Submission to the ALRC inquiry into Traditional Rights and Freedoms – Encroachment of Commonwealth Laws

This submission was prepared by Associate Professor Alexander Reilly, with the assistance and input of Professor Rosemary Owens, Professor Andrew Stewart, Dr Judith Bannister, Cornelia Koch and Dr Anna Olijnyk on behalf of the Public Law and Policy Research Unit in the Law School at the University of Adelaide.

The Public Law & Policy Research Unit (PLPRU) contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.

1. Common Law Rights and Freedoms

As the Issues Paper discusses, traditional rights and freedoms have a 'long heritage', and have been recognised in many jurisdictions for centuries.[1] It is important, however, not to equate the longevity of common law rights with their immutability. The common law constantly evolves in response to new understandings of the differentiated rights and freedoms of citizens. And so new common law rights emerge and others transform in response to the needs of the community. There are many judicial statements on the common law's ability to adapt. Famously, in *Mabo v Commonwealth (No 2)*, Brennan J stated:[2]

[1] ALRC, *Traditional Rights and Freedoms – Encroachment of Commonwealth Laws*, Issues Paper 46, p10-11.
[2] *Mabo (No 2) v Queensland* (1992) 175 CLR 1, 30.

> If a postulated rule of the common law expressed in earlier cases seriously offends … contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

Furthermore, in *PGA v The Queen*, the High Court has recognised that the common law is itself oriented towards change over time: [3]

> Without having been expressly overruled or intentionally departed from, [precedent] may become in course of time no longer really consistent with the course of judicial decision. In this way the tooth of time will eat away an ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative.

As a result of the changing nature of the common law, we submit that it is not possible to define precisely the terms of a particular common law right such as 'freedom of speech' or 'property rights'. As *Mabo* demonstrated, the very concept of a common law property right is capable of change.

The problem of definition is exacerbated by the fact that common law rights and freedoms develop differently depending on the substantive area of law in which the right or freedom is asserted, and operate differently in the context of the different legal relationships involved. It became clear in *Al-Kateb v Godwin*, for example, that a right not to be detained arbitrarily or indefinitely is a right that is different for citizens and non-citizens, and is different in the fields of immigration and criminal law.[4]

2. Methodology of the Inquiry

The inherent instability of common law rights and freedoms has important implications for the methodology of an inquiry into traditional rights and freedoms such as the present. In our submission it makes it difficult to begin the inquiry with a formal definition of a right or freedom, and then inquire into its application in a range of substantive areas of law. The very content of a right or freedom, as well as its application, will vary across substantive areas of law, and the benefits and detriments of protecting that freedom will be based on a range of social, political, cultural and legal evaluations.

We are cognisant of the fact that the Commission must work within its terms of reference, and those terms of reference expound a list of rights and freedoms as the starting point of the

[3] *PGA v The Queen* [2012] HCA 21, [23].
[4] *Al-Kateb v Godwin* (2004) 219 CLR 562.

inquiry. We also acknowledge the efforts of the Commission to remain strictly within the terms of reference in the structure of the Issues Paper. However, we submit that at some point there needs to be a change in approach, with the focus turning to substantive areas of law, and an interrogation of rights and freedoms within those areas of law.

There are clear advantages in making this change. The Australian legal system, as with all modern legal systems, is organised into substantive areas of law. This is the way law is taught to students, legislated in statutes and reported in cases. These substantive areas are comparable across common law jurisdictions.

We would also encourage the Commission to extend its inquiry to substantive areas of law in other comparable jurisdictions. Given the common origin of traditional rights and freedoms in common law countries, there would be great benefit in engaging in a comparative analysis of the protection of rights and freedoms as a part of the Commission's inquiry.

3. Participation of the Public Law and Policy Research Unit

In relation to an analysis of rights and freedoms within substantive areas of law, the Public Law and Policy Research Unit has particular expertise in relation to Workplace Relations, Migration and Refugee Law and Environmental Law.

In the area of workplace relations, PLPRU members are interested, for example, in issues arising from laws that reverse or shift the burden of proof, interfere with freedom of association, and authorise the commission of a tort (please note that Profs Owens and Stewart, academic members of PLPRU , in conjunction with other senior academic labour lawyers, have made a separate submission relating to this topic.)

In the area of migration law, PLPRU members are interested, for example, in the impact of widely framed executive discretion in the Migration Act 1958 (Cth) and the Maritime Powers Act 2013 (Cth) on the rights and freedoms of individuals.

In the area of environmental law, PLPRU members are interested, for example, in the balance of individual freedoms and environmental protection.

We look forward to the next phase of the inquiry.