



Australian
Human Rights
Commission

ALRC Freedoms Inquiry – Interim Report

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE AUSTRALIAN LAW REFORM
COMMISSION**

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Australian Law Reform Commission (ALRC) to its Freedoms Inquiry Interim Report.
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution with an accredited 'A' status.¹
3. The Commission commends the ALRC for its comprehensive review of the source of traditional rights, freedoms and privileges in its Interim Report.
4. The Commission's submission focuses on those sections of the report that align with the Commission's current work and strategic priority areas. Namely, the rights included in the inquiry, scrutiny mechanisms, freedom of religion and property rights, in particular, native title and economic development.

2 The Inquiry in Context

5. The Commission notes that the terms of reference for the ALRC's inquiry define which rights should be understood as 'traditional rights, freedoms and privileges'. The list of rights was extensive yet included 'any other similar legal right, freedom or privilege'. The Commission considers that it is regrettable that the scope of the ALRC's inquiry does not include the right to liberty.
6. The right to liberty is recognised as amongst the most fundamental common law rights.² Justice Fullagar described it as 'the most elementary and important of all common law rights'.³ The guarantee of liberty has been described as a 'constitutional objective' advanced by the separation of judicial power embodied in Ch III of the Constitution.⁴ The right to liberty is also protected by article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)⁵ which among other things, prohibits arbitrary arrest or detention.
7. The Commission agrees that common law rights overlap with the rights protected in international instruments, such as the ICCPR. In their history and development, each may be seen as an important influence on the other. A statute that encroaches on a traditional common law right will often, therefore, also encroach on its related human right.
8. The Commission believes that limitations on rights should be minimal, and considers that the ALRC's inquiry will need to determine whether limits on traditional rights and freedoms are 'appropriately justified'. The Commission considers that the most appropriate tool to conduct this analysis is a test of proportionality. A proportionality test acknowledges that not all rights are absolute, that they need to be balanced against other protected rights and that they may conflict with other public policy priorities, such as national security or public health.⁶ However, a limitation on a right should never jeopardize the essence of the right concerned.⁷ The Commission also notes that rights recognised by the ICCPR contain specific limitations within the scope of the

right itself. These rights should only be limited for the explicit reasons contained in each article of the ICCPR.

3 Scrutiny Mechanisms

9. The Commission notes the following questions posed in Chapter 1 of the Interim Report:

Should laws that limit rights and freedoms require particular scrutiny and justification and, if so, how might this be done – by applying what standard and following what type of process?

10. The President of the Commission has described the Australian approach to the protection of human rights as a form of ‘exceptionalism’:

By this I mean that relative to comparable common and civil law systems, Australia has adopted a multifaceted and unique regime for human rights protection. We have few constitutional or legislative protections for our traditional freedoms such as freedom of speech or protection from arbitrary detention without trial. We have no Charter or Bill of rights, unlike all other common law countries; for most legal systems, all domestic laws are viewed through the prism of the rights defined in either the relevant Constitution or legislative Charter or Bill of Rights; Australia has no regional court like the European Court of Human Rights or similar courts in Latin America, Africa and the Middle East.

The consequence is that Australia is increasingly isolated from evolving jurisprudence and from the legal systems with which we share common values.⁸

11. However, as a liberal democracy Australia defers to all conduct being legal, until it is made illegal. Therefore government has to legislate any limitations or infringement on rights leaving Australians otherwise free to exercise their rights, freedoms and privileges based on the common law.
12. The Commission considers that in view of Australia’s unique approach to the protection of human rights, laws that limit rights and freedoms, in particular those set out in the seven human rights treaties to which Australia is a party, require detailed scrutiny and justification.
13. The Commission also considers that the functions set out in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) are the most appropriate processes. The standard is that set out in the Parliamentary Joint Committee on Human Rights (PJCHR) Guidance Note No. 1 on drafting Statements of Compatibility.⁹ That is, any limitation on human rights is to be:
- Prescribed by law
 - Necessary in the pursuit of a legitimate objective
 - Have a rational connection to the objective to be achieved
 - Proportionate to the objective being sought.
14. The Commission has commended the government for the passage of the Act.¹⁰ As the ALRC Interim Report notes,¹¹ the Act draws an explicit connection

with human rights instruments through the introduction of parliamentary scrutiny processes relating to the seven major human rights treaties to which Australia is a party. The Act, in addition to establishing the Parliamentary Joint Committee on Human Rights to analyse all bills and legislative instruments for compliance with human rights, requires the production of statements of compatibility of bills and legislative instruments with the seven main human rights treaties, and enables the Attorney-General to refer inquiries to the committee.

15. Since its establishment the PJCHR has produced 64 reports to Parliament analysing hundreds of bills and legislative instruments and highlighting those bills which it considered raised human rights concerns. Through these reports (and also through the provision of two Guidance Notes),¹² the PJCHR has provided clear guidance to government departments on their expectations about the level of human rights analysis statements of compatibility should contain. This has resulted in noticeable improvements in the quality of statements of compatibility and hence, in the consideration of human rights impacts of new measures.
16. The Commission notes the ALRC's considerations of the overlap between scrutiny committees, reviewing the scope of the scrutiny committees and the relationship between them,¹³ and welcomes the opportunity to provide input to this process.
17. The options provided by the ALRC to rationalize the work of the various scrutiny committees include limiting the PJCHR's analysis to the most significant limitations on human rights, and the addition of the PJCHR's function to the scope of the Scrutiny of Bills Committee's work.¹⁴
18. The Commission considers that in view of Australia's unique regime for human rights protection, the PJCHR (and process of statements of compatibility) is a singularly important mechanism to implement Australia's international human rights obligations at the domestic level.
19. The Commission rejects the option that the PJCHR's function can be added to the scope of the Scrutiny of Bills Committee's work and urges the ALRC to remove this option from the final report. The Commission also urges the ALRC to acknowledge the significant contribution of the PJCHR to the protection and promotion of human rights in Australia in its Final Report. It should also be acknowledged that the Committee is in its early days of operations – its role should be allowed to evolve as it settles as a regular scrutiny mechanism within the parliamentary system.

4 Freedom of Religion

20. The National Consultation on rights and responsibilities undertaken by the Human Rights Commissioner in 2014 identified a common theme throughout the consultations; the importance of preserving religious freedom in a pluralist, multi-faith 21st Century Australia with a constitutionally secular State.
21. The consultations identified areas of tension between:

- Religious communities who feel their freedom to practice their faith, sustain independent religious communities (such as schools) and participate in the Australian public policy arena is being diminished.
 - Sections of the Australian community who believe religious freedom as a human right should be curtailed and that the capacity of people to practice their faith should not extend beyond their private beliefs and formal worship.
22. The Commission considers that the tension between these areas arises from the relationship between the human right to religious freedom and the human right to equality before the law. The Commission also considers that balancing these human rights raises a number of issues for discussion in contemporary Australian public policy debates.
23. To begin this discussion, the Human Rights Commissioner will be conducting the first of a series of Religious Freedom Roundtable on 5 November 2015. The series roundtables will provide an on-going forum that engages with various individuals and organisations at different times around a broad range of religious freedom issues.
24. It is expected that the initial Religious Freedom Roundtable will establish a series of working groups to investigate how law and policy can constructively address and protect the challenges facing religious freedom in contemporary Australia.
25. The key issues that will be the subject of discussion at the first roundtable and which will provide valuable information for the ALRC Final Report are:
- Government laws and regulations that limit the right to religious freedom.
 - Preserving religious freedom when an organisation receives taxpayers' money to provide a public service.
 - Balancing the right to religious freedom with equality before the law – what are the areas of shared agreement?
 - Developing mechanisms to support religious inclusion and social cohesion.
26. The soon to be released Issues Paper provides a background to each of these points and a set of questions for discussion at the first of the roundtables. The Commission will provide a copy of the Issues Paper as soon as it becomes available.
27. From consultations and engagement with religious communities it is clear that there are a wide-range of views about the extent that religious freedom should be protected by law. There is significant variance within religious communities, as well as outside religious communities.

28. However, there is a common denominator that reasonable facilitation should be provided in law for an individual not to be compelled against their conscience when they hold a genuine and sincere belief, and a compulsion to act would prompt them to act against that genuine and sincere belief.
29. Within religious communities there is a strong view about the importance of preserving their freedom to be self-determining and to not have secular principles imposed on their institutions and practices. It should be noted that view is broadly shared, so long as the institution is not a recipient of public money. If that institution receives public money then support decreases.
30. The Commission notes that the ALRC Final Report for the Freedoms Inquiry is to be delivered to the Attorney-General in December 2015. As the first of the Religious Freedom Roundtables will be completed early November, the Commission will undertake to provide the ALRC with the *Communiqué* of the Religious Freedom Roundtable. We encourage the ALRC to give due consideration to the outcomes of the Religious Freedom Roundtable in the development of its Freedom of Religion recommendations.

5 Property Rights - Real Property

31. The Commission notes that property rights remains an under-considered area of the Australian human rights landscape.
32. The Human Rights Commissioner has made it one of his priority areas in his work, and to date has commenced a discussion on the property rights that can be exercised by the Aboriginal and Torres Strait Islander Social Justice Commissioner under different forms of Indigenous title.
33. The Commission notes that the ALRC's recommendations contained in the *Connection to Country: Review of the Native Title Act 1993 (Cth)*,¹⁵ will inform ongoing discussions regarding the empowerment of Aboriginal and Torres Strait Islander native title holders and economic development of their native title.¹⁶
34. The Commission anticipates that its current work in this area will also inform ongoing discussion and the content of the ALRC Final Report.
35. The ALRC will be aware of the recent Indigenous Leaders Roundtable on economic development and property rights held in Broome. An outcome of the Indigenous Leaders Roundtable was the Commission being tasked to lead and facilitate on-going dialogue on Indigenous property rights.
36. The Communiqué from the Roundtable,¹⁷ identified the following five sets of issues to better enable economic development within the Indigenous estate:
 - **Fungibility and native title** – enabling communities to build on their underlying communal title to create opportunities for economic development.
 - **Business development support and succession planning** – ensuring that Aboriginal and Torres Strait Islander peoples have the

governance and risk management skills and capacity to successfully engage in business and manage their estates.

- **Financing economic development within the Indigenous estate** – developing financial products, such as bonds, to underwrite economic development through engaging the financial services sector and organisations including the ILC and IBA.
- **Compensation** – rectifying the existing unfair processes for compensation for extinguishment of native title and considering how addressing unfinished business could leverage economic development opportunities.
- **Promoting Indigenous peoples right to development** – promoting opportunities for development on Indigenous land including identifying options to provide greater access to resources on the Indigenous estate.

37. Another key theme consistently raised as part of a discussion on property rights is the absence of a recognition of regulatory takings, where regulation progressively diminishes the value of an individual's property without compensation. This issue has consistently been raised as a result of environmental regulation that imposes significant cost burdens, or restrictions, on the use of their land.
38. The Commission is of the view that a comprehensive approach is required to fully explore these issues and enable dialogue between all key stakeholders, including governments (federal, state and territory). It is anticipated that the outcomes of this work could then drive significant reform to law and policy.
39. The Commission is facilitating a second Indigenous Leaders Roundtable in December of this year to proactively develop the agenda for a new dialogue between Indigenous peoples and the government about property rights and economic development. The Commission understands that any strategies developed will need to incorporate existing mechanisms including the COAG Expert Indigenous Working Group investigation into Indigenous land use and administration; the Federal Government's 'Our North, Our Future: White Paper on Developing Northern Australia'; and the constitutional recognition process.
40. The Commission acknowledges that the *Communiqué* of the December roundtable will only be available at a time that is close to the completion of the ALRC Freedom Inquiry Report. The Commission will ensure the availability of the *Communiqué* to the ALRC as soon as possible following the Roundtable.

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- ¹ *Chart of the Status of National Institutions*, International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). At <http://nhri.ohchr.org/EN/AboutUs/ICC Accreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf> (viewed 30 January 2015)
- ² *Trobridge v Hardy* (1955) 94 CLR 147 at 152 (Fullagar J); *Williams v The Queen* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ); *Re Bolton/ Ex parte Beane* (1987) 162 CLR 514 at 520-523 (Brennan J); *Michaels v The Queen* (1995) 184 CLR 117 at 129 (Gaudron J); *McGarry v The Queen* (2001) 207 CLR 121 at 140-142 [59]-[61] (Kirby J); *Al Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] (Gleeson CJ); *South Australia v Totani* (2010) 242 CLR 1 at 155-156 [423] (Crennan and Bell JJ).
- ³ *Trobridge v Hardy* (1955) 94 CLR 147 at 152.
- ⁴ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
- ⁵ *International Covenant on Civil and Political Rights* Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ⁶ J. Debeljak, 'Balancing Rights in a Democracy: The Problems of Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, p 423.
- ⁷ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N.Doc E/CN.4/1985/4, Annex (1985), [2].
- ⁸ Professor Gillian Triggs, *Free speech and human rights in Australia* (Speech delivered at the Free Speech 2014 Symposium, Ultimo, 7 August 2014). At <https://www.humanrights.gov.au/news/speeches/free-speech-and-human-rights-australia> (viewed 13 October 2015).
- ⁹ Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility* (December 2014). At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources (viewed 13 October, 2015).
- ¹⁰ Australian Human Rights Commission, *Information concerning Australia's compliance with the Convention Against Torture*, para 27. At <https://www.humanrights.gov.au/submissions/information-concerning-australia-s-compliance-convention-against-torture> (viewed 13 October 2015).
- ¹¹ Australian Law Reform Commission, *Freedoms Inquiry Interim Report*, p 43. At <http://www.alrc.gov.au/publications/alrc127> (viewed 13 October 2015).
- ¹² Parliamentary Joint Committee on Human Rights, *Guidance Notes and Resources*. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources (viewed 10 October, 2014).
- ¹³ Australian Law Reform Commission, *Freedoms Inquiry Interim Report*, p 49. At <http://www.alrc.gov.au/publications/alrc127> (viewed 13 October 2015).
- ¹⁴ Australian Law Reform Commission, *Freedoms Inquiry Interim Report*, p 49. At <http://www.alrc.gov.au/publications/alrc127> (viewed 13 October 2015).
- ¹⁵ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015).
- ¹⁶ Australian Law Reform Commission, *Freedoms Inquiry Interim Report*, p 238. At <http://www.alrc.gov.au/publications/alrc127> (viewed 13 October 2015).
- ¹⁷ Australian Human Rights Commission, *Communiqué. Indigenous Leaders Roundtable on economic development and property rights* (Broome, 19-20 May 2015). At <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/indigenous-leaders-roundtable-economic-development> (viewed 12 October 2015).