2. Rights and Freedoms in Context

Contents

Summary

2.1 This chapter provides the conceptual foundation for the Inquiry and considers such questions as: What are traditional rights, freedoms and privileges? What is their source and where may they be found? How do they relate to human rights in international law and bills of rights? To what extent may Parliament interfere with traditional rights and freedoms? Should laws that limit rights and freedoms require particular scrutiny and justification and, if so, how might this be done—by applying what standard and following what type of process?

Common law foundations

2.2 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised in Australia, England and other common law countries for centuries. They form part of the history of the common law, embodying key moments in constitutional history, such as the sealing of the Magna Carta in 1215,[1] the settlement of parliamentary supremacy following the

1 'The liberties often associated with the *Magna Carta* were a product of the institutions of Parliament and the Courts, over the course of centuries. However, the development of those institutions was significantly influenced by the *Magna Carta*': James Spigelman, 'Magna Carta: The Rule of Law and Liberty' (Centre for Independent Studies, 15 June 2015) 1. See also Paul Brand, 'Magna Carta and the Development of the Common Law' (Patron's Address, Academy of Law, Sydney, 18 May 2015); Nicholas Cowdery, 'Magna Carta—800 Years Young' (Speech, St James' Church, Sydney, 14 June 2015).

Glorious Revolution of 1688 and the enactment of the *Bill of Rights Act 1688*.[2] They were recognised and developed by the courts and some were declared and affirmed by historic statutes and further developed by modern legislation.

2.3 The Hon Robert French AC, Chief Justice of the High Court, has said that

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.[3]

2.4 Many traditional rights and freedoms are recognised now as 'human rights'. Murphy J referred to 'the common law of human rights'[4] and Professors George Williams and David Hume have written that the common law is 'a vibrant and rich source of human rights.'[5]

2.5 Traditional rights recognised by the common law are now found in international agreements and bills of rights in other jurisdictions—including, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the bills of rights in the United States and Canadian constitutions, and the human rights Acts in the United Kingdom, New Zealand and two Australian jurisdictions, the Australian Capital Territory and Victoria. French CJ has said that the human rights and freedoms in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) 'in significant measure incorporate or enhance rights and freedoms at common law'.[6]

2.6 Before the wave of international conventions in the aftermath of the Second World War, legislation and the common law were the principal sources of protection of rights and freedoms in the UK, Australia, New Zealand and Canada. In his book, *Human Rights and the End of Empire*, English legal historian AW Brian Simpson wrote about the widely held assumption that, before international conventions on human rights, human rights in the UK were 'so well protected as to be an example to the world'. In normal times, Simpson writes, 'when there was neither war, nor insurrection, nor widespread problems of public order, few would deny that people in the United Kingdom enjoyed a relatively high level of personal and political freedom'.[7]

> In the modern period, and subject to certain limitations which, for most persons, were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly

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2 *Bill of Rights 1688* 1 Will & Mar Sess 2 c 2 (Eng). The Bill of Rights remains an important element in the rule of law in Australia, as illustrated by *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195; *Port of Portland v Victoria* (2010) 242 CLR 348.

3 Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

4 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.

5 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 33.

6 *Momcilovic v The Queen* (2011) 245 CLR 1, [51].

7 AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004).

> unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial.[8]

2.7 To the extent that Australian law has protected and fostered rights and freedoms, it has long been statutes and judge-made law that have done so.[9] In a 2013 speech, former Justice of the High Court of Australia, the Hon John Dyson Heydon AC QC, considered some of the benefits of protecting rights through statutes and the common law. He said that statutes and the common law protect rights often by 'detailed and precise rules' and vindicate 'human rights directly and specifically':

> [C]ommon law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.[10]

2.8 Taking the right to a fair trial as an example, Heydon said that rules found in certain statutes and in the common law 'were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience of conditions in society to which the rules were applied'.[11]

2.9 Identifying and critically examining laws that limit rights is a crucial part of protecting rights, and may inform decisions about whether, and if so how, such laws might need to be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new offences and new causes of action, or by enacting a bill of rights.[12] Whether the introduction of a bill of rights in Australia is desirable is widely debated,[13] and draws in part upon historical arguments about whether the courts or parliaments are better guardians of individual rights.[14] However, the question is not the subject of this Inquiry.[15]

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8 Ibid.

9 Traditions, culture and politics also play a role. 'Legal rights do not necessarily offer better protection than societal rights. Public opinion, peer pressure and individual conscience may be more effective in seeing that rules are obeyed than expensive and elaborate bureaucratic and court procedures which may have very low compliance rates': Tom Campbell, *Rights: A Critical Introduction* (Taylor & Francis, 2011) 87.

10 J D Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (Lecture, Oxford Law School, 23 January 2013).

11 'Abstract slogans and general aspirations about human rights played no useful role in their development. The great detail of this type of regime renders it superior to bills of rights': Ibid.

12 A bill of rights might give courts the power to strike down, or make declarations about, laws that unjustifiably limit rights.

13 See, eg, discussion in Attorney-General's Department, *National Human Rights Consultation Report* (2009).

14 See, eg, Jeremy Waldron, 'The Core of the Case against Judicial Review' [2006] *The Yale Law Journal* 1346. Hiebert contrasts the two 'rival paths' in liberal constitutionalism to rights protection: one is the codification of rights, as in the US; the other emphasises parliamentary supremacy, as in Westminster-modelled parliamentary systems: Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 7–8.

15 Some stakeholders nevertheless took the opportunity to argue that the most appropriate way to protect traditional rights is to enact a Commonwealth Human Rights Act: National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Kingsford Legal Centre, *Submission 110*.

2.10 The focus of this Inquiry is on identifying and critically examining Commonwealth laws that encroach upon traditional rights. However, as part of the context of this analysis, it is useful to first consider how these rights are protected in law from statutory encroachment. Broadly speaking, some protection is provided by the *Australian Constitution* and by rules of statutory construction, such as the principle of legality. These are discussed generally below and more fully throughout the report.

Australian Constitution

2.11 The *Constitution* expressly protects a handful of rights and has been found to imply certain other rights. The rights expressly protected by the *Constitution* are:

- the right to trial by jury on indictment for an offence against any law of the Commonwealth—s 80;
- freedom of trade, commerce and intercourse within the Commonwealth—s 92;
- freedom of religion—s 116; and
- the right not to be subject to discrimination on the basis of the state in which one lives—s 117.

2.12 Section 51(xxxi) of the *Constitution* provides that if the Commonwealth compulsorily acquires property, it must do so on 'just terms'—which may also be conceived of as a right.[16]

2.13 The High Court has also found certain rights or freedoms to be implied in the *Constitution*—notably, freedom of political communication.[17] This freedom is not absolute, but any law that interferes with political communication must be 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[18] The High Court has often said the freedom is not a personal right, but rather is 'best understood as a constitutional restriction on legislative power'.[19]

16 *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349 (Dixon J).

17 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227. The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication': *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 181, [148] (Gummow and Hayne JJ).

18 This is part of the second limb of the *Lange* test, as set out by French CJ in *Hogan v Hinch* (2011) 243 CLR 506.

19 *McCloy v New South Wales* [2015] HCA 34 [30]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]. Ratnapala and Crowe question the accuracy and usefulness of this distinction: Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 421.

2.14 A right to vote has also been found to be implied in the *Constitution*—laws that limit adult suffrage can only be made when the law is 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[20]

2.15 The High Court may have moved towards entrenching procedural fairness in courts as a constitutional right.[21] Chapter III of the *Constitution* vests the judicial power of the Commonwealth in the High Court and in other courts that Parliament creates or invests with federal jurisdiction. In *Leeth v Commonwealth*, Deane and Toohey JJ observed that investing judicial power in 'courts' implies that courts 'exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially'.[22] In *Dietrich v The Queen*, the High Court drew natural justice implications from the nature of judicial power and held that a person accused of a serious crime might in some circumstances be denied a fair trial, if they were not represented by a lawyer.[23] In *Polyukhovich v Commonwealth*, Deane J said:

> Common sense and the provisions of Ch III, based as they are on the assumption of traditional judicial procedures, remedies and methodology, compel the conclusion that, in insisting that the judicial power be vested only in the courts designated by Chapter III, the Constitution's intent and meaning were that judicial power would be exercised by those courts acting as courts with all that notion essentially requires.[24]

2.16 In *Polyukhovich*, it was accepted that bills of attainder violate the constitutional separation of powers.[25] The legislature cannot therefore usurp the distinctly judicial power of the courts to determine criminal guilt.

2.17 If procedural fairness were considered an essential characteristic of a court, Williams and Hume write, this might have the potential, among other things, to constitutionalise

> the presumption of innocence, the 'beyond reasonable doubt' standard of proof in criminal proceedings, the privilege against self-incrimination, limitations on the use of secret evidence, limitations on ex parte proceedings, limitations on any power to continue proceedings in the face of an unrepresented party, limitations on courts' jurisdiction to make an adverse finding on law or fact that has not been put to the parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.[26]

2.18 It remains to be seen whether this will become settled doctrine of the court.

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20 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ). See also, *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

21 Williams and Hume, above n 5, 375.

22 *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7.

23 *Dietrich v The Queen* (1992) 177 CLR 292, 315, 337, 362, 374.

24 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

25 A bill of attainder is a statute that states that a specific person is 'guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence': Ibid [30].

26 Williams and Hume, above n 5, 376.

2.19 The *Constitution* does not directly and entirely protect many of the rights, freedoms and privileges listed in the ALRC's Terms of Reference. One reason the *Constitution* does not expressly protect most civil rights, Professor Helen Irving writes, was the 'general reserve about directly including policy in the *Constitution*, instead of powers subsequently to enact policy'.

> Specifically, the British legal tradition (in which in fact the ideas of freedom and 'fair play', far from being overlooked, were thought central) largely relied on the common law, rather than statute or constitutional provision to define and protect individual rights and liberties. This approach was adopted for the most part by the Australians in constitution-making. It explains in large degree the shortage (as it is now perceived) of explicit statements of ideals and guarantees of rights, and descriptions of essential human and national attributes.[27]

2.20 Professor Jeffrey Goldsworthy has written that the constitutional tradition Australia inherited from Britain was 'obviously not opposed to rights such as freedom of speech, but was opposed to judges having power to protect them from interference by legislation':[28]

> With a few exceptions, our framers relied on other mechanisms for protecting rights, including constitutional conventions; the common law; presumptions of statutory interpretation; and community attitudes, of tolerance and respect for rights, expressed through the ballot box.[29]

2.21 In *Australian Capital Television v Commonwealth*, Dawson J suggested that those who drafted the *Constitution* saw constitutional guarantees of freedoms as 'exhibiting a distrust of the democratic process':

> They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[30]

A common law constitution?

2.22 The term 'common law constitutionalism' is now 'widely used to denote the theory that the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of common law'.[31] Under this theory, the common law is said to incorporate fundamental moral principles, against which the legality of governmental decisions, and even Acts of

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27 Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 162.

28 Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9, 25.

29 Ibid.

30 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, [23]. Mason CJ said: 'The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy': Ibid [31].

31 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17.

Parliament, may be tested.[32] Many of the rights and freedoms listed in the Terms of Reference, even those not fully protected by the *Australian Constitution*, would be considered constitutional in this way.

2.23 Commonly associated with the writing of Professor Trevor Allan[33] and Lord Justice John Laws,[34] common law constitutionalism has been called 'a potent phenomenon within contemporary public law discourse'.[35] Allan has written that 'the common law is prior to legislative supremacy, which it defines and regulates':[36]

> We should not underestimate the power of the common law constitution to protect fundamental rights, and the central role it ascribes to the individual conscience in testing the moral credentials of law, or rather of what purports to be law but may, on inspection, prove to be an infringement of the rule of law.[37]

2.24 Some even suggest that courts may invoke this common law constitution to invalidate Acts of Parliament.[38] The theory has been said to invert the traditional relationship between statute law and the common law.[39] Professor Jeffrey Goldsworthy, a critic of common law constitutionalism, has written that the theory amounts to a 'takeover bid' which replaces legislative supremacy with judicial supremacy.[40] The political constitution, Thomas Poole writes, is 'turned on its head in favour of a system of constitutional politics whose central institution is the common law court'.[41]

2.25 The theory has its leading proponents in the UK, which lacks a written and rigid constitution. In Australia, it has not been applied to invalidate unambiguous statutes. In *South Australia v Totani*, French CJ said that it is

> self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified.[42]

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32 Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 *The Modern Law Review* 463, 463.

33 See, eg, TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013).

34 See, eg, John Laws, *The Common Law Constitution* (Cambridge University Press, 2014). Paul Craig, Jeffrey Jowell and Dawn Oliver are the other 'prime movers' behind this 'quiet revolution' identified by Poole: Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142, 142.

35 Poole, above n 32.

36 TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003) 271.

37 TRS Allan, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' 190.

38 See also the comments of Sir Robin Cooke, former President of the New Zealand Court of Appeal, and discussed in Justice Michael Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights' (Speech, New Zealand Research Foundation Conference, Auckland, 4 April 1997).

39 Goldsworthy, *Parliamentary Sovereignty*, above n 31, 15.

40 Ibid.

41 Poole, above n 32, 463.

42 *South Australia v Totani* (2010) 242 CLR 1, [31]. In a speech, Chief Justice French said: 'The theoretical question whether fundamental common law principles can qualify legislative power has not been definitively answered in Australia. … The omens are not promising for the proponents of a free-standing

2.26 Common law constitutionalism does however find a more confined application in an accepted principle of statutory construction known as the 'principle of legality'.

The principle of legality

2.27 The principle of legality is a principle of statutory interpretation that gives some protection to certain traditional rights and freedoms, including almost all of those listed in the Terms of Reference.[43] In fact, as Spigelman has said, the 'protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[44]

2.28 The principle of legality may go back at least as far as Blackstone and Bentham.[45] It may be a new label for a traditional principle.[46] Early Australian authority may be found in the 1908 High Court case, *Potter v Minahan*.[47] A more recent statement of the principle appears in *Re Bolton; Ex parte Beane*:

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[48]

2.29 The rights or freedoms protected by the principle of legality 'often relate to human rights and are sometimes described as having a constitutional character'.[49] The principle 'extends to the protection of fundamental principles and systemic values'.[50] There is no settled list of rights protected by the principle, but in *Momcilovic*, Heydon J set out the following examples:

> [F]reedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests …; rights of

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common law limitation. However, the question has been left, at least theoretically, open': Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).

43 The phrase 'principle of legality' is also used to refer to 'a wider set of constitutional precepts requiring any government action to be undertaken only under positive authorisation': Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 373. In this Report, the phrase is used to refer to the narrower point of statutory interpretation. Recent papers on the principle also include Dan Meagher, 'The Common Law Principle of Legality in the Age of Human Rights' (2011) 35 *Melbourne University Law Review* 449; James Spigelman, 'The Common Law Bill of Rights' (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series*.

44 Spigelman, above n 43, 9. See also Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

45 James Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775. It has 'many authorities, ancient and modern, Australian and non-Australian': *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J). Although the continuity of the principle is questioned in Lim, above n 43, 380.

46 Jeffrey Goldsworthy, 'The Constitution and Its Common Law Background' (2014) 25 *Public Law Review* 265, 279.

47 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used': *Potter v Minahan* (1908) 7 CLR 277, 304.

48 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523. This was quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

49 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J).

50 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, (Gageler and Keane JJ).

> access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; *mens rea* as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction.[51]

2.30 The primary rationale for this principle of statutory construction was provided by Lord Hoffmann:

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[52]

2.31 The 'political cost' of the decision was also something referred to by French CJ. The interpretation of legislation takes place 'against the backdrop of the supremacy of Parliament', which can qualify or extinguish rights and freedoms by 'clear words'—but words 'for which it can be held politically accountable'.[53] As suggested in *Coco v The Queen*, the principle may 'enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.[54]

2.32 The principle of legality may be applied not only to statutes, but also to regulations and other delegated legislation, where in fact it may assume greater importance, given such laws are not made directly by Parliament.[55]

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51 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J) (citations omitted). In *Malika Holdings v Stretton*, McHugh J said: 'No doubt there are fundamental legal principles—a civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws, especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals are examples. Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend these and other fundamental principles': *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28]. Other lists appear in: Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); Spigelman, above n 43; Williams and Hume, above n 5. See also Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Ch 19.

52 *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115 131.

53 Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

54 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). This is a classic discussion of the principle of legality, although the phrase 'principle of legality' is not used.

55 See Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (forthcoming, to be published in the *University of New South Wales Law Journal*).

2.33 The principle of legality is similar to interpretation provisions in some human rights Acts, such as s 32(1) of the Victorian Charter, which provides: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.[56] French CJ has said that this provision is 'analogous to the common law principle of legality'.[57] The principle of legality could be similarly codified in a Commonwealth statute, such as the *Acts Interpretation Act 1901* (Cth). This could act as a clear statement of parliamentary support for the principle of legality and further protect fundamental rights and freedoms from statutory limitation.

2.34 Finally, it should be stressed that the principle 'does not constrain legislative power'.[58] Subject to the *Constitution*, Parliament has the power to modify or extinguish common law rights. Chief Justice Robert French has said while the principle has a 'significant role to play in the protection of rights and freedoms', it does not 'authorise the courts to rewrite statutes'.[59] The principle of legality will have a very limited application where encroaching on a right is a clear object of a statute.[60]

International law

2.35 Each chapter of this Report sets out examples of international instruments that protect the relevant right or freedom. Most commonly cited is the *International Covenant on Civil and Political Rights* (ICCPR),[61] to which Australia is a party.[62]

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56 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1). See also *Human Rights Act 1998* (UK) s 3(1).

57 Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).

58 *Momcilovic v The Queen* (2011) 245 CLR 1, [43] (French CJ). In a 2012 speech, Chief Justice Robert French said: 'The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms': Chief Justice Robert French, 'The Courts and Parliament' (Speech, Queensland Supreme Court, Brisbane, 4 August 2013).

59 Chief Justice Robert French, *The Courts and the Parliament* (Queensland Supreme Court Seminar, Brisbane, 4 August 2012).

60 'The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked': *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [314] (Gageler and Keane JJ).

61 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

62 The other United Nations human rights treaties Australia has signed are: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).

2.36 Instruments such as the ICCPR provide some protection to rights and freedoms from statutory encroachment, but, like the principle of legality, generally only when a statute is unclear or ambiguous:[63]

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party.[64]

2.37 In *Mabo v Queensland [No 2]*, Brennan J said that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[65]

2.38 However, even international instruments to which Australia is a party do not create binding domestic law in Australia. Nor do they abrogate the power of the Commonwealth Parliament to make laws that are inconsistent with the rights and freedoms set out in these instruments. In *Dietrich v The Queen*, Mason CJ and McHugh J said:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.[66]

2.39 In *Minister for Immigration v B*, Kirby J said that the High Court 'cannot invoke international law to override clear and valid provisions of Australian national law'.[67]

2.40 International law protects rights in other ways. For example, Australia periodically reports to and appears before relevant United Nations human rights treaty bodies.[68] And as discussed below and in Chapter 3, Australian parliamentary committees scrutinise laws for compatibility with core international human rights

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63 In *Coleman v Power*, Gleeson CJ distinguished between statutes enacted before ratification of a particular international treaty and those statutes enacted after ratification, arguing that only the latter can be interpreted in line with the relevant treaty: *Coleman v Power* (2004) 220 CLR 1, [19].

64 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). There is a 'common law principle that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party': *Momcilovic v The Queen* (2011) 245 CLR 1, [18] (French CJ). Every statute is 'to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with established rules of international law': *Jumbunna Coal Mine NL v Victorian Coal Miners'Association* (1908) 6 CLR 309, 353 (O'Connor J).

65 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42. Professor Ivan Shearer has said: 'This puts the matter in a nutshell: the Covenant is not as such part of the law of Australia, but is a powerful influence on the judges in developing the common law': Ivan Shearer, 'The Relationship between International Law and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 56.

66 *Dietrich v The Queen* (1992) 177 CLR 292, 305.

67 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J). Similarly, in *The Malaysian Declaration Case*, Kiefel J said that a 'statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law … However, if it is not possible to construe a statute conformably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law'. *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [247].

68 See Attorney-General's Department, *United Nations Human Rights Reporting* <http://www.ag.gov.au>.

treaties. The United Nations Human Rights Committee also considers communications from individuals who claim to be victims of a human rights violation.[69]

2.41 While the focus of the Terms of Reference is upon common law rights and freedoms,[70] international human rights law informs approaches to domestic law and also the ALRC's obligations in conducting inquiries.[71]

The nature of common law rights

2.42 Some of the rights and freedoms listed in the Terms of Reference directly give rise to legal obligations and may be enforced in courts of law. Others are more like freedoms or liberties and are protected in Australia by virtue of the fact, and largely only to the extent, that laws do not encroach on the freedom.[72] The High Court said in *Lange v Australian Broadcasting Corporation*:

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[73]

2.43 Many common law rights may therefore be largely residual,[74] and perhaps for this reason, more vulnerable to statutory encroachment.[75]

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69 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) First Optional Protocol, art 1.

70 The Terms of Reference do not expressly refer to Australia's legal obligations under international human rights instruments, as pointed out by Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Refugee Advice & Casework Service, *Submission 119*. See also Monash University Castan Centre for Human Rights, *Submission 18*.

71 The ALRC must aim to ensure that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter: *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

72 The most comprehensive and compelling explanation of the nature of rights and liberties and the jural relations that they create was provided by the American jurist Wesley Newcomb Hohfeld: Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16. For a discussion, see Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) ch 13. In a speech about common law protections of human rights, Chief Justice French said that it was 'important to recognise … that common law 'rights' have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have 'a binding effect'. But 'rights', to movement, assembly or religion, for example, are more in the nature of 'freedoms'. They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort': Chief Justice Robert French, 'Protecting Human Rights Without a Bill of Rights' (Speech, John Marshall Law School, Chicago, 26 January 2010).

73 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) quoting *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283. The corollary of this principle is that no person or authority may interfere with the liberty of a person except by authority of law: see, eg, *Entick v Carrington* (1765) 19 St Tr 1029.

74 'The traditional doctrine in English law is that Parliament is sovereign. However, individuals may say or do whatever they please provided they do not transgress the substantive law or infringe the legal rights of others. Furthermore, public authorities including the Crown may do nothing but that which they are authorized to do by some rule of common law (including the royal prerogative) or statute and, in particular, may not interfere with the liberties of individuals without statutory authority. Where public authorities are not authorized to interfere with the individual, the individual has liberties. It is in this sense that such liberties are residual rather than fundamental and positive in their nature: they consist of what

2.44 In some other jurisdictions, rights and freedoms are afforded additional protection from statutory encroachment by bills of rights and human rights statutes. The degree of protection offered by these statutes varies. A constitutionally entrenched bill of rights, such as that found in the United States Constitution, allows the judiciary to declare a law invalid. This may be contrasted with the *Human Rights Act 1998* (UK), which does not give courts the power to strike down legislation, but provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible' with rights and freedoms set out in the *European Convention on Human Rights*.[76] The Victorian Charter has a similar provision, quoted above.[77]

2.45 Common law rights overlap with the rights protected in these international instruments and bills of rights. In their history and development, each may be seen as an important influence on the other. A statute that encroaches on a traditional common law right will often, therefore, also encroach on its related human right. However, the two rights may not always have the same scope. While some common law rights are often conceived of as residual, human rights are rarely thought of in this way. Moreover, human rights have been said to tend to grow in content and form. Professor Tom Campbell has written:

> More and more interests are recognized as justifying the protection that flows from being adopted as a human right. This growth is a matter of the form of human rights as well as their content. Thus, even traditional core civil and political liberties are seen as involving positive correlative duties to secure the interest identified in the right, and not, as before, merely negative correlative duties to let people be and leave them alone to go their own way. Human rights are also being put to a wider variety of uses.[78]

2.46 Many social and economic rights are also recognised as human rights in international law—for example, the right to work and the right to housing. As important as these rights may be, they are not the focus of this Inquiry.[79]

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remains after taking account of all the legal restraints that impinge upon an individual': Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 28.

75 One consequence of the fact that many common law rights are residual is that Parliament can always 'legislate fundamental rights out of existence': Ibid 29.

76 *Human Rights Act 1998* (UK) s 3(1). Section 4(2) also gives the courts a power to make a 'declaration of incompatibility'. In a speech about human rights, Lady Hale said that statements from Lord Nicholls, Lord Steyn and Lord Rodger in *Ghaidan v Godin Mendoza* gave 'a very broad meaning' to what was 'possible': 'as long as an interpretation was not contrary to the scheme or essential principles of the legislation, words could be read in or read out, or their meaning elaborated, so as both to be consistent with the convention rights and "go with the grain" of the legislation, even though it was not what was meant at the time': Lady Hale, 'What's the Point of Human Rights?' (Warwick Law Lecture, 28 November 2013). See also, *Ghaidan v Godin Mendoza* [2004] 2 AC 557.

77 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

78 Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 17.

79 The Report focuses on the rights and freedoms listed in the Terms of Reference.

Extra-territorial application

2.47 In the absence of a specific legislative restriction which is consistent with the *Constitution*, the enjoyment of most common law rights and freedoms is not confined to Australian citizens.[80]

2.48 At common law, people who are not Australian citizens ('aliens'), other than enemy aliens, are to be treated, while they are in Australia, as being within 'the Queen's Peace', not as outlaws placed beyond the ordinary legal system. The High Court has noted on several occasions that such people are entitled to the same protection with respect to civil rights as the law affords to Australian citizens.[81]

2.49 A related issue concerns whether common law rights have extra-territorial effect—that is, do they apply to people who are outside Australia, or on their way to Australia. Generally, Australian common law does not apply of its own force in areas beyond the limits of Australia.[82] In *Ruddock v Vadarlis*, Beaumont J held that asylum seekers aboard the MV *Tampa* had not, and could not, assert a common law right to enter Australia; and it is unlikely they had other Australian common law rights that could be enforced.[83]

2.50 There is a common law presumption that legislation does not have extra-territorial application. Australian law may be given extra-territorial effect in legislation—for example, as has been done in relation to child sex offences.[84] Where Australian law has extra-territorial effect, common law rights may apply. For example, an Australian military tribunal operating outside Australia would be expected to observe natural justice.

Identifying laws that limit rights and freedoms

2.51 The first of the tasks of this Inquiry is to identify Commonwealth laws—not state and territory laws—that encroach upon traditional rights, freedoms and privileges.[85] There is no doubt that laws often encroach on traditional rights and freedoms. In *Malika Holdings v Stretton*, McHugh J said that 'nearly every session of Parliament produces laws which infringe the existing rights of individuals',[86] although

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80 At common law, freedom of movement concerns the freedom of citizens to leave and return to their own country. Therefore, migration laws applying to non-citizens are not generally considered to directly engage this particular right. See Ch 7.

81 *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ); *Re Minister for Immigration and Multicultural Affairs v Te* (2002) 212 CLR 165, [125] (Gummow J); *Singh v Commonwealth* (2004) 222 CLR 322, [201] (Gummow, Hayne and Heydon JJ).

82 In *Commonwealth v Yarmirr*, the High Court held that native title rights and interests were capable of being recognised by the common law in respect of the sea and sea-bed beyond the low-water mark: *Commonwealth v Yarmirr* (2001) 208 CLR 1, [34]–[35]. However, there was no suggestion that the common law extended beyond the territorial sea.

83 *Ruddock v Vadarlis* (2001) 110 FCR 491, [97]. Beaumont J stated that the absence of a common law claim was fatal to the case for relief in the form of the common law prerogative writ of *habeas corpus*. See also *CPCF v Minister for Immigration* [2015] HCA 1.

84 *Criminal Code* div 272.

85 See Terms of Reference.

86 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J).

perhaps fewer encroach on the most important and fundamental of common law rights.[87] This 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 a judgment about the justification for them.[88]

2.52 The Terms of Reference ask the ALRC to include consideration of Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation, and workplace relations.[89] These laws are highlighted throughout this Report.

2.53 Having identified laws that affect traditional rights and freedoms, the second task was to ask whether the laws were appropriately justified. The following section discusses justifications for limits on important rights and principles at a general level—and particularly the framing principle of proportionality. More particular justifications are then discussed throughout the Report, in the context of the rights listed in the Terms of Reference.

Justifying limits on rights and freedoms

2.54 Laws that interfere with traditional rights and freedoms are sometimes considered necessary for many reasons—such as public order, national security, public health and safety. The mere fact of interference will rarely be sufficient ground for criticism.

2.55 Important rights often clash with each other, so that some must necessarily give way, at least partly, to others. Freedom of movement, for example, does not give a person unlimited access to another person's private property, and convicted murderers must generally lose their liberty, in part to protect the lives and liberties of others. Individual rights and freedoms will also sometimes clash with a broader public interest—such as public health or safety, or national security.

2.56 Accordingly, it is widely recognised that there are reasonable limits even to fundamental rights. Only a handful of rights—such as the right not be tortured—are considered to be absolute.[90] Limits on traditional rights are also recognised by the common law. In fact, some laws that limit traditional rights may be as traditional as the rights themselves. However, such laws are generally regarded as part of the *scope* of common law rights, rather than as limits or encroachments on those rights.

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87 Although in this same passage, McHugh J also said that 'times change': 'What is fundamental in one age or place may not be regarded as fundamental in another age or place… [C]are needs to be taken in declaring a principle to be fundamental': *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J).

88 A list of all the statutory provisions cited in this report is included at Appendix A. Lists of certain laws that limit rights are also set out in G Williams, *Submission 76*; Institute of Public Affairs, *Submission 49*.

89 The Terms of Reference are also clear that this Inquiry is not to be limited to these areas.

90 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7, 8 (paras 1 and 2) 11, 15, 16 and 18: art 4.2. See, eg, Williams and Hume, above n 5, [5.3]. See also Attorney-General's Department, *Absolute Rights* <http://www.ag.gov.au>.

2.57 Bills of rights in other jurisdictions and international human rights covenants and related guidelines also feature limitations provisions. For example, limits on rights in the ICCPR are recognised in the text of the ICCPR and are elaborated upon in the 'Siracusa Principles'.[91]

2.58 Nevertheless, much of the value of calling something a right will be lost if the right is too easily qualified or diluted. Many common law rights were developed carefully over long periods of time and have been applied in many cases. In many jurisdictions, these rights are considered so fundamentally important that they have constitutional status. There seems little doubt, therefore, that the common law rights in the Terms of Reference should be treated with considerable respect in law making and should not lightly be encroached upon. Where a law does encroach on a traditional right, the encroachment should be justified.

2.59 'Human rights enjoy a prima facie, presumptive inviolability, and will often "trump" other public goods,' Louis Henkin wrote in *The Age of Rights*:

> Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.[92]

2.60 The ALRC has been asked to consider whether limits on traditional rights and freedoms are 'appropriately justified'.[93] This question might be considered on two broad levels. The first involves testing the law according to a particular measure or standard—such as proportionality. Laws that pass this standard might be said to have been *substantively* justified. This is the most commonly used meaning of the word justified, in this context, and it is the main focus of this Inquiry.

2.61 The second level concerns the processes that lead to the making of the law—the *procedural* justification. It is not suggested, however, that procedural justification implies substantive justification. Both of these types of justification are discussed below.

Proportionality

2.62 A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. This concept is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of

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91 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). These principles were formulated at a conference sponsored by non-governmental organisations in Siracusa, Italy, in 1984. The object of the conference was to achieve a consistent interpretation and application of the limitation and restriction clauses of the ICCPR.

92 Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

93 See Terms of Reference.

rights.[94] However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important—even if not strictly constitutional—rights and principles.[95]

2.63 In short, a structured proportionality analysis involves considering whether a given law that limits important 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.

2.64 A 2014 book on the jurisprudence of proportionality includes this 'serviceable—but by no means canonical' formulation of the test:

> 1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
>
> 2. Are the means in service of the objective rationally connected (suitable) to the objective?
>
> 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
>
> 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?[96]

2.65 Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[97] and 'the orienting idea in contemporary human rights law and scholarship'.[98]

> Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication. Even in the United States, which is widely understood to have formally rejected

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94 Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as 'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected': Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

95 In other words, proportionally tests need not only be used by *courts*, and need not only be used to test limits on *constitutional* rights.

96 G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak: 'According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right': Barak, above n 94, 3.

97 Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

98 Huscroft, Miller and Webber, above n 96, 1.

> proportionality, some argue that the various levels of scrutiny adopted by the US Supreme Court are analogous to the standard questions posed by proportionality.[99]

2.66 Proportionality may now also be said to have been received to some extent into the constitutional doctrine of courts in Australia. For example, in *McCloy v New South Wales*, the High Court applied a structured proportionality test to determine whether a law infringed the constitutional right to political communication.[100] More commonly the courts have considered this question in terms of whether the law is 'reasonably appropriate and adapted to serve a legitimate end', which reflects a form of proportionality analysis.[101]

2.67 The Court in *McCloy* explained how proportionality has been used in various contexts in Australian law:

> The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.[102]

2.68 Proportionality is used by Australian parliamentary committees to scrutinise Bills. The Parliamentary Joint Committee on Human Rights, for example, applies a proportionality test. The Committee's *Guide to Human Rights* states:

> A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the

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99 Ibid. The Siracusa Principles, noted above, includes a proportionality test: United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [10], [11]. For recent discussions of proportionality in the UK High Court, see *R (Lord Carlile) v Home Secretary* [2014] 3 WLR 1404, [28]–[34] (Lord Sumption); *Bank Mellat v HM Treasury [No. 2]* [2014] AC 700, [68]–[76] (Lord Reed); and *R (Nicklinson) v Ministry of Justice* [2014] 3 All ER 843, [168] (Lord Mance).

100 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

101 'What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ). The question of whether a law is reasonably appropriate and adapted to advance a legitimate object 'involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified': *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [2] (French CJ, Kiefel, Bell and Keane JJ). See also Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 677.

102 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell and Keane JJ).

> objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[103]

2.69 In a public sector guidance sheet about permissible limits on rights, the Attorney-General's Department includes a list of 'useful questions to ask when assessing whether a measure limiting a right is reasonable, necessary and proportionate':

> Will the limitation in fact lead to a reduction of that problem? Does a less restrictive alternative exist, and has it been tried? Is it a blanket limitation or is there sufficient flexibility to treat different cases differently? Has sufficient regard been paid to the rights and interests of those affected? Do safeguards exist against error or abuse? Does the limitation destroy the very essence of the right in issue?[104]

2.70 A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*.[105] This case concerned a drug control statute that placed a legal burden of proof on the defendant, and so undermined the person's right, under the *Canadian Charter of Rights and Freedoms*, to be presumed innocent until proven guilty. Section 1 of the Canadian Charter guarantees the rights and freedoms in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[106]

2.71 Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. The first concerned the importance of the objective of the law:

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[107]

2.72 Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In

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103 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) 8.

104 Attorney-General's Department (Cth), *Permissible Limitations*, available at <www.ag.gov.au>.

105 *R v Oakes* [1986] 1 SCR 103 [69]–[70].

106 The Victorian Charter similarly provides: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve': *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See also, *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

107 *R v Oakes* [1986] 1 SCR 103 [69]–[70].

> short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[108]

2.73 In each case, Dickson CJ said, courts will be 'required to balance the interests of society with those of individuals and groups'.[109] There are variations, but the language in *Oakes* is reflected in most proportionality tests.

2.74 Proportionality—'a single flexible standard'—has been contrasted with the law of the First Amendment to the *United States Constitution*, which 'uses a multitude of less flexible, but more precise, rules designed to respond to particular kinds of cases'.[110]

2.75 In *Roach v Electoral Commissioner*, Gleeson CJ expressed reservations about an 'uncritical translation' of proportionality into Australia from jurisdictions with human rights instruments and wider powers of judicial review.[111] In *Momcilovic*, Heydon J suggested that the proportionality test in the Victorian Charter created 'difficult tasks' that should be for legislatures, not judges.[112] Professor John Finnis has said that all the proportionality criteria 'involve matters of fact (including counter-factuals) and evaluative opinion in which legal learning is of little assistance and forensically ascertainable evidence is unavailable':

> [T]here is little or nothing judicial—nothing *law applying*—about assessments of proportionality in relation to rights such as those in the [*European Convention on Human Rights*], when these assessments are made by courts coming fresh to them in the context of general legislative or legislatively approved arrangements for social life.[113]

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108 Ibid.

109 Ibid.

110 Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' 28(3) *UNSWLJ* 842, 844. 'The choice between the competing merits of these approaches depends on rather large questions of fact and value. Rules will appeal to those who value certainty in the application of judicial rules and who believe that rules created by one court are capable of constraining later and lower courts. Flexible standards will appeal to those who value flexibility and to those who are, in any event, sceptical about the capacity of legal doctrine to effectively constrain judges': Ibid.

111 Human rights instruments 'create a relationship between legislative and judicial power significantly different from that reflected in the Australian Constitution': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [17] (Gleeson CJ).

112 'It will lead to debates in which many different positions could be taken up. They may be debates on points about which reasonable minds may differ. They may be debates in which very unreasonable minds may agree. They are debates that call for resolution by legislative decision': *Momcilovic v The Queen* (2011) 245 CLR 1, [431] (Heydon J). Heydon J said that s 7(2) 'creates a kind of "proportionality" regime without comprehensible criteria': Ibid [432].

113 John Finnis, 'Judicial Power: Past, Present and Future' (Speech, Gray's Inn Hall, London, 20 October 2015) 21.

2.76 However, some of these concerns may not arise when the proportionality analysis is being applied by law makers, parliamentary committees and others to test the merits of laws, rather than by courts.[114]

2.77 Other criticisms of proportionality apply more broadly.[115] Some have suggested that proportionality tests give insufficient weight to rights, or call for the comparison of incommensurable values. Others have said it 'suggests a far more rigorous algorithm of criteria than is in fact or law available'.[116] Proportionality has even been called an 'assault on human rights'.[117] To balance rights may be to 'miss the distinctive moral status that a rights claim presupposes and affirms'.[118] Far from rights being 'trumps',[119] a balancing approach might suggest that everything is 'up for grabs'.[120]

2.78 Nevertheless, in submissions to this Inquiry, a number of stakeholders said that proportionality was the appropriate concept to apply.[121] For example, the Law Council of Australia submitted that the proportionality test in *R v Oakes* 'has been applied in Australian domestic law and can produce logical and predictable outcomes when applied to legislation':

> 'Proportionality' is … a fluid test which requires those analysing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.[122]

2.79 In its submission to this Inquiry, the Human Rights Law Centre stated that

> the test for determining whether a restriction is appropriate should be one of proportionality as used in international and comparative human rights jurisprudence and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) … A proportionality test is appropriate as it preserves rights, provides a framework for

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114 The role of parliamentary committees is discussed below and in Ch 3.

115 For criticisms of proportionality reasoning, see, eg, Francisco J Urbina, 'Is It Really That Easy: A Critique of Proportionality and "Balancing as Reasoning"' (2014) 27 *Canadian Journal of Law and Jurisprudence* 167; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; Gregoire CN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179. In defence, see, eg, Moller, above n 97; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

116 John Finnis, 'Judicial Power: Past, Present and Future' (Speech, Gray's Inn Hall, London, 20 October 2015) 20.

117 Tsakyrakis, above n 115.

118 Ibid 489.

119 This is Ronald Dworkin's well-known metaphor: Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984).

120 Tsakyrakis, above n 115, 489. 'With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching': Ibid 487.

121 National Association of Community Legal Centres, *Submission 143*; Australian Human Rights Commission, *Submission 141*; Law Council of Australia, *Submission 140*; Public Interest Advocacy Centre, *Submission 133*; ANU Migration Law Program, *Submission 107*; Law Council of Australia, *Submission 75*; Human Rights Law Centre, *Submission 39*. See also Centre for Comparative Constitutional Studies, *Submission 58*. Although in most submissions, the justification for laws limiting rights was not discussed at this more general level.

122 Law Council of Australia, *Submission 75*.

> balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account. [123]

2.80 The Public Interest Advocacy Centre endorsed the use of the principle and suggested that it could be 'more deeply embedded' in Australian law.[124]

2.81 In this Inquiry, the ALRC does not consider the question of whether testing the proportionality of laws that limit rights is better carried out by the judiciary or the legislature. Nor is it necessary, in this Inquiry, to find a perfect method—if such a method exists—for testing the justification of laws that limit rights. Whether a particular law that limits a right is justified will of course sometimes be a question about which reasonable people acting in good faith disagree. A rigid insistence on a prescribed proportionality framework may also discourage more thorough and wide ranging analysis.

2.82 While the ALRC does not propose that one particular method must always be used to test the justification for laws that limit traditional rights and freedoms, proportionality tests offer a valuable way of structuring the critical analysis. They call for a considerable degree of rigour, and are clearly more thorough than mere unsupported statements that a law is justified because it is in the public interest. Proportionality is also used widely in many other countries and jurisdictions. When considering similar laws in Australia, law makers will naturally find these other analyses instructive. Importantly, the use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary.

Scrutiny processes

2.83 A law that limits important rights may be said to be justified in another more limited sense, namely, that it was made following open and robust scrutiny. A law that limits a right might therefore be said to be justified *procedurally*, if the law was made after a procedure that thoroughly tested whether the limit was *substantively* justified. A fundamental procedural justification for laws might be, for example, that they are made by a democratically elected parliament in a country with a free press. Another important process is scrutiny by parliamentary committees.

2.84 Rigorous processes for scrutinising laws for compatibility with traditional rights may be more important in jurisdictions without a constitutional bill of rights. So called 'political rights review' or 'legislative rights review', Professor Janet Hiebert has written,

> entails new responsibilities and new incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights. This innovation results in multiple sites for non-judicial rights review (government, the public service, and parliament), which distinguish this model from the American-

123 Human Rights Law Centre, *Submission 39*.
124 It also suggested how might this be done: Public Interest Advocacy Centre, *Submission 133*.

> inspired approach that relies almost exclusively on judicial review for judgments about rights.[125]

2.85 In Chapter 3, the ALRC discusses some procedural protections of traditional rights in more detail, with a particular focus on scrutiny by parliamentary committees. In Australia, proposed laws are checked for compatibility with traditional rights at a number of stages in the law making process. For example, when developing policy, government departments are encouraged to think about the effect a proposed law will have on rights. Bills and disallowable legislative instruments presented to Parliament must have a 'statement of compatibility' that assesses the legislation's compatibility with the rights and freedoms in seven international human rights instruments—which include most of the traditional rights and freedoms in the ALRC's Terms of Reference. The Attorney-General's Department plays an important role in providing advice about human rights law and often helps agencies prepare statements of compatibility.[126]

2.86 There are multiple parliamentary committees that review legislation, and three committees have a particular role in considering whether proposed laws are compatible with basic rights: the Senate Standing Committee for the Scrutiny of Bills, the Senate Standing Committee on Regulations and Ordinances, and the Parliamentary Joint Committee on Human Rights.

2.87 The Independent National Security Legislation Monitor reviews Australia's counter-terrorism and national security laws and considers whether such laws are proportionate, necessary and contain safeguards to protect individual rights. Law reform bodies such as the ALRC also routinely consider rights and freedoms in their work. Under the *Australian Law Reform Commission Act 1996* (Cth), the ALRC has a duty to ensure that the laws, proposals and recommendations it reviews, considers or makes:

> (a) do not trespass unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions; and
>
> (b) are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.[127]

2.88 Because of the close relationship between many traditional common law rights and human rights protected by international covenants and instruments, an important role is also played by the Australian Human Rights Commission. The Commission,

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125 Hiebert, above n 14, 9. See also Janet L Hiebert and James B Kelly, *Parliamentary Bills of Rights* (Cambridge University Press, 2015) 4.

126 Valuable resources about human rights may be found on the Attorney-General's Department website: <www.ag.gov.au>. See also, Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011); Attorney-General's Department, 'Tool for Assessing Human Rights Compatibility' <www.ag.gov.au>. In addition to these guides, agencies are encouraged to consult early and often with relevant areas of the Attorney-General's Department where rights encroachment issues arise. See, eg, *Drafting Direction No 3.5—Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers 2013* [7], [54].

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

established in 1986, and its predecessor, the Human Rights and Equal Opportunity Commission, established in 1981, have as their purpose, working

> for the progressive implementation of designated international conventions and declarations through representations to the Federal Parliament and the executive, through other public awareness activities, and where appropriate through intervention in judicial proceedings.[128]

2.89 No less importantly, laws are often scrutinised by the public and in the press.

2.90 Clearly, there are already many processes for testing the compatibility of proposed laws with important rights and freedoms. Some are relatively new, such as the Parliamentary Joint Committee on Human Rights, established in 2011. Some are much older, like the Senate Standing Committee on Regulations and Ordinances, established in 1932. In Chapter 3, the ALRC considers whether some of these existing procedures might be improved. For example, the ALRC considers whether the justifications given to parliamentary committees and in compatibility statements are generally adequate, or could be made more thorough and the reasoning more explicit.

128 Shearer, above n 65, 55.