1. Introduction

Contents

Traditional rights, freedoms and privileges

1.1 The Australian Law Reform Commission has been asked to identify and critically examine Commonwealth laws that encroach upon 'traditional' or 'common law' rights, freedoms and privileges.[1]

1.2 What are traditional or common law rights, freedoms and privileges? The ALRC's Terms of Reference,[2] which set out and limit the scope of this Inquiry, state that laws that encroach upon traditional rights, freedoms and privileges should be understood to refer to laws that do the following:

- interfere with freedom of speech (Chapter 2);
- interfere with freedom of religion (Chapter 3);
- interfere with freedom of association (Chapter 4);
- interfere with freedom of movement (Chapter 5);
- interfere with vested property rights (Chapter 6);
- retrospectively change legal rights and obligations (Chapter 7);
- create offences with retrospective application (Chapter 7);

1 'Traditional' and 'common law' are both used in the Terms of Reference.

2 The Terms of Reference were given to the ALRC by Senator the Hon George Brandis QC, Attorney-General of Australia. They are set out in full at the front of this paper.

- alter criminal law practices based on the principle of a fair trial (Chapter 8);
- reverse or shift the burden of proof (Chapter 9);
- exclude the right to claim the privilege against self-incrimination (Chapter 10);
- abrogate client legal privilege (Chapter 11);
- apply strict or absolute liability to all physical elements of a criminal offence (Chapter 12);
- permit an appeal from an acquittal (Chapter 13);
- deny procedural fairness to persons affected by the exercise of public power (Chapter 14);
- inappropriately delegate legislative power to the executive (Chapter 15);
- authorise the commission of a tort (Chapter 16);
- disregard common law protection of personal reputation (Chapter 16);
- give executive immunities a wide application (Chapter 17);
- restrict access to the courts (Chapter 18); and
- interfere with any other similar legal right, freedom or privilege (Chapter 19).[3]

1.3 The last item suggests the list is not exhaustive and leaves open the question of what is a traditional right, freedom or privilege. What rights, freedoms and privileges may be 'similar' to those on this list?

1.4 The list in the ALRC's Terms of Reference appears to be drawn from similar lists of rights, freedoms, privileges and legal principles protected in Australian law by a principle of statutory construction known as the 'principle of legality'. Before looking at this principle in more detail, it is worth noting how rights, freedoms and privileges are created and protected in Australian law.

Rights and freedoms under the common law

1.5 The rights, freedoms and privileges listed in the Terms of Reference have a long heritage. Many have been recognised by courts in Australia, England and other common law countries for centuries. They predate many international conventions and declarations that now also protect these rights—such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* (ICCPR).

3 The order of the list has been changed to reflect a more thematic order used in this Issues Paper. Some matters on the list are considered together with other similar matters in the one chapter.

1.6 'The common law is a vibrant and rich source of human rights,' Professors George Williams and David Hume write in their book, *Human Rights under the Australian Constitution.*[4] The Hon Robert French, Chief Justice of the High Court of Australia, has said:

> 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. We do so against the backdrop of the supremacy of Parliament which can, by using clear words for which it can be held politically accountable, qualify or extinguish those rights and freedoms except to the extent that they may be protected by the *Constitution.*[5]

1.7 Although Australia does not have a bill of rights, other common law countries with strong traditions of civil and political rights have not had bills of rights until comparatively recently. The UK *Human Rights Act*, for example, was only enacted in 1998.

1.8 In his book *Human Rights and the End of Empire*, English legal historian A W Brian Simpson wrote about the widely held assumption that, before international conventions on human rights, human rights were in the UK 'so well protected as to be an example to the world'. In normal times, Brian 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, and had done so earlier in the eighteenth and nineteenth centuries, though most of the population could only participate very indirectly, if at all, in government.[6]

1.9 These freedoms were also widely respected in the modern period:

> 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 unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial.[7]

1.10 To the extent that Australian law has protected and fostered rights and freedoms,[8] it has long been statutes and judge-made law that have done so, rather than more broadly expressed bills of rights or international conventions on human rights. Whether the introduction of a bill of rights in Australia is desirable is widely debated, but it is not the subject of this Inquiry.

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4 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 33.

5 Robert French, 'The Common Law and the Protection of Human Rights' 2.

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

7 Ibid.

8 Traditions, culture and politics also play a role.

1.11 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':

> common 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.[9]

1.12 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'.[10]

1.13 Some of the rights and freedoms listed in the Terms of Reference are justiciable legal rights—they give rise to legal obligations and may be enforced in courts of law. In a 2010 speech *Protecting Human Rights Without a Bill of Rights*, Chief Justice French said:

> It is also important to recognise, as Professor Bailey pointed out in his recent book on human rights in Australia, 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.[11]

1.14 Other matters listed in the Terms of Reference, such as those that concern access to the courts and their remedies and court procedures, do not fall neatly into either of these categories.

1.15 It might also be noted that some of the matters listed in the Terms of Reference might more precisely be called legal principles, rather than a right, freedom or privilege. For example, that legislative power should not be inappropriately delegated to the executive does not seem to be a right, freedom or privilege, but rather a constitutional principle. Accordingly, the phrase 'rights, freedoms and privileges'—and sometimes simply 'rights'—is used in this paper as shorthand for all the principles set out in the Terms of Reference.

1.16 It should also be noted that not all rights are protected by positive laws. Many rights and freedoms are protected in Australia by virtue of the fact, and to the extent,

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9 JD Heydon, *Are Bills of Rights Necessary in Common Law Systems?* Lecture Delivered at Oxford Law School (23 January 2013).

10 Heydon then said: '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.

11 Robert French, *Protecting Human Rights Without a Bill of Rights*, John Marshall Law School, Chicago (26 January 2010).

that laws do not prohibit, or otherwise encroach on, the rights and freedoms. The High Court said in *Lange v ABC* (1997):

> 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'.[12]

1.17 Many social and economic rights are also recognised 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.

1.18 Each chapter of this Issues Paper will start with a brief explanation of the particular right, freedom or privilege. But the focus of this Inquiry is on Commonwealth laws that *encroach* on these traditional or common law rights, rather than on the source or extent of the rights themselves. Therefore, after a brief consideration of the history, source and rationale of the relevant right or freedom, each chapter will consider how the right or freedom is protected from statutory encroachment.

Protections from statutory encroachment

1.19 Subject to the *Constitution*, the Commonwealth Parliament—sovereign in Australia—generally has the power to make laws that encroach on common law rights, freedoms and privileges. Constraints on Parliament may be largely political, not legal.[13]

1.20 Some argue that legislative powers should be limited, for example by enshrining in the *Australian Constitution* a bill of rights. Others will argue that it is more democratic for elected parliaments to determine the right balance between competing rights and freedoms. Nevertheless, some legal protection from statutory encroachment is given to rights and freedoms by (1) the *Australian Constitution*, (2) the 'principle of legality', and (3) international law.

Australian Constitution

1.21 The *Australian Constitution* expressly protects a handful of rights and has been found to contain an implied right to political communication. The rights expressly protected by the *Constitution* are:

- the right to just terms if the Commonwealth compulsorily acquires property—s 51(xxxi);

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12 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, Mchugh, Gummow and Kirby JJ) quoting *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283.

13 'Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … The constraints upon its exercise by Parliament are ultimately political, not legal': *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

- 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.

1.22 Further, the High Court found that freedom of political communication was implied in the *Constitution*.[14] This limits the legislative power of the Commonwealth to make laws that interfere with political communication, but does not protect speech more broadly.

1.23 However, these are only a small number of rights and freedoms. The *Australian Constitution* does not expressly or impliedly protect most 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 suggests in her book, *To Constitute a Nation*, 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.[15]

The principle of legality

1.24 The principle of legality is a rule of statutory interpretation that gives some protection to certain traditional rights and freedoms.[16] James Spigelman has said that 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'.[17]

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14 *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.

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

16 However, 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 *Melb. U. L. Rev.* 372, 373. In this Issues Paper, 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*.

17 Spigelman, above n 16, 9.

1.25 There are a few formulations of the principle of legality, with relatively minor variations. In *Re Bolton; Ex parte Beane* (1987), Brennan J set out the principle in these terms:

> 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.[18]

1.26 In *Attorney-General (SA) v Corporation of the City of Adelaide*, Heydon J said:

> The 'principle of legality' holds that in the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. For that principle there are many authorities, ancient and modern, Australian and non-Australian.[19]

1.27 In *Lee v New South Wales Crime Commission* (2013), Gageler and Keane JJ said that the application of the principle is

> not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values.[20]

1.28 Perhaps the primary rationale for this principle of statutory construction was provided by Lord Hoffmann:

> the 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.[21]

1.29 The principle of legality is not new, and perhaps goes back 'at least as far as Blackstone and Bentham'.[22] Early Australian authority for the principle may be found in the 1908 High Court case, *Potter v Minahan*.[23]

1.30 This Issues Paper highlights how the principle of legality has been used to protect, to some extent, the principles listed in the Terms of Reference. But there are many other rights and principles that the principle of legality has been found to protect. Close to 40 of these are listed in Chapter 19 of this paper.

1.31 However, it should be stressed that the principle provides only limited protection from statutory encroachment. It will be applied only where the parliamentary intention to encroach on a right is not clear. If the intention to encroach on the right is clear and

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18 *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).

19 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J).

20 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363.

21 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

22 James Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775. Although the continuity of the principle is questioned in Lim, above n 16, 380.

23 *Potter v Minahan* (1908) 7 CLR 277.

unambiguous, then the statute will be interpreted to have its desired effect. Subject to the *Constitution*, Parliament can modify or extinguish common law rights. In *Lee v New South Wales Crime Commission* (2013), Gageler and Keane JJ said:

> 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. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'.[24]

1.32 Chief Justice Robert French made a similar point in a 2012 speech:

> 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.[25]

International law

1.33 Each chapter also sets out examples of international instruments that protect the relevant right or freedom. Most commonly cited is the ICCPR, to which Australia is a party. Such instruments 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.

> 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.[26]

1.34 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* (1992), 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.[27]

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24 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [314] quoting *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321, 340 [43].

25 Robert French, *The Courts and the Parliament* (Brisbane, 4 August 2012).

26 *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, 37 [18] (French CJ). Commonly cited authority for this proposition includes O'Connor J's statement that 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.

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

1.35 In *Minister for Immigration v B* (2004), Kirby J said that the High Court 'cannot invoke international law to override clear and valid provisions of Australian national law'.[28]

Bills of rights

1.36 In many other countries, rights and freedoms are afforded some protection from statutory encroachment by bills of rights and human rights statutes. Each chapter of this Issues Paper cites relevant provisions from human rights statutes in the United Kingdom, Canada and New Zealand and from the Bill of Rights in the US Constitution.

1.37 The degree of protection offered by these statutes varies. The protection offered by a constitutionally entrenched bill of rights, such as that found in the US Constitution, is considerable, allowing the judiciary to declare laws invalid on the grounds that they are inconsistent with the bill of rights.

1.38 This may be contrasted with non-constitutional bills of rights, such as the *Human Rights Act 1998* (UK), which do not give courts the power to strike down legislation. The powers conferred on UK courts by this statute are nevertheless considerable, and have been given a broad interpretation. Section 3(1) states: 'So 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 the Convention rights'.[29] Section 4(2) also gives the courts a power to make a 'declaration of incompatibility'.

Encroachments on rights, freedoms and privileges

1.39 This Inquiry is not primarily about the history and source of common law rights and freedoms, nor about how the rights and freedoms are legally protected from statutory encroachment. Rather, the Inquiry is primarily about identifying Commonwealth laws that encroach upon traditional rights and freedoms, and determining whether these encroachments are properly justified.[30]

1.40 There is no doubt that laws often encroach on people's rights. In *Malika Holdings v Stretton* (2001), McHugh J said that 'nearly every session of Parliament produces laws which infringe the existing rights of individuals'.[31] Despite this, many common law rights and freedoms still represent an important ideal. Arguably, this is implicit in the Terms of Reference.

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28 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

29 Statements from Lord Nicholls, Lord Steyn and Lord Rodger in *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557 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).

30 It should be stressed that the ALRC is looking at Commonwealth laws, not state and territory laws.

31 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–299 [28] (McHugh J).

1.41 However, there may sometimes be good reasons to encroach on traditional rights and freedoms. For one thing, important rights often clash with each other, so that some important rights must necessarily give way, at least partly. Very few rights are considered absolute. International instruments that protect human rights commonly include provisions that set out, often in general terms, circumstances in which the relevant right may be limited.

1.42 This Issues Paper sets out some of the common justifications for encroaching on particular rights and freedoms, but also invites submissions addressing this topic.

1.43 Each chapter asks two questions. The first is directed at general principles or criteria that might be applied to help determine whether a law that encroaches on the right is justified. General justifications may be found in international instruments, but the ALRC hopes that in their submissions people will highlight other more specific justifications for encroaching on these rights. The answers to the first question in each chapter, when refined and consolidated, may provide a useful tool to test existing and future laws that encroach on rights and freedoms.

1.44 The second question that is raised in each chapter is directed at specific Commonwealth laws. The ALRC asks people to identify laws that unjustifiably encroach on each right and freedom, and to explain why these laws are not justified.

1.45 The ALRC will critically examine these laws and their justifications, as directed in our Terms of Reference. The general principles identified in answer to the first question will provide a useful guide.

1.46 The ALRC appreciates that many laws may be part of a broader regime, reflecting complex policy objectives, and therefore should not be examined in isolation.

1.47 As suggested above, the ALRC will focus on laws that *unjustifiably* encroach on common law rights, freedoms and privileges, and principally, those listed in the Terms of Reference.

The reform process

1.48 The release of this Issues Paper is the first major step in this Inquiry. The ALRC invites individuals and organisations to make a submission, particularly in response to the questions raised in this Issues Paper.

1.49 Generally, submissions will be published on the ALRC website, unless they are marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. However, the ALRC does not publish anonymous submissions.

1.50 Following the release of this Issues Paper, the ALRC will meet with a broad range of people across Australia, including people from industry, professional associations, lawyers, judges, academics, and the broader Australian community.

1.51 The ALRC will also convene and meet with an Advisory Committee of experts. For this Inquiry, the Advisory Committee is likely to meet twice.

1.52 These consultations and the submissions we receive, in addition to our own research, will help the ALRC formulate draft proposals for reform. These draft proposals will be outlined in a Discussion Paper to be released in mid-2015. The ALRC will call for submissions on these proposals and engage in a further round of consultations.

1.53 A Final Report will be released at the end of December 2015.

1.54 Further information about the ALRC consultation and submission processes, including information about how the ALRC uses submissions in its work, is available on the ALRC website, along with how to subscribe to the Inquiry enews.

To make a submission, please use the ALRC's online submission form, available at <https://www.alrc.gov.au/content/freedoms-ip46-submission>. Otherwise, submissions may be sent to freedoms@alrc.gov.au or ALRC, GPO Box 3708, Sydney 2000.

The deadline for submissions is **Friday 27 February 2015.**

Submissions, other than those marked confidential, will be published on the ALRC website.