC to properly consider this important issue. I argue that the conclusion in the 1990s against derivative use immunity merits reconsideration for many reasons:

First, the 1990s conclusion that derivative use immunity was a ‘poisoned chalice’ was reached on the basis of a handful of anecdotal accounts supplied by federal investigators with a vested interest in expanding their regulatory power. Importantly, the claimed barriers posed by derivative use immunity (based on internal legal advice) were never set by or tested in a court. By contrast, when the Victorian Supreme Court some two decades later found that the absence of derivative use immunity unjustifiably limited self-incrimination rights in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, it did so only after first ruling that the state parties to the case had overstated the protections provided by derivative use immunity: [133], [135], [156]. This appropriately narrow conception of derivative use immunity puts a lie to the ‘poisoned challice’ claims put forward for ASIC and accepted by Kluver.

Second, there has never been an adequate explanation of why derivative use immunity could be a ‘poisoned challice’ in Australia, despite being the norm in other countries with robust investigative agencies, such as the United States and Canada, where derivative use immunity is constitutionally mandated. Why is Australia different?

Third, recent High Court cases on accusatorial justice call into doubt about whether use immunity (on its own) is workable, at least when courts are not involved (as in *Lee No 1*) in the original disclosure of information. As those cases have made clear, agencies have taken to providing prosecutors with transcripts of compelled examinations, without any clear legislative authorisation for such disclosure, and without any mechanism for making defendants aware of the timing, extent, uses and circumstances of that disclosure. The result is a number of lengthy investigations and prosecutions that have failed at a late stage once the courts and defendants become aware of the disclosures. In short, mere use immunity can sometimes operate as a poisoned chalice.

Fourth, despite the arguments made by ASIC focusing on corporate officers (who voluntarily participate in highly regulated schemes), the Commonwealth legislation abrogating self-incrimination and providing only for use immunity is not limited to voluntary participants, but rather almost invariably applies to any person who may provide relevant information, such as officers’ spouses, family members, employees, neighbours or customers. Moreover, as listed below, the use immunity argument has also spread to a significant number of distinct regulatory fields, including the potentially very broad and invasive investigation of suspected terrorism (see *Australian Securities and Intelligence Organisation Act 1979*, s. 34K.)

Again, I lack the time to analyse the many Commonwealth laws abrogating the privilege against self-incrimination, so here merely list a number of ones I’m aware of that, at first glance, abrogate the privilege in broad terms without court supervision or derivative use immunity for oral answers from natural persons:

* *Aboriginal Land Rights (Northern Territory) Act 1976*, s. 54.
* *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, ss. 150, 167/9, 202/205
* *Australian Crime Commission Act 2002*, s. 30
* *Australian Securities and Investments Commission Act 2001*, s. 68
* *Australian Security and Intelligence Organisation Act 1979*, s. 34L
* *Autonomous Sanctions Act 2011*, s, 22
* *Banking Act 1958*, s. 52F
* *Charter of the United Nations Act 1945*, s. 33
* *Competition and Consumer Act 2010*, ss. 133E, 135C, 154R, 155, 159
* *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, s. 461.15
* *Customs Act 1901*, ss. 183Q, 214B
* *Dairy Produce Act 1986*, s. 113
* *Export Inspection and Meat Charges Collection Act 1985*, s. 10
* *Foreign Acquisitions and Takeovers Act 1975*, s. 36
* *Historic Shipwrecks Act 1976*, s. 10
* *Inspector-General of Intelligence and Security Act 1986*, s. 18
* *Insurance Act 1973*, ss. 38F, 56, 62D, 115AB
* *Interstate Road Transport Act 1985*, s. 45
* *Law Enforcement Integrity Commission Act 2006*, ss. 80, 96
* *Life Insurance Act 1996*, s. 156F
* *Liquid Fuel Emergency Act 1984*, s. 30
* *Mutual Assistance in Business Regulation Act 1992*, s. 14
* *National Consumer Credit Protection Act 2009*, s. 295
* *Ombudsman Act 1976*, s. 9
* *Parliamentary Service Act 1999*, ss. 65AC, 65AD
* *Private Health Insurance Act 2007*, s. 214.15
* *Public Service Act 1999*, s. 72C, 72D
* *Retirement Savings Accounts Act 1997*, s. 120
* *Superannuation Industry (Supervision) Act 1993*, ss. 287, 290, 336
* *Veterans’ Entitlements Act 1986*, s. 129

In each case, the relevant question is why the legislation does not provide a narrow derivative use immunity (as identified by Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [135], [156]), at least in the case of incriminatory oral information (and the fact of knowledge of and access to incriminatory documents) provided by natural people who have not volunteered to participate in the regulatory field in question.

## Question 12–1 What general principles or criteria should be applied to help determine whether a law that imposes strict or absolute liability for a criminal offence is justified?

This Term of Reference is problematic in several ways. First, as the Issues Paper correctly notes, it makes no sense to focus on whether or not strict/absolute liability applies to ‘all physical elements of a criminal offence’. Some physical elements of a criminal offence almost never lack subjective intent in practice (e.g. most conduct) and many others in Commonwealth legislation are technical/jurisdictional elements with no relevance to responsibility. The relevant question is whether or not absolute/strict liability applies to any element of a Commonwealth offence that may plausibly be committed without subjective intent or knowledge and that is relevant to criminal responsibility.

A second problem with this Term of Reference is one of terminology. The term ‘strict liability’ has shifted significantly in meaning over the decades and means different things in different jurisdictions. For example, in the UK (which has no common law defence of honest and reasonable mistake of fact) and before 1985 in Australia, it is used in place of the current Australian/Canadian term ‘absolute liability’. Moreover, in Canada (and in Ashworth and Horder’s text quoted in [12.15]) it refers to the absence of a reverse onus defence of due diligence (something that is, perhaps unfortunately, not part of Australia’s common law or code laws, but is often provided in particular statutes.) Only Australia (at common law and under the federal/territory codes) also provides an ‘act of another’ defence for all strict/absolute liability offences. The term ‘absolute liability’ is likewise problematic, because (as used in the federal code especially) it can mean anything from liability on mere proof of a physical element, to a completely separate, and sometimes even more protective, statutory regime for fault responsibility. For example, Division 272 of the Criminal Code is replete with ‘absolute liability’ elements for the age of a child, however s. 272.16 provides a mistake of age defence that simply differs from the usual honest and reasonable mistake defence (being more generous in one way – not requiring reasonableness – but less generous in another – a reverse onus.) My broader point is that the relevant question is not whether or not a Commonwealth law provides for ‘strict liability’ or ‘absolute liability’, but whether it provides for a sufficient protection against people being convicted despite lacking moral responsibility for a crime.

Third, this Term of Reference, by seemingly setting out a ‘right’ to a subjective (rather than strict) liability mens rea requirement to every physical element of an offence, seems to overstate this traditional right. The principle of legality only provides a right to strict liability (i.e. the right to the mistake defence listed in Chapter 19 of the Issues Paper) and, then, only for offences with serious penal consequences: see *CTM v R* [2008] HCA 25, [7]. Australia’s common law on criminal responsibility does have a presumption of subjective mens rea, but it is much weaker than the principle of legality (the Issues Paper at [12.12] seems to substantially overstate Gibbs CJ’s judgment in *He Kaw Teh*.) Australia’s traditional code states don’t provide for subjective liability at all in their general principles of criminal responsibility (as opposed to specific offences.) Australia’s federal/territory codes break new ground in providing for a default presumption in the absence of an express alternative (or negation of) fault element, but that is intended to improve parliamentary processes rather than guarantee a minimum ‘traditional’ standard of responsibility.

In my view, the Inquiry should focus on two questions. First, when, if at all, is it ever justifiable to impose true absolute liability (e.g. proof of a physical element without any corresponding standard of fault liability) for a non-trivial physical element? The answer, I would submit, is never, a point eloquently put by the Supreme Court of Canada in *R v Sault Ste Marie* [1978] SCR 1299:

There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice lead to cynicism and disrespect for the law, on his part or on the part of others? There are among the questions asked.

Second, where a Commonwealth law does provide something less than subjective liability (i.e. intent/knowledge/recklessness) corresponding to a non-trivial physical element of an offence, is what it provides adequate to ensure that no-one will be convicted for the offence despite lacking moral responsibility commensurate to the label and punishment of that offence? The issue here is not whether the particular middle-ground of ‘strict liability’ is or isn’t appropriate, but rather whether what is provided is appropriate. Consideration should be given to the very many different forms of liability that could be provided for. (See the very useful list of seven possible options by the New Zealand Court of Appeal in *Millar v Ministry of Transport* [1986] 1 NZLR 660, 665-666.)

## Question 12–2 Which Commonwealth laws unjustifiably impose strict or absolute liability for a criminal offence, and why are these laws unjustified?

I will not consider the very many ‘strict liability’ elements/offences in Comonwealth law, but instead will make one general observation about strict liability as provided for in s. 9.2 of the *Criminal Code*. The Inquiry may wish to consider whether that formulation of strict liability, taken from the common law, is justifiable default test for liability for an element that lacks a corresponding (subjective) fault element. My concern is s. 9.2(1)(b)’s requirement that the mistaken facts ‘would not have constituted an offence’, rather than the particular offence charged. The problem with this formulation is that it can completely deny the defence (and therefore effectively impose a form of absolute liability) whenever a defendant thinks she is committing even a very minor offence (e.g. a traffic offence) no matter the seriousness and stigma of the offence actually charged. In my view, a more appropriate default for elements that lack a fault element is s. 24 of Tasmania’s *Criminal Code*, which allows a mistake defence to bar criminal responsibility ‘to any greater extent than if the real state of things had been such as the person believed to exist.’ The relevant question for the Inquiry is whether any Commonwealth offence that imposes strict liability for an element should, instead, impose liability equivalent to Tasmania’s mistake defence (or, alternatively, some other more protective form of liability.)

Noting again the lack of time, here is a list of Commonwealth laws I’ve come across that, on first glance, impose absolute liability for a non-trivial element of an offence without providing for an alternative sufficiently protective test of criminal responsibility:

* *Commonwealth Electoral Act 1918*, s. 101(4)
* *Defence Force Discipline Act 1982*, ss. 40, 44(2)
* *Environment Protection and Biodiversity Conservation Act 1999*, s. 449BA(3)
* *Excise Act 1901*, s. 77FL(4)
* *Great Barrier Reef Marine Park Act 1975*, ss. 38D(2) (in relation to (1)(a)), 38EA(2), 61AAC(3), 61ACB(2), 61AEB(2)
* *Taxation Administration Act 1953*, s. 8C

In each instance, the question is whether the offence can be reframed to separate out trivial from non-trivial elements and to provide appropriately comprehensive requirements or defences for the latter.

## Question 13–1 What general principles or criteria should be applied to help determine whether a law that allows an appeal from an acquittal is justified?

This Term of Reference concerns an ‘appeal from an acquittal’. The equivalent international human right is limited to an appeal from a ‘final’ acquittal and hence does not prevent a system of appeals from acquittal equivalent to those provided for the guilty. Canada is a notable example of a country that has long permitted such appeals in some circumstances: *Criminal Code* (Can.), s. 676(1)(a). In my view, that there is nothing inherently wrong with having a regime for appeals against acquittal that is equivalent to the current regime for regular appeals against convictions. Rather, as the Issues Paper points out, the argument against appeals against acquittal mainly rests on the need to properly constrain the state’s power to prosecute.

In my view, there are two general criteria the Inquiry should use to assess Commonwealth laws permitting appeals against acquittals. First, does the law contain appropriate constraints to ensure that the prosecutor cannot take advantage of the process to simply make repeated attempts to try a defendant until he or she is fortuitously convicted? (I note that other parts of the law, notably the provisions allowing appeal courts to order new trials based on theories or evidence not advanced by the prosecution at the original trial – e.g. *R v Thomas* (No 3) [2006] VSCA 300; *R v Taufahema* [2007] HCA 11 – also implicate this concern, but they seem to be outside of the Inquiry’s Terms of Reference.) In my view, the main appropriate constraint is to require fresh and compelling evidence as a precondition for an appeal after a final acquittal.

Second, do defendants have at least the same ability to appeal against a final conviction? It is surely self-evident that a law that allows the Crown to appeal against a final acquittal in circumstances where a defendant would lack the ability to appeal against a final conviction is unjustifiable, given not only the relevant resources of states and subjects, but also the much more significant wrong involved in a wrongful conviction compared to a wrongful acquittal. Indeed, I would argue that providing for appeals against final acquittal (including, presumably, resources to police and prosecutors to investigate potential wrongful acquittals) without also providing for an appropriately resourced independent state agency to investigate potential wrongful convictions (such as the UK’s Criminal Cases Review Commission) lacks any rational policy basis (although I acknowledge that this issue may go beyond the Inquiry’s Terms of Reference.)

## Question 13–2 Which Commonwealth laws unjustifiably allow an appeal from an acquittal, and why are these laws unjustified?

As noted earlier, the relevant Commonwealth laws that permit appeals against acquittals are the provisions of the *Judiciary Act* that pick-up state and territory appeal laws, potentially including laws that provide for appeals against final acquittals in some circumstances. For example, Victoria’s provision for appeals against acquittal on the basis of fresh and compelling evidence extends to serious drug trafficking offences, including ‘substantially similar offences’ under non-Victorian laws (potentially including some offences under Part 9.1 of the federal *Criminal Code*.) This may in turn be picked up for Commonwealth offences by s. 68(1)(d) of the *Judiciary Act*, to potentially allow a person acquitted of a serious Commonwealth drug trafficking offence to be retried on the basis of fresh and compelling evidence, etc.

Some problems of the Victorian law were reviewed by the Victorian Parliament’s Scrutiny of Acts and Regulations Committee (who I advise) in its *Alert Digest No. 14 of 2011*. Relevantly, the Victorian law allows appeals against acquittal in some circumstances where there isn’t fresh and compelling evidence. First, it permits a person to be tried for an administration of justice offence that would ordinarily be barred by the common law on double jeopardy on the basis of ‘fresh’ (rather than ‘fresh and compelling’ evidence, thus permitting a retrial on the basis of minor new evidence.) Second, it permits a person to be retried for an offence ‘tainted’ by an administration of justice offence without any showing that the taint will be removed in any retrial. Third, it includes, in the definition of ‘fresh and compelling’ evidence, evidence that was rendered inadmissible by the law of evidence that applied at the time of the trial if it would now be admissible (i.e. potentially permitting a host of retrials in light of the enactment of evidence law reforms such as the uniform evidence law, or even in light of law reforms enacting specifically in response to the earlier acquittal.) All of these features flow from the COAG model for such laws. However, Victoria lacks the crucial COAG safeguard that the Court of Appeal rule that a retrial would be ‘in the interests of justice’. (Instead, the Court need only find that the retrial would be fair, which is a narrow matter.)

As well, Victoria (like most Australian jurisdictions) does not provide defendants with an equivalent right of appeal against a final conviction. Instead, Victorian courts can only revisit a final conviction upon a reference from the Attorney-General: see *Criminal Procedure Act 2009* (Vic), s. 327. By contrast, South Australian law now allows for second or subsequent appeals against conviction with the leave of the Full Court of the Supreme Court (i.e. an independent tribunal): see s. 353A, *Criminal Law Consolidation Act 1935* (SA), recently applied to order a new trial for Henry Keogh (*R v Keogh* (No 2) [2014] SASCFC 136), after the South Australian Attorney-General repeatedly refused applications under an earlier law equivalent to Victoria’s (and the High Court repeatedly refused to reconsider authorities barring courts from hearing such appeals under their existing appeal powers.)

The question for the Inquiry is whether it is justifiable for the Commonwealth *Judiciary Act* to pick-up laws on appeals against final acquittals such as Victoria’s without empowering the courts both to bar new appeals against acquittals for Commonwealth offences if they are contrary to the interests of justice and to hear equivalent appeals against final convictions for Commonwealth offences without the need for permission from a politician.

## Question 19–1 Which Commonwealth laws unjustifiably encroach on other common law rights, freedoms and privileges, and why are these laws unjustified?

As the lengthy list in Chapter 19 of the Issues Paper amply demonstrates, this Term of Reference is simply unworkable.

Consider, for instance, the supposed common law freedom from laws that ‘criminalise behaviour on the basis of subjective offensiveness’, attributed to Gleeson CJ’s remark in *Coleman v Power* [2004] HCA 39, [12] that ‘In the context of legislation imposing criminal sanctions for breaches of public order, which potentially impairs freedom of speech and expression, it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person's feelings should involve a criminal offence.’ Is this remark an application of the principle of legality or just a throwaway musing about legislative policy? Is this a new ‘common law’ (or ‘traditional’ or ‘other similar legal’) right, or just a particular take on free speech? Is it limited to criminalisation of mere ‘wound[ing] of a person’s feelings’ by ‘any words or conduct’, or does it cover all ‘behaviour;’ and any ‘subjective offensiveness’, whatever that means? Is it limited to ‘public order’ legislation, or is it broader (e.g. the postal service)? Does it matter that Gleeson seems to be the only judge in *Coleman v Power* (or elsewhere) to state any such rule? Or that, just four years later, the Full Court of the Federal Court (including Gleeson’s eventual successor as Chief) unambiguously held in *Evans v State of New South Wales* [2008] FCAFC 130, [83]? that a NSW law did ‘criminalise behavior on the basis of subjective offensiveness’? Anyway, what is actually wrong with criminalising subjectively offensive behaviour, at least where the prosecution must also prove that the defendant intended such subjective offense (e.g. modern stalking offences?) And why would the ALRC want to work any of this out in addition to all the other burdens of this Inquiry?

Accordingly, here, I will mainly discuss one right in the ALRC’s list: the right against laws that ‘permit a court to extend the scope of a penal statute’. I do this for several reasons. First, it happens to be the only criminal process right in Spigleman’s 2008 ‘common law bill of rights’ that the Attorney-General left out of the Inquiry’s express Terms of Reference. Second, it conveniently encompasses many of the other criminal process rights in the Terms of Reference (including rights concerning retrospective offences, reverse burdens, absolute/strict liability, appeals against acquittal, interrogatories in criminal proceedings, mistake, and appeals against invalid sentences), although it also goes further to cover other parts of the criminal law, such as the interpretation of physical elements and the availability of Crown sentencing appeals. Third, I happen to think it’s one of the most important, if not the most important, common law protections for accused persons, albeit one that is often misunderstood and, hence, ignored. And, finally, I think this right has been unjustifiably limited by a recently enacted Commonwealth law.

Following that discussion, I will address two further criminal process rights from the Chapter 19 list that are distinct from the others discussed so far.

### Commonwealth laws that permit a court to extend the scope of a penal statute

Traditionally, this common law right extends to both criminal law statutes and taxation statutes (as both are considered to be ‘penal’.) Here, I only address its application to criminal law statutes.

A major problem with this right is that it has at least three very different meanings, as identified a decade ago by an American scholar, Zachary Price, in ‘The Rule of Lenity as a Rule of Structure’ (2004) 72 *Fordham Law Review* 885. Here are three differently Australian statements of the right, corresponding to the three different meanings Price identified in 2004:

1. “if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences”: Gibbs CJ in *Beckwith v R* (1976) 135 CLR 569, 576. This formulation is difficult to apply (given the test of ‘ambiguity’), capricious (given that it seems to reward ingeniously narrow readings) and mostly irrelevant (given that contemporary statutory interpretation has many ways to resolve amibugity). That is why Gibbs CJ in *Beckwith* famously described the rule as ‘one of last resort’. However, it is not the only version of the rule.
2. “Where Parliament has in the public interest though fit in the one case to restrain private action to a limited extent and penalise a contravention of its directions, and in the other to exact from individuals certain contributions to the general revenue, a Court should be specially careful, in the view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature, not weakening in favour of private persons to the detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed.”: Isaacs J in *Scott v Cawsey* (1907) 5 CLR 132, 154-155. This version of the rule is inconsistent with contemporary approaches to statutory interpretation (which now always look to context and purpose, in addition to language) and arbitrary (as there is no sound reason to interpret criminal/taxation statutes using completely different rules to other statutes.) Again, though, it is not the only version of the rule.
3. “If conduct of a particular kind stands outside the language of a penal section, the fact that a Court takes the view that it is through inadvertence of the Legislature that it has not been included does not authorise it to assume to remedy the omission by giving the penal provision a wider scope than its language admits.”: Jordan CJ in *Ex parte Fitzgerald; Re Gordon* (1945) 45 SR (NSW) 182, 186. This rule combines the other two, barring non-textual approaches to interpretation, but only when expand criminal liability. That is, a court interpreting a criminal law should identify a range of possible meanings, depending on whether various interpretive sources (such as context, purpose and the principle of legality) are considered, and then select the one that favours the accused.

In my view, it is the third version of this right that should be considered in the Inquiry. That is, the ALRC should consider whether or not a Commonwealth law permits a court to use non-textual approaches to interpretation (aka ‘strained’ interpretation) to extend criminal liability.

The relevant Commonwealth law the ALRC should consider is s. 15AA of the *Acts Interpretation Act 1901*, which was recently changed by the *Acts Interpretation Amendment Act 2011* to incorporate the strong requirement of fidelity to legislative ‘purpose’ also adopted in Queensland (in 1991) and the ACT (in 2003):

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

The rationale for the new Commonwealth (and Queensland and ACT) rule is the High Court’s ruling in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 that Victoria’s purposive interpretation rule (similar to the predecessor to s15AA) does not govern a court’s choice between two interpretations that each promote parliament’s purpose. However, as a majority of the High Court made clear in *Chugg* itself, its narrow reading of a work safety statute in that case was only made because the statute in question was a criminal offence provision. (Chugg, a work safety inspector, was prosecuting Pacific Dunlop Ltd, and the interpretation dispute was about who bore the onus of proof on an element of a works safety offence.) See Dawson, Toohey and Gaurdon JJ at 262, as well as Deane J (expressly relying on the right aganst strained interpretations of penal provisions) at 254.

The new s15AA introduced in 2011 may therefore have overturned the common law right against strained interpretations of criminal provisions relied upon by the High Court in *Chugg*. Importantly, the new s15AA (and the ACT provision) lacks a key protection used in South Australia’s legislation since 1986 and adopted in Queensland in 1994: a limitation of their purposive provisions so that they do ‘not operate to create or extend any criminal liability’ (as opposed to taxation liability): *Acts Interpretation Act 1915* (SA), s. 22(2); *Acts Interpretation Act 1954* (Qld), s. 14A(2). Although these limitations have sometimes been unconvincingly sidestepped by lower courts (e.g. by Doyle CJ in *R v Hill* [1996] SASC 5975), the South Australian version was applied by the High Court itself in *Byrnes v R* [1999] HCA 38, [52], in the course of refusing to read legislation on a prosecutor’s powers as extending to a power to appeal against a sentence. In my view, the Inquiry should consider whether the new s. 15AA of the *Acts Interpretation Act 1901* justifiably omits the proviso equivalent to ss. 22(2) and 14A(2) of the South Australian and Queensland interpretation statutes that the High Court applied in *Byrnes v R*. (I will discuss these issues further in my paper at the Melbourne principle of legality conference.)

### Commonwealth laws that interfere with the right to bring a private prosecution

Section 9(5) of the *Director of Public Prosecutions Act 1983* (Cth) gives the Commonwaelth DPP a discretion to ‘take over a proceeding that was instituted or is being carried on by another person’, whether summary or indictable, and has a further discretion to either continue to prosecution or stop it. The DPP’s published policy (at [4.8]) describes this power as ‘an important safeguard against resort to this right in what may be broadly described as inappropriate circumstances’, a stance that strikes me as a fairly disparaging tone to take in relation to a common law right. The DPP ignores (or at least neglects to mention) the other important safeguards against inappropriate prosecutions, including the legislature’s power to bar some prosecutions without the consent of an executive agency, the courts’ powers to prevent abuses of process and the defendant’s ability to bring a tort of malicious prosecution. These measures involve decisions by bodies other than the DPP, something that is appropriate since the right to bring a private prosecution is ‘a valuable constitutional safeguard against inertia or partiality on the part of’ public prosecutors: see *Gouriet v Union of Post Office Workers* [1977] UKHL 5.

The exercise of the DPP’s power under s. 9(5) is governed by its Prosecution Policy (made under s. 11 of the DPP Act) at [4.10]. It lists six circumstances, any one of which is grounds where the private prosecutor will not be ‘permitted to retain conduct of the prosecution’ (i.e. to retain the right to privately prosecute.) The decision to discontinue is then governed by the same test as the decision to prosecute in the first place (see [4.12]). The test in [4.10] is roughly equivalent to the test applied under the English Crown Prosecution Service’s Legal Guidance (http://www.cps.gov.uk/legal/p\_to\_r/private\_prosecutions/) although the CPS Guidance strikes me as setting out the decision-making more clearly by identifying separate tests for when the CPS will take over and continue a prosecution, and when it will take over and discontinue a prosecution.

The major issue with the Commonwealth DPP’s Policy is whether or not it is appropriate for the DPP to take-over and discontinue a prosecution merely because the DPP would itself have chosen not to have prosecuted the matter under its own policy (as opposed to other grounds, such as bias, or absence of an offence known to law.) This exact issue was debated by five judges of the UK Supreme Court in *R (on the application of Gujra) v Crown Prosecution Service* [2012] UKSC 52, with a narrow majority ruling that such an approach was appropriate, including noting (at [38]) the similar approach by Australia’s Cth DPP. I think that the Inquiry should consider this issue for itself as it applies to Australian federal prosecutions for several reasons. First, the majority decision was expressly not based on a consideration of the right to bring public prosecutions, but rather the meaning of particular English legislation: see [30] and [82]-[83]. Second, the Supreme Court’s was sharply divided, and the dissents of Lord Mance and Lady Hale are, in my opinion, very convincing. Third, the majority decision relied on the amenability of the decision to intervene to discontinue to judicial review in England (see [29]); by contrast, on current High Court authority, there can be no judicial review of such decisions in Australia (see *Maxwell v R* (1996) 184 CLR 501, 534; *Likiardopoulos v The Queen* [2012] HCA 37, [37], but see French CJ at [2]-[4].) Fourth, the Crown Prosecution Service is bound to act compatibly with human rights by s. 6 of the *Human Rights Act 1998* (UK), which would presumably restrict some exercsises of its take-over power (see *Gujra* at [133]); the Commonwealth DPP is not similarly bound. Accordingly, the Inquiry should consider whether or not the Commonwealth DPP Policy (supported by a Commonwealth law, ss. 9(5) and 11 of the *DPP Act*) justifiably limits the right to privately prosecute.

Finally, note that the English CPS Policy specifies that: “in cases where the CPS decides that taking over a private prosecution in order to continue with it is the appropriate course of action, then, unless there are exceptional circumstances, the CPS should write to both the private prosecutor and the defendant explaining the reasons for the decision.” And “In cases where it is decided that taking over a private prosecution in order to stop it is the appropriate course of action, then, unless there are exceptional circumstances, the CPS should write to the private prosecutor explaining the reasons for the decision.” By contrast, the Commonwealth DPP policy only provides for such reasons if the prosecution being taken over is brought by a fellow federal agency (apparently to maintain a ‘harmonious relationship between the DPP and that agency): see [4.6]. The Inquiry should consider whether it is justifiable for the Commonwealth DPP to interfere with the right to privately prosecute without, in general, providing reasons for its decision.

### Commonwealth laws that vest in persons or bodies exercising executive power, the power to determine whether a person has committed a criminal offence

This claimed common law right was stated by the Full Federal Court in *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* [2014] FCAFC 22, [114]. However, as the Issues Paper notes in a footnote, the matter is now before six judges of the High Court, who may (or may not) clarify whether or not such a right exists at common law and, if so, its scope. This is, of course, another example of why an Inquiry into whether Commonwealth laws encroach ‘other common law rights’ is unworkable; the common law is not a settled body of law, but rather a moveable feast. Who knows if some of the other rights in the list in Chapter 19 will exist (or others will be discovered) next month, or next year, even if we can somehow work out whether or not they exist right now?

Anyway, I will briefly address this right to make a small point about when a breach of it is justified. In my view, the Inquiry would do well to be guided by the jurisprudence of the European Court of Human Rights on the presumption of innocence in Article 6(2) of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*. In contrast to the French CJ’s (and perhaps the Australian common law’s) narrow take on the presumption of innocence as solely referring to the criminal burden of proof (see footnote 3 to Chapter 9 of the Issues Paper), the European Court has taken a broader view that the presumption of innocence also has a role to play outside the courts, regulating public statements by public officials to some degree. For example, in *Allenet de Ribemont v France* [1995] ECHR 5 the European Court held that French officials (the Minister for the Interior and the Director of Paris’s detectives) breached a (subsequently cleared) arrestee’s right to be presumed innocent when they gave a press conference declaring him to be the ‘instigator’ of a murder’. The European Court justifies this approach by reference to both the presumption of innocence and the right to protection of reputation: see *Allen v UK* [2013] ECHR 678 for a recent discussion (although that case is mostly concerned with post-acquittal protection.)

Of course, Australia isn’t Europe. But I think that the European caselaw is a guide to the most relevant criterion for when an encroachment on the right asserted by the Federal Court isn’t justified: when the finding of guilt is made about someone who is either in the course of criminal proceedings (including arrest, as in *Allenet de Ribemont*) or in the context of proceedings have ended without a finding of guilt. Otherwise (including, as it happens, with ACMA’s inquiry into the nurse hoax), I think such findings are generally justifiable. (An exception would be where the body making the findings has coercive powers: see *Balog v Independent Commission Against Corruption* [1990] HCA 28, third-last para of that judgment.)