

7. Freedom of Movement

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Summary

7.1 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. It has its origins in ancient philosophy and natural law, and has been regarded as integral to personal liberty.¹ The freedom is fundamental to the conduct of commerce, employment and cultural exchange, and is central to international law relating to asylum.

7.2 This chapter discusses the source and rationale of the common law right of freedom of movement; how this right is protected from statutory encroachment; and when laws that interfere with freedom of movement may be considered justified,

¹ Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 27, 6.

including by reference to the concept of proportionality. While freedom of movement overlaps with concerns about personal liberty and the right to be free from arbitrary detention, these latter rights are not a focus of the chapter.

7.3 Freedom of movement, broadly conceived, may also be engaged by laws that restrict the movement or authorise the detention of any person—not only a citizen—lawfully within the territory of a state. That is, any non-citizen lawfully within Australia, whose entry into Australia has not been subject to restrictions or conditions, is entitled to the same right to freedom of movement as an Australian citizen.

7.4 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.

7.5 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.

7.6 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 to freedom of movement.

7.7 The areas of particular concern include various counter-terrorism measures. In particular, the justification for aspects of the control and preventative detention order provisions and declared area offences in sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) have been questioned.

7.8 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of movement, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

7.9 There is also good reason to review s 77 of the *Bankruptcy Act 1966* (Cth), which provides that a bankrupt must, unless excused by a trustee in bankruptcy, give their passport to the trustee. This requirement may not be a proportionate response to concerns about bankrupt individuals absconding. Restrictions on freedom of movement should be imposed subject to precise criteria, and judicial oversight, rather than through automatic forfeiture of a bankrupt’s passport.

The common law

7.10 In 13th century England, the *Magna Carta* guaranteed to local and foreign merchants the right, subject to some exceptions, to ‘go away from England, come to

England, stay and go through England'.² William Blackstone wrote in his *Commentaries on the Laws of England* that every Englishman under the common law had the right to 'go out of the realm for whatever cause he pleaseth, without obtaining the king's leave'.³

7.11 Influenced by Blackstone, Thomas Jefferson, then President of the United States, wrote that he held 'the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken away from him even by the united will of every other person in the nation'.⁴

7.12 In Australia, O'Connor J said, in *Potter v Minahan*, that a citizen of Australia is entitled to 'depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary'.⁵

7.13 The common law freedom of movement is not absolute. Common law liability and property rules determine the basic boundaries of the freedom. A person who enters land without the owner's consent commits trespass. A person who moves in disregard of the safety of others commits other torts. A motorist has a duty of care not to drive in a way that causes harm to others. Non-citizens have no common law freedom to enter a country except as allowed by the law of the country.⁶

7.14 Different considerations apply to public property (*res communes*) and state-owned property. *Res communes* include the sea, foreshore, rivers, the atmosphere, commons and dedicated public areas. Members of the public have common law freedom to the use of these things, including the freedom to navigate. However, this freedom is often regulated by legislation enacted for reasons such as conservation and safety. In contrast, there is no general common law freedom to enter state-owned property. The state may grant public access to lands such as national parks and forests subject to conditions.

Protections from statutory encroachment

Australian Constitution

7.15 Section 92 of the *Australian Constitution* provides:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.⁷

2 *Magna Carta 1297* (UK) 25 Edw 1 c 42.

3 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol I, bk I, ch 7, s II, 256.

4 See McAdam, above n 1, 13.

5 *Potter v Minahan* (1908) 7 CLR 277, 305.

6 *Ruddock v Vadarlis* (2001) 110 FCR 491.

7 *Australian Constitution* s 92.

7.16 In *Gratwick v Johnson*, Starke J said that the ‘people of Australia are thus free to pass to and fro among the states without burden, hindrance or restriction’.⁸ However, in *Cole v Whitfield*, the High Court said that this does not mean that ‘every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom’.⁹

For example, although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian’s use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State.¹⁰

7.17 In *Cunliffe v Commonwealth*, Mason CJ said that the freedom of intercourse which s 92 guarantees is not absolute:

Hence, a law which in terms applies to movement across a border and imposes a burden or restriction is invalid. But, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject-matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate to that end. Once again, it would be a matter of weighing the competing public interests.¹¹

7.18 It has also been suggested that a right to freedom of movement is implied generally in the *Constitution*. In *Miller v TCN Channel Nine*, Murphy J said that freedom of movement between states and ‘in and between every part of the Commonwealth’ is implied in the *Constitution*.¹²

7.19 However, this view has not been more broadly accepted by the High Court.¹³ Professors George Williams and David Hume wrote:

This reflects the lack of a clear textual basis for such a freedom and for the incidents of the constitutionally prescribed system of federalism which would support it, and an

8 *Gratwick v Johnson* (1945) 70 CLR 1, 17.

9 *Cole v Whitfield* (1988) 165 CLR 360, 393.

10 *Ibid*, 393. See also *AMS v AIF* (1999) 199 CLR 160, [40]–[45] (Gleeson CJ, McHugh, Gummow JJ).

11 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307–8 (Mason CJ).

12 *Miller v TCN Channel Nine* (1986) 161 CLR 556, 581–2. ‘The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society ... They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest’. Williams and Hume wrote that freedom of movement is arguably ‘implicit in the system of free trade, commerce and intercourse in s 92, the protection against discrimination based on state residence in s 117 and any protection of access to the seat of government as well as in the very fact of federalism’: George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 120. In *Williams v Child Support Registrar*, the applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia: *Williams v Child Support Registrar* (2009) 109 ALD 343.

13 In *Kruger v Commonwealth*, Brennan J said that a constitutional right to freedom of movement and association, which restricts the scope of s 122, had not been held to be implied in the *Constitution* and ‘no textual or structural foundation for the implication has been demonstrated in this case’: *Kruger v Commonwealth* (1997) 190 CLR 1, 45.

implicit view that the Constitution's federalism is not intended to protect individuals.¹⁴

7.20 In any event, a right to freedom of movement implicit in federalism would only extend to movement within Australia.

7.21 In relation to citizens returning to Australia, the High Court has held that the right of Australian citizens to enter the country is not qualified by any law imposing a need to obtain a licence or 'clearance' from the executive. Therefore, any such impost 'could not be regarded as a charge for the privilege of entry', encroaching on freedom of movement.¹⁵

7.22 Section 117 of the *Constitution*, which provides protection against discrimination on the basis of state of residence, may also protect freedom of movement within Australia. For example, in *Street v Queensland Bar Association*,¹⁶ the High Court held that a state cannot impose limits on professional practice qualifications on grounds that a person is not permanently residing in that state. The decision can be seen as removing an important impediment to cross-border movement for occupational purposes.

Principle of legality

7.23 The principle of legality provides some protection to freedom of movement, because freedom of movement is an essential part of personal liberty.¹⁷ When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of movement, unless this intention was made unambiguously clear.

7.24 For example, in *Potter v Minahan*, O'Connor J said that in the interpretation of migration laws, it must be assumed that 'the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication'.¹⁸

7.25 In relation to non-citizens, the High Court in *Plaintiff M47 v Director General of Security* held that provisions of the *Migration Act 1958* (Cth) should not be interpreted to mean that an unlawful non-citizen may be kept in immigration detention permanently or indefinitely—at least where the Parliament has not 'squarely confronted' this issue.¹⁹ Bell J stated that 'the application of the principle of legality

14 Williams and Hume, above n 12, 120.

15 *Air Caledonie v Commonwealth* (1988) 165 CLR 462, 469. This case concerned a 'fee' payable under of the *Migration Act 1958* (Cth) s 34A by passengers, citizens and non-citizens, for immigration 'clearance', with power vested in the executive to grant exemptions by regulation. This law was held to be a tax, at least in so far as it related to passengers who were Australian citizens.

16 *Street v Queensland Bar Association* (1989) 168 CLR 461.

17 See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 256.

18 *Potter v Minahan* (1908) 7 CLR 277, 305.

19 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [116]. See also, in relation to indefinite detention, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219.

requires that the legislature make plain that it has addressed that consequence and that it is the intended consequence'.²⁰

International law

7.26 Freedom of movement is widely recognised in international law and bills of rights. For example, art 13 of the *Universal Declaration of Human Rights* provides:

- (1) Everyone has the right to freedom of movement and residence within the borders of each state.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

7.27 Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR) provides, in part:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
- ...
4. No one shall be arbitrarily deprived of the right to enter his own country.²¹

7.28 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.²² However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.²³

Bills of rights

7.29 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of movement is protected in the *United States Constitution*,²⁴ and in the human rights statutes in Canada²⁵ and New Zealand.²⁶

7.30 Freedom of movement is also expressly protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).²⁷ Section 12 of the Victorian Act, for example, provides:

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

20 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, [529].

21 In addition, art 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention.

22 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

24 *United States Constitution* amend IV.

25 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 6(1)–(2).

26 *New Zealand Bill of Rights Act 1990* (NZ) s 18.

27 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12; *Human Rights Act 2004* (ACT) s 13.

Justifications for limits on freedom of movement

7.31 Freedom of movement will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for example, for reasons of public health and safety.

7.32 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.²⁸

7.33 The following section discusses some of the principles and criteria that may be applied to help determine whether a law that interferes with freedom of movement is justified, including those under international law.

Legitimate objectives

7.34 The threshold question in a proportionality test is whether the objective of a law is legitimate. Some guidance on what should be considered legitimate objectives of a law that interferes with freedom of movement may be derived from the common law and international human rights law.

7.35 The common law and international human rights law recognise that freedom of movement can be restricted in order to pursue legitimate objectives such as the protection of national security and public health. Some existing restrictions on freedom of movement are a corollary of pursuing other important public or social needs, such as the need to protect ecologically sensitive areas, or ensure safety at sea.

7.36 In considering how restrictions on freedom of movement may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR. The ICCPR provides grounds for restrictions on freedom of movement in general terms. Article 12.3 of the ICCPR provides that freedom of movement

shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

7.37 Many of the laws discussed below pursue these objectives. For example, counter-terrorism and other criminal laws clearly protect the rights of others, including the right not to be a victim of terrorism or other crime. They are also concerned with the protection of national security or public order.

7.38 Other counter-terrorism laws affecting aspects of citizenship, passports and border protection may also be necessary to protect legitimate national security and other interests. Some aspects of quarantine laws, such as quarantine zones, are necessary to protect public health.

²⁸ *Canadian Charter of Rights and Freedoms* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

7.39 A range of laws that restrict entry, for example into military security zones, safety zones and accident sites, may be necessary to protect legitimate objectives such as protecting public safety and health and ensuring public order.

7.40 There remain other laws that restrict freedom of movement and do not as obviously fall within the permissible restrictions referred to in art 12.3 of the ICCPR, for example, the requirement placed on bankrupt persons to automatically surrender their passports.

Balancing rights and interests

7.41 Whether all of the laws identified below as potentially interfering with freedom of movement in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom, may be contested.

7.42 However, even if a law does pursue such an objective, it will be important also to consider whether the law strikes an appropriate balance between freedom of movement and other rights and interests. A recognised starting point for determining whether an interference with freedom of movement is justified is the concept of proportionality.²⁹ Applying the Siracusa Principles, for example, a state must use ‘no more restrictive means than are required’ to achieve the purpose of the limitation.³⁰

7.43 The UN Human Rights Committee has said that restrictions on freedom of movement ‘must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed’.³¹ The UN Human Rights Committee has also said:

The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution ... [I]t is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.³²

Laws that interfere with freedom of movement

7.44 A wide range of Commonwealth laws may be seen as interfering with freedom of movement, broadly conceived. Some of these laws impose limits on freedom of movement that have long been recognised by the common law, for example, in relation to official powers of arrest or detention, customs and quarantine. Arguably, such laws

²⁹ See Ch 2.

³⁰ 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) [11].

³¹ United Nations Human Rights Committee, *General Comment No 27 (1999) on Article 12 of the Convention—Freedom of Movement*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13]–[14].

³² *Ibid* [13]–[14]. Legal and bureaucratic barriers were, for the Committee, a ‘major source of concern’: *Ibid* [17]. See also 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).

do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

7.45 Commonwealth laws that prohibit or constrain the movement of individuals include:

- criminal laws;
- customs and border protection laws;
- citizenship and passport laws;
- environmental regulation;
- child support laws; and
- laws restricting entry to certain areas.

7.46 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of movement, and criticisms of laws on that basis, are also discussed.

Criminal laws

7.47 Part 5.3 of the *Criminal Code* contains a range of provisions with implications for freedom of movement.³³ Importantly, these include provisions concerning:

- counter-terrorism control orders, which may contain a prohibition or restriction on a person being at specified areas or places or leaving Australia or a requirement that a person remain at specified premises;³⁴ and
- counter-terrorism preventative detention orders, which may be issued where it is suspected that a person will or has engaged in a terrorist act.³⁵

7.48 The *Criminal Code* also criminalises entering or remaining in ‘declared areas’ in foreign countries.³⁶

7.49 The declared areas offences were introduced into the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (*Foreign Fighters Act*), in response to the potential threat of individuals returning from conflict zones in Syria and Iraq. This legislation also extended the operation of the control orders and preventative detention regimes and the Australian Security Intelligence Organisation’s questioning and detention warrant powers.

33 The control orders and preventative detention orders regimes also have implications for freedom of speech and freedom of association: see Chs 4, 6. For example, under *Criminal Code* (Cth) s 104.5(3)(e), a prohibition or restriction on the person communicating or associating with specified individuals may be imposed.

34 *Criminal Code* s 104.5(3)(a)–(c).

35 *Ibid* s 105.4.

36 *Ibid* s 119.2.

7.50 All of these provisions have been subject to critical scrutiny in parliamentary committee and other inquiries.³⁷ These previous inquiries include that conducted in 2011–12 by the INSLM.³⁸ The Law Council of Australia supported further review of these provisions by the INSLM, ‘with a particular focus on determining any undue encroachment on freedom of movement’.³⁹

Criminal Code—control orders

7.51 The objects of div 104 of the *Criminal Code* are to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for one or more of the following purposes:

- protecting the public from a terrorist act;
- preventing the provision of support for or the facilitation of a terrorist act; or
- preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.⁴⁰

7.52 Among the restrictions that may be placed on an individual subject to a control order is that they may be restricted from being in specified areas or places; prohibited from leaving Australia; and required to remain at specified premises between specified times.⁴¹ An individual may be required to wear a tracking device.⁴²

7.53 In making an interim control order at the request of the Australian Federal Police (AFP), the issuing court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person ‘is reasonably necessary, and reasonably appropriate and adapted’ for the purpose of preventing terrorism.⁴³

7.54 The control order regime, along with preventative detention, was first introduced by the *Anti-Terrorism Act (No. 2) 2005* (Cth).

7.55 In 2012, then INSLM, Bret Walker SC recommended that the control order regime should be repealed.⁴⁴ The control order regime was also reviewed as part of the 2012–13 Council of Australian Governments (COAG) review of counter-terrorism legislation. The COAG report recommended that the control order regime should be retained with additional safeguards and protections.⁴⁵

37 See eg, Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) 68; Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44, 67, 106. See Gilbert and Tobin Centre of Public Law, *Submission* 22.

38 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012).

39 Law Council of Australia, *Submission* 140.

40 *Criminal Code* s 104.1.

41 *Ibid* s 104.5(a)–(c).

42 *Ibid* s 104.5(3)(d).

43 *Ibid* s 104.4(1)(d). See *Jabbour v Hicks* [2008] FMCA 178.

44 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 44.

45 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) x–xvi (Recommendations).

7.56 Following the expiration of a ten-year sunset period, the regime was extended for a further ten years by the *Foreign Fighters Act*. The Explanatory Memorandum for the legislation extending these regimes observed that the restriction of freedom of movement implicit in control orders must be ‘reasonable, necessary and proportionate’ to achieving the objective of protecting the Australian public.⁴⁶ It stated that these requirements ensure the ‘gravity of consequences likely to be occasioned by a terrorist act justifies a reasonable and proportionate limitation of free movement’.⁴⁷

7.57 Although expressing a justification in terms of a proportionality standard, and notwithstanding safeguards, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) concluded that the control order regime may not satisfy the requirement of being reasonable, necessary and proportionate in pursuit of its legitimate objective. It considered that, in the absence of further information regarding its necessity and proportionality, the control order regime was likely to be incompatible with human rights, including the right to freedom of movement.⁴⁸

7.58 The control order regime was subsequently amended by the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth) to, among other things, expand the objects of the control order regime to include preventing support for a terrorist act or hostile activity in a foreign country; reduce the documentation the AFP is required to provide when seeking the Attorney-General’s consent to apply for a control order; and streamline certain other requirements.⁴⁹

7.59 The Bill was examined by the Human Rights Committee, which observed that these amendments would ‘significantly expand the circumstances in which control orders could be sought against individuals, and significantly alter the purpose of control orders’. As a result, ‘control orders are likely to be used more widely and, as such, circumvent ordinary criminal proceedings’.⁵⁰

7.60 The Human Rights Committee stated that, by extending the grounds for control orders to acts that ‘support’ or ‘facilitate’ terrorism, the Bill would allow an order to be sought in circumstances where there is not necessarily an imminent threat to personal safety—a critical rationale relied on by the government for the need to use control orders rather than ordinary criminal processes. Accordingly, the Committee concluded

46 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [156].

47 Ibid.

48 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.74]–[1.75]. The concerns expressed did not meet with a response from the Attorney-General and the control order provisions were enacted without significant change: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) [1.28]–[1.29].

49 See Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) [30].

50 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) [1.35].

that the amendments to control orders impose limits on human rights, including freedom of movement, that are neither necessary nor reasonable.⁵¹

7.61 Further, under the amendments, when requesting the court make an interim control order, a senior AFP member would no longer be required to provide the court with an explanation of ‘each’ obligation, prohibition and restriction sought to be imposed. Rather, the AFP member would only be required to provide an explanation as to why the obligations, prohibitions or restrictions generally should be imposed and, to the extent known, a statement of facts as to why the obligations, prohibitions or restrictions—as a whole rather than individually—should not be imposed.⁵² The Human Rights Committee stated that it therefore considered that these amendments would result in ‘control orders not being proportionate because they are not appropriately targeted to the specific obligation, prohibition or restriction imposed on a person’:

As a control order is imposed in the absence of a criminal conviction, it is critical that the individual measures comprising the control order are demonstrated in each individual instance to be proportionate. As a result, the committee considers that these amendments are not proportionate to the stated legitimate objective.⁵³

7.62 The Human Rights Committee sought the Attorney-General’s further advice on how the limits the legislation imposes on human rights are reasonable, necessary or proportionate to achieve the legitimate aim of responding to threats of terrorism.⁵⁴

7.63 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) also raised concerns about the extension of the control order regime, in relation to their potential to trespass on personal rights and liberties.⁵⁵ In response, the Attorney-General observed, among other things, that:

Despite having been in operation for almost nine years, only two control orders have been requested or made to date. This demonstrates both the extraordinary nature of the regime and the approach of Australia’s police service to utilise traditional law enforcement tools where appropriate, relying on control orders only when absolutely necessary.⁵⁶

7.64 The control order regime was continued by the *Foreign Fighters Act*, without significant amendment, on 12 December 2014.

7.65 In 2015, the INSLM sought public submissions, by 18 September 2015, for an inquiry concerning the adequacy of the safeguards relating to the control order regime. The INSLM Inquiry will examine whether additional safeguards recommended by the COAG review of counter-terrorism legislation⁵⁷ are desirable, with particular

51 Ibid [1.36].

52 Ibid [1.37].

53 Ibid [1.38].

54 Ibid [1.39].

55 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 797.

56 Ibid 799.

57 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013).

consideration of the advisability of introducing a system of ‘special advocates’ into the regime.⁵⁸

7.66 A number of stakeholders to this ALRC Inquiry submitted that the control order regime constituted an unjustified interference with freedom of movement.⁵⁹ The Law Council referred to its concerns, expressed previously in submissions to parliamentary, UN and other bodies, that control orders and preventative detention orders ‘allow restriction of freedom of movement based on suspicion rather than charge’.⁶⁰

7.67 The Human Rights Law Centre raised the particular concern that control orders can be made even in circumstances where a person has not been charged and may never be tried and ‘irrespective of a person’s ongoing dangerousness’. The Centre submitted that the Australian Government should repeal the control order regime or substantially amend it to ensure it does not disproportionately limit rights.⁶¹

7.68 The Gilbert and Tobin Centre for Public Law submitted that control orders clearly infringe the rights to freedoms of movement and association, and undermine the idea that individuals should not be subject to severe constraints on their liberty without a finding of criminal guilt by a court. The Centre stated that if control orders are to be retained, they should be ‘substantially amended to require prior conviction for a terrorism offence and some finding as to the ongoing dangerousness of the person’.⁶²

7.69 The UNSW Law Society highlighted that, unlike in the UK, there is no express requirement for less restrictive alternatives to be considered before a control order is issued—including the viability of a criminal prosecution.⁶³

Criminal Code—preventative detention orders

7.70 The objects of div 105 of the *Criminal Code* are to allow a person to be taken into custody and detained for a short period of time in order to:

- prevent an imminent terrorist act occurring; or
- preserve evidence of, or relating to, a recent terrorist act.⁶⁴

7.71 The preventative detention orders regime was also extended by the *Foreign Fighters Act*.

58 Department of the Prime Minister and Cabinet, *Independent National Security Legislation Monitor* <<http://www.dpmpc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>>.

59 Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

60 Law Council of Australia, *Submission 75*.

61 Human Rights Law Centre, *Submission 39*.

62 Gilbert and Tobin Centre of Public Law, *Submission 22*. The Centre stated: ‘Given their extraordinary nature, control orders should only be available for the purpose of protecting the community from direct harm, and not for the purpose of preventing support or facilitation of terrorism as ends in themselves’.

63 UNSW Law Society, *Submission 19*.

64 *Criminal Code* s 105.1.

7.72 The Explanatory Memorandum addressed issues of proportionality, and stated that the preventative detention order regime provides sufficient protection against unreasonable and disproportionate limitations of an individual's right to freedom of movement. It stated:

This is evidenced by the high threshold required to be satisfied when applying for and issuing a [preventative detention order]. The application for a [preventative detention order] requires that an AFP member must be satisfied on reasonable grounds that the suspect will engage in a terrorist act, possess a thing related to or done an act in preparation for or planning a terrorist act ... Even if this is satisfied, an AFP member must still demonstrate that the [preventative detention order] will substantially assist in preventing a terrorist act occurring and demonstrate that detention is reasonably necessary for the purpose of preventing a terrorist act.⁶⁵

7.73 These limitations on the instances under which a preventative detention order may be sought were said to demonstrate that an order can be applied only when reasonable, necessary and proportionate.⁶⁶

7.74 The Human Rights Committee observed that the preventative detention regime 'involves very significant limitations on human rights', including freedom of movement.

Notably, it allows the imposition of a [preventative detention order] on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilt beyond a reasonable doubt. Effectively, [preventative detention orders] permit a person's detention by the executive without charge or arrest.⁶⁷

7.75 The Human Rights Committee concluded that, in the absence of further information, the preventative detention order regime was likely to be incompatible with human rights, including the right to freedom of movement.⁶⁸

7.76 The Scrutiny of Bills Committee also raised concerns about the extension of the preventative detention order regime, in relation to its potential to trespass on personal rights and liberties.⁶⁹ In response, the Attorney-General similarly observed that only one preventative detention order has been made to date, demonstrating the approach of Australia's police service to utilise the other law enforcement tools available to them, relying on preventative detention only when absolutely necessary.⁷⁰

7.77 The preventative detention order regime was continued by the *Foreign Fighters Act* without significant amendment.

65 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [194].

66 Ibid.

67 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.100].

68 Ibid [1.104].

69 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 776.

70 Ibid 777.

Offence of entering or remaining in a 'declared area'

7.78 The *Foreign Fighters Act* also amended the *Criminal Code* to criminalise entering or remaining in declared areas in foreign countries, thus engaging freedom of movement.⁷¹ As at 1 November 2015, these declared areas were Al-Raqqa Province, Syria and Mosul District, Ninewa Province, Iraq.⁷² The Attorney-General's Department has issued a protocol that provides guidance on the process for the declaration of areas for the purposes of s 119.2 of the *Criminal Code*.⁷³

7.79 The declared areas restriction was justified in the Explanatory Memorandum on the basis that it achieves the legitimate objective of deterring Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so:

People who enter, or remain in a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes may engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be used to facilitate terrorist or other acts in Australia. The radicalisation of these individuals abroad may enhance their ability to spread extremist messages to the Australian community which thereby increases the likelihood of terrorist acts being undertaken on Australian soil.⁷⁴

7.80 The Explanatory Memorandum cited several factors indicating that the restriction achieves 'an appropriate balance between securing Australia's national security and preserving an individual's civil liberties'.⁷⁵

7.81 These factors included that a legitimate purpose defence is provided—the breadth of which is intended to ensure that legitimate travel is not unduly restricted by the new offence—and the existence of safeguards to ensure that the declaration process and prosecution processes are rigorous. On this basis, it was claimed that the 'impact of the new declared area offence on the right to freedom of movement is reasonable, necessary and proportionate in order to achieve the legitimate objective of protecting Australia and its national security interests'.⁷⁶

7.82 The Human Rights Committee, in its examination of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill), considered the new 'declared area' offence provision. The Committee observed that there are significant numbers of Australians with connections to countries that may be

71 *Criminal Code* s 119.2.

72 *Ibid*; *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2014—Al-Raqqa Province, Syria* (Cth); *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq* (Cth).

73 Attorney-General's Department (Cth), 'Protocol for Declaring an Area in a Foreign Country Where a Listed Terrorist Organisation Is Engaging in a Hostile Activity under the Criminal Code Act 1995'.

74 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [234].

75 *Ibid*.

76 *Ibid* [237].

subject to a declaration, and many of these individuals could have legitimate and innocent reasons to travel and could be affected by the new offence.⁷⁷

7.83 It stated that, as a result, there is ‘not a necessary or strong link between travel to a certain area and proof of intent to engage in terrorist activity’. Further, it was not a defence to visit friends, transact business, retrieve personal property, attend to personal or financial affairs or to undertake a religious pilgrimage and, therefore, there were ‘a number of significant, innocent reasons why a person might enter or remain in a declared zone, but that would not bring a person within the scope of the sole legitimate purpose defence’.⁷⁸ The Human Rights Committee expressed concern that the offence provision ‘will operate in practice to deter and prevent Australians from travelling abroad for legitimate purposes due to fear that they may be prosecuted for an offence’. The Committee considered that the offence ‘unnecessarily restricts freedom of movement, and is therefore likely to be impermissible as a matter of international human rights’.⁷⁹

7.84 The Scrutiny of Bills Committee also examined the declared area offence. The Committee expressed concern about its scope and observed that, to the extent that it may apply despite any intentional wrongdoing, it may be considered to unduly trespass on personal rights and liberties.

In particular, it is not necessary for the person to specifically know that an area has been declared under section 119.3. Moreover, there is no requirement that the person intend to commit any particular crime or undertake any specific action when in the territory ...⁸⁰

7.85 The Scrutiny of Bills Committee observed that, notwithstanding the power to prescribe further legitimate purposes,⁸¹ the absence of some purposes on the list, such as business travel, would limit personal freedom of movement until such time as it is included in the regulations. Persons might also be prosecuted for travel which is ‘legitimate’ until such time as it has been included on the list—even where they have no intent to commit a wrongful act and are not aware that an area is a declared area.⁸²

7.86 The Scrutiny of Bills Committee expressed concern that the declared area offence might unduly trespass on personal rights and liberties, and sought advice from the Attorney-General as to ‘why it is not possible to draft the offence in a way that more directly targets culpable and intentional actions’.⁸³

77 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, 14th Report of the 44th Parliament (2014) [1.197].

78 Ibid [1.199].

79 Ibid [1.203].

80 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia *Report Relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) 57.

81 *Criminal Code* s 119.3(h).

82 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia *Report Relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) 58.

83 Ibid.

7.87 The concerns of the Human Rights and Scrutiny of Bills Committees did not result in significant changes being made to the proposed declared area offence.

7.88 Stakeholders in this ALRC Inquiry identified the declared area offence as unjustifiably interfering with freedom of movement.⁸⁴

7.89 Australian Lawyers for Human Rights, for example, highlighted that there is a ‘very limited list of permitted defences to what is effectively a blanket prohibition’. Further, it is ‘perfectly possible that an Australian could be in a declared area with no knowledge that it has been made illegal for Australians to be there and with no guilty intent’. A related concern was that the ‘humanitarian aid exception’ only applies where providing humanitarian aid (or another listed reason) is the sole reason for being in a declared area.⁸⁵

7.90 Similar concerns were expressed by the Gilbert and Tobin Centre for Public Law. The Centre stated that the declared area offence is unjustified because it criminalises a range of legitimate behaviours that are not sufficiently connected to the threat of foreign fighters:

This is clear for two reasons. First, the list of specified defences does not include a range of other legitimate reasons why somebody might travel to a foreign country in a state of conflict ... Second, the offence may prevent individuals from travelling not only to Syria and Iraq, but also areas of other countries where terrorist organisations operate and which might plausibly be designated as declared areas (such as in Israel and Indonesia).⁸⁶

7.91 The Human Rights Law Centre stated that the declared area offence is ‘extraordinary’ because it substantially interferes with a person’s freedom of movement, and ‘because the operation of the provisions will effectively, although not technically, reverse the onus of proof’.⁸⁷ That is, the offence

may require a defendant to prove a negative—that they did not travel to the declared area for a purpose or purposes other than the sole legitimate purpose on which they wish to rely. This limits the presumption of innocence and unjustifiably reverses the burden of proof in substance if not in form.⁸⁸

Other criminal laws

7.92 Many other Commonwealth criminal laws can be considered to interfere with freedom of movement, including those that allow for arrest, refusal of bail and for the imprisonment of offenders. Traditional powers of arrest, and the jurisdiction of courts over bail and the sentencing of offenders are arguably matters that limit the scope of common law or traditional understandings of freedom of association, rather than interfering with the freedom.

84 Law Council of Australia, *Submission 75*; Australian Lawyers for Human Rights, *Submission 43*; Human Rights Law Centre, *Submission 39*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

85 Australian Lawyers for Human Rights, *Submission 43*.

86 Gilbert and Tobin Centre of Public Law, *Submission 22*.

87 Human Rights Law Centre, *Submission 39*.

88 Ibid.

7.93 Some Commonwealth laws concerning police powers have been criticised, including police search and seizure powers in relation to terrorist acts and terrorism offences contained in the *Crimes Act 1914* (Cth).⁸⁹

7.94 These provisions empower the Attorney-General to prescribe a security zone where anyone in the zone can be subject to police stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. The Law Council submitted:

Detention for searching based only on an individual's presence in a particular geographical location is an encroachment on freedom of movement. The broad nature and significant scope of this power brings into question its proportionality, particularly as, once a security zone is prescribed, there are few restrictions on the exercise of the power.⁹⁰

7.95 The Law Council also raised questions about provisions of the *Crimes Act* that prescribe periods for which a person may be detained without charge, on arrest for a terrorism offence.⁹¹ These provisions allow for up to seven days to be excluded from the calculation of the investigation period in terrorism cases. The Law Council submitted:

This is considerably longer than the period of pre-charge detention permitted under the *Crimes Act* in non-terrorism cases. While national security is a balancing factor, detention for lengthy periods without charge brings into question whether the encroachment is proportionate or justified.⁹²

ASIO questioning and detention warrants

7.96 The *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) allows for the issuing of a questioning and detention warrant where there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.⁹³

7.97 In 2012, the INSLM recommended that these provisions of the *ASIO Act* should be repealed as an unjustifiable 'intrusion on personal liberty'.⁹⁴ He stated that agencies and departments had been asked to give evidence demonstrating why questioning and detention warrants were necessary and that

[n]o scenario, hypothetical or real, was shown that would require the use of a [questioning and detention warrant] where no other alternatives existed to achieve the same purpose. The power to arrest and question without charge for a broad range of preparatory and inchoate offences, the power to order the surrender of passports and prohibit a person from leaving Australia and the existing powers of detention or

89 *Crimes Act 1914* (Cth) pt 1AA, div 3A.

90 Law Council of Australia, *Submission 75*.

91 *Crimes Act 1914* (Cth) ss 23DB–23DF.

92 Law Council of Australia, *Submission 75*.

93 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34F–34H.

94 Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 106.

forcibly compelled immediate attendance under [questioning warrants] all provide less restrictive alternatives to [questioning and detention warrants].⁹⁵

7.98 The *Foreign Fighters Act* ensured the continuation of div 3 of the *ASIO Act*, which contains ASIO's special powers relating to terrorism offences and, in particular, the issuing of ASIO questioning and detention warrants.

7.99 An ASIO questioning and detention warrant authorises a person to be taken into custody immediately by a police officer and to be brought before a prescribed authority immediately for questioning under the warrant for a period of time described in s 34G(4).

7.100 The Explanatory Memorandum observed that these warrants infringe an individual's right to freedom of movement by requiring their presence before a prescribed authority. However, 'this is permissible on the basis it achieves the legitimate objective of protecting Australia's national security interests'; and because the warrants are only available where there are reasonable grounds for believing that the warrant will 'substantially assist' in the collection of 'intelligence that is important in relation to a terrorism offence'.⁹⁶

7.101 The Human Rights Committee examined these provisions and other special powers of ASIO covered by the Foreign Fighters Bill. The Human Rights Committee concluded that, in the absence of further information, the ASIO special powers regime was likely to be incompatible with human rights, including the right to freedom of movement.⁹⁷

7.102 The Gilbert and Tobin Centre submitted to this ALRC Inquiry that the power for ASIO to detain individuals for questioning 'clearly infringes the right to freedom of movement and the idea that individuals should not be held in custody without at least a reasonable suspicion of involvement in criminal activity'. This infringement is unjustified 'not only on principled grounds, but also because the provisions appear to have little practical benefit in preventing terrorism'.⁹⁸

Customs and border protection

7.103 Under the *Customs Act 1901* (Cth), Australian Border Force (ABF) officers have extensive powers of detention.⁹⁹ For example, under s 219ZJB, an ABF officer has power to detain persons suspected of committing a serious Commonwealth offence or a prescribed state or territory offence. These powers generally only apply to persons in a

95 Ibid 105–6.

96 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [78].

97 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.49].

98 Gilbert and Tobin Centre of Public Law, *Submission 22*. See Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 105. See also Human Rights Law Centre, *Submission 39*.

99 *Customs Act 1901* (Cth) pt XII div 1.

‘designated place’—for example, certain ports, airports and wharves¹⁰⁰ and where there are reasonable grounds to suspect the commission of an offence.

7.104 The *Migration Act* also contains powers of detention. For example, under s 189, an officer must detain a person that an officer knows or reasonably suspects is an unlawful non-citizen.¹⁰¹

Customs Act detention powers

7.105 The *Foreign Fighters Act* amended the detention power in s 219ZJB of the *Customs Act 1901* (Cth). Broadly, the amendments extended the definition of ‘serious Commonwealth offence’; expanded the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence; expanded the required timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from 45 minutes to 4 hours; and introduced a new section with a new set of circumstances in which a person may be detained in a designated area because of concerns about national security or security of a foreign country.¹⁰²

7.106 The Explanatory Memorandum stated that these restrictions on freedom of movement are permissible on the basis that ‘the primary reason underlying the expanded detention powers is to target individuals thought to be threats to Australia’s national security leaving the country’:

The detention powers of Customs are not indefinite and are subject to significant safeguards including the right in all but the most extreme situations to notify a family member or others of their detention ... and the requirement that if the officer detaining the individual ceases to be satisfied of certain matters, they must release the person from custody ... accordingly, the restriction on the freedom of movement is reasonable, necessary and proportionate to achieving the legitimate objective of securing Australia’s national security.¹⁰³

7.107 The Human Rights Committee observed that the statement of compatibility provided ‘no discussion of why the current powers are regarded as not sufficient in respect of the range of Commonwealth offences in relation to which they may be exercised, the range of circumstances to which they may be applied and the length of time for which a person may be detained’. In the absence of a ‘sufficiently well-defined objective’, analysis of whether the provisions might be regarded as reasonable and proportionate was not possible.¹⁰⁴

100 Ibid ss 4, 15.

101 An ‘officer’ includes ABF officers, protective services officers, members of the AFP or other police force, and others authorised by the Minister: *Migration Act 1958* (Cth) s 5. See also, in relation to persons on detained vessels or aircraft: *Maritime Powers Act 2013* (Cth) s 72.

102 *Customs Act 1901* (Cth) s 219ZJCA.

103 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [288].

104 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.316]–[1.317].

7.108 The Scrutiny of Bills Committee also examined this provision, commenting that it was not clear precisely how increasing the scope of ‘serious Commonwealth offence’ for the purposes of triggering the exercise of detention powers under s 219ZJB is a necessary response to the problem of foreign fighters.¹⁰⁵

7.109 In response, the Attorney-General stated that the provisions are part of the targeted response to the threat posed by foreign fighters.

The extension of the detention power, which is only a temporary power, is aimed at the Australian Customs and Border Protection Service facilitating other law enforcement agencies to exercise their powers to address national security threats. The current power may limit this facilitation across the full range of offences that are relevant to addressing national security threats. The new definition of ‘serious Commonwealth offence’ will, for example, allow officers of Customs to detain a person in respect of an offence under the *Australian Passports Act 2005* of using a passport that was not issued to the person.¹⁰⁶

Quarantine

7.110 Quarantine has ancient origins, in times when the only means of containing epidemics such as the plague was by confinement of infected persons, and quarantining is considered to be part of the traditional police power of the state.

7.111 The Commonwealth has extensive powers to detain Australian citizens and non-citizens under the *Quarantine Act 1908* (Cth).¹⁰⁷ For example, under s 18 of the Act, every person who is on board a vessel or aircraft arriving in Australia from a place outside Australia is subject to quarantine. Such a person potentially may be detained, placed in exclusion or under observation for the purposes of preventing or controlling diseases or pests that could cause ‘significant damage to human beings, animals, plants, other aspects of the environment or economic activities’.¹⁰⁸

Environmental regulation

7.112 The operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) can result in restrictions being placed on freedom of movement. The Act provides for the making of management arrangements (management plans, regimes and policies) for environmentally significant areas, such as World Heritage properties.

7.113 These arrangements may include restrictions on freedom of movement, for example, to protect endangered plants or animals. Regulations may be made to regulate or prohibit access to conservation zones.¹⁰⁹

105 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 816–17.

106 *Ibid* 817.

107 See *Quarantine Act 1908* (Cth) pt IV. See the quarantine power in the *Australian Constitution* s 51(ix).

108 *Quarantine Act 1908* (Cth) s 4.

109 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 390E.

7.114 Under the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), the Director of National Parks may restrict entry to areas of Commonwealth reserves on a temporary or permanent basis.¹¹⁰ For example, in the Uluru-Kata Tjuta National Park there are sites where visitors are generally not allowed to go, including the domes of Kata Tjuta, sacred sites around Uluru and the Mutitjulu Community.¹¹¹

7.115 Under the *Great Barrier Marine Park Act 1975* (Cth), the Minister may make a direction prohibiting a certain person from entering and using the Marine Park; or imposing conditions on the person's entry to and use of the Marine Park.¹¹² Breach of such directions is an offence.¹¹³

7.116 Where a national park is state property, regulation of public access will not interfere with common law freedom of movement. If the area is *res communes* (property to which all persons have access), regulation may amount to a restriction of common law freedom of movement.

Citizenship and passport laws

7.117 A citizen's freedom of movement may be interfered with following revocation of citizenship under the *Australian Citizenship Act 2007* (Cth), if the person does not retain permanent residency status.

7.118 Australian citizenship can be revoked if citizenship was granted as a result of false statements or fraud, or a person was convicted of a serious criminal offence before becoming a citizen, and the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.¹¹⁴

7.119 However, revocation of citizenship by conferral, on the basis of a criminal conviction, may not occur if the person would be rendered stateless.¹¹⁵ An Australian citizen by birth cannot have their Australian citizenship revoked under these provisions.

7.120 Australian citizenship, including of a citizen by birth, may be revoked if the person is a national or citizen of a foreign country; and serves in the armed forces of a country at war with Australia.¹¹⁶

7.121 Following passage of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (*Allegiance to Australia Act*), the *Australian Citizenship Act* allows Australian citizenship to cease for dual nationals engaged in or supporting terrorist activities.

110 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 12.23.

111 Uluru-Kata Tjuta National Park Board of Management, *Uluru-Kata Tjuta National Park Management Plan 2010-2020* (2010) 85.

112 *Great Barrier Reef Marine Park Act 1975* (Cth) s 61AEA. This applies where the person has been convicted of repeated offences against the Act, or repeatedly subject to penalties under the Act.

113 *Ibid* s 61AEB.

114 *Australian Citizenship Act 2007* (Cth) s 34(1), (2).

115 *Ibid* s 34(3).

116 *Ibid* s 35.

7.122 The amending Act introduced three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen. These are as follows:

- The person, aged 14 years or older, renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct, where the conduct was engaged in outside Australia or the person left Australia before being charged and brought to trial for the conduct.
- The person, aged 14 years or older, ceases to be an Australian citizen if the person fights for, or is in the service of, a declared terrorist organisation. The Minister may, by legislative instrument, declare a terrorist organisation. This legislative instrument is subject to strict oversight.
- The Minister may determine in writing that a person ceases to be an Australian citizen because the person has been convicted of a specified terrorist-related offence with at least six years of imprisonment (or to periods of imprisonment that total at least six years).¹¹⁷

7.123 A number of stakeholders expressed concerns about the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), as first introduced.¹¹⁸ The ANU Migration Law Program observed that removing citizenship from a person, by definition, ‘removes their freedom to leave and return to their own country’ and is a form of ‘banishment’ that may be unjustified.¹¹⁹

7.124 The Bill was the subject of inquiry by the Intelligence Committee, which recommended 27 changes.¹²⁰ The recommended changes were all implemented¹²¹ including, for example, to provide that the Minister may consider exemptions in each case where conduct has led to automatic loss of citizenship; and the loss of citizenship following conviction occurs by discretionary decision of the Minister, rather than automatically. The legislation is subject to review by the INSLM and the Intelligence Committee.¹²²

117 Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth). See *Australian Citizenship Act 2007* (Cth) ss 33AA, 35, 35AA, 35A, 35B.

118 Law Council of Australia, *Submission 140*; Legal Aid NSW, *Submission 137*; ANU Migration Law Program, *Submission 107*; Australian Lawyers for Human Rights, *Submission 106*.

119 ANU Migration Law Program, *Submission 107*. The Program noted that the measure also has an impact on individuals’ freedom of association and, in particular, on their right to remain united with family. See also Law Council of Australia, *Submission 140*.

120 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

121 Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).

122 *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) sch 2.

Passports

7.125 Under the *Australian Passports Act 2005* (Cth) an Australian passport may be refused, suspended or cancelled, interfering with a citizen's ability to leave or re-enter Australia, or other countries.

7.126 A passport or other travel document may be refused for a range of reasons set out in div 2 of the *Australian Passports Act*. A 'competent authority' may, for example, request that the Minister cancel or refuse to issue a passport to a person who is the subject of a domestic or foreign arrest warrant for serious crimes or where the person will likely engage in harmful conduct in Australia or overseas if they were allowed to travel.¹²³

7.127 A passport or other travel document may also be cancelled by the Minister for a range of prescribed reasons.¹²⁴ These include where the person has lost their Australian citizenship or a competent authority makes a request that the issue of a passport be refused or a passport be cancelled.

7.128 'Competent authorities' may make cancellation requests for reasons relating to Australian law enforcement matters, international law enforcement cooperation, potential for harmful conduct, repeated loss or thefts, the provision of financial assistance to travellers, and concurrently valid or suspended Australian travel documents.¹²⁵

7.129 These authorities include Australian federal, state and territory police; Australian courts and parole boards; bankruptcy (public) trustees; the Australian Securities and Investments Commission; ASIO; specified officers of the Attorney-General's Department; the Australian Customs and Border Protection Service; and the Australian Crime Commission.¹²⁶ For example, passports may be cancelled as a result of recommendations made by ASIO following adverse security assessments under pt IV of the *ASIO Act*.¹²⁷

7.130 The Law Council observed that some grounds to refuse, suspend or cancel a passport are 'straightforward', for example, 'where there is an order of the Family Court or a tax debt or other obligation, and the underlying facts are usually reviewable'. However, matters arising in decisions on national security grounds were said to be more problematic because, in practice, 'such decisions are unchallengeable due to non-disclosure directions given by the Executive, which prevent the affected party from knowing of or addressing the information relied on'.¹²⁸

123 *Australian Passports Act 2005* (Cth) ss 11–14.

124 *Ibid* s 22.

125 *Ibid* ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.

126 *Australian Passports Act 2005* (Cth) ss 12–14, 16; *Australian Passports Determination 2005* (Cth) pt 3.

127 *Australian Passports Act 2005* (Cth) ss 14(1), 48A.

128 Law Council of Australia, *Submission 140*. The Law Council referred to *Hussain v Minister for Foreign Affairs*, as an example. *Hussain* involved an appeal from a decision of the Administrative Appeals Tribunal (AAT) affirming decisions to cancel an Australian passport and issue an adverse security assessment under the *ASIO Act*. The applicants were unsuccessful in arguing that the AAT erred in law in preventing their legal representatives from having access to all of the evidence and submissions made by the respondents: *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241.

7.131 The Law Council submitted that, in such cases, the Minister's power 'can be exercised on the basis of undisclosed material and in the knowledge that judicial review is hampered', resulting in a 'very significant restriction on the right of movement, with very limited scope to test its proportionality to the purported threat'.¹²⁹

7.132 The *Foreign Fighters Act* amended the *Australian Passports Act 2005* (Cth) to enable the Minister for Foreign Affairs to suspend a person's Australian travel documents for a period of 14 days if requested by ASIO.¹³⁰

7.133 These amendments enable ASIO to make a request that the Minister for Foreign Affairs suspend, for a period of 14 days, all Australian travel documents issued to a person if it suspects on reasonable grounds both that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country, and that all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.¹³¹

7.134 The Explanatory Memorandum noted that the new suspension mechanism will temporarily restrict a person's right to liberty of movement if that person seeks to travel while their Australian travel documents are suspended but that, consistent with art 12.3 of the ICCPR, the restriction will be provided by law and is necessary for the protection of Australia's national security.¹³²

7.135 The introduction of the new suspension mechanism was considered 'reasonable and necessary to achieve the national security objective of taking proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas who may be planning to engage in activities of security concern'.¹³³

7.136 The Human Rights Committee expressed concern that the 'asserted necessity of a power to suspend passports for longer than seven days'—the period proposed by the INSLM—was not supported by empirical evidence.¹³⁴ The Human Rights Committee also noted, in relation to proportionality, that the measures excluded both administrative review of a decision to suspend a passport and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth); and would provide, in certain circumstances, that a person did not have to be notified of a decision not to issue or to cancel a passport on the grounds of national security.¹³⁵

129 Law Council of Australia, *Submission 140*.

130 *Australian Passports Act 2005* (Cth) s 22A. The *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) contains similar provisions under which the Minister for Foreign Affairs may order the surrender of a person's foreign travel documents if requested by ASIO: *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) ss 15A, 16A.

131 *Australian Passports Act 2005* (Cth) s 22A.

132 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [49].

133 *Ibid* [50].

134 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.244].

135 *Ibid* [1.245].

7.137 In light of these factors, the Human Rights Committee considered that the statement of compatibility in the Explanatory Memorandum had not established that the measure could be regarded as proportionate and sought further advice from the Attorney-General on whether the measure was compatible with the right to freedom of movement, and particularly whether the limitation was reasonable and proportionate.¹³⁶

7.138 The Scrutiny of Bills Committee also commented on these provisions of the Foreign Fighters Bill. It drew attention to the ‘significant difference between the INSLM’s proposal of rolling 48 hour suspensions (up to a maximum of seven days), with the 14-day suspension period as proposed in the bill’ and sought further advice from the Attorney-General.¹³⁷

7.139 The Attorney-General asserted, in response, that the INSLM’s proposed timeframe of up to seven days ‘would not allow ASIO sufficient time to assess whether to make a cancellation request and would not allow the Minister for Foreign Affairs appropriate time to consider whether to cancel a person’s travel documents’.¹³⁸ The Scrutiny of Bills Committee resolved to leave the question of whether the proposed approach is appropriate to the Senate as a whole.¹³⁹

7.140 The Law Council, in a submission to this ALRC Inquiry, queried whether s 22A contains ‘sufficient safeguards to ensure proportionality’. The Law Council noted that there is no legislative safeguard preventing multiple suspensions of a travel document. As long as there is new information that was not before ASIO at the time of the suspension request and during the period of the suspension, ‘multiple requests of suspension are conceivable’.¹⁴⁰ Finally, the absence of a notification obligation where passports are refused or cancelled for security or law enforcement reasons might affect whether the measures can be interpreted as proportionate under the ICCPR.¹⁴¹

7.141 The Law Council submitted:

In an age where a passport is indispensable to international movement, such a ‘discretionary power’ is at odds with that part of freedom of movement which seeks to guarantee that ‘everyone shall be free to leave any country, including his own’.¹⁴²

Passports and bankruptcy

7.142 The *Bankruptcy Act 1966* (Cth) provides that a bankrupt must, unless excused by a trustee in bankruptcy, give his or her passport to the trustee.¹⁴³ This provision

136 Ibid [1.246]–[1.247].

137 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (2014) 749.

138 Ibid 750.

139 Ibid.

140 Law Council of Australia, *Submission 75*.

141 Ibid. Referring to *Criminal Code* s 48A. See also UNSW Law Society, *Submission 19*.

142 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12.2.

143 *Bankruptcy Act 1966* (Cth) s 77. In practice, not every trustee collects passports: Christopher Symes, ‘Bankrupts and Passports: A Call to Repeal Sections 77(1)(a)(ii) and 272(1)(c) of the Bankruptcy Act’ (2014) 14 *QUT Law Review* 98, 99.

appeared in the Act as originally enacted—pre-dating modern parliamentary committee scrutiny processes.

7.143 Associate Professor Christopher Symes submitted that this restriction on freedom of movement should be reviewed, in view of the increased frequency of travel, ease of international communication, and the fact that no similar requirement is placed on directors of insolvent corporations.¹⁴⁴

7.144 The primary purpose of the *Bankruptcy Act* is to provide a mechanism whereby a debtor's property can be taken and used to pay creditors, and to allow the debtor to be freed from the burden of accumulated debts. However, the scheme is 'not intended to be punitive', although there 'must necessarily be punitive aspects to the legislation in order to provide appropriate incentives for bankrupts to comply with their obligations under the Act'.¹⁴⁵

7.145 For some bankrupts, the forfeiture of a passport and the requirement to seek a trustee's consent for international travel is a significant restriction on freedom of movement. The provision may not be proportionate, if it is not the least intrusive means of achieving the efficient administration of the bankruptcy.¹⁴⁶ Repeal of these provisions has been suggested because:

- where a bankrupt does not return from overseas, the bankrupt is liable to face extradition proceedings—and Australian courts and trustees may use existing cross-border laws to return the bankrupt to Australia;
- forfeiture of passports is unusual in other similar jurisdictions—the UK, US, Canada, New Zealand, South Africa, Malaysia, Singapore and India do not possess a legislative equivalent; and
- under the *Corporations Act 2001* (Cth), liquidators have the power to apply for court orders to prevent officers from absconding from Australia,¹⁴⁷ rather than legislative forfeiture of passports.¹⁴⁸

7.146 There is good reason to review s 77 of the *Bankruptcy Act*. This requirement may not be a proportionate response to concerns about bankrupt individuals absconding. Arguably, restrictions on freedom of movement should be imposed subject to precise criteria, and judicial oversight, rather than through automatic forfeiture of a bankrupt's passport. A possible mechanism would be to provide trustees with a power to apply for court orders similar to those available to liquidators.

Child support

7.147 Under the *Child Support (Registration and Collection) Act 1988* (Cth) (*Child Support Act*) the Child Support Registrar may make a 'departure prohibition order'

144 C Symes, *Submission 40*. See Symes, above n 143.

145 *Nguyen v Pattison* [2004] FMCA 517 (20 August 2004) [22].

146 Symes, above n 143, 108–9.

147 *Corporations Act 2001* (Cth) ss 486A, 486B.

148 Symes, above n 143, 109–10.

prohibiting a person from departing from Australia for a foreign country if, among other things, the person has a child support liability and the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged.¹⁴⁹

7.148 The justifications for the making of ‘departure prohibition orders’ under the *Child Support Act*¹⁵⁰ were discussed in the Federal Magistrates Court of Australia in *Williams v Child Support Registrar*.¹⁵¹

7.149 In this case, the applicant, Williams, sought orders varying a decision to issue a departure prohibition order against him. The applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia. In dismissing the appeal, the Magistrate expressed the opinion that, even if the *Child Support Act* did burden freedom of movement, it was ‘nevertheless a law reasonably appropriate and adapted to serve the object intended’—being that children receive financial support that a parent is liable to provide and that that support is paid on a regular and timely basis.¹⁵²

7.150 Professor Patrick Parkinson highlighted problems with the application of this provision to parents who are visiting Australia, but live permanently overseas. These problems were said to arise particularly in situations where the alleged child support debt is seriously contested, or is associated with a conflict of laws.¹⁵³ Parkinson recommended legislative amendments to ensure that orders can only be issued against a person ‘who is domiciled in, or habitually resident in, or a taxpayer of Australia’.

7.151 This issue was considered by the House of Representatives Standing Committee on Social Policy and Legal Affairs. In its July 2015 report, the Committee recommended that the legislation be amended to ensure that departure prohibition orders are ‘only issued by a tribunal or court on the application of the Registrar and after providing an opportunity for the subject of the [departure prohibition order] to be heard’ and that whenever an order is being considered in relation to a person who resides outside of Australia, the tribunal, court or Registrar ‘must give special consideration to those circumstances’.¹⁵⁴

Laws restricting entry to specific areas

7.152 Many Commonwealth laws interfere with freedom of movement, broadly conceived, by providing that it is unlawful to ‘enter or remain’ in certain prescribed areas.

149 *Child Support (Registration and Collection) Act 1988* (Cth) s 72D. The Explanatory Memorandum to the Child Support Legislation Amendment Bill (No. 2) 2000 introducing s 72D did not refer to freedom of movement.

150 *Ibid.*

151 *Williams v Child Support Registrar* (2009) 109 ALD 343.

152 *Ibid* [35] (Lucev FM).

153 P Parkinson, *Submission 9*.

154 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *From Conflict to Cooperation: Inquiry into the Child Support Program* (2015) 138–9, rec 21.

7.153 Of course, common law freedom of movement does not extend to unfettered access to all public property. For example, in the case of the parliamentary precincts, the Parliament has power to regulate the conduct of its business and, therefore, control access. Defence areas may be state-owned property (as distinguished from public property) and, if so, the public would have no common law freedom to enter them without licence.

7.154 Laws restrict entry to specific areas in Australia, including in relation to Aboriginal land. For example, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) restricts entry to Aboriginal land generally, and sacred sites in particular.¹⁵⁵ Other laws that may restrict entry to specific areas in Australia include:

- *Defence Act 1903* (Cth) s 51R (designated areas);
- *Offshore Minerals Act 1994* (Cth) s 404 (declared safety zones);
- *Parliamentary Precincts Act 1988* (Cth) s 6 (the Parliamentary precincts);
- *Sea Installations Act 1987* (Cth) s 57 (safety zones); and
- *Space Activities Act 1998* (Cth) s 103 (accident sites).

Migration law

7.155 The object of the *Migration Act 1958* (Cth) is to ‘regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’.¹⁵⁶ To advance this object, the Act provides for visas, requires people entering Australia to do so legally, and provides for the removal and deportation of non-citizens whose presence in Australia is not permitted, and for the taking of unauthorised maritime arrivals from Australia to a regional processing country.¹⁵⁷

7.156 Clearly, the *Migration Act* constrains the movement of people into Australia and, in some cases, their detention on, or prior, to arrival in Australia. However, to the extent that it applies to non-citizens it does not appear to engage freedom of movement, as that right has been understood by the common law. 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 which could be enforced.¹⁵⁸

7.157 At common law, freedom of movement concerns the freedom of citizens to leave and return to their own country. Therefore, laws which infringe a non-citizen’s

155 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 70, 69.

156 *Migration Act 1958* (Cth) s 4(1).

157 *Ibid* s 4(2)–(4).

158 *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*. In the High Court, Keane J stated that it is ‘well-settled that the power of the Executive government under the common law to deny entry into Australia of a non-citizen ... including by compulsion, is an incident of Australia’s sovereign power as a nation’: *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, [479]. However, this assertion may be contested: see *Ibid* [142]–[143] (Hayne and Bell JJ).

freedom of movement by, for example, restricting or imposing conditions on entry into or departure from Australia; establishing visa conditions on non-citizens that might restrict their movement; or requiring permanent residents to leave Australia under immigration processes, are not generally considered to engage common law freedom of movement.

Conclusion

7.158 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of movement:

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