



Australian Government

Australian Law Reform Commission

Traditional Rights and Freedoms— Encroachments by Commonwealth Laws

SUMMARY REPORT

This Summary Report reflects the law as at 1 November 2015

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Terms of Reference

Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to the rights, freedoms and privileges recognised by the common law,

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report pursuant to section 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- 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.

For the purpose of the inquiry ‘laws that encroach upon traditional rights, freedoms and privileges’ are to be understood as laws that:

- reverse or shift the burden of proof;
- deny procedural fairness to persons affected by the exercise of public power;
- exclude the right to claim the privilege against self-incrimination;
- abrogate client legal privilege;
- apply strict or absolute liability to all physical elements of a criminal offence;
- interfere with freedom of speech;
- interfere with freedom of religion;
- interfere with vested property rights;
- interfere with freedom of association;
- interfere with freedom of movement;
- disregard common law protection of personal reputation;
- authorise the commission of a tort;
- inappropriately delegate legislative power to the Executive;
- give executive immunities a wide application;
- retrospectively change legal rights and obligations;
- create offences with retrospective application;
- alter criminal law practices based on the principle of a fair trial;
- permit an appeal from an acquittal;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth laws in the areas of, but not limited to:

- commercial and corporate regulation;
- environmental regulation; and
- workplace relations.

In considering what, if any, changes to Commonwealth law should be made, the ALRC should consider:

- how laws are drafted, implemented and operate in practice; and
- any safeguards provided in the laws, such as rights of review or other accountability mechanisms.

In conducting this inquiry, the ALRC should also have regard to other inquiries and reviews that it considers relevant.

Consultation

In undertaking this reference, the ALRC should identify and consult relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders.

Timeframe

The Commission is to provide its interim report by December 2014 and its final report by December 2015.

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Australian Law Reform Commission

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The Hon Justice John Middleton, Federal Court of Australia

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Executive Summary

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The Freedoms Inquiry

1 The Australian Law Reform Commission was asked to identify and critically examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law. The ALRC referred to this large and challenging project as the ‘Freedoms Inquiry’.

2 In the Report, the ALRC discusses the source and rationale of many important rights and freedoms and provides an extensive survey of current Commonwealth laws that limit them. The ALRC also discusses how laws that limit traditional rights and freedoms might be critically tested and justified and whether some of these laws merit further scrutiny. Central to this task is the question of how rights should be balanced

with other rights and with the public interest, when these interests conflict. An important consideration is how laws are scrutinised by parliamentary committees and others to ensure they do not unjustifiably encroach on rights.

3 Identifying and critically examining laws that limit rights plays a crucial part in protecting rights, and may inform decisions about whether, and if so how, such laws might be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new causes of action or new offences, or by enacting a bill of rights. The Report contributes to broader discussion and debate about protecting rights in democratic societies. Law and law reform has an important role to play in this ongoing discussion.

Traditional rights, freedoms and privileges

4 The Terms of Reference,¹ provided by the Attorney-General, Senator the Hon George Brandis QC, state that laws that encroach on traditional rights, freedoms and privileges should be understood to refer to laws that:

- interfere with freedom of speech;
- interfere with freedom of religion;
- interfere with freedom of association;
- interfere with freedom of movement;
- interfere with vested property rights;
- retrospectively change legal rights and obligations;
- create offences with retrospective application;
- alter criminal law practices based on the principle of a fair trial;
- reverse or shift the burden of proof;
- exclude the right to claim the privilege against self-incrimination;
- abrogate client legal privilege;
- apply strict or absolute liability to all physical elements of a criminal offence;
- permit an appeal from an acquittal;
- deny procedural fairness to persons affected by the exercise of public power;
- inappropriately delegate legislative power to the executive;
- authorise the commission of a tort;
- disregard common law protection of personal reputation;

¹ The Terms of Reference are set out at the front of the Report and on the ALRC website: <www.alrc.gov.au/inquiries/freedoms>.

- give executive immunities a wide application;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

5 There are other important rights not expressly included in the extensive list in the Terms of Reference.² There were calls for some of these other rights to be more fully considered in this Inquiry, including: the right to personal liberty—‘the most elementary and important of all common law rights’;³ the right not to be unlawfully or arbitrarily detained; the right to privacy—‘upon which the exercise of many other rights depends’;⁴ and the right not to be tortured.⁵ Some of these are considered to some extent in the Report, in an integrated way, in chapters concerned with related rights. The broad right to personal liberty, for example, is served by many of the rights listed in the Terms of Reference, including the rights to freedom of speech, movement, assembly and religion and the right to a fair trial.⁶

Common law and constitutional settings

6 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised by courts in Australia, England and other common law countries for centuries. Some are recognised as human rights and are protected in international agreements and bills of rights in other jurisdictions. Human rights have been said to ‘incorporate or enhance’ rights at common law. In their history and development, common law rights and human rights clearly influenced each other.

7 Some common law rights and freedoms are considered to be so important that they have constitutional status, including in countries without a bill of rights. While in Australia ‘common law constitutionalism’ has not been applied by courts to invalidate statutes, the special status of some rights is reflected in how courts interpret legislation. Applying the ‘principle of legality’, courts will not interpret a statute so that it encroaches on, or limits, a fundamental right or common law principle unless Parliament has made it unmistakably clear that it intended the statute to do so. This is similar to interpretation provisions in some human rights statutes.

8 The *Australian Constitution* expressly protects a handful of rights and has been found to imply certain others, including freedom of political communication. The High Court may also have moved towards entrenching procedural fairness in courts as a constitutional right. However, the *Constitution* does not directly and entirely protect many rights and freedoms, because those who framed the *Constitution* chose to leave

2 A list of many other traditional rights and freedoms was included in the last chapter of the Issues Paper.

3 Australian Human Rights Commission, *Submission 141*.

4 Australian Privacy Foundation, *Submission 116*.

5 Refugee Advice & Casework Service, *Submission 119*.

6 Notwithstanding this, some stakeholders would have preferred dedicated chapters on these other rights. However, given the extensive scope of this Inquiry, the ALRC chose to focus on the rights listed in the Terms of Reference.

most matters of policy to Parliament, and relied on the common law and other mechanisms to protect rights.

9 International instruments that Australia has ratified, such as the *International Covenant on Civil and Political Rights*, also provide rights and freedoms with some protection from statutory encroachment, but generally only through the interpretation of statutes that are unclear or ambiguous. Although international law is an important influence on the common law, it does not create binding domestic law in Australia nor does it abrogate the power of the Commonwealth Parliament to make laws that limit rights.

10 The jurisprudence in relation to international human rights law is a valuable resource for laws makers. While the focus of the Inquiry is upon common law rights and freedoms, the ALRC is required, under its Act, to aim to ensure its recommendations are consistent with Australia's international obligations.⁷

Approach

11 The Terms of Reference set out two main tasks. The first was to identify Commonwealth laws that encroach upon traditional rights, freedoms and privileges. The second task was to critically examine those laws to determine whether the encroachments are appropriately justified. The ALRC was asked to consider, among other areas of law, commercial and corporate regulation, environmental regulation, and workplace relations.

12 Most chapters of the Report are structured to include the following elements with respect to each right, freedom or privilege:

- an analysis of the source and rationale of the right;
- an overview of how the right is protected from statutory encroachment by the *Constitution*, the principle of legality, and international law;
- a general discussion of how limits on the right might be justified;
- an extensive survey of current Commonwealth laws that may limit the right; and
- a discussion of the justifications for some of these laws, with some laws being identified as possibly unjustified and therefore deserving further review.

13 The Report sets out many of the Commonwealth laws that may be said to interfere with the common law rights and freedoms listed in the Terms of Reference. It provides an extensive survey of such laws, without making concluded judgments about whether these laws are appropriately justified.⁸

7 *Australian Law Reform Commission Act 1996* (Cth) s 24(1).

8 A list of Commonwealth laws cited in the Report, including those that may interfere with rights and freedoms, appears in Appendix 1. Lists of laws identified as limiting rights are set out in G Williams, *Submission 76*; Institute of Public Affairs, *Submission 49*. See also Simon Breheny and Morgan Begg, 'The State of Fundamental Legal Rights in Australia: An Audit of Federal Law' (Occasional Paper, Institute of Public Affairs, 2014).

14 It is widely recognised that there are reasonable limits to most rights. Only a handful of rights are considered to be absolute. Limits on traditional rights are also recognised by the common law, although such limits may be regarded as part of the *scope* of common law rights. But how can it be determined whether a law that limits an important right is justified? Proportionality tests are now the most widely accepted tool for structuring this analysis.

15 Proportionality is used to test limits on constitutional rights by the High Court and by constitutional courts and law makers around the world. This involves considering whether a given law that limits rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary. In the Report, the ALRC often draws upon proportionality analyses when considering whether particular laws that limit rights are justified.

16 The ALRC’s approach in this Inquiry was to determine a forward-looking law reform response that met the essential aspects of the Terms of the Reference across its broad range. Hence in many chapters of the Report, laws are identified that may be unjustified and therefore warrant further review.

17 The highlighted laws have been selected following consideration of a number of factors, including whether the law has been criticised for limiting rights in submissions, parliamentary committee reports or other commentary. The fact that a law limits multiple rights has also sometimes suggested the need for further review. Where a law has been identified as being amenable to further review, the conclusion may be that the appropriate action is:

- a review of specific statutes or provisions;
- a review in a coordinated fashion across Commonwealth, state and territory laws;
- consideration as part of existing regular review and monitoring processes; and/or
- a new periodic review.

18 The fact that a law has been identified as meriting further review does not imply that the ALRC has concluded the law is unjustified. Further evidence and analysis would be necessary to support such specific conclusions.⁹

19 While some stakeholders said the ALRC should have recommended specific changes to laws, others recognised that this was not possible and supported the approach taken.¹⁰ It was acknowledged that the Inquiry was ‘extremely large and

9 There may also be other laws that deserve further review, which are not highlighted in the Report.

10 See, eg, Law Council of Australia, *Submission 140*; Australian Institute of Company Directors, *Submission 105*.

complex'¹¹ and covered 'very broad terrain'.¹² Professor Graeme Orr, for example, said that, with 'all the goodwill in the world, it is hard to see how the ALRC can inform itself expertly of the myriad of social contexts needed to cover the vast terrain of issues and laws flagged in its interim report'.¹³ Given the breadth of the Inquiry, the ALRC considered that more detailed recommendations for reform—other than the reviews suggested—would require dedicated projects and further evidence, consultation and analysis. In a number of specific areas the ALRC has already undertaken inquiries, and the recommendations in the final reports of those inquiries provide a foundation upon which Government may act.¹⁴

20 The Report also provides a thorough analysis of how laws are scrutinised by government agencies, parliamentary committees and others for compatibility with rights. This is part of what has been called a 'democratic culture of justification'.¹⁵ The Report describes the role of bodies, such as the Independent National Security Legislation Monitor, the Australian Human Rights Commission and, indeed, the ALRC itself, in contributing to a general vigilance about encroachments on rights.

21 The Report discusses how some scrutiny processes might be improved, for example, by: providing additional guidance and assistance to policy makers; improving the quality of explanatory material and statements of compatibility; reducing overlap between the work of the three parliamentary scrutiny committees; giving the committees longer to conduct their scrutiny; and ensuring Parliament has sufficient time to consider committee reports.

22 The Councils for Civil Liberties said that the Inquiry had 'provided an opportunity for a national focus on the rapidly increasing numbers of statutes which undermine our rights and freedoms'.¹⁶ The Australian Institute of Company Directors expressed appreciation of 'the extensive work the ALRC has undertaken' that has 'shone a light on traditional rights and freedoms that have been eroded by legislation, commonly without recognition, fanfare or compelling justification'.¹⁷ The Australian Human Rights Commission commended the Interim Report's 'comprehensive review of the source of traditional rights, freedoms and privileges'.¹⁸

Encroachments on rights, freedoms and privileges

23 Chapters 2 and 3 of the Report lay the foundations for the ALRC's analysis of laws that encroach on rights, freedoms and privileges. Chapters 4 to 20 each consider

11 Refugee Advice & Casework Service, *Submission 119*.

12 Public Interest Advocacy Centre, *Submission 133*.

13 G Orr, *Submission 79*.

14 Secrecy provisions, discussed in Ch 4, for example, were the subject of an ALRC inquiry in 2008–09: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009). A list of ALRC reports referred to in the Report is included at Appendix 2.

15 Murray Hunt, 'Introduction' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16.

16 Councils for Civil Liberties, *Submission 142*.

17 Australian Institute of Company Directors, *Submission 105*. The AICD said that the ALRC's discussion would also 'benefit State and Territory Governments in their approach to law making'.

18 Australian Human Rights Commission, *Submission 141*.

one or two of the listed rights, freedoms or privileges in the Terms of Reference. Chapters are grouped around related rights, beginning with a set of chapters on the ‘freedoms’ in the list, and finishing with chapters on property rights. Each chapter identifies areas where further review may be merited. In some cases laws may encroach on a number of different common law rights and freedoms, as in the case of counter-terrorism and national security laws, and migration laws.

Freedom of speech

24 Freedom of speech has been described as ‘the freedom *par excellence*; for without it, no other freedom could survive’ and is closely linked to other fundamental freedoms, such as freedom of religion, thought, and conscience.

25 In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts—including in relation to various terrorism offences and terrorism-related secrecy offences, other secrecy laws and the *Racial Discrimination Act 1975* (Cth) (*RDA*). At the same time, many limitations on speech have long been recognised by the common law itself, such as incitement to crime, obscenity and sedition.

26 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech. Part IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech. However, any such review should take place in conjunction with consideration of anti-vilification laws more generally.

27 There is also reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators; and whether Commonwealth secrecy laws provide for proportionate limitations on freedom of speech.

Freedom of religion

28 Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.

29 There are very few, if any, provisions in Commonwealth laws that interfere with freedom of religion. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

30 There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations. Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws.

Freedom of association and assembly

31 Freedom of association concerns the right of all persons to group together voluntarily for a common goal or to form and join an association, such as a political party, a professional or sporting club, a non-governmental organisation or a trade union. Freedom of association is different from, but also closely related to, freedom of assembly. Australians are generally free to associate with whomever they like and to assemble to participate in activities including, for example, a protest or demonstration.

32 A wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly. These include counter-terrorism and other criminal laws and laws concerning public assembly, workplace relations, migration, and anti-discrimination. Many of these laws provide limitations on freedom of association or assembly that have long been recognised by the common law itself—for example, in relation to consorting with criminals, public assembly and other aspects of preserving public order. Areas of most concern include aspects of counter-terrorism and the character test in migration law.

33 Workplace relations laws in Australia have been subject to criticism on the basis of lack of compliance with International Labour Organization Conventions. However, while some of these provisions may offend ILO norms, they do not necessarily infringe common law freedom of association.

Freedom of movement

34 Freedom of movement at common law primarily concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. Freedom of movement has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not extend to people trying to evade punishment for a crime and, in practice, a person's freedom to leave one country is limited by the willingness of other countries to allow that person to enter.

35 A range of Commonwealth laws may be seen as interfering with freedom of movement. Some of these provisions relate to limitations that have long been recognised by the common law itself, for example, in relation to official powers of arrest or detention, customs and passport controls, and quarantine.

36 While many laws interfering with freedom of movement have strong and obvious justifications, it may be desirable to review some laws to ensure that they do not unjustifiably interfere with the right. The areas of concern include various counter-terrorism measures, including aspects of the control and preventative detention order provisions and declared area offences in the *Criminal Code* (Cth). Provisions of the *Bankruptcy Act 1966* (Cth), which provide that a bankrupt person must automatically give their passport to the trustee, also warrant review.

Fair trial

37 The right to a fair trial is an absolute right and a requirement of the rule of law. Fundamentally, a fair trial is designed to prevent innocent people being convicted of

crimes. Fair trials protect life, liberty, property, reputation and other fundamental rights and interests.

38 Some widely recognised components of a fair trial that have been subject to statutory limits include: a trial should be held in public; a defendant has a right to a lawyer; and a defendant has the right to confront the prosecution's witnesses and test their evidence, and to obtain and adduce their own evidence. Other components of a fair trial, such as the burden of proof and the privilege against self-incrimination, are discussed in separate chapters.

39 The common law and statute both feature some limits on fair trial rights, for example to protect vulnerable witnesses and to protect national security interests. Some Commonwealth laws that may be said to affect fair trial rights are uncontentious, but others may need to be reviewed to ensure they are justified. Changes to trial procedures for national security reasons have been criticised, as have laws that protect certain confidential communications even from a defendant seeking to obtain the communications to help prove their innocence in a criminal trial.

Burden of proof

40 In criminal trials, the prosecution bears the burden of proof. This has been called 'the golden thread of English criminal law' and 'a cardinal principle of our system of justice'. This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.

41 A number of Commonwealth laws reverse the legal burden of proof on some elements of a criminal offence and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law. Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

42 Further review of the reversals of the legal burden of proof in these laws may be warranted. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and directors' liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

Strict or absolute liability

43 The criminal justice system presumes that an evil intention or knowledge of the wrongfulness of the act (*mens rea*) is necessary to found criminal liability. However, some statutes impose strict or absolute liability on one or more elements of an offence.

44 There are strict and absolute liability offences across many areas of law, including corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter-terrorism and national security, and copyright. Areas of particular concern are: various terrorism offences, including

declared area offences and offences relating to dealing with terrorism-related assets and financial transactions; reporting requirements under customs legislation; and the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

45 Strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards. Any such review should include consideration of provisions in corporations law and prudential and environmental regulation.

Privilege against self-incrimination

46 The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. Many Commonwealth statutes provide coercive information-gathering and investigation powers to Commonwealth agencies, and many of these statutes abrogate the privilege against self-incrimination. Instead, the statutes provide that the information provided under compelled questioning (and in some cases, information discovered as a result of that questioning) is not admissible in subsequent proceedings.

47 The High Court has expressed concern that, in certain circumstances, the compelled questioning of persons, without the protection of the privilege against self-incrimination, could fundamentally change the nature of the adversarial system.

48 There should be further review of the privilege against self-incrimination and this could consider whether its abrogation in Commonwealth laws has been appropriately justified, and whether the statutory immunities offer appropriate protection.

Legal professional privilege

49 Legal professional privilege allows a person to resist a demand to reveal communications between the person and their lawyer. The privilege is rarely abrogated in Commonwealth laws.

50 Five statutes concerned with open government and the prevention of corruption, and two concerned with terrorism and the proceeds of crime, provide coercive information-gathering powers and abrogate the privilege. However, the statutes contain immunities to compensate for the loss of the privilege. In each case, the statute provides that communications between client and lawyer revealed under compulsion are not admissible in subsequent proceedings.

51 Laws that require monitoring of communications between a client and lawyer may not limit the privilege, but do breach the underlying principle that communications between client and lawyer should be confidential. Further review may be warranted.

Retrospective laws

52 At common law, it is abhorrent to impose criminal liability on a person for an act that was lawful when it was done. The Australian Parliament has rarely created

offences with retrospective application. The few offences that have been enacted have concerned behaviour that could never have been considered innocent, legitimate or moral, such as war crimes and offences against Australians overseas, and could be justified on this basis.

53 Amendments made in 2011 to the people smuggling offences in the *Migration Act 1958* (Cth) may have enlarged the scope of the criminal offence with retrospective effect to 1999, thereby criminalising behaviour that was not unlawful when it occurred.

54 Retrospective civil laws, that is, laws that retrospectively change legal rights and obligations, are reasonably common. Retrospective laws are not an effective way of deterring behaviour, but may serve other policy objectives such as ensuring fairness, protecting the public, or addressing the consequences of a court decision that unsettled previous understandings of the law.

55 Taxation laws with significant periods of retrospectivity may create uncertainty and inconvenience. Migration laws that have the stated intention of deterring behaviour, but apply to behaviour that occurred before the commencement of the legislation, could be further reviewed to ensure that their retrospective nature is proportionate and appropriately justified.

Procedural fairness

56 A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness before a decision that affects them is made.

57 A number of Commonwealth laws affect the common law duty to afford procedural fairness to persons affected by the exercise of public power. Excluding procedural fairness may be justified in some instances—in particular, where urgent action needs to be taken in the public interest.

58 Some migration laws that encroach on the duty to afford procedural fairness would benefit from further review, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those relating to the mandatory cancellation of visas and the fast track review process for decisions to refuse protection visas.

Judicial review

59 Access to the courts to challenge administrative action is an important common law right and superior courts of record have an inherent jurisdiction to conduct judicial review.

60 The primary mechanism used to restrict access to the courts is the privative clause—essentially a legislative attempt to limit access to judicial review in a certain field. However, the courts have construed privative clauses so narrowly that they are sometimes largely or even entirely deprived of effect.

61 Privative clauses in Commonwealth laws should be reviewed. Consideration should be given to whether alternative solutions that do not restrict access to the courts

may be implemented to achieve the underlying policy objective of the provision (for example, to avoid delays in implementing administrative decisions).

Immunity from civil liability

62 Immunity provisions in legislation can limit the legal protection given to important rights and freedoms. Although sometimes necessary, laws that give immunity from civil liability and authorise what would otherwise be a tort operate to limit individual rights and deny civil redress—and therefore require careful justification.

63 Many Commonwealth statutes give some immunity to the federal police and other law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. The immunities protect these agencies from liability that might otherwise arise from the exercise of their statutory powers, including powers to arrest or detain people, to seize or retain property, and to carry out intrusive investigations. Such powers and associated immunities are commonly justified on the grounds that they are necessary to prevent crime, protect national security and otherwise enforce the law.

64 Executive immunities warrant careful justification and consideration should be given to their appropriate scope. This issue was reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. Some of the recommendations in that report warrant further consideration by Government.

Delegating legislative power

65 From the separation of powers doctrine, and from the principle that it is Parliament's role to make laws on important matters of policy, may be derived the principle that legislative power should not be inappropriately delegated to the Executive.

66 Laws that will have a significant impact on rights and liberties, and laws creating offences with high penalties, should usually be in primary, not delegated, legislation. More generally, wide and vague delegations of legislative power undermine the separation of powers doctrine by allowing those who enforce the law also to make the law.

67 However, delegating legislative power to the Executive is now commonplace and is said to be essential for efficient and effective government. Parliament delegates such power not only to government ministers, but also to various government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission.

68 Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power.

Property rights

69 The common law has long regarded a person's property rights as fundamental. However, property rights could be encroached upon by legislative action, so long as any deprivation was not arbitrary and reasonable compensation was given.

70 In relation to personal property rights, the key areas of concern include banking and taxation laws, personal property securities, intellectual property and criminal laws. Many have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. The breadth of the *Proceeds of Crime Act 2002* (Cth) is one area that may require further consideration. The Parliamentary Joint Committee on Law Enforcement provides ongoing scrutiny of the Commonwealth legislation and the Australian Federal Police provide annual reports. However, given the potential impact of unexplained wealth measures on personal property, and the proposal for a national coordinated scheme by the Committee, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. In addition, the ALRC also suggests that a further review be scheduled in due course.

71 With respect to real property and the rights of land owners, the main focus of concern is on interferences with the right to use the land and water. State environmental laws are not the concern of this Inquiry; however, from the landholders' perspective the complexity of the 'interference' can only be understood in the light of both state and Commonwealth laws. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) interferes with the right to use land to a limited extent. The next scheduled review of the *EPBC Act* could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws. The *Water Act 2007* (Cth) does not interfere in a negative way with the water entitlements in the Murray-Darling Basin that have been established under state and territory statutes. However, it may be appropriate for the Act to be reviewed periodically.

Counter-terrorism and national security laws

72 Acts of terrorism are a gross violation of fundamental rights to life and safety and the Government has both a right and a duty to take action to protect its citizens.¹⁹ This may require the enactment of legislation that places limits on traditional rights and freedoms. National security is recognised as a legitimate objective of such limitations, at common law and in international human rights law.²⁰

19 See, eg, United Nations Security Council, Resolution 1373 (2001), Adopted by the Security Council at its 4385th Meeting, 28 September 2001. This resolution required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts.

20 See, eg, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161. For example, under the ICCPR national security is recognised expressly as a permissible limitation in relation to freedom of movement, freedom of expression, the right to peaceful assembly and freedom of

73 Counter-terrorism and national security laws that encroach on rights and freedoms should nevertheless be justified, to ensure the laws are suitable, necessary and represent a proper balance between the public interest and individual rights.

74 In the Report, a range of counter-terrorism and national security laws are identified that interfere with traditional rights and freedoms. These include laws that limit freedom of speech (for example, laws about advocating terrorism and disclosing intelligence operations); freedom of association and assembly (for example, control orders, preventative detention orders, and laws about foreign incursions and recruitment); laws that impose strict or absolute liability (for example, in relation to offences for disclosing certain classified operational information); laws that change fair trial procedures (for example, to protect sensitive information about national security).

75 Some counter-terrorism laws engage multiple rights. For example, the control order and preventative detention order regimes contained in divs 104–105 of the *Criminal Code* have implications for freedom of speech, freedom of association and freedom of movement.

76 Counter-terrorism and national security laws should be subject to ongoing and careful review, given the extent to which they may interfere with individual rights. While some of these laws have been subject to significant scrutiny, including by parliamentary committees and the Independent National Security Legislation Monitor (INSLM), it has been suggested that many are not proportionate, and would benefit from further consideration and analysis.

77 Ongoing review of these laws falls within the functions of the INSLM²¹ and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).²² INSLM and Intelligence Committee review of legislation is discussed further in Chapter 3.

Migration laws

78 A number of migration laws have also been identified as encroaching on traditional rights and freedoms, including freedom of association and assembly (the operation of the ‘character test’ in the *Migration Act*); the right not to be subject to retrospective laws (the *Migration Act* people smuggling offence and provisions converting applications for permanent protection visas into applications for temporary protection visas); the right to procedural fairness (for example, the fast track review process for decisions to refuse protection visas); and the right to judicial review (for example, the privative clause in the *Migration Act*).

association: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 12.3; 19.3; 21; 22.2 respectively.

21 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B). At 1 November 2015, the Acting INSLM was preparing a report on any impact on journalists in the operation of s 35P of the *ASIO Act* concerning offences for the disclosure of information relating to a ‘special intelligence operation’ and was seeking public submissions concerning the adequacy of the safeguards relating to the control order regime provided for by div 104 of the *Criminal Code*.

22 *Intelligence Services Act 2001* (Cth) s 29(1)(bb).

79 Migration laws pursue the objective of regulating, in the national interest, the coming into, and presence in, Australia of non-citizens.²³ Pursuit of this objective may involve some limitations on traditional rights and freedoms. However, such limitations should be proportionate.

80 In this Inquiry, significant concerns were expressed that a number of migration laws are not proportionate. The ALRC suggests that these laws would benefit from further analysis to ensure that the laws do not interfere unjustifiably with traditional rights and freedoms.²⁴

Further consideration or review

81 A range of Commonwealth laws appear to warrant further consideration or review. Some of these laws might be reviewed by a parliamentary committee, a government department, or a body such as the INSLM or the ALRC itself. Others may simply warrant reconsideration by government, given their effect on traditional rights and freedoms.

Freedom of speech

- *Racial Discrimination Act 1975* (Cth) pt IIA—review in conjunction with consideration of anti-vilification laws more generally.
- Legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example *Veterans' Entitlements Act 1986* (Cth) s 170.
- Secrecy offences, including the general secrecy offences in *Crimes Act 1914* (Cth) ss 70, 79.
- *Criminal Code* s 80.2C (advocating terrorism), ss 102.1, 102.3, 102.5, 102.7 (prescribed terrorist organisations), s 105.41 (preventative detention orders)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) s 35P (special intelligence operations)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

Freedom of association and assembly

- *Criminal Code* s 102.8, divs 104–105 (control orders and preventative detention orders), s 119 (foreign incursions and recruitment)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Migration Act* s 501 (character test).

23 *Migration Act 1958* (Cth) s 4.

24 The Law Council of Australia has suggested that an independent body should be appointed to review immigration legislation: Law Council of Australia, *Submission 140*.

Freedom of movement

- *Criminal Code* divs 104–105 (control orders and preventative detention orders), s 119 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Bankruptcy Act 1966* (Cth) s 77, which provides that a bankrupt person must automatically give their passport to the trustee in bankruptcy.

Fair trial

- Uniform Evidence Acts pt 3.10 (client legal privilege and a privilege for religious confessions without exceptions for defendants seeking to adduce evidence in support of their defence).

Burden of proof

- *Criminal Code* deeming provisions in relation to the fault elements for drug offences, for example *Criminal Code* s 302.5.
- *Taxation Administration Act 1953* (Cth) s 8Y, in relation to directors' liability for taxation offences committed by a corporation.

Strict or absolute liability

- Legislative provisions that provide for strict and absolute liability in corporations law and prudential and environmental regulation, for example, *Corporations Act 2001* (Cth) s 588G.
- Legislative provisions that provide for strict liability in relation to commercial scale copyright infringement offences under the *Copyright Act 1968* (Cth)—review by the Productivity Commission as part of its current review into intellectual property arrangements.
- *Criminal Code* ss 102.5, 102.8 (associating with a terrorist organisation), ss 119.1, 119.2 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *ASIO Act* s 34ZS (disclosure of operational information concerning an ASIO warrant)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Charter of the United Nations Act 1945* (Cth) ss 20–21 (freezable assets or giving freezable assets to a proscribed person or entity)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

Privilege against self-incrimination

- Legislative provisions that abrogate the privilege against self-incrimination, particularly those that provide only use immunity, for example *Australian Crime Commission Act 2002* (Cth) s 30.

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- *Taxation Administration Act 1953* (Cth) sch 1 s 353–10, which abrogates the privilege against self-incrimination and provides no immunity.

Legal professional privilege

- *Criminal Code* s 105.38(1), which requires contact between a lawyer and a detained person to be capable of being monitored.
- *ASIO Act* s 34ZQ(2), which requires contact between a lawyer and a detained person to be capable of being monitored.

Retrospective laws

- *Migration Act* s 228B, which defines the scope of the offence of people smuggling.
- *Income Tax Assessment Act 1997* (Cth) div 13, regarding transfer pricing.
- *Migration Act* s 45AA and *Migration Regulations 1994* (Cth) reg 2.08F, which converted applications for permanent protection visas into temporary protection visas.

Procedural fairness

- *Migration Act* s 501(3A) and associated provisions relating to the mandatory cancellation of visas on character grounds;
- *Migration Act* pt 7AA (fast track review process for decisions to refuse protection visas).

Judicial review

- Privative clauses that restrict access to judicial review, for example *Migration Act* s 474.

Property rights

- *Proceeds of Crime Act 2002* (Cth)—ongoing scrutiny by the Parliamentary Joint Committee on Law Enforcement and, in due course, by a further independent review.
- *EPBC Act*—as part of the next scheduled independent review.
- *Water Act*—in due course, by a further independent review.

Law reform process

82 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.²⁵ Under the

²⁵ Brian Opeskin, 'Measuring Success' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202.

provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.²⁶

83 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC’s website.²⁷

84 Following ALRC established practice, a multi-pronged strategy of seeking community comments was used in this Inquiry. Two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry: an Issues Paper, in December 2014 and an Interim Report in July 2015.²⁸

85 Two national rounds of stakeholder consultation meetings, teleconferences and roundtables were also conducted following the release of each of the consultation documents. The Terms of Reference for this Inquiry directed the ALRC to ‘identify and consult with relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders’. The individuals, departments, agencies and the many bodies consulted in the Inquiry are listed in Appendix 3. In a broad-reaching inquiry of this kind, the consultations and the submissions received were particularly valuable in assisting the ALRC to achieve the balance in breadth and depth necessary to discharge the brief set out in the Terms of Reference.

86 The ALRC received 151 submissions.²⁹ Submissions were received from a wide range of people and agencies, including: individuals; academics; lawyers; unions; employer organisations; employment agencies; community legal centres; law societies and representative groups; state and federal government agencies; and peak bodies.

87 In this Inquiry the ALRC also conducted a national series of symposia, in September and October 2015, focusing on aspects of the Inquiry raised in the Interim Report. The first, held in Brisbane, focused on property rights. In Perth the focus was ‘Freedom’s Limits: Speech, Association and Movement in the Australian Legal System’. In Melbourne, the topic was ‘Fair trial, procedural fairness and other traditional rights’; and the Sydney topic was ‘Proportionality and the Constitution’.³⁰

26 *Australian Law Reform Commission Act 1996* (Cth) s 38.

27 <www.alrc.gov.au/law-reform-process>.

28 Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014); Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015).

29 These are all published on the ALRC website. Seven confidential submissions were also received.

30 Presentations from the symposia are available on the ALRC website.

88 The ALRC acknowledges the contribution of all those who participated in the consultation rounds, the symposia and in preparing submissions. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

89 The ALRC also convened an Advisory Committee of experts, which met twice during the Inquiry. The Committee comprised 13 members, and their names appear at the beginning of the Report. Professor Barbara McDonald of the University of Sydney also provided crucial assistance, particularly in the preparation of the Issues Paper.

90 In this Inquiry, the ALRC was able to call upon the expertise and experience, as part-time Commissioners, of the Hon Justice John Middleton of the Federal Court of Australia and, from 9 July 2015, Emeritus Professor Suri Ratnapala. Invaluable input was also provided by six expert readers who commented on certain chapters of the report. Their names appear at the beginning of the Report.

91 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, and the enlisting of expert readers, are invaluable aspects of ALRC inquiry processes—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the considerable contribution made by the Advisory Committee and the expert readers in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

92 Once tabled in the Australian Parliament, the Report becomes a public document.³¹ ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2014–15 records that 60% of ALRC reports are substantially implemented and 26% are partially implemented, representing an overall implementation rate of 86%.³²

Outcomes

93 The overall effect of the Report will be to provide a significant contribution to a broader discussion and debate about protecting rights in democratic societies. The specific outcomes of the ALRC's review include :

- discussion of the source and rationale of the traditional rights and freedoms listed in the Terms of Reference;
- consideration of the protection from statutory encroachment given to traditional rights and freedoms by the *Constitution*, principles of statutory interpretation

31 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

32 Australian Law Reform Commission, *Annual Report 2014–2015*, Report No 128 (2015) 27. See also Appendixes F and G.

and international law—complementing work that considers other ways to protect rights;

- an extensive survey of Commonwealth laws that encroach on the listed traditional rights and freedoms recognised by the common law;
- analysis of the justification for a range of these laws;
- discussion of a proportionality test to provide a structured method of reviewing the justification of laws that limit rights and freedoms;
- analysis of the law-making processes for testing compatibility of laws with fundamental rights and how these can be improved to ensure that laws that limit traditional rights and freedoms are thoroughly scrutinised; and
- the highlighting of laws that warrant further consideration or review—to provide a road map for future work to ensure that encroachments on rights, freedoms and privileges are avoided or appropriately justified.