

# 19. Other Rights, Freedoms and Privileges

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## Introduction

19.1 The ALRC has been asked to look at laws that interfere with ‘any other similar legal right, freedom or privilege’—similar, that is, to the 19 traditional or common law rights, freedoms and privileges listed in the Terms of Reference. The list in this chapter is drawn from various lists of common law rights discussed in the context of the principle of legality.<sup>1</sup> The list does not therefore include other important rights, such as the right to work, social security, housing and privacy, many of which are set out in the *International Covenant on Economic, Social and Cultural Rights*.<sup>2</sup>

19.2 The ALRC invites submissions addressing the following question.

**Question 19–1** Which Commonwealth laws unjustifiably encroach on other common law rights, freedoms and privileges, and why are these laws unjustified?

## List of other rights, freedoms and privileges

19.3 Laws that encroach on common law rights, freedoms, privileges and principles may include laws that do the following:

- abrogate the liberty of the individual and authorise detention;<sup>3</sup>

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1 This principle of statutory construction is discussed in Ch 1. Although there is some overlap, the list in this chapter does not include the rights and freedoms that are listed in the Terms of Reference and discussed earlier in the paper. The list and accompanying citations is taken from similar lists in DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); James Spigelman, ‘The Common Law Bill of Rights’ (2008) 3 *Statutory Interpretation and Human Rights: Mcpherson Lecture Series*; George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013); *Momcilovic v The Queen* (2011) 245 CLR 1, 177 [444] (Heydon J).

2 The right to privacy is discussed in Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014).

3 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 11–13; *Plaintiff M47/2012 v Director General of Security* (2012) 292 ALR 243, [116]–[117]

- legislate contrary to the ‘rule of law’;<sup>4</sup>
- abrogate freedom of assembly;<sup>5</sup>
- authorise the fraudulent exercise of power;<sup>6</sup>
- authorise the unreasonable exercise of power;<sup>7</sup>
- interfere with the Court’s power to issue *habeas corpus* in respect of a person not lawfully detained;<sup>8</sup>
- remove the right to refuse a blood test;<sup>9</sup>
- interfere with the right to go about lawful business;<sup>10</sup>
- limit the right to bring an action for mental injury;<sup>11</sup>
- require the making of a statutory declaration;<sup>12</sup>
- interfere with the right to bring a private prosecution;<sup>13</sup>
- permit a court to extend the scope of a penal statute;<sup>14</sup>
- limit trial by jury;<sup>15</sup>
- vest in persons or bodies exercising executive power, the power to determine whether a person has committed a criminal offence;<sup>16</sup>
- criminalise behaviour on the basis of subjective offensiveness;<sup>17</sup>
- permit the use of information obtained by means of telephone interception;<sup>18</sup>

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(Gummow J), [529] (Bell J); *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28]; *Bowditch v Balchin* (1850) 5 Exch 378, 381.

4 *Moran Hospitals Pty Ltd v King* 49 ALD 444, 461.

5 *South Australia v Totani* (2010) 242 CLR 1, 28 [30] (French CJ); *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.

6 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 663 [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Callinan JJ).

7 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350–351 [28]–[29] (French CJ), 362 [63], 369 [86] (Hayne, Kiefel and Bell JJ), 370–372 [90]–[93] (Gageler J).

8 *Ex parte Walsh and Johnson; In re Yates* 37 CLR 36, 91 (Isaacs J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 12 (Mason CJ); *Cox v Hakes* (1890) 15 App Cas 506, 527–30; *Wall v R; Ex parte King Won (No 1)* 39 CLR 245, 250.

9 *O’Brien v Gillies* (1990) 69 NTR 1.

10 *R v Kola* (2002) 83 SASR 47 [39]. Re interfere with lawful right to use highways, see: *Melbourne Corporation v Barry* (1922) 31 CLR 174, 204.

11 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

12 *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* (1989) 88 ALR 287, 304.

13 *R (Gujra) v Crown Prosecution Service* [2012] 3 WLR WLR 1227.

14 *Ex parte Fitzgerald; re Gordon* (1945) 45 SR NSW 182, 186; *Krakouer v The Queen* (1998) 194 CLR 202, 223 [62]. See also: Pearce and Geddes, above n 1, ch 9.

15 *Tassell v Hayes* (1987) 163 CLR 34.

16 *Today FM (Sydney) v Australian Communications and Media Authority* (2014) 307 ALR 1. Special leave to appeal to the High Court was granted on 15 August 2014.

17 *Coleman v Power* (2004) 220 CLR 1, 25 [12] (Gleeson CJ).

18 *Taciak v Commissioner of Australian Federal Police* (1995) 59 FCR 285, 297.

- permit the administration of interrogatories in criminal proceedings;<sup>19</sup>
- remove mistaken belief as a defence to a criminal charge;<sup>20</sup>
- deprive a subject of a right to appeal against a sentence a court has no power to pass;<sup>21</sup>
- infringe on open court and derogate from judicial due process;<sup>22</sup>
- alter the standard procedure of a court once it has been invested with jurisdiction;<sup>23</sup>
- require courts to take secret evidence in the absence of an affected party's legal representatives;<sup>24</sup>
- abrogate the principle of open justice;<sup>25</sup>
- interfere with the course of justice;<sup>26</sup>
- restrict right to continue action once action commenced;<sup>27</sup>
- deny legal representation;<sup>28</sup>
- deny the opportunity for a hearing before dismissal from office;<sup>29</sup>
- require the compulsory production of documents;<sup>30</sup>
- permit the disclosure of information compulsorily acquired;<sup>31</sup>

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19 *New South Wales Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456.

20 *CTM v The Queen* (2008) 236 CLR 440.

21 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 589.

22 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520; *Russell v Russell* (1976) 134 CLR 495.

23 *Owners of the Ship, Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 303, 421; *Electric Light and Power Supply Corporation Ltd v Electricity Commission of New South Wales* (1956) 94 CLR 554, 560; *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 96; *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486. This presumption also extends to limitations on a court's ordinary procedure: *Cameron v Cole* 589; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 252; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205.

24 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 526 [73] (French CJ).

25 *Hogan v Hinch* (2011) 243 CLR 506, 534–536 [27]–[29] (French CJ); *Russell v Russell* (1976) 134 CLR 495; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Rinehart v Welker* [2011] NSWCA 403 (7 December 2011) [26]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; *Scott v Scott* [1913] AC 417, 473–477.

26 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 558 (McHugh J).

27 *Di Carlo v Kashani-Malaki* (2013) 2 Qd R 17 [26].

28 *Orellana-Fuentes v Standard Knitting Mill Pty Ltd* (2003) 57 NSWLR 282 [98]; *Bell v Australian Securities Commission* (1991) 31 FCR 184.

29 *Gladstone v Armstrong* [1908] VLR 454; *Barratt v Howard* (2000) 96 FCR 428.

30 *AB Pty Ltd v Australian Crime Commission* (2009) 175 FCR 296.

31 *Johns v Australian Securities Commission* (1993) 178 CLR 408; *Apache Northwest Pty Ltd v Agostini* (2009) 175 FCR 296.

- interfere with the liberty to carry on a business;<sup>32</sup>
- interfere with the right to enter into a legal contract;<sup>33</sup>
- interfere with native title;<sup>34</sup>
- permit search for and seizure of property;<sup>35</sup>
- restrict fishing in tidal waters;<sup>36</sup>
- limit the power to dispose of an interest in a lease;<sup>37</sup> and
- prevent subleasing of land.<sup>38</sup>

19.4 Some Commonwealth laws that encroach on these common law rights, freedoms, privileges and principles may be justified. The ALRC seeks submissions identifying those laws that are *not* justified, and explaining why the laws are not justified.

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32 *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464 (O'Connor J); *Committee of Direction of Fruit Marketing v Collins* (1925) 36 CLR 410.

33 *Hayes v Cable* [1962] SR NSW; *Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd* (2007) 210 FLR 106.

34 *Wik Peoples v Queensland* (1996) 187 CLR 1, 247; Robert French, 'The Common Law and the Protection of Human Rights'.

35 *Crowley v Murphy* (1981) 52 FLR 123, 141; *George v Rockett* (1990) 170 CLR 104, 110–111.

36 *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.

37 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677.

38 *Re Shearer* (1891) 12 LR NSW 24.