1. The Inquiry in Context

Contents

The Inquiry

1.1 The Australian Law Reform Commission (ALRC) has been asked to identify and critically examine Commonwealth laws that encroach upon 'traditional' or common law rights, freedoms and privileges.[1] In this Interim Report, the ALRC analyses the source and rationale of many of these important common law rights and provides an extensive survey of current Commonwealth laws that limit these rights. The ALRC also discusses how laws that limit traditional rights might be justified and whether some of these laws merit further scrutiny.

1.2 This chapter considers these matters at a more general level, providing a conceptual foundation for the Inquiry: What are traditional rights, freedoms and privileges? What is their source and where may they be found? How do they relate to human rights in international treaties and bills of rights? To what extent, if any, may Parliament interfere with traditional rights and freedoms? Should laws that limit rights and freedoms require particular scrutiny and justification and, if so, how might this be done—by applying what standard and following what type of process?

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

Traditional rights, freedoms and privileges

1.3 The ALRC's Terms of Reference, 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:

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

1.4 Following the list above, each chapter of this report considers a particular right, freedom or privilege.[2] Some chapters consider a few closely related rights together. In

2 A list of other similar legal rights and freedoms was included in the last chapter of the Issues Paper. Relatively few submissions included comments on these other rights, and given the extensive scope of this Inquiry, the ALRC has chosen to focus on the 19 rights listed in the Terms of Reference.

this report the ALRC uses the phrase 'rights and freedoms' and sometimes simply 'rights' as a general term to capture all of the rights listed above.[3]

Common law foundations

1.5 These rights, freedoms and privileges have a long and distinguished heritage. Many have been recognised by courts in Australia, England and other common law countries for centuries. They form part of the history of the common law, embodying key moments in constitutional history, such as the sealing of the Magna Carta in 1215, the settlement of parliamentary supremacy following the Glorious Revolution of 1688 and the enactment of the *Bill of Rights Act 1688*.[4] Many were found and developed by the courts; some were significantly developed by legislatures. The Hon Robert French AC, Chief Justice of the High Court, has said that

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.[5]

1.6 In speaking to mark the 800th anniversary of the Magna Carta,[6] the Hon James Spigelman AC QC, former Chief Justice of the Supreme Court of New South Wales, said that we can 'trace the strength of our tradition of the rule of law to this document' and the support of liberties has developed in the wake of the demarcation between the great organs of state.[7]

> What we came to know as civil liberties or, in earlier centuries as the 'rights of Englishmen', were the practical manifestations of experience of the law over the centuries as manifest in judicial decisions and in legislation.[8]

1.7 Many traditional rights, freedoms and privileges are often called fundamental, and are recognised now as 'human rights'. Murphy J referred to 'the common law of

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3 Nearly all are 'rights', broadly speaking. The American legal theorist Wesley Hohfeld distinguished between four basic 'incidents' of rights: privileges (or liberties), claims, powers, and immunities: see Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

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

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

6 The various iterations of the document from 1215 are described in James Spigelman, 'Magna Carta in its Medieval Context' (Speech given at Banco Court, Supreme Court of New South Wales, 22 April 2015). See also Paul Brand, 'Magna Carta and the Development of the Common Law' (Patron's Address, Academy of Law, Sydney, 18 May 2015); Nicholas Cowdery, 'Magna Carta—800 Years Young' (Speech given at St James' Church, Sydney, 14 June 2015).

7 'The liberties often associated with the *Magna Carta* were the product of the institutions of Parliament and the Courts, over the course of centuries': James Spigelman, 'Magna Carta: The Rule of Law and Liberty', Centre for Independent Studies, 15 June 2015, 1.

8 Ibid 7.

human rights'[9] and Professors George Williams and David Hume have written that the common law is 'a vibrant and rich source of human rights.'[10]

1.8 Many are now found in international covenants and declarations and bills of rights in other jurisdictions—including, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the Bill of Rights in the US Constitution, and the human rights Acts in the United Kingdom, Canada and the two Australian jurisdictions with such Acts, the Australian Capital Territory and Victoria. In *Momcilovic v The Queen*, French CJ said that the human rights and freedoms in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) 'in significant measure incorporate or enhance rights and freedoms at common law'.[11]

1.9 Before the wave of international conventions in the aftermath of the Second World War, legislation and the common law were the principal sources of protection of rights and freedoms. In his book, *Human Rights and the End of Empire*, English legal historian AW Brian Simpson wrote about the widely held assumption that, before international conventions on human rights, human rights were in the UK 'so well protected as to be an example to the world'. In normal times, Simpson writes, 'when there was neither war, nor insurrection, nor widespread problems of public order',

> few would deny that people in the United Kingdom enjoyed a relatively high level of personal and political freedom, 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.[12]

1.10 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.[13]

1.11 To the extent that Australian law has protected and fostered rights and freedoms,[14] it has long been statutes and judge-made law that have done so. 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

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

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

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

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

13 Ibid.

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

and the common law. He said that statutes and the common law protect rights often by 'detailed and precise rules' and vindicate 'human rights directly and specifically':

> [C]ommon law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.[15]

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'.[16]

1.13 Where Heydon was speaking of the strength of the common law in protecting rights, others have sought protection through human rights statutes.[17] Whether the introduction of a bill of rights in Australia is desirable is widely debated.[18] It draws in part upon historical arguments about whether the courts or parliaments are better guardians of individual rights. However, these matters are not the subject of this Inquiry.

1.14 The focus of this Inquiry is on identifying Commonwealth laws that interfere with traditional rights, freedoms and privileges, and determining whether the laws are justified. To frame this discussion, however, it is useful to consider briefly how these rights, freedoms and privileges are currently protected in law from statutory encroachment. Broadly speaking, some protection is provided by the *Australian Constitution* and, less directly, by rules of statutory construction. It is also useful to consider the nature and function of common law rights.

Australian Constitution

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

- the right to trial by jury on indictment for an offence against any law of the Commonwealth—s 80;
- freedom of trade, commerce and intercourse within the Commonwealth—s 92;

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15 JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (Lecture delivered at Oxford Law School, 23 January 2013).

16 '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': JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (Lecture delivered at Oxford Law School, 23 January 2013).

17 Hiebert contrasts the two 'rival paths' in liberal constitutionalism to rights protection: one is the codification of rights, as in the US, the other emphasises parliamentary supremacy, as in Westminster-modelled parliamentary systems. Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 7–8.

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

- 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.

1.16 Section 51(xxxi) of the *Constitution* also provides that if the Commonwealth compulsorily acquires property, it must do so on 'just terms'—which may also be conceived of as a right.[19]

1.17 The High Court has also found certain rights or freedoms to be implied in the *Constitution*—notably, freedom of political communication.[20] This freedom is not absolute, but any law that interferes with political communication must be 'reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[21]

1.18 A right to vote has also been found to be implied in the *Constitution*—laws that limit adult suffrage can only be made when the law is proportionate, that is, 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[22]

1.19 The High Court may also have somewhat moved towards entrenching procedural fairness as a constitutional right.[23] If procedural fairness were considered an essential characteristic of a court, this might have the potential, among other things, to constitutionalise:

> the presumption of innocence, the 'beyond reasonable doubt' standard of proof in criminal proceedings, the privilege against self-incrimination, limitations on the use of secret evidence, limitations on ex parte proceedings, limitations on any power to continue proceedings in the face of an unrepresented party, limitations on courts' jurisdiction to make an adverse finding on law or fact that has not been put to the parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.[24]

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

1.21 The *Constitution* does not, therefore, directly and entirely protect many of the rights, freedoms and privileges listed in the ALRC's Terms of Reference. One reason the *Constitution* does not expressly protect most civil rights, Professor Helen Irving

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

20 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227.

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

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

23 Williams and Hume, above n 10, 375.

24 Ibid 376.

suggests, 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.[25]

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

> They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[26]

A common law constitution?

1.23 The term 'common law constitutionalism' is now 'widely used to denote the theory that the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of common law'.[27] Under this theory, many of the rights and freedoms listed in the ALRC's Terms of Reference would be considered constitutional.

1.24 Commonly associated with the writing of Professor TRS Allan[28] and Lord Justice John Laws,[29] common law constitutionalism has been called 'a potent phenomenon within contemporary public law discourse'.[30] Professor Allan has written

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

26 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

27 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17. Thomas Poole, a critic of the theory, has written that the main lines of the theory of common law constitutionalism are well defined: 'The common law is said to comprise a network of moral principles which reflect values considered to be fundamental. By virtue of this unique connection with basic moral principles, the common law is thought to constitute the political community by incorporating a set of higher-order values against which the legality of governmental decisions may be tested. Rights are the juridical residue of these higher-order principles and public law is reconceived as a vehicle for the protection of those rights against the state. The courts, on this account, assume a pivotal role in the polity: John Griffith's notion of the "political constitution" is turned on its head in favour of a system of constitutional politics whose central institution is the common law court?': Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65 *The Modern Law Review* 463, 463.

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

29 See, eg, John Laws, *The Common Law Constitution* (Cambridge University Press, 2014).

30 Poole, above n 27.

that 'the common law is prior to legislative supremacy, which it defines and regulates'.[31] Elsewhere, Allan wrote:

> We should not underestimate the power of the common law constitution to protect fundamental rights, and the central role it ascribes to the individual conscience in testing the moral credentials of law, or rather of what purports to be law but may, on inspection, prove to be an infringement of the rule of law.[32]

1.25 Some even suggest that courts may invoke this common law constitution to invalidate Acts of Parliament.[33] The theory has therefore been said to invert the traditional relationship between statute law and the common law.[34] Professor Jeffrey Goldsworthy, a critic of common law constitutionalism, has written that the theory amounts to a 'takeover bid' which replaces legislative supremacy with judicial supremacy.[35]

1.26 The theory has its leading proponents in the United Kingdom, which lacks a written and rigid constitution. In Australia, it has had only limited application; it has not been applied to invalidate unambiguous statutes. In *South Australia v Totani*, French CJ said:

> [I]t is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified.[36]

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

The principle of legality

1.28 The principle of legality is a principle of statutory interpretation that gives some protection to certain traditional rights and freedoms, including almost all of those listed in the ALRC's Terms of Reference.[37] In fact, as Spigelman has said, the 'protection

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

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

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

34 Goldsworthy, above n 27, 15.

35 Ibid.

36 *South Australia v Totani* (2010) 242 CLR 1, [31]. In a recent speech, French CJ said: 'The theoretical question whether fundamental common law principles can qualify legislative power has not been definitively answered in Australia. ... The omens are not promising for the proponents of a free-standing common law limitation. However, the question has been left, at least theoretically, open': Robert French, 'Common Law Constitutionalism' (Robin Cooke Lecture given at Wellington, New Zealand, 27 November 2014).

37 The phrase 'principle of legality' is also used to refer to 'a wider set of constitutional precepts requiring any government action to be undertaken only under positive authorisation': Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 373. In this Interim Report, the phrase is used to refer to the narrower point of statutory interpretation. Recent papers on the principle also include Dan Meagher, 'The Common Law Principle of Legality in the Age of

which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[38]

1.29 The principle of legality perhaps goes back 'at least as far as Blackstone and Bentham'.[39] It may be a 'new label' for a traditional principle.[40] Early Australian authority may be found in the 1908 High Court case, *Potter v Minahan*.[41] A more recent statement of the principle appears in *Re Bolton; Ex parte Beane*:

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[42]

1.30 The rights or freedoms protected by the principle of legality 'often relate to human rights and are sometimes described as having a constitutional character'.[43] The principle 'extends to the protection of fundamental principles and systemic values'.[44] There is no settled list of rights protected by the principle, but in *Momcilovic* Heydon J set out the following examples:

> freedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests...; rights of access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; mens rea as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction.[45]

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*.

38 Spigelman, above n 37, 9.

39 James Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 775. It has 'many authorities, ancient and modern, Australian and non-Australian': *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J). Although the continuity of the principle is questioned in Lim, above n 37, 380.

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

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

42 *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).

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

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

45 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J) (citations omitted). Other lists appear in: Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); Spigelman, above n 37; Williams and Hume, above n 10. See also Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Ch 19.

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

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[46]

1.32 The 'political cost' of the decision was also something alluded to by French CJ. The interpretation of legislation takes place 'against the backdrop of the supremacy of Parliament', which can qualify or extinguish rights and freedoms by 'clear words'—but words 'for which it can be held politically accountable'.[47] As suggested in *Coco v The Queen*, the principle may 'enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights'.[48]

1.33 The principle of legality may be applied not only to statutes, but also to regulations and other delegated legislation, where in fact it may assume greater importance, given such laws are not made directly by Parliament.[49]

1.34 Finally, it should be stressed that the principle 'does not constrain legislative power'.[50] Subject to the *Constitution*, Parliament has the power to modify or extinguish common law rights. Chief Justice Robert French has said the principle has a 'significant role to play in the protection of rights and freedoms', but it does not 'authorise the courts to rewrite statutes'.[51] The principle of legality will therefore be applied only where the parliamentary intention to encroach on a right is not clear. Moreover, it will have a very limited application where encroaching on the particular right is clearly the object of a statute.[52]

The nature of common law rights and principles

1.35 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.

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46 *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115 131.

47 French, 'The Common Law and the Protection of Human Rights', above n 5.

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

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

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

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

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

In a 2010 speech, 'Protecting Human Rights Without a Bill of Rights', Chief Justice French said:

> It is also important to recognise... that common law 'rights' have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have 'a binding effect'. But 'rights', to movement, assembly or religion, for example, are more in the nature of 'freedoms'. They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort.[53]

1.36 As suggested by French CJ, not all rights are protected by positive laws. Many are freedoms or liberties and are protected in Australia by virtue of the fact, and only to the extent, that laws do not encroach on the freedom. The High Court said in *Lange v Australian Broadcasting Corporation*:

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[54]

1.37 Many common law rights may therefore be largely residual,[55] and perhaps for this reason, more vulnerable to statutory encroachment.[56]

1.38 In *Dietrich v R*, Brennan J distinguished rights included in a constitutional Bill of Rights from individual legal rights recognised by the common law in Australia:

> In this country, a Court might declare an individual legal right bearing some resemblance to a right conferred by a constitutional Bill of Rights. But such an individual legal right is distinguishable from a right conferred by a constitutionally entrenched Bill of Rights, for it is either (i) an immunity resulting from a limitation on legislative power imposed otherwise than by reference to the scope of the right itself, or (ii) a right amenable to abrogation by competent legislative authority. The only legal sources from which such 'rights' may emerge are the text of the Constitution of the Commonwealth and other organic laws governing our legal system, statutes and the common law. Rights can be declared upon a construction of the Constitution or

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53 Chief Justice Robert French, 'Protecting Human Rights Without a Bill of Rights' (at the John Marshall Law School, Chicago, 26 January 2010).

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

55 'The traditional doctrine in English law is that Parliament is sovereign. However, individuals may say or do whatever they please provided they do not transgress the substantive law or infringe the legal rights of others. Furthermore, public authorities including the Crown may do nothing but that which they are authorized to do by some rule of common law (including the royal prerogative) or statute and, in particular, may not interfere with the liberties of individuals without statutory authority. Where public authorities are not authorized to interfere with the individual, the individual has liberties. It is in this sense that such liberties are residual rather than fundamental and positive in their nature: they consist of what remains after taking account of all the legal restraints that impinge upon an individual': Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 28.

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

> other organic laws, upon a construction of a statute, or by judicial development of the rules of the common law.[57]

1.39 In many countries, rights and freedoms are afforded some protection from statutory encroachment by bills of rights and human rights statutes. 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 United States Constitution, is considerable, allowing the judiciary to declare laws invalid on the grounds that they are inconsistent with the bill of rights.

1.40 This may be contrasted with the *Human Rights Act 1998* (UK), which does not give courts the power to strike down legislation, but instead, provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.[58]

1.41 Similarly, s 32(1) of the Victorian Charter provides: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. French CJ has said that this is 'analogous to the common law principle of legality'.[59]

1.42 Common law rights overlap with the rights protected in these international instruments and bills of rights. In their history and development, each may be seen as an important influence on the other. A statute that encroaches on a traditional common law right will often, therefore, also encroach on its related human right. However, the two rights may not always have the same scope. As noted above, some common law rights are largely conceived of as residual; they exist to the extent that no law is made that interferes with them. Human rights are rarely thought of in this way, and moreover have been said to grow both in content and form—more rapidly, some suggest, than common law rights. Professor Tom Campbell has written:

> More and more interests are recognized as justifying the protection that flows from being adopted as a human right. This growth is a matter of the form of human rights as well as their content. Thus, even traditional core civil and political liberties are seen as involving positive correlative duties to secure the interest identified in the right, and not, as before, merely negative correlative duties to let people be and leave them alone to go their own way. Human rights are also being put to a wider variety of uses.[60]

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57 *Dietrich v R* (1992) 177 CLR 292, [45] (citations omitted).

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

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

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

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

1.44 In the absence of a specific legislative restriction which is consistent with the *Constitution*, the enjoyment of common law rights and freedoms is not confined to Australian citizens. For example, the guarantee of jury trial by s 80 of the *Constitution* in respect of indictable federal offences is conferred irrespective of the status of the accused. At common law, aliens who are not classified as enemy aliens are treated as being within 'the Queen's Peace', not as outlaws placed beyond the ordinary legal system. The High Court has noted on several occasions that an alien, other than an enemy alien, is, while resident in Australia, entitled to the same protection with respect to civil rights as the law affords to Australian citizens.[61]

International law and the common law

1.45 Each chapter of this Interim Report sets out examples of international instruments that protect the relevant right or freedom. Most commonly cited is the *International Covenant on Civil and Political Rights* (ICCPR),[62] to which Australia is a party.[63] 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.[64]

> 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.[65]

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

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

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

64 In *Coleman v Power*, Gleeson CJ distinguished between statutes enacted before Australia ratified a relevant international treaty and those statutes enacted since ratification, arguing that only the later statutes are capable of being interpreted, where possible, in line with Australia's obligations under the relevant international treaty: *Coleman v Power* (2004) 220 CLR 1, [19].

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

1.46 In *Mabo*, Brennan J said that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[66]

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

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.[67]

1.48 In *Minister for Immigration v B*, Kirby J said that the High Court 'cannot invoke international law to override clear and valid provisions of Australian national law'.[68] However, as Kiefel J said in *The Malaysian Declaration Case*:

> [A] statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law.... However, if it is not possible to construe a statute conformably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law.[69]

Identifying laws that limit rights and freedoms

1.49 The central tasks of this Inquiry are to identify Commonwealth laws—not state and territory laws—that encroach upon traditional rights, freedoms and privileges, and to determine whether these encroachments are properly justified.[70] There is no doubt that laws often encroach on traditional rights and freedoms. In *Malika Holdings v Stretton*, McHugh J said that 'nearly every session of Parliament produces laws which infringe the existing rights of individuals'.[71]

1.50 This report sets out many of the Commonwealth laws that may be said to interfere with the common law rights and freedoms listed in the Terms of Reference. It provides an extensive survey of such laws.[72]

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established rules of international law': *Jumbunna Coal Mine NL v Victorian Coal Miners'Association* (1908) 6 CLR 309, 353 (O'Connor J).

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

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

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

69 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [247].

70 See Terms of Reference for this Inquiry. 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, although these matters are discussed.

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

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

1.51 The Terms of Reference ask the ALRC to include consideration of Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation, and workplace relations. Such laws are highlighted throughout this report. However, the Terms of Reference are also clear that this Inquiry is not to be limited to these areas. This report is structured by the rights and freedoms in the Terms of Reference, but engages with commercial, environmental and workplace laws as they arise.

1.52 Having identified laws that affect traditional rights, it is vital to ask whether the laws are justified. The following section discusses justifications for limits on important rights and principles at a general level. More particular justifications are then discussed throughout this report.

Justifying limits on rights and freedoms

1.53 Laws that interfere with traditional rights and freedoms are sometimes considered necessary. The mere fact of interference will rarely be a sufficient ground of criticism.

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

1.55 Accordingly, it is widely recognised that there are reasonable limits even to fundamental rights. Only a handful of rights—such as the right not be tortured—are considered to be absolute.[73] Limits on traditional rights are recognised by the common law. In fact, some laws that limit traditional rights may be as traditional as the rights themselves—although such 'limits' may rather define the scope of the rights.

1.56 This is also reflected in the limitations provisions in various bills of rights in other jurisdictions and in international human rights covenants and related guidelines, such as the 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights'.[74]

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

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73 See, eg, Williams and Hume, above n 10, [5.3].

74 United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

a law does encroach on a traditional right or principle, the encroachments should be justified.

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

> Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.[75]

1.59 The ALRC has been asked to consider whether limits on traditional rights and freedoms are 'appropriately justified'.[76] This question might be considered on two broad levels. The first involves testing the law according to a particular measure or standard—such as proportionality. Laws that pass this standard might be said to have been *substantively* justified. This is the most commonly used meaning of the word justified, in this context, and it is the main focus of this Inquiry. The second level concerns the processes that lead to the making of the law—the *procedural* justification. Both of these types of justification are discussed below.

Proportionality

1.60 A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. Although it is commonly used by courts to test the validity of laws that limit constitutional rights,[77] proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit important (even if not constitutional) rights and principles.[78]

1.61 A 2012 book on the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:

> 1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
> 2. Are the means in service of the objective rationally connected (suitable) to the objective?
> 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?

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

76 See Terms of Reference.

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

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

> 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?[79]

1.62 Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[80] and 'the orienting idea in contemporary human rights law and scholarship'.[81]

> Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication. Even in the United States, which is widely understood to have formally rejected proportionality, some argue that the various levels of scrutiny adopted by the US Supreme Court are analogous to the standard questions posed by proportionality.[82]

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

> A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[83]

1.64 A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*.[84] This case concerned a statute, the *Narcotic Control Act*, which placed a legal burden of proof on the defendant, and so undermined the person's right, under the *Canadian Charter of Rights and Freedoms*, to be presumed innocent until proven guilty. Section 1 of the Canadian Charter guarantees the rights and freedoms in the Charter 'subject only to such reasonable limits

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79 G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak: 'According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right': Barak, above n 77, 3.

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

81 Huscroft, Miller and Webber, above n 79, 1.

82 Ibid. For recent discussions of proportionality in the UK High Court, see *R (Lord Carlile) v Home Secretary* [2014] 3 WLR 1404, [28]–[34] (Lord Sumption); *Bank Mellat v HM Treasury [No. 2]* [2014] AC 700, [68]–[76] (Lord Reed); and *R (Nicklinson) v Ministry of Justice* [2014] 3 All ER 843, [168] (Lord Mance).

83 Parliamentary Joint Committee on Human Rights, 'Guide to Human Rights' (March 2014) 8 <http://www.aph.gov.au/joint_humanrights/>.

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

prescribed by law as can be demonstrably justified in a free and democratic society'.[85] Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

1.65 The first criterion concerned the importance of the objective of the law.

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[86]

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

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[87]

1.67 In each case, Dickson CJ said, courts will be 'required to balance the interests of society with those of individuals and groups'.[88] There are variations, but the language in *Oakes* is reflected in most proportionality tests.

1.68 In Australia, a kind of proportionality test is applied when courts consider the validity of a law that limits the constitutional right to political communication. In considering such laws, courts look at whether the law is 'reasonably appropriate and adapted to serve a legitimate end'.[89] In this context, the phrase 'reasonably appropriate

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

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

87 Ibid.

88 Ibid.

89 This is part of the second limb of the *Lange* test. 'The test adopted by this Court in *Lange v Australian Broadcasting Corporation*, as modified in *Coleman v Power*, to determine whether a law offends against the implied freedom of communication involves the application of two questions: 1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect? 2. If the law effectively burdens that freedom, is the law *reasonably appropriate and adapted to serve a legitimate end* in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the

and adapted' does not mean 'essential' or 'unavoidable', but has been said to be closer to the notion of proportionality.[90] Professor Adrienne Stone has written that, in other circumstances, the 'reasonably appropriate and adapted to' formula has been used as 'a very minimal standard of review':

> By contrast, the proportionality formula, which has also been used to interpret grants of Commonwealth power, is a more rigorous tool of judicial review. In contrast to its previous deference, when employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights.... This kind of test resembles those employed in European Union law and in Canada.[91]

1.69 Despite the benefits of a structured proportionality analysis, some flexibility in approach may have benefits. Williams and Hume write that the Australian High Court's 'incompletely theorised agreement about the verbal formulation of the proportionality test has allowed the Court to forge majorities recognising rights rather than falling into disputes about the precise jurisprudential basis of how to balance those rights against other rights and the public interest'.[92]

1.70 Proportionality—'a single flexible standard'—has been contrasted with the law of the First Amendment to the US Constitution, which 'uses a multitude of less flexible, but more precise, rules designed to respond to particular kinds of cases'.[93]

1.71 In *Roach v Electoral Commissioner*, Gleeson CJ expressed reservations about an 'uncritical translation of the concept of proportionality' from jurisdictions with human rights instruments, into the Australian context.[94] In *Momcilovic*, Heydon J suggested that the proportionality test in the Victorian Charter created 'difficult tasks' that should be for legislatures, not judges.[95] However, these concerns may not arise if the

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informed decision of the people?': *Hogan v Hinch* (2011) 243 CLR 506, [47] (French CJ) (emphasis added).

90 *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ).

91 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 677.

92 Williams and Hume, above n 10, 136–7.

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

94 'Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our Constitution. They create a relationship between legislative and judicial power significantly different from that reflected in the Australian Constitution': *Roach v Electoral Commissioner* (2007) 233 CLR 162, [17] (Gleeson CJ).

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

proportionality analysis is being applied by law makers and others to test the merits of proposed laws, rather than by courts testing existing laws against constitutional rights.

1.72 Other criticisms of proportionality may apply not only to the use of the concept by courts, but also more broadly. The use of proportionality in the constitutional law of other countries has its critics.[96] Some have suggested that proportionality tests give insufficient weight to rights, or call for the comparison of incommensurable values. Proportionality has even been called an 'assault on human rights'.[97] To balance rights may be to 'miss the distinctive moral status that a rights claim presupposes and affirms'.[98] Far from rights being 'trumps',[99] a balancing approach might suggest that everything is 'up for grabs'.[100]

1.73 Nevertheless, in submissions to this Inquiry, a number of stakeholders said that proportionality was the appropriate concept to apply.[101] For example, the Law Council of Australia submitted that the proportionality test in *R v Oakes* 'has been applied in Australian domestic law and can produce logical and predictable outcomes when applied to legislation'.

> 'Proportionality' is... a fluid test which requires those analysing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.[102]

1.74 In its submission to this Inquiry, the Human Rights Law Centre stated:

> the test for determining whether a restriction is appropriate should be one of proportionality as used in international and comparative human rights jurisprudence and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). ... A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.[103]

1.75 In this Inquiry, the ALRC does not consider the question of whether testing the proportionality of laws that limit rights is better carried out by the judiciary or the legislature. Nor is it necessary, in this Inquiry, to find a perfect method—if such a

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96 See, eg, Francisco J Urbina, 'Is It Really That Easy: A Critique of Proportionality and "Balancing as Reasoning"' (2014) 27 *Canadian Journal of Law and Jurisprudence* 167; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; Gregoire CN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179. In defence, see, eg, Moller, above n 80.

97 Tsakyrakis, above n 96.

98 Ibid 489.

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

100 Tsakyrakis, above n 96, 489. 'With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching': Ibid 487.

101 Although in most submissions, the justification for laws limiting rights was not discussed at this more general level.

102 Law Council of Australia, *Submission 75*.

103 Human Rights Law Centre, *Submission 39*. See also Centre for Comparative Constitutional Studies, *Submission 58*.

method exists—for testing the justification of laws that limit rights. Whether a particular law that limits a right is justified will of course sometimes be a question about which reasonable people acting in good faith disagree. A rigid insistence on a prescribed proportionality framework may also discourage more thorough and wide ranging analysis.

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

Scrutiny processes

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

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

> entails new responsibilities and new incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights. This innovation results in multiple sites for non-judicial rights review (government, the public service, and parliament), which distinguish this model from the American-inspired approach that relies almost exclusively on judicial review for judgments about rights.[104]

1.79 In Chapter 2, the ALRC discusses some procedural protections of traditional rights in more detail, with a particular focus on scrutiny by parliamentary committees—and the tests used in those scrutiny processes.

1.80 In Australia, proposed laws are checked for compatibility with traditional rights at a number of stages in the law making process. For example, when developing policy, government departments are encouraged to think about the effect a proposed law will have on fundamental rights. Bills and disallowable legislative instruments presented to Parliament must have a 'statement of compatibility' that assesses the legislation's

104 Hiebert, above n 17, 9. See also Janet L Hiebert and James B Kelly, *Parliamentary Bills of Rights* (Cambridge University Press, 2015) 4.

compatibility with the rights and freedoms in seven international human rights instruments (which include most of the traditional rights and freedoms in the ALRC's Terms of Reference). The Attorney-General's Department plays an important role in providing advice about human rights law and often assists agencies prepare statements of compatibility and explanatory memoranda.[105]

1.81 Law reform bodies such as the ALRC also routinely consider rights and freedoms in their work. Under the *Australian Law Reform Commission Act 1996* (Cth), the ALRC has a duty to ensure that the laws, proposals and recommendations it reviews, considers or makes:

> (a) do not trespass unduly on personal rights and liberties or make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions; and
>
> (b) are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.[106]

1.82 The Office of Parliamentary Counsel will also consider common law rights and freedoms when drafting legislation, and may question departments about proposed laws that appear to unduly interfere with rights.

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

1.84 Because of the close relationship between many traditional common law rights and many human rights protected by international covenants and instruments, an important role is also played by the Australian Human Rights Commission. The Commission, established in 1986, and its predecessor, the Human Rights and Equal Opportunity Commission, established in 1981, have as their purpose, working

> for the progressive implementation of designated international conventions and declarations through representations to the Federal Parliament and the executive, through other public awareness activities, and where appropriate through intervention in judicial proceedings.[107]

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

1.86 Clearly, there are already many processes for testing the compatibility of proposed laws with important rights and freedoms. Some are relatively new, such as

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

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

107 Shearer, above n 66, 55.

the Parliamentary Joint Committee on Human Rights, established in 2011. Some are much older, like the Senate Standing Committee on Regulations and Ordinances, established in 1932. In Chapter 2, the ALRC considers whether some of these existing procedures might be improved. For example, the ALRC considers whether the justifications given to parliamentary committees and in compatibility statements are generally adequate, or could be made more thorough and the reasoning more explicit.

Laws that may merit further review

1.87 Throughout this paper, the ALRC highlights certain laws that may merit closer review. These are laws that have been criticised for unjustifiably limiting common law rights or principles. This report highlights some of these criticisms and some of the arguments that may be relevant to justification. However, for most of these laws, the ALRC would need more extensive consultation and evidence to justify making detailed recommendations for reform.[108]

1.88 Therefore, rather than make detailed recommendations for reform based on insufficient evidence, the ALRC has highlighted laws that seem to merit further review. These laws are identified in the conclusion to each chapter. The highlighted laws have been selected following consideration of a number of factors, including whether the law has been criticised in submissions or other literature for unjustifiably limiting one or more of the relevant rights and whether the law has recently been thoroughly reviewed. Laws that may be criticised for reasons other than interference with rights, for example because they do not achieve their objective, are not highlighted for that reason alone. The fact that a law limits multiple rights has also sometimes suggested the need for further review.[109]

1.89 The ALRC calls for submissions on which laws that limit traditional rights deserve further review.

The reform process

1.90 The release of this Interim Report is the second major step in this Inquiry. It builds upon the Issues Paper, which was released in December 2014. A Final Report will be presented to the Attorney-General in December 2015.

1.91 In the Issues Paper, two questions were asked about each right, freedom or principle listed in the Terms of Reference. The first was directed at general principles or criteria that might be applied to help determine whether a law that encroaches on the

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108 Gathering this evidence is not possible, given the wide scope of the Inquiry. By way of illustration, 16 prior reports of the ALRC are referred to with respect to the consideration of particular aspects of rights, freedoms and privileges—sometimes only one small part of the broader chapter, as in the case of the work on secrecy provisions that is referred to in Ch 3: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009). Each of these ALRC inquiries took some 12–15 months to undertake.

109 There may also be other laws that deserve further review, not highlighted in this report. Without testing the justification for all laws that limit rights, even in only a preliminary way, the ALRC cannot confidently say that they also do not need to be reviewed. The fact that a law is not highlighted should not be taken to imply that the ALRC considers that it does not need further review.

right is justified. The second question invited people to identify specific Commonwealth laws that unjustifiably encroached on the relevant right or freedom, and to explain why these laws are not justified. The ALRC received 76 public submissions. These are published on the ALRC website.

1.92 The ALRC has consulted with a broad range of people and organisations, and will meet with others after the release of this Interim Report. The names of the people and organisations the ALRC meets with will be published in the Final Report.

1.93 The ALRC also convened an Advisory Committee of experts, which has met once and will meet again later in the year. The committee has 13 members, and their names appear at the beginning of this report. Professor Barbara McDonald also provided crucial assistance, particularly in the preparation of the Issues Paper.

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

1.95 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.

Call for further submissions

1.96 The ALRC invites submissions in response to this Interim Report. Although the paper does not contain proposals for specific changes to the law, it does highlight a number of laws that may unjustifiably interfere with traditional rights and therefore deserve further scrutiny. The ALRC invites submissions addressing whether these laws do indeed deserve further review, and submissions identifying any other Commonwealth laws that should be reviewed.

1.97 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.

To make a submission, please use the ALRC's online form, available at <https://www.alrc.gov.au/content/freedoms-IR127-online-submission>.
Otherwise, submissions may be sent to freedoms@alrc.gov.au or ALRC, GPO Box 3708, Sydney 2000. The deadline for submissions is **Monday 21 September 2015**. Submissions, other than those marked confidential, will be published on the ALRC website.