

Submission to Australian Law Reform Commission

Traditional Rights and Freedoms— Encroachments by Commonwealth Laws

March 2015

National Association of Community Legal Centres

ABN 67 757 001 303 ACN 163 101 737

Tel: 61 2 9264 9595

Fax: 61 2 9264 9594

Email: naclc@clc.net.au

Web: www.naclc.org.au

Mail: PO Box A2245 Sydney South NSW 1235 Australia

 @naclccomms

Contents

Executive Summary	1
Scope of Inquiry	2
‘Traditional’ Rights, Freedoms and Privileges	2
ALRC’s Approach to Reform	3
General Principles and Criteria	3
Freedom of Expression	5
The work of legal assistance services in Australia	6
Proposed amendments to the <i>Racial Discrimination Act 1975</i> (Cth)	7
Commonwealth anti-terrorism laws	7
Freedom of Religion	8
Exemptions under anti-discrimination legislation	9
Freedom of Association	10
Freedom of association in an employment context	10
Client Legal Privilege	10
Other Rights, Freedoms and Privileges	11

Executive Summary

This submission is made in response to Australian Law Reform Commission's Issues Paper, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*. The submission is made on behalf of the National Association of Community Legal Centres (NACLC).

NACLC is the peak national organisation representing community legal centres (CLCs) in Australia. Its members are the state and territory associations of CLCs that represent over 200 centres in various metropolitan, regional, rural and remote locations across Australia.

CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to their local or special interest communities. CLCs' work is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest.

NACLC welcomes the opportunity to contribute to the work of the Australian Law Reform Commission (ALRC). This submission does not respond to all issues canvassed in the Issues Paper. Rather, it provides general comments on the scope of the Inquiry and the ALRC's approach to reform, outlines a number of suggested general principles and criteria for determining whether a law that interferes with a particular right, freedom or privilege is justified. It also considers a number of specific chapters, including in relation to freedom of speech (chapter 2), freedom of religion (chapter 3), freedom of association (chapter 4), client legal privilege (chapter 11) and other rights, freedoms and privileges (chapter 19).

However, NACLC draws the ALRC's attention to the submissions made by a number of CLCs from across Australia which consider these, and additional issues, raised in the Issues Paper, including by:

- Women's Legal Services Australia
- Kingsford Legal Centre
- The Human Rights Law Centre
- Refugee Advice and Casework Service
- JobWatch
- Arts Law Centre of Australia
- Consumer Action Law Centre

NACLC also intends to make a more detailed submission in response to the Discussion Paper released as part of this Inquiry.

NACLC would welcome the opportunity to discuss these issues in more detail. The most appropriate contact person for this submission is:

Amanda Alford
Deputy Director, Policy and Advocacy
Ph: (02) 9264 9595
Email: amanda.alford@clc.net.au

Scope of Inquiry

NACLC understands that the ALRC receives Terms of Reference for its inquiries from the Commonwealth Attorney-General, and that those Terms of Reference govern the focus and scope of each Inquiry. The Terms of Reference for this Inquiry ask the ALRC to inquire into and report on:

- the identification of Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and
- a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.

The Terms of Reference go on to list the types of laws that are 'to be understood' as 'laws that encroach upon traditional rights, freedoms and privileges'. The Terms of Reference state that in undertaking this Inquiry, the ALRC 'should include consideration of Commonwealth laws in commercial and corporate regulation, environmental regulation and workplace relations, but is 'not limited to' considering such areas.

The ALRC calls for submissions on two key questions in relation to each 'traditional right, freedom or privilege' considered in the Issues Paper. The ALRC asks:

- What general principles or criteria should be applied to help determine whether a law that interferes with the particular right, freedom or privilege, is justified?
- Which Commonwealth laws unjustifiably interfere with the particular right, freedom or privilege, and why are these laws unjustified?

NACLC highlights a number of key issues with respect to the scope of the Inquiry and the ALRC's interpretation of its Terms of Reference below.

At the outset, NACLC submits that while the Terms of Reference refer to Commonwealth 'laws', the ALRC should take a broad approach, as it has in previous inquiries, and consider Commonwealth laws and legal frameworks.

'Traditional' Rights, Freedoms and Privileges

First, the Inquiry considers only a narrow category of 'traditional' common law rights, which NACLC submits is problematic in a number of respects.

The Terms of Reference direct the ALRC to focus on 'traditional' (and/or 'common law') rights, freedoms and privileges. Importantly however, the common law evolves over time, in part through statutory amendment (and therefore in some circumstances international law where the Parliament seeks to enact domestic legislation giving effect to Australia's international human rights obligations). While in some instances the values that underlie the common law, including some of the key principles listed in the Terms of Reference, reflect what are now recognised as fundamental or universal human rights or standards, others no longer reflect, or perhaps never necessarily reflected, community beliefs and values.

In light of this, NACLC considers that the ALRC's focus on 'traditional' rights, freedoms and privileges in the way characterised in the Issues Paper does not reflect the full range of

Australia's human rights obligations. NACLC suggests that a more appropriate framework for the assessment of the rights-compatibility of Commonwealth laws and legal frameworks is international human rights law. This would also ensure that the ALRC's Inquiry could complement the work already undertaken by the Joint Parliamentary Committee on Human Rights, and would be consistent with the recommendations made in the course of the 2009 National Human Rights Consultation, in relation to an audit of Commonwealth laws for compatibility with Australia's international human rights obligations.¹

However, if the ALRC continues to take its current approach to interpreting the Terms of Reference and the scope of this Inquiry, then NACLC highlights that many 'traditional' rights, freedoms and privileges share common origins (for example the Magna Carta of 1215) and are reflected in more contemporary international human rights instruments. NACLC submits that as a result it is appropriate to consider and refer to the rights as provided for under those instruments.

ALRC's Approach to Reform

The Issues Paper appears to foreshadow the ALRC proceeding in the following way in the course of its Inquiry:

1. developing of a set of general principles or criteria to help determine whether a particular law that interferes with a right, freedom or privilege is justified
2. producing a catalogue of Commonwealth laws that, according to those principles or criteria, unjustifiably interfere with one or more rights, freedoms or privileges, and
3. making recommendations for reform to any such Commonwealth laws that unjustifiably interfere with one or more rights, freedoms or privileges.

In considering changes to Commonwealth laws in line with the third step, the Terms of Reference direct the ALRC to have regard to any safeguards provided in the laws. NACLC suggests that the ALRC should consider not only safeguards provided in the laws, but also safeguards not provided for under Australian law, and mechanisms to actively protect against such unjustifiable encroachment. A National Human Rights Act is a key example of such a mechanism and as a result, NACLC suggests that the ALRC give further thought to the necessity and appropriateness of a National Human Rights Act in this context.

NACLC would be pleased to provide further and more detailed submissions on this point should the ALRC consider that such a submission may be useful.

General Principles and Criteria

In each chapter of the Issues Paper, the ALRC asks what general principles or criteria should be applied to help determine whether a law that interferes with the particular right, freedom or privilege, is justified.

NACLC notes that there are some rights, freedoms and privileges that are absolute rights that cannot be limited or 'encroached' upon as they are absolute. This means they cannot be limited

¹ National Human Rights Consultation, *Report* (September 2009), rec 4.

for any reason and that there are no circumstances that justify a qualification or limitation of the right. These include:

- freedom from torture or cruel, inhuman and degrading treatment or punishment
- freedom from slavery and servitude
- freedom from imprisonment for inability to fulfil a contractual obligation
- prohibition against the retrospective operation of criminal laws, and
- right to recognition before the law.

A number of other rights are considered non-derogable under international law. These include the rights outlined above, as well as:

- right to life
- freedom from medical or scientific experimentation without consent, and
- freedom of thought, conscience and religion.

Where a right, freedom or privilege may be limited or ‘encroached’ upon, NACLC suggests that the most appropriate general principles and criteria are those that derive from international human rights law and standards, and the rule of law.

NACLC suggests that the general principles or criteria to be considered should include, but not be limited to, whether the law purporting to encroach upon the right, freedom or privilege:

- is certain, clear and known
- is prescribed by law
- is necessary in pursuit of a legitimate objective, on the basis of a reasoned and evidence-based explanation, and that objective is a pressing and substantial concern
- is rationally connected to the objective to be achieved
- is necessary, reasonable and proportionate
- contains effective safeguards
- apply to all people equally and not discriminate on arbitrary or irrational grounds, and
- not be retrogressive.²

Broadly, NACLC notes that in considering the development of general principles, a number of international human rights treaties, including the *International Covenant on Civil and Political Rights* specifically provide for prescribed purposes for which rights may be limited, including for example where necessary for the protection of national security, public order, public health, public moral, the rights and freedoms of others, interests of justice, rights or reputation of others, or parties’ private lives.³

The approach suggested by NACLC in part reflects the one taken by the Parliamentary Joint Committee on Human Rights, the role of which is to assess Bills before the Commonwealth

² See, eg: Parliament of Australia, Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (March 2014); Parliament of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1, Drafting Statement of Compatibility* (December 2014); Law Council of Australia, *Rule of Law Principles*, (March 2011).

³ See, eg, *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), arts 12(3), 13, 14(1), 18(3), 19(3), 21, 22(2); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, (entered into force on 3 January 1976) art 8(1)(a), 8(1)(c).

Parliament for compatibility with human rights. The Committee's Guidance Notes and Guide to Human Rights outlines the key rights found in the seven key international human rights treaties to which Australia is a party, and provides the standards against which the Committee considers questions of human rights compatibility.⁴

Freedom of Expression

Briefly, Article 19(2) of the ICCPR provides that 'everyone shall have the right to freedom of expression'. The exercise of the right is

one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.⁵

However, Article 19(3) of the ICCPR provides that the right is not an absolute or unfettered right and 'carries with it special duties and responsibilities. It may therefore be subject to certain restrictions'. In particular, in assessing whether restrictions on freedom of expression are permissible, they must be, among other things: provided by law and are necessary for the respect of the rights or reputations of others; the protection of national security or public order; or the protection of public health or morals.

Also of relevance are principles developed by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion to assist in determining what constitutes a legitimate restriction or limitation of freedom of expression, and what constitutes an 'abuse' of that right.⁶

While there is no right to freedom of opinion and expression under Commonwealth law, the High Court of Australia has inferred a right to freedom of political communications under the *Australian Constitution*.⁷

There are a number of legislative and policy issues at both a Commonwealth and state and territory level that potentially restrict the right to freedom of opinion and expression. The three key examples that are the focus of this submission are: restrictions on law reform and policy advocacy work by legal assistance services; proposed amendments to the *Racial Discrimination Act 1975* (Cth); and Commonwealth anti-terrorism laws.

⁴ Parliament of Australia, Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, (March 2014); Parliament of Australia, Parliamentary Joint Committee on Human Rights, Guidance Note 1, *Drafting Statement of Compatibility* (December 2014).

⁵ UN Human Rights Council, *Resolution: Freedom of Opinion and Expression*, 12th sess, 1 October 2009, UN Doc A/HRC/RES/12/16, Preamble.

⁶ See: F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion* (20 April 2010) Un Doc A/HRC/14/23, [77]–[81].

⁷ *Lange v Australian Broadcasting Corporation* (1997) ALR 96.

The work of legal assistance services in Australia

There are four publicly funded legal assistance providers in Australia—community legal centres (CLCs), Legal Aid Commissions (LACs), Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS). Of particular concern in the context of the right to freedom of opinion and expression is the decision by the Australian Government to no longer fund legal assistance service providers to undertake law reform and policy advocacy work.

The value of this work has been recognised in a number of contexts, including the recent Productivity Commission Inquiry into Access to Justice Arrangements. The Productivity Commission acknowledged that CLCs play a key role in law reform, policy and advocacy and expressed the view that ‘there are strong grounds for the legal assistance sector to receive funding to undertake strategic advocacy, law reform and public interest litigation’.⁸

Further, while the contribution made by CLCs undertaking law reform and advocacy work can be difficult to quantify, the Commission also expressed the view that: ‘advocacy can ... be an efficient way to use limited taxpayer dollars’ and stated that

strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities). Advocacy can also be an efficient use of limited resources. It can be an important part of a strategy for maximising the impact of LAC and CLC work.⁹

However, following amendments to Community Legal Services Programme (CLSP) Service Agreement, CLCs are no longer able to use Commonwealth funding for law reform and policy and advocacy work. The change to service agreements amended the definition of ‘core legal services’ to make clear that services funded by the Commonwealth will not, for the period of the extension of the Agreement, include law reform or policy advocacy. This has been clarified by the Australian Government Attorney-General’s Department, which has indicated that where a CLC makes a submission to a government or parliamentary body to ‘provide factual information and/or advice with a focus on systemic issues affecting access to justice’, it will not be considered an advocacy activity. However, the preparation of any such submissions is not to result in reduced service delivery.

Importantly, the amendment also removed clause five, which protected CLCs from measures ‘that could be used to stifle legitimate debate’ and confirmed that it was necessary for CLCs to ‘obtain advance approval of any public debate or advocacy activities’.

In addition, the Commonwealth Government has defunded the National Aboriginal and Torres Strait Islander Legal Services and all Law Reform and Policy Officer positions with state and territory ATSILS; and Legal Aid Commissions are prevented from using Commonwealth funding for the purpose of lobbying government or elected representatives, or to engage in public campaigns.

⁸ Productivity Commission, *Access to Justice Arrangements*, Final Report, (December 2014), 713. See also 709-713.

⁹ Productivity Commission, *Access to Justice Arrangements*, Draft Report (April 2014), 623.

The *Not-For-Profit Freedom to Advocate Act 2013* (Cth) (Freedom to Advocate Act) is an Act to 'prohibit Commonwealth agreements from restricting or preventing not-for-profit entities from commenting on, advocating support for or opposing changes to Commonwealth law, policy or practice, and for related purposes'. NACLC submits that the changes to CLSP service agreements, while not preventing CLCs from undertaking this work and hence not breaching this Act, have a stifling effect and inevitably significantly reduce the advocacy work and public comment of CLCs undertaken to identify and address unfair laws and practices.

If the ALRC takes a broad view of freedom of speech, as ALRC President Professor Rosalind Croucher suggested, including 'laws more generally that affect people's capacity to speak freely',¹⁰ then NACLC suggests that these changes to service agreements (which should be considered a legal framework for the purposes of this Inquiry), raise serious concerns with respect to freedom of opinion and expression in Australia, and unjustifiably limit the right of freedom of speech for NGOS and individuals.

Proposed amendments to the *Racial Discrimination Act 1975* (Cth)

NACLC and a range of CLCs made submissions in relation to the Exposure Draft of the *Freedom of Speech (Repeal of s 18C) Bill 2014* (Cth) released by the Australian Attorney-General's Department consultation with respect to proposed amendments to the *Racial Discrimination Act 1975* (Cth) (RDA).

While the right to freedom of expression is a fundamental human right, it is not absolute and the harm that may arise from racial vilification, including for example limiting the ability of victims to exercise their 'freedoms', is significant. Accordingly, NACLC expressed the view that the RDA reflects an appropriate balance between the right to freedom of speech or expression and the right to freedom from racial vilification and should not be amended.

NACLC does not consider that the RDA is an example of a piece of legislation that unduly restricts or encroaches upon the exercise of the right to freedom of speech. Rather, s 18C of the RDA, and related provisions, only limit freedom of speech to the extent necessary to protect individuals and communities from racial vilification. Further detailed information about CLC concerns with the proposed amendments to the RDA is available in the submissions made by CLCs to the Exposure Draft.¹¹ If the ALRC considers the RDA in more detail in the Discussion Paper, NACLC will make further submissions on these issues.

Commonwealth anti-terrorism laws

At the date of this submission, a number of significant amendments to Australia's national security legislation have been proposed, or recently passed. The amendments cover three areas: Australia's security intelligence framework, counter-terrorism measures, and data retention laws. Each have the potential to raise significant human rights issues.

As the Human Rights Law Centre has emphasised, the protection of Australia from 'threats to national security and the protection and promotion of human rights are complementary goals

¹⁰ Professor Rosalind Croucher, *ALRC Inquiry into Freedoms*, Australian Human Rights Commission Free Speech 2014 Symposium Papers (2014), 9.

¹¹ See, eg, Kingsford Legal Centre (endorsed by NACLC and others), *Submission to Australian Government Attorney-General's Department, Amendments to the Racial Discrimination Act 1975 (Cth)*, 30 April 2014.

that are both fundamentally concerned with protecting the community and individuals from harm'.¹² Accordingly, while understanding the need for national security and anti-terrorism laws, NACLC emphasises the importance of ensuring that such legislation strikes an appropriate balance between the protection of national security and other rights, including freedom of speech. It is also vital to ensure such legislation contains safeguards and is subject to appropriate scrutiny.

By way of example, one set of provisions which appears to limit freedom of speech, relate to advocating terrorism under the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), which was given Royal Assent on 3 November 2014. The Act introduces a new offence under the *Criminal Code Act 1995* of a person advocating terrorism. A person commits an offence if they intentionally counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence and the person is reckless as to whether another person will engage in a terrorist act or commit a terrorist offence.¹³ The offence carries a maximum penalty of five years' imprisonment.

The Revised Explanatory Memorandum states that 'the restriction on free expression is justified on the basis that advocating the commission of a terrorist act or terrorism offence is conduct which jeopardises the security of Australia, the personal safety of its population and its national security interests'.¹⁴ However, NACLC suggests that the scope of the offence of advocating terrorism is unnecessarily broad and threatens to undermine the right to free speech, in particular by risks criminalising legitimate expressions of free speech, despite the good faith defence. Given much of the conduct criminalised by the proposed offence is already prohibited under existing legislation, the proposed offence is unnecessary and fails to strikes the appropriate balance between freedom of speech and the protection of national security or public order.

There are also a number of other provisions introduced in the recent suite of legislation that raise similar concerns about freedom of speech. Accordingly, NACLC draws the ALRC's attention to submissions made by individual CLCs including the Human Rights Law Centre, on other counter-terrorism legislation which unjustifiably encroaches on the right to freedom of speech.

Freedom of Religion

The right to freedom of thought, conscience and religions includes the freedom to choose and change religion and belief; exercise religion or belief publicly or privately, alone or with others; to exercise religion or belief in worship, teaching, practice and observance; and the right to have no religion, or to have non-religious beliefs protected.¹⁵

¹² Human Rights Law Centre, 'Human Rights Impacts of Foreign Fighters Bill', Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 3 October 2014.

¹³ *Criminal Code Act 1995* (Cth) s 80.2C.

¹⁴ Revised Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth), 29.

¹⁵ See, eg, *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976) art 18.

Freedom of religion can be limited provided such limitation is prescribed by law and is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.¹⁶

Exemptions under anti-discrimination legislation

One of the key issues with respect to the right to freedom of religion in Australia that is relevant to the work of CLCs relates to the existence and operation of exemptions for religious organisations under anti-discrimination law.

NACLC opposes broad permanent exemptions from anti-discrimination law for religious institutions. NACLC suggests that existing exemptions and exceptions under anti-discrimination legislation for religious organisations undermine the effectiveness of anti-discrimination legislation and are an unjustifiable encroachment on the right to be free from unlawful discrimination (a right provided for under international human rights law).¹⁷

For example, at a Commonwealth level the *Sex Discrimination Act 1984* (Cth) (SDA) contains protections from discrimination on the basis of sexual orientation, gender identity and intersex status. However, the SDA also includes exceptions for religious bodies and educational institutions established for religious purposes. For example the SDA permits educational institutions 'that are conducted in accordance with the doctrine, tenets, beliefs or teachings of a particular religion or creed' to discriminate against a person on the basis of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy if done 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.¹⁸

These exemptions permit religious bodies to discriminate in the areas of employment, education and the provision of goods, services and facilities.¹⁹ While the exceptions do not apply to conduct connected with the provision of Commonwealth-funded aged care services, the exceptions are of significant concern and are particularly inappropriate in the context of publicly funded services.²⁰

The freedom to manifest religious belief in worship, observance, practice or teaching may be limited by laws when deemed necessary to protect, among other things, the fundamental rights and freedoms of others. However, in light of the exceptions under the SDA (and similar exemptions under the *Age Discrimination Act 2004* (Cth) (ADA), NACLC suggests that neither the SDA or ADA currently strike an appropriate balance between respecting the right to freedom of religious worship, and the harms caused by breach of the right to non-discrimination on the basis of sexual orientation, gender identity and intersex status; or age.

¹⁶ Ibid, art 18(3).

¹⁷ See, eg, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9 (entered into force on 3 September 1981) art 11.

¹⁸ *Sex Discrimination Act 1984* (Cth) s 38.

¹⁹ Ibid, s 37.

²⁰ See, eg, NACLC, *Submission to Standing Committee on Legal and Constitutional Affairs Inquiry into the Sex Discrimination Amendments (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth) (2013).

Freedom of Association

Freedom of association in an employment context

The right to freedom of association is guaranteed under a number of international conventions and is a core principle of the International Labour Organization, of which Australia is a member. By way of example, article 22 of the *International Covenant on Civil and Political Rights* provides that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests. The right may be restricted where prescribed by law, and necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.²¹ NACLC suggests that these limitations are appropriate guiding principles in determining whether an encroachment on freedom of association is unjustifiable, but that the ALRC also consider those principles provided for under the Victorian Charter of Human Rights which provides for limitation where it can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and all relevant factors are taken into account.²²

NACLC emphasises the importance of provisions under the *Fair Work Act 2009* (Cth) in protecting the right of individual employees to freedom of association in the workplace and protecting employees from adverse action based on actions they may take in exercising or proposing to exercise a workplace right or engaging or proposing to engage in lawful industrial activity. NACLC considers the current protections for freedom of association under the Fair Work Act are appropriate and justified.

NACLC draws the ALRC's attention to the submissions made by individual CLCs on this issue, including for example those by Kingsford Legal Centre and JobWatch.

More broadly, NACLC draws the ALRC's attention to the submission made by the Refugee and Advice Casework Service with respect to section 501 of the *Migration Act 1958* (Cth) and its unjustifiable encroachment on freedom of association.

Client Legal Privilege

NACLC limits its submission on client legal privilege to discussion of the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth). While this Bill has not yet passed Parliament, it may do so in the course of the ALRC's Inquiry.²³

Client legal privilege is the right of a client (of a lawyer) not to have communications associated with the provision of legal advice or impending litigation disclosed without their consent. As highlighted in the Issues Paper, the privilege is a fundamental principle under common law.²⁴

²¹ *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976) art 22(2).

²² See, eg, *Charter of Rights and Responsibilities Act 2006* (Vic) s 7

²³ The Parliamentary Joint Committee on Intelligence and Security Committee recently recommended that the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth) be passed, with some amendment: Parliament of Australia, Joint Committee on Intelligence and Security Committee, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Cth) (February 2015).

NACLC is concerned about a number of aspects of the Bill, and considers that it may unjustifiably encroach on the rights, freedoms and privileges of Australians in a number of respects. Of particular relevance to chapter 11 of the ALRC's Issues Paper is that the Bill does not appear to protect communications between client and lawyer and therefore appears to be an unjustifiable encroachment on client legal privilege. As a result, NACLC suggests that the ALRC consider this issue in the course of this Inquiry.

Other Rights, Freedoms and Privileges

NACLC reiterates its comments made earlier in this submission with respect to the approach it suggests the ALRC should take to interpreting its Terms of Reference, and traditional rights and freedoms.

In particular however, NACLC strongly recommends that the ALRC consider the rights to equality and non-discrimination in the course of this Inquiry. The right to equality and non-discrimination is a fundamental human right provided for under the *International Covenant on Civil and Political Rights* and should be considered, including in the context of anti-discrimination legislation; the general and other protections provisions under the *Fair Work Act 2009* (Cth), of which CLCs are generally supportive;²⁵ and the Stronger Futures legislation.²⁶

²⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachment by Commonwealth Laws*, Issues Paper 46 (December 2014), 79.

²⁵ *Fair Work Act 2009* (Cth) s 351(1).

²⁶ *Stronger Futures in the Northern Territory Act 2012* (Cth); *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth); and *Social Security Legislation Amendment Act 2012* (Cth).

NACLC acknowledges the traditional owners of the lands across Australia and particularly the Gadigal people of the Eora Nation, traditional owners of the land on which the NACLC office is situated. We pay deep respect to Elders past and present.