of Taxation". The transcript of that proceeding was tendered by the respondents in this proceeding and records the following exchange:

> Her Honour: […] What you have not done is to identify the causes of action upon which you seek to rely to sue the Commissioner, or to sue any of the other named respondents. The statement of claim that you have prepared does not disclose any cause of action.
>
> Mr Garrett: Against the other respondents?
>
> Her Honour: Against any of the respondents.
>
> Mr Garrett: Including the Commissioner?
>
> Her Honour: Including the Commissioner of Taxation. It does not disclose how it is that you – the jurisdiction of the Court upon which you seek to rely, and whether the Court does have that jurisdiction to determine the case as pleaded.
>
> Mr Garrett: I see, your Honour.
>
> Her Honour: On the face of it, the originating application and the statement of claim do not disclose any cause of action that founds a proper claim upon which you may sue.

Proceedings commenced by Mr Garrett were also held to have no reasonable prospect of success by Tracey J in *Garrett v Macks* [2014] FCA 1259 and in *Garrett v Duncan* [2014] FCA 1260. In each case, his Honour concluded that Mr Garrett had no reasonable prospect of successfully prosecuting his application given the existence of a complete defence of accord and satisfaction. An application by Mr Garrett for leave to appeal to the High Court in matter M42 of 2014 was refused on the basis that the application contained "no intelligible cause of action and no arguable grounds in support of the leave" which had been sought.

27 The respondents in this proceeding also rely upon the fourth category of vexatious proceeding defined in s 37AM(1)(d) for the purposes of s 37AO(1)(a). A proceeding will fall into that category if it is conducted "in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose." Mr Garrett has conducted more than one proceeding, including the present proceeding, falling within that description. In *Sunburst Properties Pty Ltd (in liq) v Agwater Pty Ltd* [2005] SASC 335, Gray J noted at [69] that Mr Garrett had acknowledged conduct to frustrate the attempts by the National Australia Bank to recover the debts it claimed. His Honour said at [69]:

> At times in his evidence, Mr Garrett was frank. He acknowledged the backdating of documents in an effort to frustrate National Australia Bank's attempts to recover its alleged debts. Again these matters were confirmed by, and consistent with, other

evidence.

At [70] his Honour referred to the "vast body of documentary evidence" tendered at trial which "was admitted to be backdated and was of dubious accuracy".

28 Mr Garrett's conduct of proceedings to harass or annoy, cause delay or detriment, or to achieve another wrongful purpose can be seen in many other instances including the present proceeding. A debt recovery proceeding in the Supreme Court of Victoria ultimately resulted in summary judgment against Mr Garrett after he conceded a fact at a hearing contrary to the defence he had filed in the proceeding. In the Supreme Court proceeding numbered SCI 2013 02968, as previously mentioned, Mr Garrett had challenged the fact of having been the trustee of the Andrew Garrett Family Trust at the relevant time, but at the hearing of an application for summary judgment he conceded that he had been the trustee of the Andrew Garrett Family Trust until 8 June 2013. Mukhtar AsJ set out those circumstances in reasons following a subsequent hearing in the proceeding on 15 September 2014:

> On 6 August 2014, I granted in part the Commissioner's application for summary judgment. A reference to the Court's written reasons which are attached to the order made that day shows that the only question was whether Mr Garrett was, or was not, a trustee of the Family Trust and whether he was, or was not, a trustee of the Oenoviva Trust. On the undisputed facts, and moreover on a concession made by Mr Garrett in Court it was established that Mr Garrett was the trustee of the Family Trust. By operation of various provisions of the *Taxation Administration Act* and the *Tax Administration Act 1997*, he as trustee was liable as a tax paying entity. Therefore, summary judgment for $71,007.69 was granted.

Mukhtar AsJ referred to the previous reasons recording the concession which Mr Garrett had made in court at the earlier hearing. In the subsequent hearing on 15 September 2014, his Honour struck out entirely an amended defence which Mr Garrett had filed on 21 August 2014. His Honour went on to say at [8]:

> It will be seen from my previous orders that an enormous amount of time of judicial resources have been spent in dealing with a multitude of applications made by Mr Garrett. The materials that have been filed are vast and largely irrelevant and repetitious. I have urged Mr Garrett to keep steadily in mind that the threshold issue concerning his tax liability in this case is whether or not he is, as it appears, a trustee of the Oenoviva Trust. Yet, the vast amount of applications and irrelevant material that is being produced seems to be avoiding grappling with that crucial issue.

It is clear from his Honour's observations that Mr Garrett was conducting that proceeding so as to harass or annoy, cause delay or detriment, or to achieve another wrongful purpose.

29 In the present proceeding, Mr Garrett has made a number of allegations of perjury without proper foundation. Paragraph 12.3 of the statement of claim initially alleged that all

of the respondents had sworn affidavits for the sole and improper purpose of misleading Mukhtar AsJ into granting summary judgment in SCI 2013 02968. Mr Garrett's proposed amended statement of claim, which he sought leave to file in his interlocutory application dated 27 January 2014, limited that allegation to only the twelfth respondent under the heading "perjury". However, neither the proposed pleading (limiting the allegation to one respondent), nor the existing pleading, alleged any proper foundation to warrant or justify the allegation of perjury in any way.

30 Mr Garrett's pleading in this proceeding also alleges that the respondents have acted with an improper purpose in administering the Australian Business Register and in issuing garnishee notices. None of the pleadings disclose any proper foundation for those allegations of improper purpose. Pleadings of that kind, without proper foundation, can only be explained as done so as to harass or annoy the respondents. Mr Garrett was previously criticised for making serious assertions without support. In *Garrett v Macks* [2006] FCA 601, Lander J said at [14]:

> These claims in their bald form should never have been made. They make the most serious allegations against a number of people, three of whom are officers of this Court, two of whom are professional persons who act as liquidators and trustees and are, therefore, responsible in that manner to this Court, and one of whom, of course, is a senior public officer, being the Deputy Commissioner of Taxation. Mr Garrett has made no effort in any way to support the allegations made in the proceeding. It was put by Mr Evans, by way of evidence, but really by way of submission in paragraph 19 of his affidavit, that the allegations are scandalous. I agree.

Despite these observations, Mr Garrett repeated the allegations against Mr Macks (see *Garrett v Macks* [2009] FCA 253 at [8]), and has made allegations of a similar kind in the present proceeding. Whatever might be Mr Garrett's subjective motivation for making serious allegations of this kind without proper foundation, the conduct of proceedings by Mr Garrett in making such allegations, especially in light of his past and repeated conduct, is "in a way" so as to harass or annoy the respondents. The absence of any proper foundation for allegations of the kind alleged by Mr Garrett manifests conduct to harass or annoy because no other purpose is achieved by the claims made.

31 None of the material relied upon by Mr Garrett in opposition to the orders sought under s 37AO detracts from the strength of the material in favour of making the orders sought. The submissions and materials relied upon by Mr Garrett at the hearing on 4 February 2015 in large part weigh against his application by revealing the very case put against him. Much of his material seeks to justify the unsuccessful positions he had

previously taken in cases decided against him. His submissions showed no appreciation of the significance for him of matters having been decided against him. The impression created, as Mortimer J observed in *Garrett v Make Wine Pty Ltd* [2014] FCA 1258 at [195], is that Mr Garrett "is so firmly persuaded in his own mind that he has not received any 'justice' that he simply refuses to accept any outcome, including a judicially imposed outcome, that does not give him what he believes he is entitled to."

32 The new material upon which Mr Garrett sought, and on 18 February 2015 was given leave, to rely takes the matter no further in his favour. Mr Garrett sought to rely upon a decision by Jessup J in *Garrett v The Chief Executive Officer of Austrade* [2015] FCA 39, in which his Honour considered two objections to the competency of actions brought by Mr Garrett against the Chief Executive Officer and a senior grant auditor of Austrade. Jessup J had two proceedings before him in respect of which the respondents had objected to the competency of the applications made by Mr Garrett. In one of the proceedings, his Honour upheld the objection to competency, ordering that the proceeding be dismissed. In the other proceeding, his Honour expressed himself more tentatively, namely, that the objection "may be a good one" but was not supported by the submissions and material as put. The dismissal by his Honour to the objection of competency which had been made in one of Mr Garrett's proceedings, however, is at most only one circumstance suggesting that Mr Garrett may have a competent proceeding against an individual. That of itself would not be enough to prevent making orders under s 37AO any more than it would defeat extant orders under that provision if an order were made giving him leave to bring a proceeding. The existence of an order made under s 37AO does not mean that a person against whom such an order is made does not subsequently institute, nor had previously instituted, a proceeding which is not vexatious and which ought not to proceed.

33 The other new material relied upon by Mr Garrett was his application dated 6 February 2015 to stay his application for leave to appeal a decision pending judgment in this proceeding. The application was rejected by Beach J, but Mr Garrett wanted to use the fact of having made the application as an example of him "taking reasonable steps, as [he saw] it, not to put the other side to any expense until a substantive issue of whether the debt that was the subject of the appointment of the two trustees in bankruptcy existed or didn't". Whatever may have been the subjective motivation of Mr Garrett in making the application for a stay on his application for leave to appeal, however, it does not bear upon the objective circumstances required to be considered in the application of s 37AO. The example, in any

event, even assuming the characterisation given to it by Mr Garrett, goes no way to answer the overwhelming material warranting the making of the orders under s 37AO.

34 The material satisfies me that the orders sought by the respondents should be made. Mr Garrett has frequently instituted and conducted vexatious proceedings in Australian courts and tribunals, and the reasons for that conclusion apply also to this proceeding. I am satisfied also that the present proceeding against the respondents comes within the fourth category in the statutory definition of 'vexatious proceeding', namely, a proceeding conducted in a way so as to harass or annoy, and, therefore, that it should be dismissed in its present form.

35 Accordingly the following orders will be made:

(1) A declaration that Mr Garrett is a person who has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals.

(2) A declaration that by this proceeding the respondents are each persons against whom Mr Garrett has instituted or conducted a vexatious proceeding.

(3) That Mr Garrett be prohibited from:

(a) instituting in his own name; or

(b) causing others to institute; or

(c) being concerned, whether directly or indirectly, in the institution of,

any proceeding in any registry of the Federal Court of Australia against the Commissioner of Taxation, any Second Commissioner of Taxation, any Deputy Commissioner of Taxation, any person who is or was employed in the Australian Taxation Office as an "APS Employee" within the meaning of the *Public Service Act 1999* (Cth), or any agent or adviser of the Commissioner of Taxation without the leave of this Court.

(4) That Mr Garrett is prohibited from:

(a) instituting in his own name; or

(b) causing others to institute; or

(c) being concerned, whether directly or indirectly, in the institution of,

any proceeding in any registry of the Federal Court of Australia without the leave of this Court.

(5) This proceeding will be dismissed.

(6) Mr Garrett is to pay the costs of the respondents of and incidental to the interlocutory application made by the respondents for orders pursuant to s 37AO.

(7) The applicant pay the respondent's costs of and incidental to the proceeding.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Pagone.

Associate:

Dated: 26 February 2015

15. Judicial Review

A common law principle

15.7 Access to the courts for the purpose of judicial review is an important common law right. Sir William Wade stated that 'to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power'.[6]

15.8 In Church of Scientology v Woodward , Brennan J said:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[7]

15.9 In his Introduction to Australian Public Law , Professor David Clark gives a brief history of judicial review of administrative action:

> Judicial review in the administrative law sense originated in the 17th century when various prerogative writs, so called because they issued in the name of the Crown, began to be issued against administrative bodies. These writs, such as certiorari, prohibition and mandamus originated in the 13th century, but were originally confined to review of the decisions of inferior courts ... By the late 17th century the writs began to be used against administrative agencies such as the Commissioners of Sewers, and the Commissioners for Bridges and Highways. With the dramatic expansion of State functions in the 19th century and the emergence of innumerable statutory bodies, committees, commissions, and other administrative agencies, the way was open for the expansion of judicial review in this sense.
>
> The power to judicially review what were once called inferior jurisdictions (lower courts and administrative agencies) arrived in Australia with the opening of the first Supreme Courts in Van Diemen's Land and New South Wales in 1824 ... The power to review by certiorari, prohibition and mandamus was, in origin, a common law power and was, therefore, a power of jurisdiction created by the courts through their judicial decisions.[8]

15.10 It is widely recognised that the right to judicial review is not absolute. Judicial review is available to test the legality of a decision, and not its merits—the courts are not authorised to ask whether a decision was a 'good' decision. It asks only whether the decision has been properly made, in accordance with the law.

15.11 At common law, the availability and scope of judicial review is a consequence of the judicial remedy sought. These remedies are the prerogative writs of habeas corpus,[9] quo warranto,[10] mandamus,[11] certiorari,[12] and prohibition,[13] as well as the equitable remedies of injunction and declaration. The standing rules relating to the availability of common law remedies and time limits which apply in relation to each of these differ.[14] While some of these requirements have relaxed over time,[15] access to judicial review at common law remains technical and complex. The Kerr Committee[16] recognised that the rules that apply to judicial review at common law were 'both unwieldy and unnecessary'.[17] It noted that 'a case can be lost or won on the basis of choice of remedy'.[18]

15.12 At common law, the following are subject to judicial review: a rule-maker's power to make delegated legislation;[19] decisions of the Governor-General; recommendations and findings contained in coronial reports; Royal Commission reports;

and the reports of other formal advisory bodies. Judicial review is also available in relation to decisions made in exercise of a prerogative or executive power, intermediate decisions, and some contractual decisions.[20]

Judicial review in Australia

15.13 In addition to the common law, s 75(v) of the Constitution provides for an 'entrenched minimum provision' of judicial review.[21] Section 39B(1) of the Judiciary Act 1903 (Cth) (Judiciary Act) extends the original jurisdiction of the High Court of Australia (High Court) to the Federal Court of Australia (Federal Court).[22] Section 39B(1A)(c) vests the Federal Court with jurisdiction over 'any matter arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter'.

15.14 In 1977, the ADJR Act was introduced as part of wide-ranging reforms to federal administrative law in Australia.[23] The Act seeks to simplify, codify and, in some cases, expand common law judicial review. It established: a single, simple procedure for review, which applies regardless of the grounds argued, or the remedy sought; codified the grounds for review; and established a right to reasons for a decision where a person has standing to seek review, with certain exceptions. However, limitations imposed on the ADJR Act have affected its capacity to operate as a simpler, more streamlined avenue for judicial review.[24]

15.15 This chapter discusses how access to the courts is protected from statutory encroachment; laws which restrict access to the courts; and when laws that restrict access to the courts may be justified. It is about judicial review, rather than merits review.[25] However, judicial review has been characterised as 'inevitably sporadic and peripheral'.[26] The availability of merits review has been described as 'in a way more important than judicial review because it can offer a complete answer, not available through the courts, to a person affected by a decision'.[27]

[6] Sir William Wade, above n 3.

[7] Church of Scientology v Woodward (1982) 154 CLR 25, 70 (Brennan J).

[8] David Clark, Introduction to Australian Public Law (Lexis Nexis Butterworths, 4th ed, 2013) 247.

[9] The writ of habeas corpus demands that a person incarcerated be brought before the court to determine whether there is lawful authority to detain the person.

[10] The writ of quo warranto requires the decision maker to show by what authority they exercise a power.

[11] Mandamus is an order compelling or directing a lower court or administrative decision maker to perform mandatory duties correctly. A writ of procedendo sends a case to a lower court with an order to proceed to judgment.

[12] A writ of certiorari sets aside a decision made contrary to the law.

[13] A writ of prohibition forbids a decision maker from commencing or continuing to perform an unlawful act.

[14] Matthew Groves and Janina Boughey, 'Administrative Law in the Australian Environment' in Matthew Groves (ed), Modern Administrative Law in Australia: Concepts and Context (Cambridge University Press, 2014) 3, 6.

[15] The tests for standing to sue at common law are converging: Mark Aronson and Matthew Groves, Judicial Review of Administrative Action (Thomson Reuters Australia, 2013) 723.

[16] In 1968, the Commonwealth Administrative Review Committee, chaired by Sir John Kerr was established to consider reform of administrative law in Australia. This committee is referred to in this chapter as the 'Kerr Committee'.

[17] Commonwealth, Report of the Administrative Review Committee , Parliamentary Paper No 133 (1971) [58]. This report is referred to in this chapter as the Kerr Committee Report .

[18] Ibid.

[19] It is rare that an application for judicial review of delegated legislation will be successful. The courts tend to adopt a presumption of validity, and 'a reluctance to substitute judicial opinion for that of the legislation-maker':Dennis Pearce and Stephen Argument, Delegated Legislation in Australia (LexisNexis Butterworths, 3rd ed, 2005) [14.1]. However, the principles of ultra vires that apply to administrative decision making also apply to delegated legislation: Stephen Argument, 'Delegated Legislation' in Matthew Groves and HP Lee (eds), Australian Administrative Law: Fundamentals, Principles and Doctrines (Cambridge University Press, 2007) 141. For an example of a successful challenge to delegated legislation, see: Paradise Projects Pty Ltd v Gold Coast City Council [1994] 1 Qd R 314, 321. For a more in-depth discussion of inappropriate delegations of legislative power, see Chapter 17.

[20] For an example of review at common law of a decision to enter a contract, see Cubic Transportation Systems Inc v New South Wales [2002] NSWSC 656 (26 July 2002). Further, the High Court has held that injunctive and declaratory relief were available for legal errors made by contractors in written advice to the Minister, even where the Minister had no obligation to consider the advice: Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319, [51]–[53], [99]–[104].

[21] This is discussed further below. The 'entrenched minimum provision' of judicial review extends to State Supreme Courts, and thus, the decisions of state administrative bodies: Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531. Section 75(iii) of the Constitution also protects access to the courts. It states that the High Court shall have original jurisdiction in any matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

[22] This jurisdiction is modified to exclude the justiciability of certain criminal justice process decisions before the High Court.

[23] In addition to introducing the Administrative Decisions (Judicial Review) Act 1977 , the government established the Administrative Appeals Tribunal as a general merits review body, introduced freedom of information legislation, and established the Commonwealth Ombudsman: John McMillan, 'Parliament and Administrative Law' (Research Paper 13 2000-01, 7 November 2000).

[24] Decisions of the Governor-General , and findings and recommendations in official reports are excluded from review under the ADJR Act. Reviews under the ADJR Act are only available for decisions made under an enactment, thus, excluding challenges to delegated legislation, decisions made in exercise of executive or pregorative power and contractual decisions. The courts have interpreted the term "decision" in the ADJR Act to generally mean a 'final, or operative and determinative' decision. An intermediate step does not ordinarily constitute a decision. Intermediate decisions were considered to be a decision in their own right if a statute made separate provision for it, and it was substantive: Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531.

[25] Merits review is concerned with a person or body—other than the primary decision maker—considering the facts, law and policy underlying the original decision, and substituting a fresh decision where the new decision is correct or preferable. By contrast, judicial review is concerned with the lawfulness of a decision, whether by reference to whether the decision maker had the power to make the decision, a legal error has occurred in making the decision or, where necessary, whether the rules of procedural fairness were complied with. However, where the tribunal conducting merits review makes a legal or procedural error, that decision may be subject to judicial review.

[26] Re McBain; Ex Parte Australian Catholic Bishops Conference (2002) 209 CLR 372, [471]–[472]; Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, [522]–[523].

[27] Justice Robert French, 'Administrative Law in Australia: Themes and Values' in Matthew Groves and HP Lee (eds), Australian Administrative Law: Fundamentals, Principles and Doctrines (Cambridge University Press, 2007) 22. See also Justice Janine Pritchard, 'The Rise and Rise of Merits Review: Implications for Judicial Review and for Administrative Law' (2015) 79 Australian Institute of Administrative Law Forum 14; Commonwealth, Report of the Administrative Review Committee, Parliamentary Paper No 133 (1971) [58].

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[redacted]

From: eLodgment_admin@fedcourt.gov.au
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To: Andrew Morton Garrett
Subject: Lodgment Rejection, eLodgment ID 525648 on New File, TASMANIA REGISTRY

Dear Andrew Morton Garrett

Thank you for using eLodgment.

Your lodgment has been rejected for the following reason;

As leave has not been obtained for you to institute proceedings, this lodgement is being rejected.

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[redacted]

From: eLodgment_admin@fedcourt.gov.au
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---

andrew.garrett@taggc.com.au

From: eLodgment_admin@fedcourt.gov.au
Sent: Wednesday, 29 November 2017 8:34 AM
To: Andrew Morton Garrett
Subject: Lodgment Rejection, eLodgment ID 526669 on New File, TASMANIA REGISTRY

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Thank you for using eLodgment.

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No: VID600/2014

Federal Court of Australia

District Registry: Victoria

Division: General

ANDREW MORTON GARRETT
Applicant

THE COMMISSIONER OF TAXATION and others named in the schedule
Respondent

ORDER

JUDGE: JUSTICE PAGONE

DATE OF ORDER: 26 February 2015

WHERE MADE: Melbourne

THE COURT DECLARES THAT:

1. The applicant is a person who has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals.

2. By this proceeding the respondents are each persons against whom the applicant has instituted or conducted a vexatious proceeding.

AND THE COURT ORDERS THAT:

3. The applicant is prohibited from:

   (a) instituting in his own name; or

   (b) causing others to institute; or

   (c) being concerned, whether directly or indirectly, in the institution of,

   any proceeding in any registry of the Federal Court of Australia against the Commissioner of Taxation, any Second Commissioner of Taxation, any Deputy Commissioner of Taxation, any person who is or was employed in the Australian Taxation Office as an "APS employee" within the meaning of the Public Service Act 1999 (Cth), or any agent or adviser of the Commissioner of Taxation without the leave of this Court.

4. The applicant is prohibited from:

   (a) instituting in his own name; or

   (b) causing others to institute; or

(c) being concerned, whether directly or indirectly, in the institution of,

any proceeding in any registry of the Federal Court of Australia without the leave of this Court.

5. The proceeding be dismissed.

6. The applicant pay the costs of the respondents of and incidental to the interlocutory application made by the respondents for orders pursuant to s 37AO.

7. The applicant pay the respondent's costs of and incidental to the proceeding.

Date that entry is stamped:

Registrar

Schedule

No: VID600/2014

Federal Court of Australia

District Registry: Victoria

Division: General

Respondent	JAMES O'HALLORAN
Respondent	CHRIS BARLOW
Respondent	ANNE EDWARDS
Respondent	DEBBIE HASTINGS
Respondent	AARON ELBOURNE
Respondent	BRETT SWANSON
Respondent	DAMIEN CHANNEL
Respondent	CHRIS SPILLANE
Respondent	DEBRA SIGNAL
Respondent	SEAN O'DONGHUE
Respondent	ALYX SUDALL
Respondent	BRETT SWANSON
Respondent	JANE FERRY

Telephone: (03) 8600 3333
Facsimile: (03) 8600 3351
DX 435 MELBOURNE

A.B.N. 49 110 847 399

FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

305 WILLIAM STREET
MELBOURNE VIC 3000

12 December 2017

Mr Andrew Garrett

By email: [redacted]

Dear Mr Garrett,

Re: Recent Documents and Correspondence

I refer to your email dated 1 December 2017. I do not propose responding to each of the matters raised in your email. I can, however, advise that as a registrar of the Federal Court of Australia, I am able to exercise the powers of a registrar in any registry of the Court.

Yours faithfully,

Tim Luxton
Acting District Registrar

Telephone: (03) 8600 3333
Facsimile: (03) 8600 3351
DX 435 MELBOURNE

A.B.N. 49 110 847 399

FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

305 WILLIAM STREET
MELBOURNE VIC 3000

28 November 2017

Mr Andrew Garrett

By email: [redacted]

Dear Mr Garrett,

Re: Recent Documents and Correspondence

I am the Acting District Registrar for Victoria. The District Registrar for Tasmania is currently on leave.

I note that you have recently sought to file various documents with the Federal Court of Australia, and that you have also sent a number of emails to the Court. Pursuant to the orders of Justice Pagone made on 26 February 2015 in proceeding VID600/2014 (copy enclosed), you are prohibited from instituting any proceeding in any registry of the Court without the leave of the Court. No such leave has been granted. Accordingly, you are unable to institute a proceeding in the Court and your documents cannot be accepted for filing.

Please note that if you seek to institute any further proceeding in breach of the orders of Justice Pagone made on 26 February 2015, then without further notice to you the relevant documents will not be accepted for filing.

Yours faithfully,

Tim Luxton
Acting District Registrar

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

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

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

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

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

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

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

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

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

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

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

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

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

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128 Shearer, above n 65, 55.

3. Scrutiny Mechanisms

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Summary

3.1 Existing and proposed laws are scrutinised for compatibility with rights and principles, including the traditional rights and freedoms identified in the Terms of Reference for this Inquiry, at a number of stages and by a number of different agencies, bodies and institutions. This chapter outlines some of these processes for testing compatibility, with a particular focus on scrutiny of draft legislation by parliamentary Committees, and considers how the processes may be improved.

3.2 Scrutiny of laws for compatibility with rights may be seen as part of a 'democratic culture of justification'—that is, a culture in which 'every exercise of public power is expected to be justified by reference to reasons which are publicly

available to be independently scrutinised for compatibility with society's fundamental commitments'.[1]

3.3 Such scrutiny can provide a check on legislative interferences with rights. There is also an important democratic rights value in good, transparent processes and debate about all laws, but particularly those laws that limit long-held and fundamental individual rights and freedoms.

3.4 Professor Janet Hiebert and others have written about processes of 'legislative rights review' and the 'importance of confronting whether and how proposed legislation implicates rights adversely and engaging in reasoned judgment about whether the initiative should be amended or is nevertheless justified'.[2] This can happen throughout the legislative process:

> From the early stages of bureaucratic policy development of identifying compatibility issues and advising on more compliant ways to achieve a legislative initiative, through to the Cabinet process of deciding whether to proceed with legislative bills, and ultimately in parliamentary deliberation about whether to approve legislation or put pressure on the government to make amendments.[3]

3.5 Scrutiny can also continue after a law is enacted. This chapter discusses the role and functions of some of the agencies and institutions that scrutinise existing laws for compatibility with rights.

3.6 Policy makers are provided with assistance at the policy development and legislative drafting stages. Additionally, there is a long history of subjecting bills to scrutiny by parliamentary committees. Scrutiny may also continue after enactment where bodies such as the Australian Law Reform Commission (ALRC) and the Australian Human Rights Commission (AHRC) review legislation. Others such as the Independent National Security Legislation Monitor (INSLM) are tasked with undertaking reviews for specific areas warranting particular attention.

3.7 This chapter discusses a number of areas for further improvements in the processes that provide checks on legislative encroachments on rights. These include:

- additional guidance and assistance for policy makers during the policy development and legislative drafting stages;

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1 Murray Hunt, 'Introduction' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16.

2 Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 39, 40. See also, Hunt, above n 1; David Kinley, Finding and Filling the Democratic Deficit in Human Rights in Murray Hunt, Hayley Hooper and Paul Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 29; John Uhr, 'The Performance of Australian Legislatures in Protecting Rights' in Adrienne Stone, Jeffrey Goldsworthy and Tom D Campbell (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, Ltd., 2013).

3 Hiebert, above n 2, 40.

- the quality of explanatory material and statements of compatibility, including the range of rights covered by each Committee, and the differences in the scrutiny applied;
- the level of overlap between the work of the three parliamentary scrutiny committees;[4]
- the time available for scrutiny committees to conduct their scrutiny; and
- the extent to which the Parliament considers scrutiny committee reports.

3.8 This chapter discusses a variety of approaches to implement such further improvement. In doing so, it draws upon analogous approaches in other jurisdictions, parliamentary inquiries and expert commentators.

Policy development and legislative drafting

3.9 Policy is usually developed by government departments. The Office of Parliamentary Counsel (OPC) drafts legislation on instructions provided by the government department with policy responsibility. Policy development and legislative drafting are not undertaken in a rights vacuum. Guidance on developing rights-compatible legislation is provided in the *Legislation Handbook* and *Legislative Instruments Handbook*,[5] in drafting directions prepared by the OPC,[6] and other guidance documents.[7]

Drafting and policy development

3.10 The *Legislation Handbook* published by the Department of Prime Minister and Cabinet states that the Attorney-General's Department should be consulted on legislative proposals which may be 'inconsistent with or contrary to an international instrument relating to human rights,' in particular the *International Covenant on Civil and Political Rights* (ICCPR).[8]

3.11 The drafting directions prepared by the OPC specifically alert policy makers to the types of provisions that have drawn adverse comment from the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).[9]

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4 The Senate Standing Committee for the Scrutiny of Bills, Parliamentary Joint Committee on Human Rights and Senate Standing Committee on Regulations and Ordinances are required to scrutinise Commonwealth laws for encroachments on rights.

5 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (1999) [8.19]; Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014) ch 6.

6 Office of Parliamentary Counsel (Cth), *Drafting Directions*.

7 See, eg, Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011); Office of Parliamentary Counsel (Cth), *OPC's Drafting Services—A Guide for Clients* (2012).

8 Department of the Prime Minister and Cabinet (Cth), above n 5, [6.34].

9 See, eg, *Drafting Direction No 3.5—Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers 2013* pt 7.

3.12 The Attorney-General's Department has published a number of guidance documents for policy makers about human rights issues.[10] Guidance sheets are available on a range of issues including, fair trial and fair hearing rights, the presumption of innocence, retrospective criminal laws, and freedom of movement.[11] The Attorney-General's Department also provides guidance on 'permissible limitations' on rights included in the ICCPR.[12] This is based on the Siracusa Principles,[13] which broadly invite an analysis of whether the limitation is prescribed by law, in pursuit of a legitimate objective, rationally connected to its stated objective, and proportionate to the achievement of the objective. The guidance sets out useful questions to ask in conducting this analysis.

3.13 The Attorney-General's Department also provides guidance and performs a scrutiny role in specific subject areas. For example, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides guidance on a variety of issues relating to criminal offences, including when it is appropriate to: impose strict or absolute liability; reverse the burden of proof; or abrogate the privilege against self-incrimination.[14] It also guides policy makers to relevant areas within the Attorney-General's Department for other issues, such as when it may be appropriate to abrogate legal professional privilege.[15] The Security and Intelligence Law Branch of the Attorney-General's Department scrutinises all draft Bills and legislative instruments containing secrecy provisions. It provides an advisory assessment as to whether the provision is appropriately tailored and adequately justified and may also suggest alternative drafting.

Explanatory material

3.14 Since 1983, it has been standard practice for government Bills to be accompanied by an explanatory memorandum, and since 2003, all Commonwealth regulations must be accompanied by an explanatory statement. However, the history of explanatory statements and explanatory memoranda goes back to 1932 and the 1950s respectively.[16]

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10 Attorney-General's Department, *Tool for Assessing Human Rights Compatibility* <www.ag.gov.au>. This includes guidance sheets on a number of issues, including, for example, fair trial and fair hearing rights, the presumption of innocence, prohibition on retrospective criminal laws, and freedom of movement.

11 Ibid.

12 Attorney-General's Department, *Permissible Limitations* <http://www.ag.gov.au>.

13 See Ch 2.

14 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.2.6], [4.3], [9.5].

15 Ibid [9.5.8].

16 Explanatory statements have accompanied Commonwealth regulations since the inception of the Regulations and Ordinances Committee in 1932. Explanatory memoranda in the modern sense have commonly accompanied government bills since the 1950s. In the first half of the 20th Century, they took the form of comparative memoranda, which inserted the proposed amendments into the parent Act, demarking the proposed additions and deletions: Patrick O'Neill, 'Was There an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament' (Parliamentary Library, Parliament of Australia, 2006).

3.15 Explanatory material is prepared by the government department with policy responsibility for the Bill or instrument, for approval by the relevant Minister. It contains the policy objectives of the Bill or legislative instrument, and contains a short explanation about each of the clauses. Explanatory material ought, where possible, to address matters relating to the principles considered by the Scrutiny of Bills Committee[17] or Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee).[18]

3.16 The OPC may also indicate, as part of the drafting process, that particular matters—such as those that have been of interest to the Scrutiny of Bills Committee—should be explained in the explanatory memorandum.[19]

3.17 Since 2011, all legislation and disallowable instruments must also be accompanied by a 'statement of compatibility'. Statements of compatibility must include an assessment of whether a Bill or disallowable instrument is compatible with human rights.[20] These are prepared by the relevant department for approval by the relevant Minister.

3.18 Following the introduction of this requirement, the Attorney-General's Department developed a tool for assessing human rights compatibility. Templates and example statements of compatibility assist departments in the drafting of statements of compatibility.[21] The Attorney-General's Department provides specific assistance and advice to departments on statements of compatibility where requested and assists policy makers in responding to requests for further information from the Parliamentary Joint Committee on Human Rights (Human Rights Committee).[22]

3.19 Additionally, the Human Rights Committee has published a guidance note on drafting statements of compatibility, setting out 'the Committee's approach to human rights assessments and its requirements for statements of compatibility'.[23]

Consultation on draft Bills

3.20 A draft version of a Bill (an exposure draft) will sometimes be released to the public, particularly where 'the proposed measures will have a significant impact on groups in the community'.[24] Cabinet endorsement or Prime Ministerial approval (for Bills that do not include measures endorsed by Cabinet) is required before an exposure draft is released.[25] This is in addition to consultation with other government agencies, which provides an additional opportunity for potential encroachments on rights to be brought to the attention of policy makers.

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17 Department of the Prime Minister and Cabinet (Cth), above n 5, [8.19].
18 Office of Parliamentary Counsel, *Legislative Instruments Handbook* (2014) [177].
19 Office of Parliamentary Counsel (Cth), above n 7, [68].
20 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8–9.
21 Attorney-General's Department, above n 10.
22 The Human Rights Committee's scrutiny role and processes are discussed below.
23 Parliamentary Joint Committee on Human Rights, *Drafting Statements of Compatibility* (Guidance Note No 1, Parliament of Australia, 2014).
24 Department of the Prime Minister and Cabinet (Cth), above n 5, [4.7(i)].
25 Ibid [7.9].

Parliamentary scrutiny processes

3.21 Parliamentary debate is the ultimate forum for the scrutiny of, and judgments about, encroachments on rights. However, in order to ensure the Parliament is well-informed in conducting such debates, a number of scrutiny committees specifically consider whether Commonwealth laws encroach upon rights. This process began with the Regulations and Ordinances Committee, established in 1932, to review delegated legislation.[26] The scrutiny function was expanded with the introduction of the Scrutiny of Bills Committee in 1981. Both Committees have a longstanding history of conducting a technical scrutiny function, without specifically assessing the policy merits of a particular provision.[27] In 2011, the Human Rights Committee was established to consider a set of human rights specifically tied to Australia's international human rights obligations.

3.22 Additionally, the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee), Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) and the Senate Standing Committee on Legal and Constitutional Affairs[28] (Legal and Constitutional Affairs Committee) review legislation which may have an impact on rights, including in relation to migration, counter-terrorism and national security legislation.

Senate Standing Committee on Regulations and Ordinances

3.23 The Regulations and Ordinances Committee was established in 1932. It is comprised of six Senators. It is required to review and, if necessary, report on whether disallowable instruments:[29]

- are in accordance with the applicable statute;

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26 The original terms of reference provided for the referral of '[a]ll Regulations and Ordinances" to the committee "for consideration and, if necessary, report there on. In 1979 A disallowable instrument is a legislative instrument subject to disallowance under the *Legislative Instruments Act 2003* (Cth). Under s 42 of the Act, a Senator or MP may, within 15 days of the tabling of a legislative instrument, move a notice of motion to disallow the instrument. If the motion is agreed to, the instrument is disallowed, and ceases to have effect. If the motion is not resolved or withdrawn within 15 days, the instrument is deemed to be disallowed, and ceases to have effect. A similar instrument cannot be made within six months after disallowance, unless the House that disallowed the regulation provides approval.

27 Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"' (2015) 26 *Public Law Review* 19, 22; Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

28 At the commencement of each parliament, eight legislative and general purpose committees are appointed. These are the Community Affairs, Economics, Education and Employment, Environment and Communications, Legal and Constitutional Affairs and Rural and Regional Affairs committees. Each of these committees is comprised of a legislation committee and a references committee. The legislation committee deals with bills, estimates processes and departmental oversight. The references committee conducts inquiries into matters referred to it by the Senate.

29 Under s 44 of the *Legislative Instruments Act 2003* (Cth), a number of legislative instruments are not subject to disallowance (exempt instruments). The Regulations and Ordinances Committee does not scrutinise such instruments. However, the Human Rights Committee is required to examine all legislative instruments (including exempt instruments), as part of its scrutiny function.

- unduly trespass on personal rights and liberties;[30]
- unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal;[31] or
- contain matters more appropriate for parliamentary enactment.[32]

3.24 The Committee is supported by a secretariat and a legal adviser.[33] The legal adviser reviews all disallowable instruments against the Committee's scrutiny principles, and provides a report on compliance.[34]

3.25 Legislative instruments must be registered, and then tabled before both Houses of Parliament within 6 days of registration. Copies of the instruments are sent to the legal adviser, who provides the Committee with a report on compliance with the Committee's scrutiny principles.

3.26 Where an instrument raises a concern with respect to the matters being tested, the Regulations and Ordinances Committee usually writes to the relevant rule-maker[35] for further explanation, or to seek an undertaking for specific action to resolve the concern.[36] This process is usually completed within 15 sitting days of the instrument being tabled, to allow the Committee to seek disallowance of an instrument if its concerns are not allayed.

3.27 Where the scrutiny process is not completed, the Regulations and Ordinances Committee may move a notice of motion for disallowance in order to provide it with sufficient time to complete its review, and retain its power to seek disallowance if concerns about compliance with its scrutiny principles are not addressed.[37] The power to seek disallowance is a powerful tool, which acts as a discipline on rule-makers. The Senate has adopted all disallowance motions recommended by the Regulations and Ordinances Committee.[38]

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30 The Regulations and Ordinances Committee appears to have interpreted this statement broadly, allowing the Committee to scrutinise disallowable instruments to determine whether they encroach upon a variety of rights-type issues.

31 Scrutiny under this principle reflects the development of administrative law and its greater emphasis on merits and judicial review of government decisions.

32 Senate, Parliament of Australia, *Standing Order 23* (24 August 1994).

33 The appointment must be approved by the President of the Senate: Ibid cl (9).

34 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2012–13* (Report No 118, 2013), [1.12].

35 Delegated legislation is made by a wide variety of executive and administrative authorities, including Ministers, Heads of Departments and agencies, and their delegates.

36 Senate Standing Committee on Regulations and Ordinances, *Report on the Work of the Committee in 2012–13* (Report No 118, 2013) [1.13].

37 Ibid [1.14]–[1.15].

38 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 424.

Senate Standing Committee for the Scrutiny of Bills

3.28 The Scrutiny of Bills Committee was established in 1981, with its functions at first carried out by the Legal and Constitutional Affairs Committee.[39] In May 1982, the Scrutiny of Bills Committee was constituted as a separate Committee, and in 1987 as a Standing Committee of the Senate.[40] The scrutiny principles applied by the Committee are drawn from those of the Regulations and Ordinances Committee, and require it to consider whether Bills or Acts:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.[41]

3.29 The Committee is comprised of six Senators, and is supported by a secretariat made up of a secretary, principal research officer and legislative research officer. The Committee is also supported by a legal adviser,[42] who reviews all Bills against the scrutiny principles, and provides a report on whether and how the principles are breached. Based on this advice, the Committee publishes, on each Wednesday of a Parliamentary sitting week, an *Alert Digest* containing an outline of each of the Bills introduced in the previous sitting week, along with any comments in relation to a particular Bill.

3.30 If concerns are raised in the *Digest*, the Committee writes to the Minister responsible for the Bill, inviting a response to its concerns, and sometimes suggesting an amendment. The Minister's response may include a revised version of a section of legislation or explanatory memorandum, or may better explain why the Bill has appeared in its current form. If the response does not allay the Committee's concerns, it will draw the provisions in question to the Senate's attention through its Report, and leave it to the Senate to determine the appropriateness of the relevant encroachment on rights and freedoms in the Bill.

3.31 The Committee's concerns, the Minister's responses and the Committee's conclusions are published in a Report. Since February 2015, the Committee also

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39 Senate Standing Committee for the Scrutiny of Bills, *Ten Years of Scrutiny—A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills* (Senate, Parliament of Australia, 1991), 6.

40 Ibid 5–7.

41 Senate, Parliament of Australia, *Standing Order 24* (15 July 2014).

42 Ibid cl (8).

publishes a newsletter highlighting key scrutiny issues. It focuses on 'information that may be useful when Bills are debated'.[43]

Parliamentary Joint Committee on Human Rights

3.32 The Human Rights Committee was established under s 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (*Parliamentary Scrutiny Act*). It must examine all Bills and legislative instruments (including exempt instruments) that come before either House of Parliament for compatibility with human rights, and report to both Houses on that issue.[44] The Human Rights Committee is an extension of existing parliamentary rights review mechanisms, and is explicitly focused on international human rights instruments.

3.33 The *Parliamentary Scrutiny Act* defines human rights as those rights and freedoms declared in the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESR),[45] as well as a number of other international instruments relating to rights in the ICCPR and ICESR.[46]

3.34 The Committee is comprised of 10 members, drawn from the Senate and the House of Representatives,[47] and is supported by a legal adviser and secretariat, which includes two human rights lawyers.[48] If the Committee is not initially satisfied with the human rights compatibility of a Bill, it will write to the relevant Minister seeking further detail. The Committee also has the power to request a briefing, call for written submissions, hold public hearings and call for witnesses.[49]

3.35 On each Tuesday of a Parliamentary sitting week, the Committee publishes a report commenting on provisions raising human rights concerns, or where insufficient information has been provided to allow it to undertake an analysis. The Committee also comments on responses received to comments it has made in earlier reports.

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43 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Senate Scrutiny of Bills Committee News* (2015), 1.

44 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(a). The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) formed part of the government response to the National Human Rights Consultation. The National Human Rights Consultation Committee recommended the adoption of federal human rights legislation modelled on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT): Attorney-General's Department *National Human Rights Consultation Report* (2009).

45 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

46 Namely, the *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); *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 the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

47 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 5(1).

48 Parliamentary Joint Committee on Human Rights, *Annual Report 2012–13* (2013) [1.15]. The appointment of the legal adviser must be approved by the Presiding Officers.

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2012, 7177 (Harry Jenkins).

3.36 The Committee seeks to determine 'whether any identified limitation of a human right is justifiable'[50] by reference to a proportionality analysis.[51]

Senate Standing Committee on Legal and Constitutional Affairs

3.37 The Senate Legal and Constitutional Affairs Committee (Legal and Constitutional Affairs Committee) is one of eight legislative and general purpose Standing Committees first established in 1970. Each Committee is allocated a group of departments and agencies to oversee.[52] The Legal and Constitutional Affairs Committee oversees the Attorney-General's Department and Department of Immigration and Border Protection.[53] It scrutinises a number of laws which have a significant impact on rights, such as migration law, and counter-terrorism and national security legislation.

3.38 These Committees are appointed under Senate Standing Order 25 at the commencement of each Parliament,[54] and are comprised of a pair of sub-committees, the Legislation sub-committee, which deals with Bills,[55] estimates processes and oversees departmental performance, and the References sub-committee, which deals with references from the Senate.[56]

3.39 In reviewing Bills, the Legislation and References Committee is required to take into account comments made by the Scrutiny of Bills Committee.[57] Consideration of the Bill on the floor of the Parliament is suspended while a legislative or general purpose Committee is scrutinising a Bill.[58] As a result, the Constitutional and Legal Affairs Committee must consider encroachments on rights to the extent that the Scrutiny of Bills Committee raises these issues in its reports. As discussed above, the Scrutiny of Bills Committee is specifically required to review Bills to determine whether they trespass on personal rights and liberties.

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50 See, eg, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report—Nineteenth Report of the 44th Parliament* (2015), v.

51 In considering whether a limitation on a right may be proportionate, the key factors the Human Rights Committee considers are whether there are less restrictive ways to achieve the policy objective, whether there are effective safeguards and controls over the measure, and the extent of the interference with a right: Parliamentary Joint Committee on Human Rights, 'Drafting Statements of Compatibility' (Guidance Note No 1, Parliament of Australia, 2014) pp 2–3. See ch 2 for a further discussion on proportionality tests.

52 Harry Evans and Rosemary Laing, above n 38, ch 16.

53 Ibid.

54 Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), ch 16.

55 The Senate Standing Committee on the Selection of Bills selects the bills that will be considered by a legal and general purpose committee. It is comprised of the whips of the Government, Opposition and minor parties, and two government members, and two opposition members.

56 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 2.

57 Ibid cl 2B.

58 Senate, Parliament of Australia, *Standing Order 115* (14 August 2006).

3.40 Each of the legislative and general purpose committees (including the Legal and Constitutional Affairs Committee) has six Senators.[59] The Committees have the power to appoint persons with specialist knowledge.[60]

Parliamentary Joint Committee on Intelligence and Security

3.41 The Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee) was established in 2001, under s 28 of the *Intelligence Services Act 2001* (Cth) (*Intelligence Services Act*). It has eleven members.[61] Five members are drawn from the Senate and six from the House of Representatives.[62]

3.42 The Intelligence Committee is required to review any matter relating to Australia's intelligence and security agencies that is referred to it by the Attorney-General or a resolution of either House of Parliament.[63] This includes reviewing Bills relating to national security that come before the Parliament. The Committee may also request the Attorney-General to refer a matter to it.[64] Some examples of Bills the Intelligence Committee has reviewed since January 2014 include the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), and the National Security Legislation Amendment Bill (No. 1) 2014 (Cth).

3.43 The Intelligence Committee also has a role in post-implementation review. It is required, under s 29 of the *Intelligence Services Act*, to review the operation, effectiveness and implications of the following provisions by 7 March 2018:[65]

- *Australian Security Intelligence Organisation Act 1979* (Cth): pt III div 3;
- *Crimes Act 1914* (Cth): pt 1AA div 3A;
- *Criminal Code*: divs 104 and 105;[66] and
- *Criminal Code*: ss 119.2 and 119.3.

3.44 The Intelligence Committee is required to review pt 5-1A of the *Telecommunications (Interception and Access) Act 1979* (Cth) (*Interception and Access Act*) by 13 April 2020. Additionally, where a Bill seeks to amend provisions in the *Interception and Access Act* that would expand the scope of data retention powers, that Bill must be referred to the Intelligence Committee for review.[67]

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59 Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 5.
60 Ibid cl 17. The appointment must be approved by the President of the Senate.
61 *Intelligence Services Act 2001* (Cth) s 28(3).
62 Ibid s 28(2).
63 Ibid s 28(1)(b).
64 Ibid s 28(2).
65 Ibid s 29(1)(bb).
66 *Criminal Code Act 1995* (Cth) sch 1 *(Criminal Code)*.
67 See, eg, *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) s 187AA(4).

3.45 The Intelligence Committee is also required to monitor and review the performance of the Australian Federal Police's functions under pt 5.3 of the *Criminal Code*.[68]

3.46 While the *Intelligence Services Act* does not expressly require that the Intelligence Committee consider rights as part of its review of Bills, in practice the Committee considers whether the Bill provides adequate safeguards and accountability mechanisms.[69] These are matters that are relevant to whether encroachments on rights are justified.[70] The Intelligence Committee has the power to conduct private hearings,[71] which may allow it to conduct a more thorough evidence-based review of justifications for encroachments on rights based on national security concerns, as it can hear and take into account sensitive matters of national security that cannot be made public.

Parliamentary Joint Committee on Law Enforcement

3.47 The Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) was established in December 2013, and is comprised of ten members.[72] Five members are drawn from the House of Representatives and five from the Senate.[73]

3.48 The Law Enforcement Committee is concerned mostly with the activities of the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). It is required, among other things, to examine trends and changes in criminal activities, practices and methods and report on changes it thinks desirable to the structure, functions, powers and procedures of the ACC and AFP.[74] It is also required to oversee the operation of pt 2–6 and s 20A of the *Proceeds of Crime Act 2002* (Cth).[75]

3.49 The Law Enforcement Committee is not expressly required to consider rights as part of its review. However, its oversight functions are designed to monitor the implementation and operation of legislative frameworks which may encroach upon rights.[76]

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68 *Intelligence Services Act 2001* (Cth) s 29(1)(baa).

69 See, eg, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (September 2014) 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 2; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) 2.

70 This is reflected in the Terms of Reference to this ALRC Inquiry, which requires the ALRC to consider 'any safeguards provided in the laws, such as rights of review or other accountability mechanisms'.

71 *Intelligence Services Act 2001* (Cth) sch 1, cl 6–7.

72 *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) s 5.

73 Ibid s 5(2).

74 Ibid s 7(1)(g).

75 *Proceeds of Crime Act 2002* (Cth) s 179U.

76 The Attorney-General, in discussing the Law Enforcement committee's role, stated that it exemplifies the 'commitment to improving oversight and accountability in relation to the exercise of the functions of Commonwealth agencies': Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Examination of the Australian Crime Commission Annual Report 2013–2014* (June 2015) [1.3].

Other review mechanisms

Australian Human Rights Commission

3.50 The AHRC, as part of its role under the *Australian Human Rights Commission Act 1986* (Cth), has the power to review laws to determine whether they are compatible with Australia's human rights obligations. Such a review may be conducted under a reference from the Attorney-General, or because it appears to the AHRC desirable to do so.[77] It is required to report to the Attorney-General on its review,[78] and to include any recommendations for amendments of an enactment to ensure it is not inconsistent with, or contrary to, any human right.[79] The Attorney-General is required to table a copy of any such report within 15 sitting days of receipt of the report.[80]

Independent National Security Legislation Monitor

3.51 The INSLM must review, on his or her own initiative, or arising from a reference from the Prime Minister or the Intelligence Committee, the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation, and any other laws which relate to counter-terrorism or national security.[81] As part of its review, the INSLM must consider whether these laws contain appropriate safeguards to protect the rights of the individual, and are proportionate and necessary.[82] The INSLM is required to give the Prime Minister an annual report relating to the above functions.[83] The Prime Minister must table the annual report before Parliament within 15 sitting days.[84]

3.52 As discussed above, the Intelligence Committee is also specifically tasked with a post-implementation review of a number of provisions relating to counter-terrorism and national security.

Australian Law Reform Commission

3.53 The ALRC conducts reviews into matters referred to it by the Attorney-General.[85] In conducting a review, the ALRC must aim to ensure that the laws, proposals and recommendations it reviews, considers or makes 'do not trespass unduly on personal rights and liberties'.[86] It is required to report on its review to the Attorney-General,[87] who must table the report within 15 sitting days.[88]

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77 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(e).
78 Ibid.
79 Ibid s 29(1).
80 Ibid s 46.
81 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1).
82 Ibid s 6(1)(b).
83 Ibid s 29(1).
84 Ibid s 29(5).
85 *Australian Law Reform Commission Act 1996* (Cth) s 21.
86 Ibid s 24(1)(a).
87 Ibid s 21(2).
88 Ibid s 23.

Efficacy of guidance materials and pre-legislative processes

3.54 This section considers how guidance materials for policy makers may be further improved and supplemented.

3.55 As set out above, there is a lot of guidance available to policy makers as they develop policy and prepare drafting instructions for OPC. The Attorney-General's Department has indicated, as at 1 November 2015, that it is in the process of updating it.

3.56 However, these materials may not be easily discoverable for policy makers as they begin the policy-making process. The guidance material is prepared by a number of government departments and agencies, and sometimes, by the relevant parliamentary scrutiny committee. It is sometimes organised by subject matter, and sometimes by reference to human rights.

3.57 The *Legislation Handbook*, which provides an overview of legislative processes, was last updated in 2000, before the establishment of the Human Rights Committee in 2011.[89] The *Legislation Handbook* would benefit from being updated, with specific reference to the approach to rights encroachments, the justifications for such encroachments, and the role of the various parliamentary scrutiny committees. It should also contain an up to date list of the additional guidance material available to assist in the legislative drafting process.[90]

3.58 One example of useful additional guidance relates to sunset clauses and review mechanisms. While some rights-encroaching legislation include time limits or 'sunset clauses',[91] and review or reporting mechanisms,[92] there is no general guidance about when sunset clauses or review mechanisms may be an appropriate safeguard for legislation identified as likely to be inconsistent with rights. Such guidance could be included in the *Legislation Handbook*, and might be an issue dealt with in guidance material published by the Attorney-General's Department.

3.59 The OPC has indicated that its role is to assist policy makers to translate their policy goals into a Bill. It seeks 'to assist instructors to develop and refine the policy so that the legislation is effective, clear and introduced within required timeframes'.[93] The OPC could provide further advice to departments about how avoid or minimise legislative encroachments on rights by, for instance, setting out whether less

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89 The Legislation Handbook discusses the role of the Scrutiny of Bills Committee and provides guidance on information that ought to be included in explanatory memoranda. Department of the Prime Minister and Cabinet (Cth), above n 5, [8.19], [14.53].

90 A recent report on reducing red tape recommended that the Legislation Handbook be amended. It also recommended that the information required to support the legislation process be streamlined, including by way of an electronic system: Barbara Belcher, *Independent Review of Whole of Government Internal Regulation* (2015) vol 1, [15.1]–[15.2]. The changes recommended here could be incorporated into any decision by the Government to adopt the recommendations made in that report.

91 See, eg, *Criminal Code* ss 119.2, 105.53.

92 See, eg, Ibid s 105.47; *Personal Property Securities Act 2009* (Cth) s 343.

93 Office of Parliamentary Counsel (Cth), above n 7, [64].

encroaching drafting options are available, and the relative merits of such options. The OPC currently takes this approach where policy makers know their desired outcome, but do not have detailed views on how to implement them.[94] Alternatively, the OPC may wish to follow the approach it takes where questions of constitutional validity arise. While the OPC does not refuse to draft 'constitutionally suspect provisions',[95] it will:

- draw attention to the constitutional doubts;
- ensure legal advice is obtained from the Australian Government Solicitor, Solicitor-General or Attorney-General; and
- where appropriate, advise on alternative approaches.[96]

3.60 Under such a model, the OPC might, for instance, draw attention to potential encroachments, direct the policymaker to relevant advisers (for example, the relevant sections of the Attorney-General's Department), and where appropriate, advise on alternative approaches. If the policymaker decides to continue with the rights encroaching approach, the OPC would follow such instructions.

Efficacy of scrutiny and review mechanisms

Overlapping parliamentary scrutiny

3.61 Since the establishment of the Human Rights Committee, the overwhelming majority of Bills which have an impact on the traditional rights, freedoms and privileges listed in the Terms of Reference have been subject to at least two separate streams of parliamentary committee review. This section considers the level of overlap, and whether streamlining the functions of the committees may be useful.

3.62 Where no concerns arise about human rights compatibility, or where further information is required before a determination on compatibility can be made, the work of the Human Rights Committee, in practice, appears quite similar to the work of the Scrutiny of Bills Committee. In particular, the reports of each Committee reflect that both Committees commonly write to the Minister seeking additional information or explanation as to why a law that limits rights is justified.[97]

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94 Ibid [58]–[60].

95 Ibid [27]–[28]. As set out above, it is not the role of the OPC to determine constitutional validity, and the drafting of provisions by OPC is not an assertion that the provision is constitutionally valid. It is the role of the Commonwealth's primary advisers to ensure that the government does not propose legislation which it considers may be constitutionally invalid.

96 Ibid [28].

97 Compare Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Second Report of the 44th Parliament* (February 2014), [1.317]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Sixth Report of 2014* (June 2014), 238–9.

3.63 However, where there are stronger concerns about the impact of a proposed law on human rights, it seems that only the Human Rights Committee regularly seeks evidence to justify an encroachment, and focuses on the measure as a whole.[98] A similar approach appears to be reflected in considering legislative instruments.[99]

3.64 The Scrutiny of Bills Committee, in its own Inquiry into the future role and direction of the Committee, recognised the potential for significant overlap in the work of the Committees.[100] However, the Committee also noted that there were significant areas of difference. The Scrutiny of Bills Committee does not conduct its scrutiny function by reference to international law, and potentially does not cover many of the economic, social and cultural rights considered by the Human Rights Committee. Similarly, the Human Rights Committee does not usually address matters like administrative law principles that are covered by the Scrutiny of Bills Committee. This can result in the two Committees focusing on very different issues. Additionally, even where the two Committees consider the same right, the scope of the right discussed may vary. For example, in looking at provisions which have retrospective effect, the Human Rights Committee focuses only on retrospective criminal offences. By contrast, the Scrutiny of Bills Committee considers retrospective civil provisions, as well as other matters such as 'legislation by press release' in taxation matters.[101]

3.65 It may be useful to consider reviewing the scope of the work of the Committees, and the relationship between them. For instance, the Human Rights Committee might focus its attention only on the most significant limitations on a set of identified rights and liberties, while the Scrutiny of Bills Committee and Regulations and Ordinances Committees might continue to undertake a technical review of all Bills and disallowable instruments. Any consideration of the scope of the Committees and their relationship should take into account the range of rights considered by each Committee, and the application of each Committee's scrutiny principles.

3.66 The United Kingdom's experience provides an instructive precedent. The Joint Committee on Human Rights (UK Human Rights Committee) was established in 2001.[102] The UK Human Rights Committee has, since its inception, focused only on Bills which appear to raise 'significant questions of human rights'.[103] The legal adviser to the UK Human Rights Committee reviews all Bills at an early stage, and brings

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98 Compare Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Second Report of the 44th Parliament* (February 2014), [1.37]–[1.42]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2014* (March 2014), 94–126.

99 Compare Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 10th Report of 2013* (June 2013) [3.11], [3.19]; Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No 6 of 2013* (June 2013) 2013 403–4.

100 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012), [3.12].

101 Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

102 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001–2005 Parliament—19th Report of Session 2004–05* (2005) [1].

103 Ibid [46].

those Bills which raise significant concerns to the Committee's attention.[104] Significance is determined by reference to various criteria, including

> how important is the right affected, how serious is the interference with it, and in the case of qualified rights, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.[105]

3.67 Since 2006, the UK Human Rights Committee has begun an additional sifting process, to further target its scrutiny. The additional criteria used to determine its work program include whether:

- the European Court of Human Rights or United Kingdom higher courts have recently given a judgment on the issue raised;
- the Bill has attracted broad public or media attention;
- 'reputable' stakeholders such as non-governmental organisations have commented on the Bill;
- the Explanatory Notes are incomplete; and
- the Bill raises an issue that has consistently been a concern for the UK Human Rights Committee in the past, but which the Government does not appear to have addressed.[106]

3.68 Similar criteria adapted for Australia could, for example, be used by the Human Rights Committee. However, any such approach would need to be carefully adapted, given the comparative sizes of the two Parliaments, and the respective workloads of Parliamentarians.

Statements of compatibility and explanatory memoranda

3.69 Since January 2013, the Human Rights Committee has identified over 80 statements of compatibility that did not meet its expectations.[107] The Scrutiny of Bills Committee, in the same period, asked the relevant Minister to include further information and justification in explanatory memoranda for 78 Bills.[108]

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104 Joint Committee on Human Rights, UK Parliament, *The Work of the Committee in the 2001–2005 Parliament—19th Report of Session 2004–05* (2005) [47].

105 Ibid.

106 Joint Committee on Human Rights, UK Parliament, *The Committee's Future Working Practices—23rd Report of Session 2005–06* (July 2006) [29].

107 This figure is derived from a review of reports of the Human Rights Committee. Where a number of bills are introduced as part of a package, it has been counted as a single bill. Data has been collected from January 2013 because the Human Rights Committee began regularly drawing attention to statements of compatibility it judged inadequate from its first report of 2013 onwards.

108 This figure is derived from a review of reports of the Scrutiny of Bills Committee from January 2013 onwards.

3.70 The need for explanatory material that sets out adequate justification for encroachments on rights is well documented. In its 2006 report on future approaches to scrutiny, the UK Human Rights Committee noted:

> [t]he provision of proper Explanatory Memoranda is absolutely essential to the effective functioning of the [scrutiny process].[109]

3.71 Such concerns have been echoed in the Australian context:

> Deficient [explanatory memoranda] means that committees are required to seek additional information from agencies about the proposed legislation. This delays the scrutiny process and could have been avoided had a sufficient EM been provided. This is not an ideal outcome given the tight timeframes under which committees often operate when reporting to Parliament.[110]

3.72 In 2004, the Scrutiny of Bills Committee specifically considered the quality of explanatory memoranda. It recommended that an 'appropriately qualified person' check that the explanatory memorandum complies with requirements set out in a new Legislation Handbook, which would consolidate material contained in the existing *Legislation Handbook*, Legislation Circular and the OPC's *Drafting Directions*.[111]

3.73 The Human Rights Committee has also emphasised the need to include, in statements of compatibility, a detailed and evidence-based assessment of proposed provisions that interfere with rights.[112]

3.74 Statements of compatibility are also required in New Zealand, the UK, ACT and Victoria. In the ACT and New Zealand, the Attorney-General prepares the statement of compatibility. In Victoria and the United Kingdom, as in the Commonwealth, it is the Minister or the sponsor of the Bill who prepares the statement of compatibility.

3.75 The Law Council of Australia (Law Council) submitted that a more centralised approach to preparing statements of compatibility—for example, by an independent statutory body such as the AHRC—should be considered.[113]

3.76 At the Commonwealth level, the *Parliamentary Scrutiny Act* was designed to 'deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process'.[114] Centralising the preparation of statements of compatibility, however, may reduce the extent to which a culture of human rights permeates among policy makers as a whole.

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109 Joint Committee on Human Rights, UK Parliament, *The Committee's Future Working Practices—23rd Report of Session 2005–06* (July 2006) [41].

110 Alex Hickman, 'Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?' (2014) 29 *Australasian Parliamentary Review* 116, 120.

111 Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills—Third Report of 2004* (2004), 31.

112 Parliamentary Joint Committee on Human Rights, 'Drafting Statements of Compatibility' (Guidance Note No 1, Parliament of Australia, 2014), 1.

113 Law Council of Australia, *Submission 140*. This was supported in Civil Liberties Australia, *Submission 94*.

114 Commonwealth, *Parliamentary Debates* House of Representatives Human Rights (Parliamentary Scrutiny) Bill 2010, Second Reading Speech, 30 September 2010, (Robert McClelland) 271.

3.77 Training for policy makers and parliamentarians on human rights and proportionality analyses may be useful. The Law Council submitted that the Attorney-General's Department should be provided with additional resources to conduct such training.[115] Other bodies such as the AHRC may also be well placed to conduct such training. The Human Rights Law Centre supported this approach.[116]

3.78 Additionally, it may be useful to consider stipulating in (primary or delegated) legislation, what must be included in statements of compatibility.[117] One approach may be to incorporate the Committee's expectations into pt 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).[118] The object of such procedures would be to ensure that statements of compatibility and explanatory memoranda provide sufficiently detailed and evidence-based rationales for encroachments on rights to allow the parliamentary scrutiny Committees to complete their review.

Time constraints and parliamentary consideration of Committee reports

3.79 Parliamentary Committees tasked with legislative scrutiny are subject to significant time constraints. Parliamentarians have identified that 'the main thing that would make parliamentary scrutiny more effective is more time'.[119] Bills may pass into legislation with little or no consideration of the committees' reports.[120] Bills may even be passed into legislation before the Scrutiny of Bills Committee has published its reports. Since 2000, this has occurred in relation to 109 of the Bills considered in the Scrutiny of Bills Committee's reports. Since its inception, over 50 Bills have been passed before the Human Rights Committee completed its review. The Scrutiny of Bills Committee has indicated that the 'main difficulty the Committee encounters is

115 Law Council of Australia, *Submission 140*.

116 Human Rights Law Centre, *Submission 148*.

117 There is some question about what is necessary for the Human Rights Committee to conduct its scrutiny role. For example, the Attorney-General, in responding to additional information and justification sought by the Human Rights Committee, wrote that while a detailed analysis 'is the Committee's preference based on its interpretation of [the relevant guidance materials], I do not agree with its apparent suggestion that there is a formal requirement that Statements must include "a separate and detailed analysis of each measure which may limit human rights". More particularly, I do not agree with the Committee's contention that such an itemised account is necessary in order for it to discharge or document in its reports any demonstrable attempt to discharge, its statutory mandate to undertake an analysis of the human rights compatibility of Bills introduced to the Parliament (especially those Bills which may limit human rights)': Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (November 2014) 38.

118 Such a legislative codification of the Committee's expectations is likely to have persuasive effect. However, the lack of consequences for a failure to lodge a statement of compatibility, or lodging an inadequate statement of compatibility would remain a structural issue: Shawn Rajanayagam, 'Does Parliament Do Enough: Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38 *UNSWLJ* 1046, 1073.

119 Carolyn Evans and Simon Evans, 'Messages from the Front Line: Parliamentarians' Perspectives of Rights Protection' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 342.

120 See, eg, Senate Standing Committee for the Scrutiny of Bills, above n 39, 33, 96–7; Evans and Evans, above n 119, 342.

when legislation is introduced and passed before the Committee can complete its scrutiny process'.[121]

3.80 The Scrutiny of Bills Committee, in its own Inquiry into its future role and direction, concluded that minimum timeframes for Committee consideration of legislation were not appropriate, on the basis that its role is not to delay the passage of legislation, but to provide timely reports which alert the Senate to the need for possible further examination of provisions of concern. It also noted that the Scrutiny of Bills Committee retains the discretion to set its own timeframe for considering and reporting on a Bill, while acknowledging that the passage of legislation is not deferred pending the Committee's views.[122]

3.81 A number of parliamentarians[123] and commentators[124] support the imposition of minimum timeframes for scrutiny Committees to consider Bills.

3.82 As discussed above, where the Senate Standing Committee for Selection of Bills (Selection of Bills Committee) refers a Bill to a legislative or general purpose Committee for review, that Committee must take into account any comments made by the Scrutiny of Bills Committee. While the legislative or general purpose Committee is reviewing the Bill, debate in relation to the Bill is suspended. However, the Selection of Bills Committee has not published any guidance on its criteria for determining which Bills should be referred. One approach to ensure that sufficient time is provided may be to amend the Standing Orders to require all Bills which attract adverse comment by the parliamentary scrutiny Committees (Scrutiny of Bills Committee and Human Rights Committee) to be referred for review by a legislation or general purpose Committee.

3.83 A separate concern is the extent to which Parliament takes into account reports of the Scrutiny of Bills Committee and Human Rights Committee in passing legislation. Speaking about the Human Rights Committee, Professor George Williams noted that 'there is little or no evidence that [the reports of the Committee] have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights'.[125] A review of Bills before the Commonwealth

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121 Senate Standing Committee for the Scrutiny of Bills, *Submission 150*.

122 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) [4.26].

123 A number of parliamentarians interviewed by Professors Carolyn and Simon Evans indicated that 'there was a need for parliamentarians, and parliamentary committees, to be given sufficient time to carry out their role seriously and responsibly': Evans and Evans, above n 119, 343.

124 See, eg, Law Council of Australia, Submission No 19 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Amnesty International, Submission No 18 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Combined Community Legal Centres NSW, Submission No 16 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 1 April 2010; Australian Human Rights Commission, Submission No 11 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Civil Liberties Australia, Submission No 7 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010.

125 G Williams, *Submission 76*.

Parliament in the three year period from 2001 to 2003 found that, of the 63 Bills considered to burden human rights, 43 (or approximately 68%) were enacted.[126]

3.84 In the UK, of 1,006 substantive references to the UK Human Rights Committee's reports during debate in Parliament, only 16 resulted in the Government offering amendments.[127] In a further seven instances, the Government issued guidance based on the UK Human Rights Committee's reports.[128]

3.85 The effectiveness of the scrutiny process was also queried in the context of the *Anti-Terrorist, Crime and Security Act 2001* (UK):

> [A]ll 124 clauses of the ATCSA 2001 were discussed in sixteen hours, which resulted in no amendments to the Government's proposal. If parliamentary debate is unable to effect changes to potential legislation that breaches human rights standards, its effectiveness must be questioned. One possibility for the complacency of the Commons might be that the s 19 Declaration of Compatibility gives the impression that the Act has already been 'proofed' for human rights compliance. Thus it may serve as a 'legitimizing cloak' which detracts from the quality of debate.[129]

3.86 However, determining the efficacy of scrutiny Committees solely, or even primarily, by reference to the number of amendments resulting from consideration of Committee reports is not necessarily appropriate. As noted by political scientists Meghan Benton and Meg Russell, 'take-up by government of recommendations is only one form of Committee influence and arguably not even the most important'.[130] Influencing policy debate, improving transparency within the bureaucracy, holding the government to account by scrutiny and questioning, and creating incentives to draft or amend legislation to avoid negative comments from the Committee, are all examples of other important functions of scrutiny Committees.

3.87 Since 2005, the UK Human Rights Committee has adopted the practice of recommending amendments to Bills in its reports to give effect to its recommendations, and encourages its members to table these amendments before both Houses of Parliament.[131] This has contributed to a dramatic increase in parliamentary consideration of its reports, increasing from 23 substantive references in the 2001–2005 Parliament to 1,006 substantive references in the 2005–2010 Parliament.[132]

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126 Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' in *National Parliament, National Symbols: Lectures in the Senate Occasional Lecture Series 2006–2007* (Department of the Senate, 2007) figure 1.

127 Murray Hunt, Hayley Hooper and Paul Yowell, 'Parliaments and Human Rights: Redressing the Democratic Deficit' (Arts & Humanities Research Council Public Policy Series No 5, Arts & Humanities Research Council, 2012) 43–4.

128 Ibid 44.

129 Rhonda Powell, 'Human Rights, Derogations and Anti-Terrorist Detention' 69 *Saskatchewan Law Review* 79, 98.

130 Meghan Benton and Meg Russell, 'Assessing the Impact of Parliamentary OVersight Committees: The Select Committees in the British House of Commons' [2012] *Parliamentary Affairs* 1, 26.

131 Murray Hunt, Hayley Hooper and Paul Yowell, above n 127, 22.

132 Ibid 41.

3.88 A more radical suggestion to facilitate greater parliamentary consideration of Committee reports is, in effect, to incorporate the scrutiny process into a Bill's passage through Parliament, with scrutiny Committees empowered to amend the text of a Bill. These amendments would be subject to rejection in a vote before the Parliament.[133] However, this has the potential to result in more politically partisan scrutiny Committees, subject to greater executive control.[134]

3.89 Alternatively, consideration might be given to providing that the Senate 'cannot deal with a Bill until the Committee has presented a report which in itself has been dealt with by the parliament'.[135] A number of stakeholders supported this approach.[136] For example, the Public Interest Advocacy Centre (PIAC) submitted that, outside of a 'clearly defined emergency', a Bill should not be passed unless the relevant parliamentary scrutiny Committee has considered the Bill, the relevant Minister has responded to questions raised, and the parliament has had the opportunity to read and debate the recommendations made in any report of such Committees.[137]

3.90 It may be constructive to consider reviewing the operations of the Committees and Senate procedures to ensure that the relevant parliamentary scrutiny bodies have sufficient time to conduct their reviews, and to facilitate adequate consideration of scrutiny reports during parliamentary debates. While political interests may, in some circumstances, result in a Bill being passed without adequate time for review, or consideration by the Parliament, such procedures may assist in creating a rights-minded culture, and facilitate more informed decision-making by the legislature.

3.91 A number of submissions to the Scrutiny of Bills Committee's Inquiry into its future role and direction also noted that the Scrutiny of Bills Committee should have access to adequate resources to complete its scrutiny task.[138] The Law Council submitted to this Inquiry that the Human Rights Committee should be better resourced.[139] The need for specialist assistance for the Intelligence Committee was also

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133 Jonathan Morgan, 'Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 428, 444.

134 Ibid.

135 Senate Standing Committee for the Scrutiny of Bills, above n 39, 97.

136 Human Rights Law Centre, *Submission 148*; Public Interest Advocacy Centre, *Submission 133*.

137 Public Interest Advocacy Centre, *Submission 133*.

138 Australian Law Reform Commission, Submission No 32 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 9 April 2010; Rule of Law Institute of Australia, Submission No 28a to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 24 June 2010; Australian Lawyers for Human Rights, Submission No 24a to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 9 July 2010; Law Council of Australia, Submission No 19 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 6 April 2010; Australian Human Rights Commission, Submission No 11 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Civil Liberties Australia, Submission No 7 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 19 March 2010; Michael Tate, Submission No 2 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee*, 2 March 2010.

139 Law Council of Australia, *Submission 140*.

raised in consultations during this Inquiry. In particular, it was suggested that the Intelligence Committee may benefit from specialist intelligence assistance provided by seconding members of the intelligence community to work with the Committee.

Review bodies

3.92 Some stakeholders raised questions about the capacity of the INSLM to conduct comprehensive and transparent reviews of counter-terrorism and national security laws. PIAC, for example, expressed concern about scrutiny being 'left to a body that only recently was entirely defunded by the Government, the position only being restored when the Government sought to pass a number of controversial counter-terror laws'.[140] The National Association of Community Legal Centres stated that ongoing support and funding for the INSLM is required.[141]

3.93 The INSLM noted, in its 2014 Annual report, that there has been no Government response to any of the INSLM's recommendations.[142] Since this statement, while the INSLM has commenced a number of inquiries, these are still ongoing. The Law Council submitted that this highlighted a need for the *Independent National Security Legislation Monitor Act 2010* (Cth) to be strengthened, for example, by requiring the Government to respond to the INSLM's recommendations within certain timeframes.[143]

3.94 The Law Council also noted reductions in the budget for the Australian Human Rights Commission, and the lack of government response to a number of its reports and publications. It submitted that the government should be required to table a response to any report on complaints within six months of receiving the report.[144]

Conclusion

3.95 The mechanisms and processes for the scrutiny of laws for compatibility with rights and freedoms could be further improved by, for example:

- providing additional guidance and assistance for policy makers during the policy development and legislative drafting;
- improving the quality of explanatory material and statements of compatibility;

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140 Public Interest Advocacy Centre, *Submission 133*. PIAC supported 'a stand-alone reference to the ALRC to investigate the impact of counter-terrorism laws on human rights and the broader implications for the community'. These concerns were echoed in Monash University Castan Centre for Human Rights, *Submission 99*.

141 National Association of Community Legal Centres, *Submission 143*.

142 See Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2014) 2. The INSLM has not concluded any further inquiries since the statement in the 2014 Annual report.

143 Law Council of Australia, *Submission 140*.

144 Ibid. The National Association of Community Legal Centres supports this approach, and suggests extending the requirement to respond to ALRC reports: National Association of Community Legal Centres, *Submission 143*.

- considering the level of overlap between the work of the three scrutiny Committees, including the range of rights covered by each Committee, and the differences in the scrutiny applied;
- increasing the time available for scrutiny committees to conduct its scrutiny; and
- improving the extent to which the Parliament considers scrutiny committee reports.

4. Freedom of Speech

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Summary

4.1 Freedom of speech has been described as 'the freedom *par excellence*; for without it, no other freedom could survive'.[1] Freedom of speech is 'closely linked to other fundamental freedoms which reflect … what it is to be human: freedoms of religion, thought, and conscience'.[2]

4.2 This chapter discusses the source and rationale of the common law right of freedom of speech; how this right is protected from statutory encroachment; and when laws that interfere with freedom of speech may be considered justified, including by reference to the concept of proportionality.

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1 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.
2 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.

4.3 Free speech and free expression are understood to be integral aspects of a person's right of self-development and fulfilment. The freedom is intrinsically important, and also serves a number of broad objectives:

> First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[3]

4.4 At the same time, it is widely recognised that freedom of speech is not absolute. In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts. Some limitations on speech have long been recognised by the common law itself, such as obscenity and sedition, defamation, blasphemy, incitement, and passing off.

4.5 Numerous Commonwealth laws may be seen as interfering with freedom of speech and expression. There are, for example, more than 500 government secrecy provisions alone. In the area of commercial and corporate regulation, a range of intellectual property, media, broadcasting and telecommunications laws restrict the content of publications, broadcasts, advertising and other media products. In the context of workplace relations, anti-discrimination law—including the general protections provisions of the *Fair Work Act 2009* (Cth)—prohibit certain forms of speech and expression.

4.6 Some areas identified as being of concern are:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and, in particular, the offence of advocating terrorism;
- various terrorism-related secrecy offences in the *Criminal Code*, *Crimes Act 1914* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) and, in particular, those relating to 'special intelligence operations';
- Commonwealth secrecy offences generally, including the general secrecy offences in ss 70 and 79 of the *Crimes Act*; and
- anti-discrimination law and, in particular, s 18C of the *Racial Discrimination Act 1975* (Cth) (*RDA*).

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

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3 *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).

(INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

4.8 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech. However, it appears that pt IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech.

4.9 In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'. In some respects, the provision is broader than is required under international law to prohibit the advocacy of racial hatred, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

4.10 However, any such review should take place in conjunction with a more general review of anti-vilification laws. This could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws serve their purposes, including in discouraging the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion. Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable.

4.11 There is also reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. Some of these laws may unjustifiably interfere with freedom of speech—and may be unconstitutional—in prohibiting criticism of public officers engaged in performing public functions.

4.12 Finally, the Australian Government should give further consideration to the recommendations of the ALRC in its 2009 report on secrecy laws,[4] and to whether Commonwealth secrecy laws—including the *Australian Border Force Act 2015* (Cth)—provide for proportionate limitations on freedom of speech.

The common law

4.13 Freedom of speech has been characterised as one of the 'fundamental values protected by the common law'.[5] Heydon J has observed that 'there are many common law rights of free speech' in the sense that the common law recognises a 'negative theory of rights' under which rights are marked out by 'gaps in the criminal law'.[6]

4.14 The High Court of Australia has stated that freedom of speech is 'a common law freedom' and that it 'embraces freedom of communication concerning government and political matters':

> The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters … The

4 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

5 *Nationwide News v Wills* (1992) 177 CLR 1, 31.

6 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [145] (Heydon J). See Ch 2.

> common law and the freedoms it encompasses have a constitutional dimension. It has been referred to in this Court as 'the ultimate constitutional foundation in Australia'.[7]

4.15 In relation to defamation, the common law defence of qualified privilege has been extended on the basis of the constitutionally protected freedom of communication, discussed below. In *Lange v Australian Broadcasting Corporation* (*Lange*), the High Court determined that, as the development of the common law in Australia cannot run counter to constitutional imperatives, the common law rules of qualified privilege should properly reflect the requirements of ss 7, 24, 64, 128 and related sections of the *Australian Constitution*.[8]

4.16 Freedom of speech is not absolute. Even the First Amendment of the *United States Constitution* has been held not to protect all speech: it does not, for example, protect obscene publications or speech inciting imminent lawless action.[9] Australian common law has long recognised limits to free speech, for example, in relation to the criminal law of incitement and conspiracy, and in obscenity and sedition law.

Protections from statutory encroachment

Australian Constitution

4.17 In Australian law, particular protection is given to political speech, recognising that free speech on political matters is necessary for our system of representative government:

> Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.[10]

4.18 Beginning with a series of cases in 1992,[11] the High Court has recognised that freedom of political communication is implied in the *Constitution*. This freedom 'enables the people to exercise a free and informed choice as electors'.[12] The *Constitution* has not been found to protect free speech more broadly.

4.19 The *Constitution* does not protect a personal right, but rather, the freedom acts as a restraint on the exercise of legislative power by the Commonwealth.[13]

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7 *Monis v The Queen* (2013) 249 CLR 92, [60] (French CJ).

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566, 571.

9 *Brandenburg v Ohio* 395 US 444 (1969).

10 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139 (Mason CJ). See also *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).

11 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

12 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570.

13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506. This 'negative' form of the right to freedom of speech is shared by the United States and other common law countries, where 'constitutional rights are thought to have an exclusively negative cast': Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (University of Melbourne Legal Studies Research Paper 476) 12.

> The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?[14]

4.20 The freedom is not absolute. For one thing, it only protects some types of speech—political communication.[15] In *Lange*, it was held that the freedom is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'.[16]

4.21 While the scope of the implied freedom is open to some interpretation, it does not appear to extend to non-political communication and non-federal communications concerning discrete state issues.[17] French CJ has advocated a broader understanding of the meaning of 'political communications' to include 'matters potentially within the purview of government'.[18] This interpretation has not so far commanded support from a majority of the High Court.[19]

4.22 The limited scope of the communications covered by the implied freedom is illustrated by the decision of the High Court in *APLA Ltd v Legal Services Commissioner (NSW)*.[20] This concerned prohibitions, in New South Wales legislation, on advertising by barristers and solicitors. The High Court held that the prohibitions did not burden the implied freedom of political communication, because the advertising was not communication about government on political matters.[21]

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14 *Unions NSW v New South Wales* (2013) 304 ALR 266, [36]. Also, the High Court said in *Lange*: 'Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government': *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557. Sections 7 and 24 do not 'confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power': Ibid 560.

15 Political communication includes 'expressive conduct' capable of communicating a political or government message to those who witness it: *Levy v Victoria* (1997) 189 CLR 579.

16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

17 See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 184. However, the High Court has stated that the 'complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication': *Unions NSW v New South Wales* (2013) 304 ALR 266, [25].

18 *Hogan v Hinch* (2011) 243 CLR 506, [49]. French CJ has said that the 'class of communication protected by the implied freedom in practical terms is wide': *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [67]. The case left open the possibility that religious preaching may constitute 'political communication'.

19 See Williams and Hume, above n 17, 185.

20 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

21 Kirby J, in dissent, held that as a matter of basic legal principle, a protected freedom of communication arises to protect the integrity and operation of the judicial branch of government, just as it does with regard to the legislature and executive branch: Ibid [343]. The laws in question, he said, amounted to 'an impermissible attempt of State law to impede effective access to Ch III courts and to State courts exercising federal jurisdiction', which 'cannot stand with the text, structure and implications of the Constitution': Ibid [272].