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Section 2 – Overview of Ministerial Responsibilities

**PROVISION OF LEGAL ASSISTANCE TO MINISTERS AND THEIR STAFF**

Part 3 of the *Parliamentary Entitlements Regulations 1997* (the Regulations) establishes a scheme for the provision of assistance to Ministers (and former Ministers) to defend legal proceedings against them arising out of the performance of their ministerial duties or their position as Minister. The total expenditure under Part 3 of the Regulations in the 2011-12 financial year was \$56,174.82 (GST exclusive).

The Regulations do not exhaustively cover the circumstances in which assistance can be provided to Ministers in legal proceedings. Under existing arrangements, the Commonwealth normally meets the costs of administrative law challenges to a Minister's decisions or in responding to subpoenas relating to a Minister's current portfolio.

The Attorney-General is the approving Minister under the Regulations except where the Attorney-General is involved in the matter for which an application for assistance has been made. In summary, the Regulations:

- enable assistance to be given to current and former Ministers who held that office on or after 24 May 1990:
  - for certain legal proceedings against them, including claims for damages and other relief, and for criminal proceedings, where the proceedings have arisen out of the performance of their ministerial duties
  - for inquiries involving a Minister, where the proceedings have arisen out of the performance of their ministerial duties, but not a court challenge to the conduct or validity of the inquiry
  - where a Minister is sued only because of being, or having been, the holder of the office of Minister, and
  - where a subpoena to give evidence or produce documents is received by a Minister and relates to the performance of Ministerial duties or holding the office of Minister
- establish the criteria relevant to giving assistance and the level of assistance that can be given to a Minister
- provide for conditions to be imposed on a decision to give assistance, the revocation of decisions to give assistance and the repayment of money paid if a condition of approval is breached
- require the Secretary to this Department to monitor strategies in legal proceedings for which assistance has been given and to inform the approving Minister if he or she considers that proposed expenditure is unreasonable, and
- require the Attorney-General to report to Parliament on decisions to give assistance and to table a consolidated statement of expenditure at the end of each financial year.

**Ministerial Staff**

The Commonwealth may also pay the legal costs of ministerial staff, employed under the *Members of Parliament (Staff) Act 1984*, for proceedings arising out of their duties assisting a Minister in performing ministerial duties. Provision for such assistance is set out in Appendix E of the *Legal Services Directions 2005*. The Directions are a statutory instrument issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, about the performance of legal work for the Commonwealth.

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Section 2 – Overview of Ministerial Responsibilities

**MINISTERIAL COUNCILS**

**STANDING COUNCIL ON LAW AND JUSTICE (SCLJ)**

*Formerly the Standing Committee of Attorneys General (SCAG)*

**Objectives**

SCLJ is a ministerial council that provides a forum for Attorneys-General to discuss and progress issues of national significance which require cooperation across jurisdictions, including through uniform or harmonised action where appropriate. SCLJ also oversees the national classification scheme for film, computer games and publications.

**SCLJ priority issues**

Current SCLJ priority issues are:

- Implementation of the National Organised Crime Response Plan
- Progressing a national response to combat cyber crime
- Progressing significant justice microeconomic reform initiatives
- Continuing reform and oversight of the National Classification Scheme
- Promoting stronger interactions between the family law, child welfare and child violence systems
- Harnessing the benefits of technology to improve access to justice, and
- Progressing measures to reduce indigenous disadvantage.

**Frequency of Meetings**

Meetings of SCLJ will be held as determined by the Ministers. Generally, meetings will be held twice a year, around April and October. Meetings are held in each jurisdiction on a rotational basis and are chaired by the Minister who is hosting the particular meeting.

SCLJ meetings are held in conjunction with the Legislative and Governance Forum on Corporations. The Minister for Financial Services, Superannuation and Corporate Law has portfolio responsibility for that meeting.

The next SCLJ meeting is scheduled for 4-5 April 2013 in Darwin.

**Membership**

SCLJ members comprise the Attorneys-General of the Commonwealth, States and Territories and the New Zealand Minister of Justice. The Commonwealth Minister for Home Affairs and Justice currently attends SCLJ meetings as the Minister responsible for censorship and in relation to other matters for which the Minister is responsible including criminal law. Norfolk Island has observer status at SCLJ meetings.

SCLJ is supported by the National Justice CEOs Group (NJCEO) which is made up of the Chief Executive Officers of Attorney-General's and Justice Departments from the Commonwealth, States and Territories, as well as New Zealand. The Commonwealth CEO is the Secretary of the Department.

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Section 2 – Overview of Ministerial Responsibilities

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**Secretariat**

The permanent SCLJ Secretariat is located in the New South Wales Department of Justice and Attorney General (DJAG). The Secretary to SCLJ is Mr Laurie Glanfield AM, Director General, NSW DJAG.

The Secretariat provides support to SCLJ (including to the National Criminal Law Reform Committee and the Censorship Officers' Standing Committee) and the NJCEOs Group. The homepage can be accessed at [www.sclj.gov.au](http://www.sclj.gov.au).

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Section 2 – Overview of Ministerial Responsibilities

**STANDING COUNCIL ON POLICE AND EMERGENCY MANAGEMENT (SCPEM)**

SCPEM was officially launched on 17 September 2011 and replaces two previously separate councils, the Ministerial Council on Police and Emergency Management – Emergency Management (MCPEM-EM) and the Ministerial Council on Police and Emergency Management - Police (MCPEM-P).

**Objectives**

The purpose of the Council is to promote a coordinated national response to law enforcement and emergency management issues. The Council looks to develop a shared framework for cooperation and a basis for strategic directions for the policing and emergency services of Australia and New Zealand. SCPEM looks to develop a shared framework for cooperation and a basis for strategic directions for the emergency services and policing of Australia and New Zealand. The Council also strives to encourage and share best practice across jurisdictions in emergency management and police policy and operations

The Council has particular responsibilities for:

- national leadership on emergency management (all hazards) and disaster resilience, including national policies and priorities
- law enforcement issues such as police powers, criminal offences and the sharing of intelligence
- advancement of the professionalism of policing, and
- consideration of an annual Serious and Organised Crime Threat Assessment presented by the Chair of the Australian Crime Commission Board.

The Council reports to the Council of Australian Governments (COAG) on implementation of the National Strategy for Disaster Resilience.

The Council will work closely with the Standing Council on Law and Justice to ensure coordination of joint priorities, most notably in the areas of organised crime and cyber crime.

**Membership**

SCPEM has a rotating chair and comprises ministers responsible for Police and Emergency Management from the Commonwealth, States and Territories and New Zealand. The President of the Australian Local Government Association is also a member of SCPEM.

Both the Attorney-General and the Minister for Home Affairs and Justice currently represent the Commonwealth on SCPEM. Other Ministers may be invited to participate in Council meetings with the prior agreement of the Chair.

SCPEM will be hosted and chaired by the Northern Territory in 2013.

**Secretariat**

The National Security Resilience Policy Division and the Criminal Justice Division within the Department provide joint secretariat support to SCPEM.

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Section 2 – Overview of Ministerial Responsibilities

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**INTER-GOVERNMENTAL COMMITTEE OF THE AUSTRALIAN CRIME COMMISSION (IGC-ACC)**

**Objectives**

As legislated under s8 of the Australian Crime Commission Act 2002, the IGC-ACC has the following functions:

- to generally monitor the work of the ACC and ACC Board
- to oversee the strategic direction of the ACC and ACC Board, and
- to receive reports from ACC Board for transmission to the governments represented on the IGC-ACC, and transmit those reports accordingly.

**Frequency of Meetings**

The IGC-ACC meets twice a year, immediately prior to SCPEM. The next meeting will be held on 4-5 July 2013 in Darwin. .

**Membership**

The IGC-ACC comprises the Police Ministers of States and Territories and the Commonwealth Minister for Home Affairs. The Minister for Home Affairs chairs IGC-ACC meetings.

**Secretariat**

The SCPEM Secretariat within the Criminal Justice Division of the Department provides secretariat support to the IGC-ACC.

**Transfer of IGC-ACC functions to SCPEM**

The COAG decision on a more effective ministerial council system requires that the functions of IGC-ACC be transferred to SCPEM. This will require amendments to both Commonwealth and State and Territory ACC legislation (the amendments to the Commonwealth legislation must be made first). Until this occurs the IGC-ACC will continue to meet separately.

The Department is consulting with the ACC to determine how best to amend the ACC Act to give effect to the COAG decision. Once a settled Commonwealth position has been reached, the Department will consult with the ACC Board on changes which will be necessary for State and Territory legislation.

The Department does not propose to alter the IGC-ACC membership, chairing or voting rules in the transition to SCPEM.

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Section 2 – Overview of Ministerial Responsibilities

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**QUINTET OF ATTORNEYS-GENERAL**

The Quintet of Attorneys General meets annually and comprises the Attorneys General from the United Kingdom, United States, Canada, New Zealand and Australia. The mandate of the Quintet is to work jointly on issues of mutual concern including criminal justice and legal cooperation. To date the Quintet has met four times.

The next meeting of the Quintet is to be held 8 - 9 May 2013 in Auckland, New Zealand. The agenda usually comprises one substantive issue for discussion, with each country suggesting an additional agenda item for information sharing or discussion purposes.

The agenda for the May 2013 Quintet meeting has yet to be finalised, and a brief outlining options for agenda topics for you to lead will be provided shortly.

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You are here: Attorney-General's Department >> Legal system >> Office of Legal Services Coordination

### Office of Legal Services Coordination

Legal Services Directions and guidance notes

Purchasing legal services

Engagement of Counsel

Compliance and reporting

Connecting government lawyers

Commonwealth Legal Services Expenditure

### Contact details

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# Office of Legal Services Coordination

The Office of Legal Services Coordination works to make sure Australian Government agencies receive consistent and well-coordinated legal services.

Legal services should:

- be of a high standard
- uphold the public interest
- be sensitive to the context that Commonwealth interests may be broader than those of any one agency.

We also administer the [Legal Services Directions 2017](#). The Legal Services Directions 2017 replace the Legal Services Directions 2005, and by operation of Appendix G, paragraph 6 of the Legal Services Directions 2017, where a pre-existing instrument or document refers to the Legal Services Directions 2005, the reference will be read as a reference to the Legal Services Directions 2017.

More information about the services we provide and our responsibilities can be found by following the links below:

- [Legal Services Directions 2017 and guidance notes](#)
- [Purchasing legal services](#)
- [Compliance and reporting](#)
- [Connecting government lawyers](#)
- [Commonwealth legal services expenditure](#)

## Service of court documents on the Commonwealth

Section 63 of the *Judiciary Act 1903* provides that where the Commonwealth is a party to a suit, a process in that suit is to be served on the Attorney-General, or upon some person appointed by him or her to receive service.

Service can be effected on the Commonwealth at the locations listed in the following document:

- [Locations to Effect Service on the Commonwealth - December 2017 \[DOCX 30KB\]](#)
- [Locations to Effect Service on the Commonwealth - December 2017 \[PDF 107KB\]](#)

Law firms providing legal services to the Commonwealth or its agencies may apply to the Office of Legal Services Coordination to be appointed to receive service on behalf of the Commonwealth under the *Judiciary Act 1903 (Cth)*. Guidance note 9 to the Legal Services Directions 2017 provides an indication of what issues an application for appointment should address.

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## **Annexure 2; Statutory Encroachments on Traditional Rights and Freedoms**



**Australian Government**

**Australian Law Reform Commission**

# Traditional Rights and Freedoms— Encroachments by Commonwealth Laws

FINAL REPORT

This Final Report reflects the law as at 1 November 2015

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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**Australian Government**  
**Australian Law Reform Commission**

Senator the Hon George Brandis QC  
Attorney-General of Australia  
Parliament House  
Canberra ACT 2600

23 December 2015

Dear Attorney-General

***Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges***

On 19 May 2014, the Australian Law Reform Commission received Terms of Reference to undertake a *Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges*. On behalf of the Members of the Commission involved in this Inquiry and in accordance with the *Australian Law Reform Commission Act 1996*, I am pleased to present you with the Final Report on this reference *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Final Report 129, 2015).

Yours sincerely,

A handwritten signature in cursive script that reads "Rosalind Croucher".

**Professor Rosalind Croucher AM**  
**President**



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## Terms of Reference

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### **Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges**

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to the rights, freedoms and privileges recognised by the common law,

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report pursuant to section 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- the identification of Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and
- a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.

For the purpose of the inquiry 'laws that encroach upon traditional rights, freedoms and privileges' are to be understood as laws that:

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

### **Scope of the reference**

In undertaking this reference, the ALRC should include consideration of Commonwealth laws in the areas of, but not limited to:

- commercial and corporate regulation;
- environmental regulation; and
- workplace relations.

In considering what, if any, changes to Commonwealth law should be made, the ALRC should consider:

- how laws are drafted, implemented and operate in practice; and
- any safeguards provided in the laws, such as rights of review or other accountability mechanisms.

In conducting this inquiry, the ALRC should also have regard to other inquiries and reviews that it considers relevant.

### **Consultation**

In undertaking this reference, the ALRC should identify and consult relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders.

### **Timeframe**

The Commission is to provide its interim report by December 2014 and its final report by December 2015.

## Participants

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### **Australian Law Reform Commission**

#### **President**

Professor Rosalind Croucher AM

#### **Part-time Commissioners**

The Hon Justice John Middleton, Federal Court of Australia

Emeritus Professor Suri Ratnapala, TC Beirne School of Law, University of Queensland (from July 2015)

#### **Executive Director**

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Dr Julie Mackenzie (from May 2015)

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# 1. Executive Summary

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## The Freedoms Inquiry

1.1 The Australian Law Reform Commission was asked to identify and critically examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law. The ALRC referred to this large and challenging project as the ‘Freedoms Inquiry’.

1.2 In the Report, the ALRC discusses the source and rationale of many important rights and freedoms and provides an extensive survey of current Commonwealth laws that limit them. The ALRC also discusses how laws that limit traditional rights and freedoms might be critically tested and justified and whether some of these laws merit further scrutiny. Central to this task is the question of how rights should be balanced

with other rights and with the public interest, when these interests conflict. An important consideration is how laws are scrutinised by parliamentary committees and others to ensure they do not unjustifiably encroach on rights.

1.3 Identifying and critically examining laws that limit rights plays a crucial part in protecting rights, and may inform decisions about whether, and if so how, such laws might be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new causes of action or new offences, or by enacting a bill of rights. The Report contributes to broader discussion and debate about protecting rights in democratic societies. Law and law reform has an important role to play in this ongoing discussion.

### **Traditional rights, freedoms and privileges**

1.4 The Terms of Reference,<sup>1</sup> provided by the Attorney-General, Senator the Hon George Brandis QC, state that laws that encroach on traditional rights, freedoms and privileges should be understood to refer to laws that:

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

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<sup>1</sup> The Terms of Reference are set out at the front of the Report and on the ALRC website: <[www.alrc.gov.au/inquiries/freedoms](http://www.alrc.gov.au/inquiries/freedoms)>.

- give executive immunities a wide application;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

1.5 There are other important rights not expressly included in the extensive list in the Terms of Reference.<sup>2</sup> There were calls for some of these other rights to be more fully considered in this Inquiry, including: the right to personal liberty—‘the most elementary and important of all common law rights’;<sup>3</sup> the right not to be unlawfully or arbitrarily detained; the right to privacy—‘upon which the exercise of many other rights depends’;<sup>4</sup> and the right not to be tortured.<sup>5</sup> Some of these are considered to some extent in the Report, in an integrated way, in chapters concerned with related rights. The broad right to personal liberty, for example, is served by many of the rights listed in the Terms of Reference, including the rights to freedom of speech, movement, assembly and religion and the right to a fair trial.<sup>6</sup>

### Common law and constitutional settings

1.6 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised by courts in Australia, England and other common law countries for centuries. Some are recognised as human rights and are protected in international agreements and bills of rights in other jurisdictions. Human rights have been said to ‘incorporate or enhance’ rights at common law. In their history and development, common law rights and human rights clearly influenced each other.

1.7 Some common law rights and freedoms are considered to be so important that they have constitutional status, including in countries without a bill of rights. While in Australia ‘common law constitutionalism’ has not been applied by courts to invalidate statutes, the special status of some rights is reflected in how courts interpret legislation. Applying the ‘principle of legality’, courts will not interpret a statute so that it encroaches on, or limits, a fundamental right or common law principle unless Parliament has made it unmistakably clear that it intended the statute to do so. This is similar to interpretation provisions in some human rights statutes.

1.8 The *Australian Constitution* expressly protects a handful of rights and has been found to imply certain others, including freedom of political communication. The High Court may also have moved towards entrenching procedural fairness in courts as a constitutional right. However, the *Constitution* does not directly and entirely protect many rights and freedoms, because those who framed the *Constitution* chose to leave

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2 A list of many other traditional rights and freedoms was included in the last chapter of the Issues Paper.

3 Australian Human Rights Commission, *Submission 141*.

4 Australian Privacy Foundation, *Submission 116*.

5 Refugee Advice & Casework Service, *Submission 119*.

6 Notwithstanding this, some stakeholders would have preferred dedicated chapters on these other rights. However, given the extensive scope of this Inquiry, the ALRC chose to focus on the rights listed in the Terms of Reference.

most matters of policy to Parliament, and relied on the common law and other mechanisms to protect rights.

1.9 International instruments that Australia has ratified, such as the *International Covenant on Civil and Political Rights*, also provide rights and freedoms with some protection from statutory encroachment, but generally only through the interpretation of statutes that are unclear or ambiguous. Although international law is an important influence on the common law, it does not create binding domestic law in Australia nor does it abrogate the power of the Commonwealth Parliament to make laws that limit rights.

1.10 The jurisprudence in relation to international human rights law is a valuable resource for laws makers. While the focus of the Inquiry is upon common law rights and freedoms, the ALRC is required, under its Act, to aim to ensure its recommendations are consistent with Australia's international obligations.<sup>7</sup>

### **Approach**

1.11 The Terms of Reference set out two main tasks. The first was to identify Commonwealth laws that encroach upon traditional rights, freedoms and privileges. The second task was to critically examine those laws to determine whether the encroachments are appropriately justified. The ALRC was asked to consider, among other areas of law, commercial and corporate regulation, environmental regulation, and workplace relations.

1.12 Most chapters of the Report are structured to include the following elements with respect to each right, freedom or privilege:

- an analysis of the source and rationale of the right;
- an overview of how the right is protected from statutory encroachment by the *Constitution*, the principle of legality, and international law;
- a general discussion of how limits on the right might be justified;
- an extensive survey of current Commonwealth laws that may limit the right; and
- a discussion of the justifications for some of these laws, with some laws being identified as possibly unjustified and therefore deserving further review.

1.13 The Report sets out many of the Commonwealth laws that may be said to interfere with the common law rights and freedoms listed in the Terms of Reference. It provides an extensive survey of such laws, without making concluded judgments about whether these laws are appropriately justified.<sup>8</sup>

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<sup>7</sup> *Australian Law Reform Commission Act 1996* (Cth) s 24(1).

<sup>8</sup> A list of Commonwealth laws cited in the Report, including those that may interfere with rights and freedoms, appears in Appendix 1. Lists of laws identified as limiting rights are set out in G Williams, *Submission 76*; Institute of Public Affairs, *Submission 49*. See also Simon Breheny and Morgan Begg, 'The State of Fundamental Legal Rights in Australia: An Audit of Federal Law' (Occasional Paper, Institute of Public Affairs, 2014).

1.14 It is widely recognised that there are reasonable limits to most rights. Only a handful of rights are considered to be absolute. Limits on traditional rights are also recognised by the common law, although such limits may be regarded as part of the *scope* of common law rights. But how can it be determined whether a law that limits an important right is justified? Proportionality tests are now the most widely accepted tool for structuring this analysis.

1.15 Proportionality is used to test limits on constitutional rights by the High Court and by constitutional courts and law makers around the world. This involves considering whether a given law that limits rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary. In the Report, the ALRC often draws upon proportionality analyses when considering whether particular laws that limit rights are justified.

1.16 The ALRC’s approach in this Inquiry was to determine a forward-looking law reform response that met the essential aspects of the Terms of the Reference across its broad range. Hence in many chapters of the Report, laws are identified that may be unjustified and therefore warrant further review.

1.17 The highlighted laws have been selected following consideration of a number of factors, including whether the law has been criticised for limiting rights in submissions, parliamentary committee reports or other commentary. The fact that a law limits multiple rights has also sometimes suggested the need for further review. Where a law has been identified as being amenable to further review, the conclusion may be that the appropriate action is:

- a review of specific statutes or provisions;
- a review in a coordinated fashion across Commonwealth, state and territory laws;
- consideration as part of existing regular review and monitoring processes; and/or
- a new periodic review.

1.18 The fact that a law has been identified as meriting further review does not imply that the ALRC has concluded the law is unjustified. Further evidence and analysis would be necessary to support such specific conclusions.<sup>9</sup>

1.19 While some stakeholders said the ALRC should have recommended specific changes to laws, others recognised that this was not possible and supported the approach taken.<sup>10</sup> It was acknowledged that the Inquiry was ‘extremely large and

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9 There may also be other laws that deserve further review, which are not highlighted in the Report.

10 See, eg, Law Council of Australia, *Submission 140*; Australian Institute of Company Directors, *Submission 105*.

complex'<sup>11</sup> and covered 'very broad terrain'.<sup>12</sup> Professor Graeme Orr, for example, said that, with 'all the goodwill in the world, it is hard to see how the ALRC can inform itself expertly of the myriad of social contexts needed to cover the vast terrain of issues and laws flagged in its interim report'.<sup>13</sup> Given the breadth of the Inquiry, the ALRC considered that more detailed recommendations for reform—other than the reviews suggested—would require dedicated projects and further evidence, consultation and analysis. In a number of specific areas the ALRC has already undertaken inquiries, and the recommendations in the final reports of those inquiries provide a foundation upon which Government may act.<sup>14</sup>

1.20 The Report also provides a thorough analysis of how laws are scrutinised by government agencies, parliamentary committees and others for compatibility with rights. This is part of what has been called a 'democratic culture of justification'.<sup>15</sup> The Report describes the role of bodies, such as the Independent National Security Legislation Monitor, the Australian Human Rights Commission and, indeed, the ALRC itself, in contributing to a general vigilance about encroachments on rights.

1.21 The Report discusses how some scrutiny processes might be improved, for example, by: providing additional guidance and assistance to policy makers; improving the quality of explanatory material and statements of compatibility; reducing overlap between the work of the three parliamentary scrutiny committees; giving the committees longer to conduct their scrutiny; and ensuring Parliament has sufficient time to consider committee reports.

1.22 The Councils for Civil Liberties said that the Inquiry had 'provided an opportunity for a national focus on the rapidly increasing numbers of statutes which undermine our rights and freedoms'.<sup>16</sup> The Australian Institute of Company Directors expressed appreciation of 'the extensive work the ALRC has undertaken' that has 'shone a light on traditional rights and freedoms that have been eroded by legislation, commonly without recognition, fanfare or compelling justification'.<sup>17</sup> The Australian Human Rights Commission commended the Interim Report's 'comprehensive review of the source of traditional rights, freedoms and privileges'.<sup>18</sup>

## **Encroachments on rights, freedoms and privileges**

1.23 Chapters 2 and 3 of the Report lay the foundations for the ALRC's analysis of laws that encroach on rights, freedoms and privileges. Chapters 4 to 20 each consider

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11 Refugee Advice & Casework Service, *Submission 119*.

12 Public Interest Advocacy Centre, *Submission 133*.

13 G Orr, *Submission 79*.

14 Secrecy provisions, discussed in Ch 4, for example, were the subject of an ALRC inquiry in 2008–09: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009). A list of ALRC reports referred to in the Report is included at Appendix 2.

15 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.

16 Councils for Civil Liberties, *Submission 142*.

17 Australian Institute of Company Directors, *Submission 105*. The AICD said that the ALRC's discussion would also 'benefit State and Territory Governments in their approach to law making'.

18 Australian Human Rights Commission, *Submission 141*.

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one or two of the listed rights, freedoms or privileges in the Terms of Reference. Chapters are grouped around related rights, beginning with a set of chapters on the ‘freedoms’ in the list, and finishing with chapters on property rights. Each chapter identifies areas where further review may be merited. In some cases laws may encroach on a number of different common law rights and freedoms, as in the case of counter-terrorism and national security laws, and migration laws.

### **Freedom of speech**

1.24 Freedom of speech has been described as ‘the freedom *par excellence*; for without it, no other freedom could survive’ and is closely linked to other fundamental freedoms, such as freedom of religion, thought, and conscience.

1.25 In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts—including in relation to various terrorism offences and terrorism-related secrecy offences, other secrecy laws and the *Racial Discrimination Act 1975* (Cth) (*RDA*). At the same time, many limitations on speech have long been recognised by the common law itself, such as incitement to crime, obscenity and sedition.

1.26 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech. Part IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech. However, any such review should take place in conjunction with consideration of anti-vilification laws more generally.

1.27 There is also reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators; and whether Commonwealth secrecy laws provide for proportionate limitations on freedom of speech.

### **Freedom of religion**

1.28 Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.

1.29 There are very few, if any, provisions in Commonwealth laws that interfere with freedom of religion. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

1.30 There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations. Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws.

### **Freedom of association and assembly**

1.31 Freedom of association concerns the right of all persons to group together voluntarily for a common goal or to form and join an association, such as a political party, a professional or sporting club, a non-governmental organisation or a trade union. Freedom of association is different from, but also closely related to, freedom of assembly. Australians are generally free to associate with whomever they like and to assemble to participate in activities including, for example, a protest or demonstration.

1.32 A wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly. These include counter-terrorism and other criminal laws and laws concerning public assembly, workplace relations, migration, and anti-discrimination. Many of these laws provide limitations on freedom of association or assembly that have long been recognised by the common law itself—for example, in relation to consorting with criminals, public assembly and other aspects of preserving public order. Areas of most concern include aspects of counter-terrorism and the character test in migration law.

1.33 Workplace relations laws in Australia have been subject to criticism on the basis of lack of compliance with International Labour Organization Conventions. However, while some of these provisions may offend ILO norms, they do not necessarily infringe common law freedom of association.

### **Freedom of movement**

1.34 Freedom of movement at common law primarily concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. Freedom of movement has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not extend to people trying to evade punishment for a crime and, in practice, a person's freedom to leave one country is limited by the willingness of other countries to allow that person to enter.

1.35 A range of Commonwealth laws may be seen as interfering with freedom of movement. Some of these provisions relate to limitations that have long been recognised by the common law itself, for example, in relation to official powers of arrest or detention, customs and passport controls, and quarantine.

1.36 While many laws interfering with freedom of movement have strong and obvious justifications, it may be desirable to review some laws to ensure that they do not unjustifiably interfere with the right. The areas of concern include various counter-terrorism measures, including aspects of the control and preventative detention order provisions and declared area offences in the *Criminal Code* (Cth). Provisions of the *Bankruptcy Act 1966* (Cth), which provide that a bankrupt person must automatically give their passport to the trustee, also warrant review.

### **Fair trial**

1.37 The right to a fair trial is an absolute right and a requirement of the rule of law. Fundamentally, a fair trial is designed to prevent innocent people being convicted of

crimes. Fair trials protect life, liberty, property, reputation and other fundamental rights and interests.

1.38 Some widely recognised components of a fair trial that have been subject to statutory limits include: a trial should be held in public; a defendant has a right to a lawyer; and a defendant has the right to confront the prosecution's witnesses and test their evidence, and to obtain and adduce their own evidence. Other components of a fair trial, such as the burden of proof and the privilege against self-incrimination, are discussed in separate chapters.

1.39 The common law and statute both feature some limits on fair trial rights, for example to protect vulnerable witnesses and to protect national security interests. Some Commonwealth laws that may be said to affect fair trial rights are uncontentious, but others may need to be reviewed to ensure they are justified. Changes to trial procedures for national security reasons have been criticised, as have laws that protect certain confidential communications even from a defendant seeking to obtain the communications to help prove their innocence in a criminal trial.

### **Burden of proof**

1.40 In criminal trials, the prosecution bears the burden of proof. This has been called 'the golden thread of English criminal law' and 'a cardinal principle of our system of justice'. This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.

1.41 A number of Commonwealth laws reverse the legal burden of proof on some elements of a criminal offence and may be seen as interfering with the principle that a person is presumed innocent until proved guilty according to law. Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

1.42 Further review of the reversals of the legal burden of proof in these laws may be warranted. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and directors' liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

### **Strict or absolute liability**

1.43 The criminal justice system presumes that an evil intention or knowledge of the wrongfulness of the act (*mens rea*) is necessary to found criminal liability. However, some statutes impose strict or absolute liability on one or more elements of an offence.

1.44 There are strict and absolute liability offences across many areas of law, including corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter-terrorism and national security, and copyright. Areas of particular concern are: various terrorism offences, including declared area offences and offences relating to dealing with terrorism-related assets and

financial transactions; reporting requirements under customs legislation; and the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

1.45 Strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards. Any such review should include consideration of provisions in corporations law and prudential and environmental regulation.

### **Privilege against self-incrimination**

1.46 The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime. Many Commonwealth statutes provide coercive information-gathering and investigation powers to Commonwealth agencies, and many of these statutes abrogate the privilege against self-incrimination. Instead, the statutes provide that the information provided under compelled questioning (and in some cases, information discovered as a result of that questioning) is not admissible in subsequent proceedings.

1.47 The High Court has expressed concern that, in certain circumstances, the compelled questioning of persons, without the protection of the privilege against self-incrimination, could fundamentally change the nature of the adversarial system.

1.48 There should be further review of the privilege against self-incrimination and this could consider whether its abrogation in Commonwealth laws has been appropriately justified, and whether the statutory immunities offer appropriate protection.

### **Legal professional privilege**

1.49 Legal professional privilege allows a person to resist a demand to reveal communications between the person and their lawyer. The privilege is rarely abrogated in Commonwealth laws.

1.50 Five statutes concerned with open government and the prevention of corruption, and two concerned with terrorism and the proceeds of crime, provide coercive information-gathering powers and abrogate the privilege. However, the statutes contain immunities to compensate for the loss of the privilege. In each case, the statute provides that communications between client and lawyer revealed under compulsion are not admissible in subsequent proceedings.

1.51 Laws that require monitoring of communications between a client and lawyer may not limit the privilege, but do breach the underlying principle that communications between client and lawyer should be confidential. Further review may be warranted.

### **Retrospective laws**

1.52 At common law, it is abhorrent to impose criminal liability on a person for an act that was lawful when it was done. The Australian Parliament has rarely created offences with retrospective application. The few offences that have been enacted have concerned behaviour that could never have been considered innocent, legitimate or

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moral, such as war crimes and offences against Australians overseas, and could be justified on this basis.

1.53 Amendments made in 2011 to the people smuggling offences in the *Migration Act 1958* (Cth) may have enlarged the scope of the criminal offence with retrospective effect to 1999, thereby criminalising behaviour that was not unlawful when it occurred.

1.54 Retrospective civil laws, that is, laws that retrospectively change legal rights and obligations, are reasonably common. Retrospective laws are not an effective way of deterring behaviour, but may serve other policy objectives such as ensuring fairness, protecting the public, or addressing the consequences of a court decision that unsettled previous understandings of the law.

1.55 Taxation laws with significant periods of retrospectivity may create uncertainty and inconvenience. Migration laws that have the stated intention of deterring behaviour, but apply to behaviour that occurred before the commencement of the legislation, could be further reviewed to ensure that their retrospective nature is proportionate and appropriately justified.

### **Procedural fairness**

1.56 A fair procedure for decision making is an important component of the rule of law. The common law recognises a duty to accord a person procedural fairness before a decision that affects them is made.

1.57 A number of Commonwealth laws affect the common law duty to afford procedural fairness to persons affected by the exercise of public power. Excluding procedural fairness may be justified in some instances—in particular, where urgent action needs to be taken in the public interest.

1.58 Some migration laws that encroach on the duty to afford procedural fairness would benefit from further review, given the gravity of the consequences for those affected by the relevant decision. Migration laws that might be further scrutinised include those relating to the mandatory cancellation of visas and the fast track review process for decisions to refuse protection visas.

### **Judicial review**

1.59 Access to the courts to challenge administrative action is an important common law right and superior courts of record have an inherent jurisdiction to conduct judicial review.

1.60 The primary mechanism used to restrict access to the courts is the privative clause—essentially a legislative attempt to limit access to judicial review in a certain field. However, the courts have construed privative clauses so narrowly that they are sometimes largely or even entirely deprived of effect.

1.61 Privative clauses in Commonwealth laws should be reviewed. Consideration should be given to whether alternative solutions that do not restrict access to the courts may be implemented to achieve the underlying policy objective of the provision (for example, to avoid delays in implementing administrative decisions).

### **Immunity from civil liability**

1.62 Immunity provisions in legislation can limit the legal protection given to important rights and freedoms. Although sometimes necessary, laws that give immunity from civil liability and authorise what would otherwise be a tort operate to limit individual rights and deny civil redress—and therefore require careful justification.

1.63 Many Commonwealth statutes give some immunity to the federal police and other law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. The immunities protect these agencies from liability that might otherwise arise from the exercise of their statutory powers, including powers to arrest or detain people, to seize or retain property, and to carry out intrusive investigations. Such powers and associated immunities are commonly justified on the grounds that they are necessary to prevent crime, protect national security and otherwise enforce the law.

1.64 Executive immunities warrant careful justification and consideration should be given to their appropriate scope. This issue was reviewed more fully in the ALRC's 2001 report, *The Judicial Power of the Commonwealth*. Some of the recommendations in that report warrant further consideration by Government.

### **Delegating legislative power**

1.65 From the separation of powers doctrine, and from the principle that it is Parliament's role to make laws on important matters of policy, may be derived the principle that legislative power should not be inappropriately delegated to the Executive.

1.66 Laws that will have a significant impact on rights and liberties, and laws creating offences with high penalties, should usually be in primary, not delegated, legislation. More generally, wide and vague delegations of legislative power undermine the separation of powers doctrine by allowing those who enforce the law also to make the law.

1.67 However, delegating legislative power to the Executive is now commonplace and is said to be essential for efficient and effective government. Parliament delegates such power not only to government ministers, but also to various government agencies such as the Australian Taxation Office and the Australian Securities and Investments Commission.

1.68 Given the quantity of delegated law in Australia, careful and ongoing scrutiny—built into the law making process—may be the most suitable way to limit inappropriate delegations of legislative power.

### **Property rights**

1.69 The common law has long regarded a person's property rights as fundamental. However, property rights could be encroached upon by legislative action, so long as any deprivation was not arbitrary and reasonable compensation was given.

1.70 In relation to personal property rights, the key areas of concern include banking and taxation laws, personal property securities, intellectual property and criminal laws. Many have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. The breadth of the *Proceeds of Crime Act 2002* (Cth) is one area that may require further consideration. The Parliamentary Joint Committee on Law Enforcement provides ongoing scrutiny of the Commonwealth legislation and the Australian Federal Police provide annual reports. However, given the potential impact of unexplained wealth measures on personal property, and the proposal for a national coordinated scheme by the Committee, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. In addition, the ALRC also suggests that a further review be scheduled in due course.

1.71 With respect to real property and the rights of land owners, the main focus of concern is on interferences with the right to use the land and water. State environmental laws are not the concern of this Inquiry; however, from the landholders' perspective the complexity of the 'interference' can only be understood in the light of both state and Commonwealth laws. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) interferes with the right to use land to a limited extent. The next scheduled review of the *EPBC Act* could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws. The *Water Act 2007* (Cth) does not interfere in a negative way with the water entitlements in the Murray-Darling Basin that have been established under state and territory statutes. However, it may be appropriate for the Act to be reviewed periodically.

### Counter-terrorism and national security laws

1.72 Acts of terrorism are a gross violation of fundamental rights to life and safety and the Government has both a right and a duty to take action to protect its citizens.<sup>19</sup> This may require the enactment of legislation that places limits on traditional rights and freedoms. National security is recognised as a legitimate objective of such limitations, at common law and in international human rights law.<sup>20</sup>

1.73 Counter-terrorism and national security laws that encroach on rights and freedoms should nevertheless be justified, to ensure the laws are suitable, necessary and represent a proper balance between the public interest and individual rights.

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19 See, eg, United Nations Security Council, Resolution 1373 (2001), Adopted by the Security Council at its 4385th Meeting, 28 September 2001. This resolution required States to ensure that terrorists, their accomplices and supporters be brought to justice and that terrorist acts are established as serious criminal offences in domestic laws and the punishment duly reflects the seriousness of such terrorist acts.

20 See, eg, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161. For example, under the ICCPR national security is recognised expressly as a permissible limitation in relation to freedom of movement, freedom of expression, the right to peaceful assembly and freedom of association: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 12.3; 19.3; 21; 22.2 respectively.

1.74 In the Report, a range of counter-terrorism and national security laws are identified that interfere with traditional rights and freedoms. These include laws that limit freedom of speech (for example, laws about advocating terrorism and disclosing intelligence operations); freedom of association and assembly (for example, control orders, preventative detention orders, and laws about foreign incursions and recruitment); laws that impose strict or absolute liability (for example, in relation to offences for disclosing certain classified operational information); laws that change fair trial procedures (for example, to protect sensitive information about national security).

1.75 Some counter-terrorism laws engage multiple rights. For example, the control order and preventative detention order regimes contained in divs 104–105 of the *Criminal Code* have implications for freedom of speech, freedom of association and freedom of movement.

1.76 Counter-terrorism and national security laws should be subject to ongoing and careful review, given the extent to which they may interfere with individual rights. While some of these laws have been subject to significant scrutiny, including by parliamentary committees and the Independent National Security Legislation Monitor (INSLM), it has been suggested that many are not proportionate, and would benefit from further consideration and analysis.

1.77 Ongoing review of these laws falls within the functions of the INSLM<sup>21</sup> and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).<sup>22</sup> INSLM and Intelligence Committee review of legislation is discussed further in Chapter 3.

### **Migration laws**

1.78 A number of migration laws have also been identified as encroaching on traditional rights and freedoms, including freedom of association and assembly (the operation of the ‘character test’ in the *Migration Act*); the right not to be subject to retrospective laws (the *Migration Act* people smuggling offence and provisions converting applications for permanent protection visas into applications for temporary protection visas); the right to procedural fairness (for example, the fast track review process for decisions to refuse protection visas); and the right to judicial review (for example, the privative clause in the *Migration Act*).

1.79 Migration laws pursue the objective of regulating, in the national interest, the coming into, and presence in, Australia of non-citizens.<sup>23</sup> Pursuit of this objective may involve some limitations on traditional rights and freedoms. However, such limitations should be proportionate.

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21 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B). At 1 November 2015, the Acting INSLM was preparing a report on any impact on journalists in the operation of s 35P of the *ASIO Act* concerning offences for the disclosure of information relating to a ‘special intelligence operation’ and was seeking public submissions concerning the adequacy of the safeguards relating to the control order regime provided for by div 104 of the *Criminal Code*.

22 *Intelligence Services Act 2001* (Cth) s 29(1)(bb).

23 *Migration Act 1958* (Cth) s 4.

1.80 In this Inquiry, significant concerns were expressed that a number of migration laws are not proportionate. The ALRC suggests that these laws would benefit from further analysis to ensure that the laws do not interfere unjustifiably with traditional rights and freedoms.<sup>24</sup>

### **Further consideration or review**

1.81 A range of Commonwealth laws appear to warrant further consideration or review. Some of these laws might be reviewed by a parliamentary committee, a government department, or a body such as the INSLM or the ALRC itself. Others may simply warrant reconsideration by government, given their effect on traditional rights and freedoms.

#### ***Freedom of speech***

- *Racial Discrimination Act 1975* (Cth) pt IIA—review in conjunction with consideration of anti-vilification laws more generally.
- Legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example *Veterans' Entitlements Act 1986* (Cth) s 170.
- Secrecy offences, including the general secrecy offences in *Crimes Act 1914* (Cth) ss 70, 79.
- *Criminal Code* s 80.2C (advocating terrorism), ss 102.1, 102.3, 102.5, 102.7 (prescribed terrorist organisations), s 105.41 (preventative detention orders)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) s 35P (special intelligence operations)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

#### ***Freedom of association and assembly***

- *Criminal Code* s 102.8, divs 104–105 (control orders and preventative detention orders), s 119 (foreign incursions and recruitment)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Migration Act* s 501 (character test).

#### ***Freedom of movement***

- *Criminal Code* divs 104–105 (control orders and preventative detention orders), s 119 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Bankruptcy Act 1966* (Cth) s 77, which provides that a bankrupt person must automatically give their passport to the trustee in bankruptcy.

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<sup>24</sup> The Law Council of Australia has suggested that an independent body should be appointed to review immigration legislation: Law Council of Australia, *Submission 140*.

***Fair trial***

- Uniform Evidence Acts pt 3.10 (client legal privilege and a privilege for religious confessions without exceptions for defendants seeking to adduce evidence in support of their defence).

***Burden of proof***

- *Criminal Code* deeming provisions in relation to the fault elements for drug offences, for example *Criminal Code* s 302.5.
- *Taxation Administration Act 1953* (Cth) s 8Y, in relation to directors' liability for taxation offences committed by a corporation.

***Strict or absolute liability***

- Legislative provisions that provide for strict and absolute liability in corporations law and prudential and environmental regulation, for example, *Corporations Act 2001* (Cth) s 588G.
- Legislative provisions that provide for strict liability in relation to commercial scale copyright infringement offences under the *Copyright Act 1968* (Cth)—review by the Productivity Commission as part of its current review into intellectual property arrangements.
- *Criminal Code* ss 102.5, 102.8 (associating with a terrorist organisation), ss 119.1, 119.2 (declared area offences)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *ASIO Act* s 34ZS (disclosure of operational information concerning an ASIO warrant)—review by INSLM and the Intelligence Committee as part of their ongoing roles.
- *Charter of the United Nations Act 1945* (Cth) ss 20–21 (freezable assets or giving freezable assets to a proscribed person or entity)—review by INSLM and the Intelligence Committee as part of their ongoing roles.

***Privilege against self-incrimination***

- Legislative provisions that abrogate the privilege against self-incrimination, particularly those that provide only use immunity, for example *Australian Crime Commission Act 2002* (Cth) s 30.
- *Taxation Administration Act 1953* (Cth) sch 1 s 353–10, which abrogates the privilege against self-incrimination and provides no immunity.

***Legal professional privilege***

- *Criminal Code* s 105.38(1), which requires contact between a lawyer and a detained person to be capable of being monitored.
- *ASIO Act* s 34ZQ(2), which requires contact between a lawyer and a detained person to be capable of being monitored.

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**Retrospective laws**

- *Migration Act* s 228B, which defines the scope of the offence of people smuggling.
- *Income Tax Assessment Act 1997* (Cth) div 13, regarding transfer pricing.
- *Migration Act* s 45AA and *Migration Regulations 1994* (Cth) reg 2.08F, which converted applications for permanent protection visas into temporary protection visas.

**Procedural fairness**

- *Migration Act* s 501(3A) and associated provisions relating to the mandatory cancellation of visas on character grounds;
- *Migration Act* pt 7AA (fast track review process for decisions to refuse protection visas).

**Judicial review**

- Privative clauses that restrict access to judicial review, for example *Migration Act* s 474.

**Property rights**

- *Proceeds of Crime Act 2002* (Cth)—ongoing scrutiny by the Parliamentary Joint Committee on Law Enforcement and, in due course, by a further independent review.
- *EPBC Act*—as part of the next scheduled independent review.
- *Water Act*—in due course, by a further independent review.

**Law reform process**

1.82 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.<sup>25</sup> Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.<sup>26</sup>

1.83 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by

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25 Brian Opeskin, ‘Measuring Success’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202.  
26 *Australian Law Reform Commission Act 1996* (Cth) s 38.

the subject matter of the reference and the timeframe in which the inquiry must be completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC's website.<sup>27</sup>

1.84 Following ALRC established practice, a multi-pronged strategy of seeking community comments was used in this Inquiry. Two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry: an Issues Paper, in December 2014 and an Interim Report in July 2015.<sup>28</sup>

1.85 Two national rounds of stakeholder consultation meetings, teleconferences and roundtables were also conducted following the release of each of the consultation documents. The Terms of Reference for this Inquiry directed the ALRC to 'identify and consult with relevant stakeholders, including relevant Commonwealth departments and agencies, the Australian Human Rights Commission, and key non-government stakeholders'. The individuals, departments, agencies and the many bodies consulted in the Inquiry are listed in Appendix 3. In a broad-reaching inquiry of this kind, the consultations and the submissions received were particularly valuable in assisting the ALRC to achieve the balance in breadth and depth necessary to discharge the brief set out in the Terms of Reference.

1.86 The ALRC received 151 submissions.<sup>29</sup> Submissions were received from a wide range of people and agencies, including: individuals; academics; lawyers; unions; employer organisations; employment agencies; community legal centres; law societies and representative groups; state and federal government agencies; and peak bodies.

1.87 In this Inquiry the ALRC also conducted a national series of symposia, in September and October 2015, focusing on aspects of the Inquiry raised in the Interim Report. The first, held in Brisbane, focused on property rights. In Perth the focus was 'Freedom's Limits: Speech, Association and Movement in the Australian Legal System'. In Melbourne, the topic was 'Fair trial, procedural fairness and other traditional rights'; and the Sydney topic was 'Proportionality and the Constitution'.<sup>30</sup>

1.88 The ALRC acknowledges the contribution of all those who participated in the consultation rounds, the symposia and in preparing submissions. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

1.89 The ALRC also convened an Advisory Committee of experts, which met twice during the Inquiry. The Committee comprised 13 members, and their names appear at the beginning of the Report. Professor Barbara McDonald of the University of Sydney also provided crucial assistance, particularly in the preparation of the Issues Paper.

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27 <[www.alrc.gov.au/law-reform-process](http://www.alrc.gov.au/law-reform-process)>.

28 Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014); Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015).

29 These are all published on the ALRC website. Seven confidential submissions were also received.

30 Presentations from the symposia are available on the ALRC website.

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

1.91 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, and the enlisting of expert readers, are invaluable aspects of ALRC inquiry processes—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the considerable contribution made by the Advisory Committee and the expert readers in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

1.92 Once tabled in the Australian Parliament, the Report becomes a public document.<sup>31</sup> ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2014–15 records that 60% of ALRC reports are substantially implemented and 26% are partially implemented, representing an overall implementation rate of 86%.<sup>32</sup>

## Outcomes

1.93 The overall effect of the Report will be to provide a significant contribution to a broader discussion and debate about protecting rights in democratic societies. The specific outcomes of the ALRC’s review include :

- discussion of the source and rationale of the traditional rights and freedoms listed in the Terms of Reference;
- consideration of the protection from statutory encroachment given to traditional rights and freedoms by the *Constitution*, principles of statutory interpretation and international law—complementing work that considers other ways to protect rights;
- an extensive survey of Commonwealth laws that encroach on the listed traditional rights and freedoms recognised by the common law;
- analysis of the justification for a range of these laws;
- discussion of a proportionality test to provide a structured method of reviewing the justification of laws that limit rights and freedoms;

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31 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

32 Australian Law Reform Commission, *Annual Report 2014–2015*, Report No 128 (2015) 27. See also Appendixes F and G.

- analysis of the law-making processes for testing compatibility of laws with fundamental rights and how these can be improved to ensure that laws that limit traditional rights and freedoms are thoroughly scrutinised; and
- the highlighting of laws that warrant further consideration or review—to provide a road map for future work to ensure that encroachments on rights, freedoms and privileges are avoided or appropriately justified.

## 2. Rights and Freedoms in Context

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### Summary

2.1 This chapter provides the conceptual foundation for the Inquiry and considers such questions as: What are traditional rights, freedoms and privileges? What is their source and where may they be found? How do they relate to human rights in international law and bills of rights? To what extent may Parliament interfere with traditional rights and freedoms? Should laws that limit rights and freedoms require particular scrutiny and justification and, if so, how might this be done—by applying what standard and following what type of process?

### Common law foundations

2.2 The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised in Australia, England and other common law countries for centuries. They form part of the history of the common law, embodying key moments in constitutional history, such as the sealing of the Magna Carta in 1215,<sup>1</sup> the settlement of parliamentary supremacy following the

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<sup>1</sup> ‘The liberties often associated with the *Magna Carta* were a product of the institutions of Parliament and the Courts, over the course of centuries. However, the development of those institutions was significantly influenced by the *Magna Carta*’: James Spigelman, ‘Magna Carta: The Rule of Law and Liberty’ (Centre for Independent Studies, 15 June 2015) 1. See also Paul Brand, ‘Magna Carta and the Development of the Common Law’ (Patron’s Address, Academy of Law, Sydney, 18 May 2015); Nicholas Cowdery, ‘Magna Carta—800 Years Young’ (Speech, St James’ Church, Sydney, 14 June 2015).

Glorious Revolution of 1688 and the enactment of the *Bill of Rights Act 1688*.<sup>2</sup> They were recognised and developed by the courts and some were declared and affirmed by historic statutes and further developed by modern legislation.

2.3 The Hon Robert French AC, Chief Justice of the High Court, has said that

many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.<sup>3</sup>

2.4 Many traditional rights and freedoms are recognised now as ‘human rights’. Murphy J referred to ‘the common law of human rights’<sup>4</sup> and Professors George Williams and David Hume have written that the common law is ‘a vibrant and rich source of human rights.’<sup>5</sup>

2.5 Traditional rights recognised by the common law are now found in international agreements and bills of rights in other jurisdictions—including, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the bills of rights in the United States and Canadian constitutions, and the human rights Acts in the United Kingdom, New Zealand and two Australian jurisdictions, the Australian Capital Territory and Victoria. French CJ has said that the human rights and freedoms in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) ‘in significant measure incorporate or enhance rights and freedoms at common law’.<sup>6</sup>

2.6 Before the wave of international conventions in the aftermath of the Second World War, legislation and the common law were the principal sources of protection of rights and freedoms in the UK, Australia, New Zealand and Canada. In his book, *Human Rights and the End of Empire*, English legal historian AW Brian Simpson wrote about the widely held assumption that, before international conventions on human rights, human rights in the UK were ‘so well protected as to be an example to the world’. In normal times, Simpson writes, ‘when there was neither war, nor insurrection, nor widespread problems of public order, few would deny that people in the United Kingdom enjoyed a relatively high level of personal and political freedom’.<sup>7</sup>

In the modern period, and subject to certain limitations which, for most persons, were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly

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

3 Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

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

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

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

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

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unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial.<sup>8</sup>

2.7 To the extent that Australian law has protected and fostered rights and freedoms, it has long been statutes and judge-made law that have done so.<sup>9</sup> In a 2013 speech, former Justice of the High Court of Australia, the Hon John Dyson Heydon AC QC, considered some of the benefits of protecting rights through statutes and the common law. He said that statutes and the common law protect rights often by ‘detailed and precise rules’ and vindicate ‘human rights directly and specifically’:

[C]ommon law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.<sup>10</sup>

2.8 Taking the right to a fair trial as an example, Heydon said that rules found in certain statutes and in the common law ‘were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience of conditions in society to which the rules were applied’.<sup>11</sup>

2.9 Identifying and critically examining laws that limit rights is a crucial part of protecting rights, and may inform decisions about whether, and if so how, such laws might need to be amended or repealed. This may be seen to complement work that considers other ways to protect rights—such as by creating new offences and new causes of action, or by enacting a bill of rights.<sup>12</sup> Whether the introduction of a bill of rights in Australia is desirable is widely debated,<sup>13</sup> and draws in part upon historical arguments about whether the courts or parliaments are better guardians of individual rights.<sup>14</sup> However, the question is not the subject of this Inquiry.<sup>15</sup>

8 Ibid.

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

10 J D Heydon, ‘Are Bills of Rights Necessary in Common Law Systems?’ (Lecture, Oxford Law School, 23 January 2013).

11 ‘Abstract slogans and general aspirations about human rights played no useful role in their development. The great detail of this type of regime renders it superior to bills of rights’: Ibid.

12 A bill of rights might give courts the power to strike down, or make declarations about, laws that unjustifiably limit rights.

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

14 See, eg, Jeremy Waldron, ‘The Core of the Case against Judicial Review’ [2006] *The Yale Law Journal* 1346. Hiebert contrasts the two ‘rival paths’ in liberal constitutionalism to rights protection: one is the codification of rights, as in the US; the other emphasises parliamentary supremacy, as in Westminster-modelled parliamentary systems: Janet L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 *Modern Law Review* 7, 7–8.

15 Some stakeholders nevertheless took the opportunity to argue that the most appropriate way to protect traditional rights is to enact a Commonwealth Human Rights Act: National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Kingsford Legal Centre, *Submission 110*.

2.10 The focus of this Inquiry is on identifying and critically examining Commonwealth laws that encroach upon traditional rights. However, as part of the context of this analysis, it is useful to first consider how these rights are protected in law from statutory encroachment. Broadly speaking, some protection is provided by the *Australian Constitution* and by rules of statutory construction, such as the principle of legality. These are discussed generally below and more fully throughout the report.

### **Australian Constitution**

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

- the right to trial by jury on indictment for an offence against any law of the Commonwealth—s 80;
- freedom of trade, commerce and intercourse within the Commonwealth—s 92;
- freedom of religion—s 116; and
- the right not to be subject to discrimination on the basis of the state in which one lives—s 117.

2.12 Section 51(xxxi) of the *Constitution* provides that if the Commonwealth compulsorily acquires property, it must do so on ‘just terms’—which may also be conceived of as a right.<sup>16</sup>

2.13 The High Court has also found certain rights or freedoms to be implied in the *Constitution*—notably, freedom of political communication.<sup>17</sup> This freedom is not absolute, but any law that interferes with political communication must be ‘reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.<sup>18</sup> The High Court has often said the freedom is not a personal right, but rather is ‘best understood as a constitutional restriction on legislative power’.<sup>19</sup>

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

17 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227. The High Court has said that ‘freedom of association to some degree may be a corollary of the freedom of communication’: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 181, [148] (Gummow and Hayne JJ).

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

19 *McCloy v New South Wales* [2015] HCA 34 [30]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]. Ratnapala and Crowe question the accuracy and usefulness of this distinction: Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 421.

2.14 A right to vote has also been found to be implied in the *Constitution*—laws that limit adult suffrage can only be made when the law is ‘reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government’.<sup>20</sup>

2.15 The High Court may have moved towards entrenching procedural fairness in courts as a constitutional right.<sup>21</sup> Chapter III of the *Constitution* vests the judicial power of the Commonwealth in the High Court and in other courts that Parliament creates or invests with federal jurisdiction. In *Leeth v Commonwealth*, Deane and Toohy JJ observed that investing judicial power in ‘courts’ implies that courts ‘exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially’.<sup>22</sup> In *Dietrich v The Queen*, the High Court drew natural justice implications from the nature of judicial power and held that a person accused of a serious crime might in some circumstances be denied a fair trial, if they were not represented by a lawyer.<sup>23</sup> In *Polyukhovich v Commonwealth*, Deane J said:

Common sense and the provisions of Ch III, based as they are on the assumption of traditional judicial procedures, remedies and methodology, compel the conclusion that, in insisting that the judicial power be vested only in the courts designated by Chapter III, the Constitution’s intent and meaning were that judicial power would be exercised by those courts acting as courts with all that notion essentially requires.<sup>24</sup>

2.16 In *Polyukhovich*, it was accepted that bills of attainder violate the constitutional separation of powers.<sup>25</sup> The legislature cannot therefore usurp the distinctly judicial power of the courts to determine criminal guilt.

2.17 If procedural fairness were considered an essential characteristic of a court, Williams and Hume write, this might have the potential, among other things, to constitutionalise

the presumption of innocence, the ‘beyond reasonable doubt’ standard of proof in criminal proceedings, the privilege against self-incrimination, limitations on the use of secret evidence, limitations on ex parte proceedings, limitations on any power to continue proceedings in the face of an unrepresented party, limitations on courts’ jurisdiction to make an adverse finding on law or fact that has not been put to the parties, and limitations on the power of a court or a judge to proceed where proceedings may be affected by actual or apprehended bias.<sup>26</sup>

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

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

21 Williams and Hume, above n 5, 375.

22 *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7.

23 *Dietrich v The Queen* (1992) 177 CLR 292, 315, 337, 362, 374.

24 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

25 A bill of attainder is a statute that states that a specific person is ‘guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence’: Ibid [30].

26 Williams and Hume, above n 5, 376.

2.19 The *Constitution* does not directly and entirely protect many of the rights, freedoms and privileges listed in the ALRC's Terms of Reference. One reason the *Constitution* does not expressly protect most civil rights, Professor Helen Irving writes, was the 'general reserve about directly including policy in the *Constitution*, instead of powers subsequently to enact policy'.

Specifically, the British legal tradition (in which in fact the ideas of freedom and 'fair play', far from being overlooked, were thought central) largely relied on the common law, rather than statute or constitutional provision to define and protect individual rights and liberties. This approach was adopted for the most part by the Australians in constitution-making. It explains in large degree the shortage (as it is now perceived) of explicit statements of ideals and guarantees of rights, and descriptions of essential human and national attributes.<sup>27</sup>

2.20 Professor Jeffrey Goldsworthy has written that the constitutional tradition Australia inherited from Britain was 'obviously not opposed to rights such as freedom of speech, but was opposed to judges having power to protect them from interference by legislation':<sup>28</sup>

With a few exceptions, our framers relied on other mechanisms for protecting rights, including constitutional conventions; the common law; presumptions of statutory interpretation; and community attitudes, of tolerance and respect for rights, expressed through the ballot box.<sup>29</sup>

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

They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.<sup>30</sup>

### **A common law constitution?**

2.22 The term 'common law constitutionalism' is now 'widely used to denote the theory that the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of common law'.<sup>31</sup> Under this theory, the common law is said to incorporate fundamental moral principles, against which the legality of governmental decisions, and even Acts of

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

28 Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9, 25.

29 Ibid.

30 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, [23]. Mason CJ said: 'The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy': Ibid [31].

31 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17.

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Parliament, may be tested.<sup>32</sup> Many of the rights and freedoms listed in the Terms of Reference, even those not fully protected by the *Australian Constitution*, would be considered constitutional in this way.

2.23 Commonly associated with the writing of Professor Trevor Allan<sup>33</sup> and Lord Justice John Laws,<sup>34</sup> common law constitutionalism has been called ‘a potent phenomenon within contemporary public law discourse’.<sup>35</sup> Allan has written that ‘the common law is prior to legislative supremacy, which it defines and regulates’.<sup>36</sup>

We should not underestimate the power of the common law constitution to protect fundamental rights, and the central role it ascribes to the individual conscience in testing the moral credentials of law, or rather of what purports to be law but may, on inspection, prove to be an infringement of the rule of law.<sup>37</sup>

2.24 Some even suggest that courts may invoke this common law constitution to invalidate Acts of Parliament.<sup>38</sup> The theory has been said to invert the traditional relationship between statute law and the common law.<sup>39</sup> Professor Jeffrey Goldsworthy, a critic of common law constitutionalism, has written that the theory amounts to a ‘takeover bid’ which replaces legislative supremacy with judicial supremacy.<sup>40</sup> The political constitution, Thomas Poole writes, is ‘turned on its head in favour of a system of constitutional politics whose central institution is the common law court’.<sup>41</sup>

2.25 The theory has its leading proponents in the UK, which lacks a written and rigid constitution. In Australia, it has not been applied to invalidate unambiguous statutes. In *South Australia v Totani*, French CJ said that it is

self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified.<sup>42</sup>

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32 Thomas Poole, ‘Dogmatic Liberalism? TRS Allan and the Common Law Constitution’ (2002) 65 *The Modern Law Review* 463, 463.

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

34 See, eg, John Laws, *The Common Law Constitution* (Cambridge University Press, 2014). Paul Craig, Jeffrey Jowell and Dawn Oliver are the other ‘prime movers’ behind this ‘quiet revolution’ identified by Poole: Thomas Poole, ‘Questioning Common Law Constitutionalism’ (2005) 25 *Legal Studies* 142, 142.

35 Poole, above n 32.

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

37 TRS Allan, ‘In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law’ 190.

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

39 Goldsworthy, *Parliamentary Sovereignty*, above n 31, 15.

40 Ibid.

41 Poole, above n 32, 463.

42 *South Australia v Totani* (2010) 242 CLR 1, [31]. In a speech, Chief Justice French said: ‘The theoretical question whether fundamental common law principles can qualify legislative power has not been definitively answered in Australia. ... The omens are not promising for the proponents of a free-standing

2.26 Common law constitutionalism does however find a more confined application in an accepted principle of statutory construction known as the ‘principle of legality’.

### **The principle of legality**

2.27 The principle of legality is a principle of statutory interpretation that gives some protection to certain traditional rights and freedoms, including almost all of those listed in the Terms of Reference.<sup>43</sup> In fact, as Spigelman has said, the ‘protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation’.<sup>44</sup>

2.28 The principle of legality may go back at least as far as Blackstone and Bentham.<sup>45</sup> It may be a new label for a traditional principle.<sup>46</sup> Early Australian authority may be found in the 1908 High Court case, *Potter v Minahan*.<sup>47</sup> A more recent statement of the principle appears in *Re Bolton; Ex parte Beane*:

Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.<sup>48</sup>

2.29 The rights or freedoms protected by the principle of legality ‘often relate to human rights and are sometimes described as having a constitutional character’.<sup>49</sup> The principle ‘extends to the protection of fundamental principles and systemic values’.<sup>50</sup> There is no settled list of rights protected by the principle, but in *Momcilovic*, Heydon J set out the following examples:

[F]reedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests ...; rights of

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common law limitation. However, the question has been left, at least theoretically, open’: Robert French, ‘Common Law Constitutionalism’ (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).

43 The phrase ‘principle of legality’ is also used to refer to ‘a wider set of constitutional precepts requiring any government action to be undertaken only under positive authorisation’: Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372, 373. In this Report, the phrase is used to refer to the narrower point of statutory interpretation. Recent papers on the principle also include Dan Meagher, ‘The Common Law Principle of Legality in the Age of Human Rights’ (2011) 35 *Melbourne University Law Review* 449; James Spigelman, ‘The Common Law Bill of Rights’ (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series*.

44 Spigelman, above n 43, 9. See also Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

45 James Spigelman, ‘The Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 775. It has ‘many authorities, ancient and modern, Australian and non-Australian’: *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J). Although the continuity of the principle is questioned in Lim, above n 43, 380.

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

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

48 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523. This was quoted with approval in *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

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

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

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access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; *mens rea* as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction.<sup>51</sup>

2.30 The primary rationale for this principle of statutory construction was provided by Lord Hoffmann:

[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>52</sup>

2.31 The ‘political cost’ of the decision was also something referred to by French CJ. The interpretation of legislation takes place ‘against the backdrop of the supremacy of Parliament’, which can qualify or extinguish rights and freedoms by ‘clear words’—but words ‘for which it can be held politically accountable’.<sup>53</sup> As suggested in *Coco v The Queen*, the principle may ‘enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights’.<sup>54</sup>

2.32 The principle of legality may be applied not only to statutes, but also to regulations and other delegated legislation, where in fact it may assume greater importance, given such laws are not made directly by Parliament.<sup>55</sup>

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51 *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J) (citations omitted). In *Malika Holdings v Stretton*, McHugh J said: ‘No doubt there are fundamental legal principles—a civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws, especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals are examples. Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend these and other fundamental principles’: *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28]. Other lists appear in: Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); Spigelman, above n 43; Williams and Hume, above n 5. See also Australian Law Reform Commission, *Traditional Rights and freedoms—Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) Ch 19.

52 *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115 131.

53 Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

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

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

2.33 The principle of legality is similar to interpretation provisions in some human rights Acts, such as s 32(1) of the Victorian Charter, which provides: ‘So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’.<sup>56</sup> French CJ has said that this provision is ‘analogous to the common law principle of legality’.<sup>57</sup> The principle of legality could be similarly codified in a Commonwealth statute, such as the *Acts Interpretation Act 1901* (Cth). This could act as a clear statement of parliamentary support for the principle of legality and further protect fundamental rights and freedoms from statutory limitation.

2.34 Finally, it should be stressed that the principle ‘does not constrain legislative power’.<sup>58</sup> Subject to the *Constitution*, Parliament has the power to modify or extinguish common law rights. Chief Justice Robert French has said while the principle has a ‘significant role to play in the protection of rights and freedoms’, it does not ‘authorise the courts to rewrite statutes’.<sup>59</sup> The principle of legality will have a very limited application where encroaching on a right is a clear object of a statute.<sup>60</sup>

### International law

2.35 Each chapter of this Report sets out examples of international instruments that protect the relevant right or freedom. Most commonly cited is the *International Covenant on Civil and Political Rights* (ICCPR),<sup>61</sup> to which Australia is a party.<sup>62</sup>

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- 56 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1). See also *Human Rights Act 1998* (UK) s 3(1).
- 57 Robert French, ‘Common Law Constitutionalism’ (Robin Cooke Lecture, Wellington, New Zealand, 27 November 2014).
- 58 *Momcilovic v The Queen* (2011) 245 CLR 1, [43] (French CJ). In a 2012 speech, Chief Justice Robert French said: ‘The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms’: Chief Justice Robert French, ‘The Courts and Parliament’ (Speech, Queensland Supreme Court, Brisbane, 4 August 2013).
- 59 Chief Justice Robert French, *The Courts and the Parliament* (Queensland Supreme Court Seminar, Brisbane, 4 August 2012).
- 60 ‘The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked’: *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [314] (Gageler and Keane JJ).
- 61 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 62 The other United Nations human rights treaties Australia has signed are: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008); *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).