Australian Government
Australian Law Reform Commission

Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

ISSUES PAPER

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Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Issues Paper is 27 February 2015.

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The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: <https://www.alrc.gov.au/content/freedoms-ip46-submission>. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

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Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

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Please send any pre-prepared submissions in Word or RTF format.

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As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for submitters.

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Terms of Reference

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.

Questions

2. Freedom of Speech

Question 2–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

Question 2–2 Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

3. Freedom of Religion

Question 3–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

Question 3–2 Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

4. Freedom of Association

Question 4–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?

Question 4–2 Which Commonwealth laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

5. Freedom of Movement

Question 5–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of movement is justified?

Question 5–2 Which Commonwealth laws unjustifiably interfere with freedom of movement, and why are these laws unjustified?

6. Property Rights

Question 6–1 What general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified?

Question 6–2 Which Commonwealth laws unjustifiably interfere with vested property rights, and why are these laws unjustified?

7. Retrospective Laws

Question 7–1 What general principles or criteria should be applied to help determine whether a law that retrospectively changes legal rights and obligations is justified?

Question 7–2 Which Commonwealth laws retrospectively change legal rights and obligations without justification? Why are these laws unjustified?

8. Fair Trial

Question 8–1 What general principles or criteria should be applied to help determine whether a law that limits the right to a fair trial is justified?

Question 8–2 Which Commonwealth laws unjustifiably limit the right to a fair trial, and why are these laws unjustified?

9. Burden of Proof

Question 9–1 What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

Question 9–2 Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

10. The Privilege against Self-incrimination

Question 10–1 What general principles or criteria should be applied to help determine whether a law that excludes the privilege against self-incrimination is justified?

Question 10–2 Which Commonwealth laws unjustifiably exclude the privilege against self-incrimination, and why are these laws unjustified?

11. Client Legal Privilege

Question 11–1 What general principles or criteria should be applied to help determine whether a law that abrogates client legal privilege is justified?

Question 11–2 Which Commonwealth laws unjustifiably abrogate client legal privilege, and why are these laws unjustified?

12. Strict and Absolute Liability

Question 12–1 What general principles or criteria should be applied to help determine whether a law that imposes strict or absolute liability for a criminal offence is justified?

Question 12–2 Which Commonwealth laws unjustifiably imposes strict or absolute liability for a criminal offence, and why are these laws unjustified?

13. Appeal from Acquittal

Question 13–1 What general principles or criteria should be applied to help determine whether a law that allows an appeal from an acquittal is justified?

Question 13–2 Which Commonwealth laws unjustifiably allow an appeal from an acquittal, and why are these laws unjustified?

14. Procedural Fairness

Question 14–1 What general principles or criteria should be applied to help determine whether a law that denies procedural fairness is justified?

Question 14–2 Which Commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?

15. Delegating Legislative Power

Question 15–1 What general principles or criteria should be applied to help determine whether a law that delegates legislative power to the executive is justified?

Question 15–2 Which Commonwealth laws unjustifiably delegate legislative power to the executive, and why are these laws unjustified?

16. Authorising what would otherwise be a Tort

Question 16–1 What general principles or criteria should be applied to help determine whether a law that authorises what would otherwise be a tort is justified?

Question 16–2 Which Commonwealth laws unjustifiably authorise what would otherwise be a tort, and why are these laws unjustified?

17. Executive Immunities

Question 17–1 What general principles or criteria should be applied to help determine whether a law that gives executive immunities a wide application is justified?

Question 17–2 Which Commonwealth laws unjustifiably give executive immunities a wide application, and why are these immunities unjustified?

18. Judicial Review

Question 18–1 What general principles or criteria should be applied to help determine whether a law that restricts access to judicial review is justified?

Question 18–2 Which Commonwealth laws unjustifiably restrict access to judicial review, and why are these laws unjustified?

19. Others Rights, Freedoms and Privilege

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

1. Introduction

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Traditional rights, freedoms and privileges

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

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

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

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

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

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

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

Rights and freedoms under the common law

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

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

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

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms. We do so against the backdrop of the supremacy of Parliament which can, by using clear words for which it can be held politically accountable, qualify or extinguish those rights and freedoms except to the extent that they may be protected by the *Constitution*.[5]

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

1.8 In his book *Human Rights and the End of Empire*, English legal historian A W Brian Simpson wrote about the widely held assumption that, before international conventions on human rights, human rights were in the UK 'so well protected as to be an example to the world'. In normal times, Brian Simpson writes, 'when there was neither war, nor insurrection, nor widespread problems of public order',

> few would deny that people in the United Kingdom enjoyed a relatively high level of personal and political freedom, and had done so earlier in the eighteenth and nineteenth centuries, though most of the population could only participate very indirectly, if at all, in government.[6]

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

> In the modern period, and subject to certain limitations which, for most persons, were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly unthreatened by the grosser forms of interference with personal liberty, such as officially sanctioned torture, or prolonged detention without trial.[7]

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

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

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

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

7 Ibid.

8 Traditions, culture and politics also play a role.

1.11 In a 2013 speech, former Justice of the High Court of Australia, the Hon John Dyson Heydon AC QC, considered some of the benefits of protecting rights through statutes and the common law. He said that statutes and the common law protect rights often by 'detailed and precise rules' and vindicate 'human rights directly and specifically':

> common law and statutory rules tend to be detailed. They are generally enforceable. They are specifically adapted to the resolution of particular problems. Their makers seek, with some success, to make them generally coherent with each other and with the wider legal system.[9]

1.12 Taking the right to a fair trial as an example, Heydon said that rules found in certain statutes and in the common law 'were worked out over a very long time by judges and legislators who thought deeply about the colliding interests and values involved in the light of practical experience of conditions in society to which the rules were applied'.[10]

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

> It is also important to recognise, as Professor Bailey pointed out in his recent book on human rights in Australia, that common law 'rights' have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have 'a binding effect'. But 'rights', to movement, assembly or religion, for example, are more in the nature of 'freedoms'. They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort.[11]

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

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

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

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

10 Heydon then said: 'Abstract slogans and general aspirations about human rights played no useful role in their development. The great detail of this type of regime renders it superior to bills of rights': Ibid.

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

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

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[12]

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

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

Protections from statutory encroachment

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

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

Australian Constitution

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

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

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

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

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

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

1.23 However, these are only a small number of rights and freedoms. The *Australian Constitution* does not expressly or impliedly protect most of the rights, freedoms and privileges listed in the ALRC's Terms of Reference. One reason the *Constitution* does not expressly protect most civil rights, Professor Helen Irving suggests in her book, *To Constitute a Nation*, was the 'general reserve about directly including policy in the *Constitution*, instead of powers subsequently to enact policy'.

> Specifically, the British legal tradition (in which in fact the ideas of freedom and 'fair play', far from being overlooked, were thought central) largely relied on the common law, rather than statute or constitutional provision to define and protect individual rights and liberties. This approach was adopted for the most part by the Australians in constitution-making. It explains in large degree the shortage (as it is now perceived) of explicit statements of ideals and guarantees of rights, and descriptions of essential human and national attributes.[15]

The principle of legality

1.24 The principle of legality is a rule of statutory interpretation that gives some protection to certain traditional rights and freedoms.[16] James Spigelman has said that the 'protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[17]

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

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

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

17 Spigelman, above n 16, 9.

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

> Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[18]

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

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

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

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

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

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[21]

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

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

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

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

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

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

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

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

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

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

> The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'.[24]

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

> The common law principle of legality has a significant role to play in the protection of rights and freedoms in contemporary society while operating consistently with the principle of parliamentary supremacy. It does not, however, authorise the courts to rewrite statutes in order to accord with fundamental human rights and freedoms.[25]

International law

1.33 Each chapter also sets out examples of international instruments that protect the relevant right or freedom. Most commonly cited is the ICCPR, to which Australia is a party. Such instruments provide some protection to rights and freedoms from statutory encroachment, but, like the principle of legality, generally only when a statute is unclear or ambiguous.

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party.[26]

1.34 However, even international instruments to which Australia is a party do not create binding domestic law in Australia. Nor do they abrogate the power of the Commonwealth Parliament to make laws that are inconsistent with the rights and freedoms set out in these instruments. In *Dietrich v The Queen* (1992), Mason CJ and McHugh J said:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.[27]

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

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

26 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). There is a 'common law principle that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party': *Momcilovic v The Queen* (2011) 245 CLR 1, 37 [18] (French CJ). Commonly cited authority for this proposition includes O'Connor J's statement that every statute is 'to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with established rules of international law':*Jumbunna Coal Mine NL v Victorian Coal Miners'Association* (1908) 6 CLR 309, 353.

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

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

Bills of rights

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

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

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

Encroachments on rights, freedoms and privileges

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

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

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

29 Statements from Lord Nicholls, Lord Steyn and Lord Rodger in *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557 gave 'a very broad meaning' to what was 'possible': 'as long as an interpretation was not contrary to the scheme or essential principles of the legislation, words could be read in or read out, or their meaning elaborated, so as both to be consistent with the convention rights and "go with the grain" of the legislation, even though it was not what was meant at the time': Lady Hale, *What's the Point of Human Rights?* Warwick Law Lecture (28 November 2013).

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

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

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

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

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

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

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

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

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

The reform process

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

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

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

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

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

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

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

> To make a submission, please use the ALRC's online submission form, available at <https://www.alrc.gov.au/content/freedoms-ip46-submission>. Otherwise, submissions may be sent to freedoms@alrc.gov.au or ALRC, GPO Box 3708, Sydney 2000.
>
> The deadline for submissions is **Friday 27 February 2015.**
>
> Submissions, other than those marked confidential, will be published on the ALRC website.

2. Freedom of Speech

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A common law right

2.1 Freedom of speech is a fundamental common law right.[1] It has been described as 'the freedom *par excellence*; for without it, no other freedom could survive'.[2]

2.2 This chapter discusses: the source and rationale of freedom of speech; how it is protected from statutory encroachment; and when laws that encroach on freedom of speech may be justified. The ALRC calls for submissions on two questions.

> **Question 2–1** What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?
>
> **Question 2–2** Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

2.3 In *Monis v The Queen* (2013), Chief Justice French explained the source of freedom of speech:

> Freedom of speech is a common law freedom. It embraces freedom of communication concerning government and political matters. The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters. Lord Coleridge CJ in 1891 described what he called the right of free speech as 'one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done'. The common law and the freedoms

1 *Nationwide News v Wills* (1992) 177 CLR 1, 32 (Mason CJ); *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 67 [151].

2 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

> it encompasses have a constitutional dimension. It has been referred to in this Court as 'the ultimate constitutional foundation in Australia'.[3]

2.4 Free speech or free expression is understood to be an integral aspect of a person's right of self-development and fulfilment.[4] Professor Eric Barendt writes that freedom of speech is 'closely linked to other fundamental freedoms which reflect... what it is to be human: freedoms of religion, thought, and conscience'.[5]

2.5 This freedom is intrinsically important, but also serves a number of broad objectives:

> First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[6]

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

> Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.[7]

2.7 The common law on freedom of speech both reflects and informs the works of some leading philosophers and jurists from Aristotle in the 4th century BCE,[8] JS Mill in the 18th century,[9] through to John Rawls, Ronald Dworkin[10] and Eric Barendt[11] in the 20th century.[12] Freedom of speech has been enshrined in founding constitutions for modern republics such as that of France and the United States of America.

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3 *Monis v The Queen* (2013) 249 CLR 92, 128 [60].
4 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.
5 Ibid. See also United Nations Human Rights Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [1].
6 *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).
7 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 108 (Mason CJ). See also, *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).
8 Aristotle, *Politics* (Hackett Publishing Company, 1998) vol Book 6.
9 John Stuart Mill, *On Liberty* (London, 1859) in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, 1991).
10 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing, 1978).
11 Barendt, above n 4.
12 John Rawls, *Political Liberalism* (Colombia University Press, 1993).

Protections from statutory encroachments

Australian Constitution

2.8 Beginning with a series of cases in 1992,[13] the High Court has recognised that freedom of political communication is implied in the *Australian Constitution*. This freedom 'enables the people to exercise a free and informed choice as electors'.[14]

2.9 The *Constitution* does not protect a personal right, but rather, the freedom acts as a restraint on the exercise of legislative power by the Commonwealth.[15]

> The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?[16]

2.10 However, the freedom is not absolute. For one thing, it only protects some types of speech—political communication.[17] 'It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*.'[18]

2.11 In *Lange v Australian Broadcasting Corporation* (1997), the High Court formulated a two-step test to determine whether a law burdens the implied freedom. As modified in *Coleman v Power* [2004],[19] the test involves asking two questions:

> 1. Does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
>
> 2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and the procedure prescribed by s 128 of the *Constitution* for

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

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

15 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506.

16 *Unions NSW v State of New South Wales* (2013) 88 ALJR 227 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Also, the High Court said in *Lange*: 'Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government': *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557 (the Court). Sections 7 and 24 do not 'confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power': Ibid 560 (the Court).

17 However, French CJ has said that the 'class of communication protected by the implied freedom in practical terms is wide': *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [67] (French CJ).

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

19 *Coleman v Power* (2004) 220 CLR 1.

> submitting a proposed amendment of the *Constitution* to the informed decision of the people?[20]

2.12 The *Australian Constitution* has not been found to protect free speech more broadly.

Principle of legality

2.13 The principle of legality provides some protection to freedom of speech.[21] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of speech, unless this intention was made unambiguously clear.[22]

2.14 For example, in *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013), French CJ said:

> The common law freedom of expression does not impose a constraint upon the legislative powers of the Commonwealth or the States or Territories. However, through the principle of legality, and criteria of reasonable proportionality, applied to purposive powers, the freedom can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of statutes generally and the construction of delegated legislation made in the purported exercise of statutory powers. As a consequence of its effect upon statutory construction, it may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.[23]

International law

2.15 International instruments provide for freedom of expression including the right to 'seek, receive and impart information and ideas of all kinds regardless of frontiers'.[24] The UN's Human Rights Committee provides a detailed list of forms of communication that should be free from interference:

> Political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse.[25]

2.16 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[26] However, where a statute is ambiguous, courts will

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20 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43–44 [67] (French CJ).

21 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

22 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 30–33 [42]–[46]; *Evans v State of New South Wales* [2008] FCAFC 130 (15 July 2008) [72]; *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115 130.

23 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 32 [44] (French CJ). See also, *Monis v The Queen* (2013) 249 CLR 92, 331.

24 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2). The Universal Declaration of Human Rights also enshrines freedom of speech in its preamble: *Universal Declaration of Human Rights 1948*.

25 United Nations Human Rights Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [11].

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

generally favour a construction that accords with Australia's international obligations.[27]

Bills of rights

2.17 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes protect free speech in the United States,[28] United Kingdom,[29] Canada[30] and New Zealand[31]. For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the European Convention on Human Rights, art 10 of which provides:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[32]

2.18 Although the right may be stronger for being incorporated into statute law, the particular freedom may not necessarily be different from the freedom recognised at common law: several members of the House of Lords expressed the opinion 'that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the Convention.'[33]

2.19 The First Amendment to the United States *Constitution* provides significant protection to free speech. In *New York Times v Sullivan,* Brennan J spoke of a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'.[34]

2.20 Free speech is also is provided for in the Victorian Charter of Human Rights and Responsibilities and the *Human Rights Act 2004* (ACT).[35]

Justifications for encroachments

2.21 It is widely recognised that freedom of speech is not absolute. Conventions enshrining the freedom recognise that it may be subject to laws necessary to protect the rights or reputations of others, national security, and 'public health or morals'.[36] Even the First Amendment of the United States *Constitution* has been held not to protect all

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27 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

28 *United States Constitution* amend I.

29 *Human Rights Act 1998* (UK) c 42, s 12 and sch 1 pt I, art 10(1).

30 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 2(b).

31 *Bill of Rights Act 1990* (NZ) s 14.

32 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 10(1).

33 *Attorney General v Guardian Newspapers Ltd (No 2) (Spycatcher)* [1988] 1988 UKHL 6 283–284 (Lord Goff). This was approved in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 550–551 (Lord Keith); *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115.

34 *New York Times v Sullivan* 376 US 254 (1964) 270 (Brennan J, giving the opinion of the Court).

35 *Charter of Human Rights and Responsibilities 2006* (Vic) s 15; *Human Rights Act 2004* (ACT) s 16.

36 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).

speech: it does not, for example, protect obscene publications or speech inciting imminent lawless action.[37]

2.22 The difficulty is always balancing the respective rights or objectives. 'It is difficult to draw a line between speech which might appropriately be regulated and speech which in any liberal society should be tolerated.'[38]

2.23 Laws limiting freedom of speech have been justified:

- to prevent the publication or dissemination private or confidential information,[39] including the identity of vulnerable persons;
- to protect national security;[40] or
- to prevent or restrict dissemination of indecent or classified material.

2.24 Similarly, laws prohibit, or render unlawful, speech that causes harm, distress or offence to others through incitement to violence,[41] harassment, intimidation[42] or discrimination.[43]

2.25 International law provides that freedom of expression may be justifiably limited where, for example, an individual's privacy is interfered with.[44]

2.26 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[45]

2.27 Many of these encroachments on free speech may be justified. The ALRC invites submissions identifying those Commonwealth laws that limit free speech and that are *not* justified, and explaining why these laws are not justified.

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37 *Brandenburg v Ohio* 395 US 444 (1969).
38 Barendt, above n 4, 21.
39 An individual's privacy is, to some extent, protected by the equitable action for breach of confidence and under the *Privacy Act 1988* (Cth).
40 See for example, *Crimes Act 1914* (Cth) s 70.
41 *Criminal Code Act 1995* (Cth) s 11.4.
42 *Fair Work Act 2009* (Cth) s 676.
43 *Racial Discrimination Act 1975* (Cth) s 18C.
44 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1).
45 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

3. Freedom of Religion

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A common law right

3.1 Freedom of religion protects not only the freedom to observe or practise religious beliefs, but also the freedom not to observe or practise any religion or belief.[1] This chapter discusses the source and rationale for protecting freedom of religion; how this freedom is protected from statutory encroachment; and when laws that encroach on this freedom may be justified.

3.2 The ALRC calls for submissions on two questions about this freedom.

Question 3–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

Question 3–2 Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

3.3 Freedom of religion is recognised in the common law. In *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983), in the context of defining the meaning of 'religion' for taxation purposes, Mason ACJ and Brennan J commented:

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society … [A] definition of religion … mark[s] out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.[2]

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1 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120; *Attorney-General ex rel Black v Commonwealth* (1981) 146 CLR 559; *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987) 162 CLR 145.

2 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

3.4 Broadly speaking, religious freedom involves positive and negative religious liberty. Positive religious liberty involves the 'freedom to actively manifest one's religion or beliefs in various spheres (public or private) and in myriad ways (worship, teaching and so on)'.[3] Negative religious freedom, on the other hand, is freedom from coercion or discrimination on the grounds of religious or non-religious belief.[4]

3.5 The freedom to observe and practise religious faith protects the inherent dignity of individuals, acknowledging the autonomy of individuals to make decisions about the way they live their lives.[5]

3.6 The protection of religious freedom recognises the existence of multiple identity groups in a pluralist democratic society.[6] Respect for another person's religious beliefs has been described as 'one of the hallmarks of a civilised society'.[7]

3.7 The 17th century philosopher, John Locke, wrote about the importance of tolerating other religious beliefs:

> The Toleration of those that differ from others in Matters of Religion, is so agreeable to the Gospel of Jesus Christ, and to the genuine Reason of Mankind, that it seems monstrous for Men to be so blind, as not to perceive the Necessity and Advantage of it, in so clear a light.[8]

3.8 Thomas Jefferson, writing in his *Notes on the State of Virginia* (1781—2), advocated for religious freedom on the basis of natural law:

> Our rulers have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit, we are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.[9]

3.9 Common law protection for freedom of religion developed significantly towards the end of the nineteenth century in England, predominantly in deceased estate cases where testators had attempted to influence the religious tendencies of their beneficiaries by attaching conditions to a legacy.[10]

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3 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press) 128.

4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(2).

5 *Universal Declaration of Human Rights 1948* preamble.

6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).

7 'Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony': *R v Secretary of state for education and employment; ex parte Williamson* [2005] UKHL 15 [15] (Lord Nicholls of Birkenhead).

8 John Locke, 'A Letter Concerning Toleration (1685)' in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1998) 174.

9 Thomas Jefferson, 'Notes on the State of Virginia (1781—2)' in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1989) 219.

10 There are a large number of reported cases on such facts from the late Victorian period: Peter James Hymers, *Halsbury's Laws of England* (Lexis Nexis Butterworths, 4th ed, 2008) vol 50, [379]. In some cases, such clauses have been found to be contrary to public policy, although this is not precedent at Australian law: *Trustees of Church property for Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394.

Protections from statutory encroachments

Australian Constitution

3.10 Section 116 of the *Australian Constitution* provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[11]

3.11 This provision has been read narrowly by the High Court.[12] For example, in *Krygger v Williams* (1915) the High Court upheld a law requiring attendance at compulsory peacetime military training by persons who conscientiously objected on religious grounds. The court found the law requiring attendance at military training did not infringe s 116:

> To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.[13]

3.12 Given the limitations of s 116 as a protection of religious freedom, and the limited protection at common law, there is some debate about the extent to which freedom of religion is protected by Australian law.[14]

Principle of legality

3.13 The principle of legality provides some protection to freedom of religion.[15] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously clear.[16] McHugh JA in *Canterbury Municipal Council v Moslem Alawy Society* (1985) suggested that Australian courts should show restraint in upholding provisions which interfere with religious equality:

> If the ordinance is capable of a rational construction which permits persons to exercise their religion at the place where they wish to do so, I think that a court should prefer that construction to one which will prevent them from doing so.[17]

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11 *Australian Constitution* s 116.

12 *Attorney-General ex rel Black v Commonwealth* (1981) 146 CLR 559, 604 (Gibbs J); *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 268. See also, Tony Blackshield, George Williams and Michael Coper (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 93–4.

13 *Krygger v Williams* (1915) 15 CLR 366, 369 (Griffith CJ).

14 Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012) 88.

15 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

16 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

17 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA). See also, DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [5.15].

International law

3.14 Article 18(1) of the *Universal Declaration of Human Rights* 1948 enshrines freedom of religion:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

3.15 Article 18(1) of the ICCPR states that 'everyone shall have the right to freedom of thought, conscience and religion'.

3.16 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[18] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[19]

Bills of rights

3.17 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes protect freedom of religion in the United States,[20] the United Kingdom,[21] Canada[22] and New Zealand.[23] An example is s 15 of the New Zealand *Bill of Rights Act*, which provides:

> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.[24]

3.18 The *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) also include protection for religious freedom.[25] For instance, s 7 of the Victorian charter requires that in the event of a conflict between rights, lawmakers can place limits on rights, taking into account: 'the nature of the right; the importance of the purpose of the limitation'; 'the nature and extent of the limitation'; and 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

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

19 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

20 *United States Constitution* amend I.

21 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 9(1).

22 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* c 11, sch B pt I, s 2(a).

23 *Bill of Rights Act 1990* (NZ) s 15.

24 Ibid.

25 *Charter of Human Rights and Responsibilities 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.

Justifications for encroachments

3.19 Like all freedoms, the freedom of religion is not absolute: 'it is subject to powers and restrictions of government essential to the preservation of the community'.[26] As White J of the South Australian Supreme Court has stated:

> the common law has never purported to prevent the Parliament from asserting and exercising absolute right to interfere with religious worship and the expression of religious beliefs at any time that it liked … the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression.[27]

3.20 Similarly, in the UK case of *R v Secretary of state for education and employment; ex prate Williamson* (2005), Lord Nicholls of Birkhenhead stated that

> under article 9 there is a difference between freedom to hold a belief and freedom to express or 'manifest' a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified. This is to be expected, because the way a belief is expressed in practice may impact on others.[28]

3.21 Legal protection of religious freedom depends on balancing respect for different religious values and beliefs with those principles and laws that underpin other freedoms, non-discrimination and equality in a pluralist, secular democracy:

> As a practical matter, it is impossible for the legal order to guarantee religious liberty absolutely and without qualification … Governments have a perfectly legitimate claim to restrict the exercise of religion, both to ensure that the exercise of one religion will not interfere unduly with the exercise of other religions, and to ensure that practice of religion does not inhibit unduly the exercise of other civil liberties.[29]

3.22 International law provides that freedom of religion may be limited where it is 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[30]

3.23 While some discrimination in employment practices— by religious schools for example—has been tolerated and even protected by law,[31] limits on discrimination on religious grounds have been justified to ensure the protection of vulnerable people. Freedom of religion is fundamental, but so too is freedom from discrimination on the grounds of gender, race, sexual orientation or some other protected attribute. Freedom from discrimination is also a fundamental human right.[32]

3.24 Where there is conflict between religious teaching and the rights of citizens to engage in public life without fear of persecution, religious freedoms may be limited.

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26 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149 (Rich J).

27 *Grace Bible Church v Reedman* (1984) 36 SASR 376, 385, 388.

28 *R v Secretary of state for education and employment; ex parte Williamson* [2005] UKHL 15 [16].

29 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204.

30 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3); United Nations Human Rights Committee, General Comment No 22 (1993) on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion, CCPR/C/21/Rev.1 22.

31 *Sex Discrimination Act 1984* (Cth) s 38.

32 *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [1] (Maxwell P).

This arises in Commonwealth anti-discrimination legislation.[33] Such a conflict may arise for example between religious teaching concerning sexuality, and the non-discrimination principles which inform unlawful dismissal provisions in employment law.

3.25 Religious freedom may be limited where one person's religious observance may cause harm to another person. In Victoria, for instance, medical professionals who have a conscientious objection to performing a lawful termination of pregnancy are legally obliged to refer a patient to a doctor whom they 'know does not have a conscientious objection to abortion'.[34]

3.26 Encroachments on religious freedom are also sometimes said to be required to prevent an individual from causing themselves harm when following certain religious practices, particularly if that person is a minor.[35] For instance, the decision of a minor to refuse life-saving therapeutic medical treatment on the basis of religious beliefs may be overruled by a court exercising its *parens patriae* jurisdiction.[36]

3.27 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[37]

3.28 Some laws that limit freedom of religion may be justified. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why they are not justified.

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33 See, for example provisions in the *Sex Discrimination Act 1984* (Cth) ss 37 and 38. These provisions provide exemptions to the requirement of non-discrimination on the grounds of gender, marital status and pregnancy in relation to the ordination of priests, and an exemption for employing staff in religious educational institutions.

34 *Abortion Law Reform Act 2008* (Vic) s 8(1)(b). For some, this requirement may conflict with their religious objection to abortion by requiring them to indirectly help a woman to procure an abortion.

35 Evans, above n 14, 10.

36 *X v The Sydney Children's Hospitals Network* (2013) 85 NSWLR 294.

37 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

4. Freedom of Association

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A common law right

4.1 In practice, Australians are generally free to associate with whomever they like, and to assemble together to participate in a protest or demonstration. However, freedom of association and assembly are less often discussed, and their scope at common law less clear, than related freedoms, such as freedom of speech. Lord Bingham described the approach of the English common law to freedom of assembly as 'hesitant and negative, permitting that which was not prohibited'.[1] In *Duncan v Jones* (1936), Lord Hewart CJ said that 'English law does not recognize any special right of public meeting for political or other purposes'.[2]

4.2 Nevertheless, freedom of association is widely regarded as one of the fundamental rights. This chapter discusses the source and rationale of freedom of association; how this freedom is protected from statutory encroachment; and when laws that encroach on this freedom may be justified.

4.3 The ALRC calls for submissions on two questions about this freedom:

> **Question 4–1** What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?
>
> **Question 4–2** Which Commonwealth laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

1 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–127.

2 *Duncan v Jones* [1936] 1 KB 218, 222. This 'reflected the then current orthodoxy': *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–127.

4.4 The 19th century author of *Democracy in America*, Alexis de Tocqueville, considered freedom of association as 'almost as inalienable as the freedom of the individual':

> The freedom most natural to man, after the freedom to act alone, is the freedom to combine his efforts with those of his fellow man and to act in common ... The legislator cannot wish to destroy it without attacking society itself.[3]

4.5 Professor Thomas Emerson wrote in 1964 that freedom of association has 'always been a vital feature of American society':

> In modem times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.[4]

4.6 Freedom of association is closely related to other fundamental freedoms recognised by the common law, particularly freedom of speech. It has been said to serve the same values as freedom of speech: 'the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy'.[5]

4.7 The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association explained the importance of these rights as empowering men and women to:

> express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.[6]

4.8 Freedom of assembly and association serve as a vehicle for the exercise of many other civil, cultural, economic, political and social rights.

4.9 Freedom of association provides an important foundation for legislative protection of employment rights. The system for collective, or enterprise bargaining, which informs much of Australia's employment landscape, relies on the freedom of trade unions and other employee groups to form, meet and support their members.[7]

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3 Alexis de Tocqueville, *Democracy in America* (Library of America, 2004) 220. See also Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 149, 161.

4 Thomas I Emerson, 'Freedom of Association and Freedom of Expression' [1964] *Yale Law Journal* 1, 1.

5 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272. ('For many people, participation in public meetings or less formal forms of protest—marches and other demonstrations on the streets, picketing, and sit-ins—is not just the best, but the only effective means of communicating their views. ... Taking part in public protest, particularly if the demonstration itself is covered on television and widely reported, enables people without media access to contribute to public debate': Ibid 269.)

6 UN Human Rights Council, The Rights to Freedom of Peaceful Assembly and of Association, A/HRC/RES/15/21, 15th Session, 06/10/2010.

7 The General Protections provisions of the *Fair Work Act* 2009 (Cth) concern an employee's right to join, or to not join, a union.

Protections from statutory encroachment

The Australian Constitution

4.10 Freedom of association is not expressly protected in the *Australian Constitution*. There is also no free-standing right to association implied in the *Constitution*.[8] Generally, Australian Parliaments may make laws that encroach on freedom of association.

4.11 However, just as there is in the *Constitution* an implied right to 'political communication', arguably there is also an implied right to 'political association'. The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*'.[9]

4.12 Recognition of this corollary acknowledges the importance of freedom of association to a vibrant democracy. People should be free, generally speaking, to join groups like political parties to lobby for and effect change. Gaudron J in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) said that the

> notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association.[10]

4.13 However, it seems this right to free association is *only* a corollary of the right to political communication. The High Court said in *Wainohu v New South Wales* (2011):

> Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.[11]

4.14 The effect of this decision, Professors George Williams and David Hume write, 'will be to give freedom of association a limited constitutional vitality'.[12]

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8 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ). ('There is no such 'free-standing' right [as freedom of association] to be implied from the *Constitution*'). See also, *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014). See also: *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 [28]; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227.

9 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ). This position has been supported in recent judgements: *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 [28]; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 238 [158] (Gummow & Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan & Bell JJ).

10 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J).

11 *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan and Bell JJ with French CJ and Kiefel J agreeing 220 [72], 251 [186] (Heydon J).

12 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 217. Williams and Hume go on to write: 'It would be better to reformulate the position in *Wainohu* at least so that any freedoms of political association and political movement were identified as derivative, not of freedom of communication, but of the constitutionally prescribed systems of representative and responsible government and for amending the *Constitution* by referendum. In other words, the *Constitution* protects that freedom of association and movement which is necessary to sustain the free, genuine choices which the constitutionally prescribed systems contemplate': Ibid 217–18.

The principle of legality

4.15 The principle of legality provides some protection to freedom of association.[13] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of association, unless this intention was made unambiguously clear.[14]

4.16 For example, in *Melbourne Corporation v Barry* (1922), the High Court found that a by-law, made under a power to regulate traffic and processions, could not prohibit traffic and processions. Higgins J said:

> It must be borne in mind that there is this common law right; and that any interference with a common law right cannot be justified except by statute—by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted. As stated in *Ex parte Lewis*, it is a 'right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance'.[15]

International law

4.17 International law recognises rights to peaceful assembly and to freedom of association. For example, the ICCPR provides for a 'right to freedom of association including the right to form and join trade unions'.[16]

4.18 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[17] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[18]

Bills of rights

4.19 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of association is protected in the human rights statutes in the United Kingdom,[19] Canada[20] and New Zealand.[21] For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the European Convention on Human Rights, art 11 of which provides:

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13 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.
14 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.
15 Ibid quoting *Ex parte Lewis* (1888) 21 QBD, 197.
16 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21, 22.
17 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).
18 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.
19 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).
20 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 2(d).
21 *Bill of Rights Act 1990* (NZ) s 17. The protection provided by bills of rights and human rights Act is discussed more generally in Ch 1.

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.[22]

4.20 The First Amendment of the US Constitution refers to the 'right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.[23]

4.21 Freedom of association is also provided for in the Victorian Charter of Human Rights and Responsibilities and the *Human Rights Act 2004* (ACT).[24]

Justifications for encroachments

4.22 Preventing people from 'getting together to hatch crimes' has long been considered one justification for restrictions on freedom of association.[25] Chief Justice of the High Court, Robert French, has said that:

> Laws directed at inchoate criminality have a long history, dating back to England in the Middle Ages, which is traceable in large part through vagrancy laws. An early example was a statute enacted in 1562 which deemed a person found in the company of gypsies, over the course of a month, to be a felon.[26]

4.23 The High Court has recognised a 'public interest'[27] in restricting the activities, or potential activities, of criminal associations and criminal organisations.[28] In *South Australia v Totani* (2011),[29] French CJ explained that legislative encroachments on freedom of association are not uncommon where the legislature aimed to prevent crime. The *Serious and Organised Crime (Control) Act 2008* (SA)

> does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of

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22 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).

23 *United States Constitution* amend I.

24 *Charter of Human Rights and Responsibilities 2006* (Vic) s 16(2); *Human Rights Act 2004* (ACT) s 15(2).

25 Professors Campbell and Whitmore wrote, concerning vagrancy laws, that 'New South Wales in 1835 was still a penal colony and one can understand why at that time it should have been thought necessary to prevent people getting together to hatch crimes': Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 135. This was quoted in *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014) [8] (French CJ).

26 *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014). The court was citing Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103, 113.

27 *South Australia v Totani* (2010) 242 CLR 1, 54 [92] (Gummow J). While Mason CJ recognised that some restrictions on this freedom of communication may be permitted, he went on to say that they 'must be no more than is reasonably necessary to achieve the protection of the competing public interest': *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ).

28 For example, the Immigration Minister has the power to refuse or cancel the visa of a non-citizen where that person does not pass a 'character test' due to an association with a group or organisation who the Minister reasonably suspects has or will be involved in criminal activity: *Migration Act 1958* (Cth) s 501. This particular provision has been construed narrowly: *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

29 In that case, South Australia's *Serious and Organised Crime (Control) Act* 2008 s 4 is aimed to disrupt and restrict the activities of organisations involved in serious crime and of the activities of their members and associates and the protection of the public from violence associated with such organisations.

> association of persons connected with organisations which are or have been engaged in serious criminal activity.[30]

4.24 Similarly, in *Tajjour v State of New South Wales,* the High Court upheld the validity of s 93X of the *Crimes Act 1900* (NSW):

> Section 93X is a contemporary version of a consorting law, the policy of which historically has been 'to inhibit a person from habitually associating with persons ... because the association might expose that individual to temptation or lead to his involvement in criminal activity'. The object of the section is to prevent or impede criminal conduct.[31]

4.25 Limits on free association are also sometimes said to be necessary for other people to enjoy freedom of association and assembly. For example, a noisy protest outside a church interferes with the churchgoers' freedom of association. Laws that facilitate the freedom of assembly of some may therefore need to inhibit the freedom of assembly of others, for example by giving police certain powers to control or regulate public protests.

4.26 In *Melbourne Corporation v Barry*, Higgins J distinguished between people's right to 'freely and at their will to pass and repass without let or hindrance' from a right to assemble on a public highway. Quoting *Ex parte Lewis* (1888) (the Trafalgar Square Case), Higgins J said:

> A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.[32]

4.27 Similarly, freedom of association is sometimes limited by laws that regulate protests, laws perhaps aimed at ensuring the protests are peaceful and do not disproportionately affect others. Protest organisers might be required to notify police in advance, so that police may prepare, for example by cordoning off public spaces. Police may also be granted extraordinary powers during some special events, such as sporting events and inter-governmental meetings like the G20 or APEC.

4.28 International law and bills of rights include certain general circumstances in which limits on freedom of association may be justified, for example, to:

- protect the rights or freedoms of others;
- protect national security or public safety;

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30 *South Australia v Totani* (2010) 242 CLR 1, 36 [44].

31 *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014) [160] (Gageler J). References omitted.

32 *R v Cunningham Graham and Burns; ex parte Lewis* [1888] 16 Cox 420. This case was quoted in *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J).

- prevent public disorder or crime.[33]

4.29 The ICCPR provides that freedom of association may be limited where it is necessary and in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[34]

4.30 International instruments also provide that the right to join a trade union may be limited as it applies to 'members of the armed forces or of the police or of the administration of the State'.[35]

4.31 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[36]

4.32 The ALRC invites submissions identifying Commonwealth laws that limit free association without appropriate justification, and explaining why such laws are not justified.

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33 See, *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(2). See also, *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1; *Bill of Rights Act 1990* (NZ) s 5; *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28.

34 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22(2).

35 Ibid art 8. (Williams and Hume: 'the right to freedom of association is recognised in the ICCPR while the right to form trade unions (which can be seen as a subset of the right to freedom of association) is recognised in the ICESCR': Williams and Hume, above n 12, 4.)

36 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

5. Freedom of Movement

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A common law right

5.1 Freedom of movement concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. It has its origins in ancient philosophy and natural law, and has been regarded as integral to personal liberty.[1]

5.2 This chapter discusses the source and rationale of freedom of movement; how this freedom is protected from statutory encroachment; and when laws that encroach on this freedom may be justified.

5.3 The ALRC calls for submissions on two questions about this freedom.

> **Question 5–1** What general principles or criteria should be applied to help determine whether a law that interferes with freedom of movement is justified?
>
> **Question 5–2** Which Commonwealth laws unjustifiably interfere with freedom of movement, and why are these laws unjustified?

5.4 In 13th century England, the *Magna Carta* guaranteed to local and foreign merchants the right, subject to some exceptions, to 'go away from England, come to England, stay and go through England'.[2]

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1 Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 27, 6. See also Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) ch 4; Harry Street, *Freedom, the Individual and the Law* (Penguin Books, 1972) ch 11.

2 *Magna Carta 1297* (UK) 25 Edw 1, c 42.

5.5 William Blackstone wrote in his *Commentaries of the Laws of England* (1765-69) that every Englishman under the common law had the right to 'go out of the realm for whatever cause he pleaseth, without obtaining the king's leave'.[3]

5.6 In 1806, Thomas Jefferson, then President of the United States, wrote that he held 'the right of expatriation to be inherent in every man by the laws of nature, and incapable of being rightfully taken away from him even by the united will of every other person in the nation'.[4]

5.7 In *Potter v Minahan* (1908), O'Connor J of the High Court of Australia said:

> A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary.[5]

5.8 However, this freedom has commonly—both in theory and practice—been subject to exceptions and limitations. For example, the freedom does not of course extend to people trying to evade punishment for a crime, and in practice, a person's freedom to leave one country is very much limited by the willingness of other countries to allow that person to enter.

Protections from statutory encroachment

Australian Constitution

5.9 Section 92 of the *Australian Constitution* provides:

> On the imposition of uniform duties of customs, trade, commerce, *and intercourse* among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.[6]

5.10 In *Gratwick v Johnson* (1945), Starke J said that the 'people of Australia are thus free to pass to and from among the states without burden, hindrance or restriction'.[7] However, in *Cole v Whitfield* (1988), the High Court said that this does not mean that 'every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom'.[8]

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3 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765). Quoted in McAdam, above n 1, 12.

4 Thomas Jefferson, *The Works of Thomas Jefferson: Correspondence and Papers, 1803-1807* (Cosimo, Inc., 2010) 273. In this same letter, Jefferson wrote: 'Congress may by the Constitution 'establish an uniform rule of nationalization,' that is, by what rule an alien may become a citizen. But they cannot take from a citizen his natural right of divesting himself of the character of a citizen by expatriation': Ibid 274. McAdam notes that Jefferson drew on Blackstone's natural rights thinking about freedom of movement: McAdam, above n 1, 13.

5 *Potter v Minahan* (1908) 7 CLR 277, 305.

6 *The Constitution 1901* (Cth) s 92. (emphasis added)

7 *Gratwick v Johnson* (1945) 70 CLR 1, 17.

8 *Cole v Whitfield* (1988) 165 CLR 360, 393.

> For example, although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State.[9]

5.11 In *Cunliffe v The Commonwealth* (1994), Mason CJ said that the freedom of intercourse which s 92 guarantees is not absolute:

> Hence, a law which in terms applies to movement across a border and imposes a burden or restriction is invalid. But, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject-matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate to that end. Once again, it would be a matter of weighing the competing public interests.[10]

5.12 It has also been suggested that a right to freedom of movement is implied generally in the *Constitution*. In *Miller v TCN Channel Nine* (1986), Murphy J said that freedom of movement between states and 'in and between every part of the Commonwealth' is implied in the *Constitution*.[11] However, this view has not been more broadly accepted by the High Court.[12] Professors George Williams and David Hume write:

> This reflects the lack of a clear textual basis for such a freedom and for the incidents of the constitutionally prescribed system of federalism which would support it, and an implicit view that the *Constitution's* federalism is not intended to protect individuals.[13]

5.13 In any event, a right to freedom of movement implicit in federalism would presumably only extend to movement within Australia, rather than to a broader freedom which would include the freedom to leave and return to Australia.

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9 Ibid, 393. See also: *AMS v AIF* (1999) 199 CLR 160, 177–179 [40]–[45] (Gleeson CJ, McHugh & Gummow JJ).

10 *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 307–308 (Mason CJ).

11 *Miller v TCN Channel Nine* (1986) 161 CLR 556, 581–582. 'The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society. They are necessary for the proper operation of the system of representative government at the federal level. They are also necessary for the proper operation of the Constitutions of the States (which derive their authority from Chapter V of the *Constitution*). They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest.' The freedom, Williams and Hume write, is arguably 'implicit in the system of free trade, commerce and intercourse in s 92, the protection against discrimination based on state residence in s 117 and any protection of access to the seat of government as well as in the very fact of federalism': George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 120.

12 In *Kruger v Commonwealth* (1997), Brennan J said that a constitutional right to freedom of movement and association which restricts the scope of s 122 had not been held to be implied in the Constitution and 'no textual or structural foundation for the implication has been demonstrated in this case': *Kruger v Commonwealth* (1997) 190 CLR 1, 45 .

13 Williams and Hume, above n 11, 120.

Principle of legality

5.14 The principle of legality provides some protection to freedom of movement.[14] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of movement, unless this intention was made unambiguously clear. In *Potter v Minahan* (1908), O'Connor J said:

> It cannot be denied that, subject to the *Constitution*, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication.[15]

5.15 Freedom of movement is an essential part of personal liberty, which is also protected by the principle of legality.[16]

International law

5.16 Freedom of movement is widely recognised in international law and bills of rights. For example, art 13 of the Universal Declaration of Human Rights provides:

> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country.

5.17 Article 12 of the *International Covenant on Civil and Political Rights* provides, in part:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> ...
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

5.18 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[17] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[18]

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14 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

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

16 See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 256.

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

18 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

Bills of rights

5.19 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of movement is protected in the United States Constitution,[19] and in the human rights statutes in Canada[20] and New Zealand.[21]

5.20 Freedom of movement is also expressly protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[22] Section 12 of the Victorian Act provides:

> Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

Justifications for encroachments

5.21 Freedom of movement will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for example, for reasons of public health and safety.

5.22 International instruments provide for grounds for restrictions on freedom of movement in quite general terms. For example, art 12(3) of the ICCPR provides that freedom of movement:

> shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

5.23 The United Nations Human Rights Committee has said that such restrictions on the right 'must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed'.[23] The Committee has also said:

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. ... it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[24]

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19 *United States Constitution* amend IV.

20 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 6(1)–(2).

21 *Bill of Rights Act 1990* (NZ) s 18.

22 *Charter of Human Rights and Responsibilities 2006* (Vic) s 12; *Human Rights Act 2004* (ACT) s 13.

23 United Nations Human Rights Committee, General Comment No 27 (1999) on Article 12 of the Convention - Freedom of Movement [13]–[14].

24 Ibid. Legal and bureaucratic barriers were, for the Committee, a 'major source of concern': Ibid [17].

5.24 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[25]

5.25 Some Australian Commonwealth laws that interfere with freedom of movement may be justified. The ALRC invites submissions identifying those that are *not* justified, and explaining why they are not justified.

25 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

6. Property Rights

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A common law right

6.1 The common law has long regarded a person's property rights as fundamental. William Blackstone said in 1773: 'There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.'[1]

6.2 However, many laws have been made that interfere with property rights. This chapter discusses the source and rationale of the protection of vested property rights; how these rights are protected from statutory encroachment; and when laws that interfere with these rights may be justified.

6.3 The ALRC calls for submissions on two questions about these rights.

> **Question 6–1** What general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified?
>
> **Question 6–2** Which Commonwealth laws unjustifiably interfere with vested property rights, and why are these laws unjustified?

6.4 In his *Commentaries,* Blackstone called the right to property an absolute right,[2] anchored in the *Magna Carta* (1215), and described the limited power of the legislature to encroach upon it in terms that are still reflected in laws today:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any

1 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) Book 2.

2 Blackstone named two other absolute rights: the right of personal security and the right of personal liberty.

> control or diminution, save only by the laws of the land ... The laws of England are ... extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.
>
> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land ... Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained ... All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[3]

6.5 Arguably, for many centuries the common law principles reflected a view that the rights of property owners were more deserving of protection than the personal rights of liberty and safety of non-property owners.[4]

6.6 Property and possessory rights are explicitly protected by the law of torts and by criminal laws and are given further protection by rebuttable presumptions in the common law as to statutory interpretation, discussed below. An interference with real property in the possession of another may give rise to the tort of trespass to land or of nuisance. In *Entick v Carrington* (1765), Lord Camden LCJ said:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.[5]

6.7 These rights have long been exercisable against the Crown or government officers acting outside their lawful authority. After citing the passage above, Mason CJ, Brennan and Toohey JJ in *Plenty v Dillon* (1991) said that the principle in *Entick v Carrington* 'applies to entry by persons purporting to act with the authority of the

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3 Blackstone, above n 1, Book 2.

4 For example, the common law's slow-to-develop protection of uninvited entrants from intentional or negligent physical injury by occupiers. It was only in 1828 in *Bird v Holbrook* (1828) that the courts declared the deliberate maiming of a trespasser, albeit only if it was without prior warning, to be unlawful: *Bird v Holbrook* (1828) 4 Bing 628. For negligent injury, trespassers were at first owed no duty of care; then, after *Southern Portland Cement v Cooper* [1974] only a duty of common humanity; until 1984 when the High Court of Australia in *Hackshaw v Shaw* (1984) recognised a limited duty of reasonable care when there was a real risk that a trespasser might be present and injured: *Southern Portland Cement v Cooper* [1974] AC 623 (PC); *Hackshaw v Shaw* (1984) 155 CLR 614.

5 *Entick v Carrington* [1765] EWHC KB J98 1066.

Crown as well as to entry by other persons'.[6] Their honours then quoted Lord Denning adopting a quotation from the Earl of Chatham:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.' So be it—unless he has justification by law.[7]

6.8 Similarly, in *Halliday v Nevill* (1984), Brennan J said:

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.[8]

6.9 Implicit in this statement of the law is the recognition that the law—common law or statute—may authorise entry onto private property. Examples of such statutes are discussed in Chapter 7, which deals with laws authorising what would otherwise be a tort.

6.10 Similarly, the common law provides protection against unauthorised interference or detention of chattels. *Entick v Carrington*[9] concerned not just an unauthorised search but also a seizure of private papers. *Wilkes v Wood* (1763)[10] set out enduring common law principles against unauthorised search and seizure, later reflected in the 4th amendment to the *United States Constitution.*

6.11 Unauthorised interferences with chattels may be a trespass or conversion of the chattels, while unauthorised detention, even if initially authorised by statute, may give rise to tort actions in conversion or detinue once that authority has lapsed. For example, in *National Crime Authority v Flack* (1998), the plaintiff, Mrs Flack successfully sued the National Crime Authority and the Commonwealth for the return of money found in her house and seized by the National Crime Authority. Heerey J noted a common law restriction on the seizure of property under warrant:

> [A]t common law an article seized under warrant cannot be kept for any longer than is reasonably necessary for police to complete their investigations or preserve it for evidence. As Lord Denning MR said *in Ghani v Jones* [1970] 1 QB 693 at 709: 'As

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6 *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ).

7 *Southam v Smout* (Unreported, [1964] 1 Q.B.) 308, 320.

8 *Halliday v Neville* (1984) 155 CLR 1, 10 (Brennan J). Brennan J was quoted in *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ). In *Plenty v Dillon*, Gaudron and McHugh JJ said 'If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official': ibid 655.

9 *Entick v Carrington* [1765] EWHC KB J98.

10 *Wilkes v Wood* [1763] 2 Wilson 203; 98 E R 489.

soon as the case is over, or it is decided not to go on with it, the article should be returned.'[11]

What is vested property?

6.12 The idea of property is multi-faceted. The term 'property' is used in common and some legal parlance to describe types of property, that is, both real and personal property. 'Real' property encompasses interests in land and fixtures or structures upon the land. 'Personal' property encompasses both tangible things—chattels or goods—and certain intangible legal rights,[12] such as copyright and other intellectual property rights,[13] shares in a corporation, beneficial rights in trust property, rights in superannuation[14] and some contractual rights, including, for example, many debts.[15]

6.13 In law, the term 'property' is perhaps more accurately or commonly used to describe types of rights. Dealing with a term 'property' in a particular Act, the High Court of Australia said:

> In [the Act], as elsewhere in the law, 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of property may be elusive. Usually it is treated as a bundle of rights.[16]

6.14 For land and goods, both of which may be possessed by someone other than the owner,[17] property rights in the sense of ownership must be distinguished from mere possession of the land or goods, even though the latter may give some rise to qualified legal rights[18] and from mere contractual rights affecting the property. The particular right may be regarded as 'proprietary' even though it is subject to certain rights of

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11 *National Crime Authority v Flack* (1998) 86 FCR 16, 27 (Heerey J). Heerey J continued: 'Section 3zv of the *Crimes Act* ... introduced by *the Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth) ... did not come into force until after the issue and execution of the warrant in the present case. However it would appear to be not relevantly different from the common law'. For the current law, see, *Crimes Act 1914* (Cth) ss 3ZQX–3ZQZB.

12 Also known in law as 'choses in action'. Intangible rights are *created* by law. Not all legal rights are part of a person's property: eg many of the common law rights discussed in this Issues Paper or the human rights recognised in international law and in the ACT and Victorian charters. Tangible things exist independently of law but law governs rights of ownership and possession in them.

13 Patent rights were held to be property rights that attracted the presumption against divesting by legislation or delegated regulations: *UWA v Gray* [2008] FCA 498 [89].

14 *Greville v Williams* (1906) 4 CLR 694.

15 *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243.

16 *Yanner v Eaton* (1999) 201 CLR 351, 365–366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). 'Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).

17 The owner of land is generally the person entitled beneficially to a fee simple estate in freehold tenure: Muray Raff, 'Environmental Obligations and the Western Liberal Property Concept' (1998) 22 *MULR* 657, 659.

18 Actual possession may give the possessor better rights than others whose interest does not derive from the true owner: see *Newington v Windeyer* (land) or *National Crime Authority v Flack* (goods) Possession may, in effect, give the possessor rights akin to proprietary rights. Note, 'Not only is a right to possession a right of property but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights': *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J).

others in respect of the same property: a tenancy of land, for example, gives the tenant rights that are proprietary in nature as well as possessory.

6.15 A 'property right' may take different forms depending on the type of property. Implicit in a property right, generally, are all or some of the following rights: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.[19] Property rights also depend on the statutory framework of laws and property rights affecting the particular type of property, for example, the system of land tenure in a particular state or territory, or a scheme such as the *Personal Property Securities Act 2009* (Cth); and the interaction between that statutory scheme and the common law.

6.16 The ALRC's Terms of Reference refer to 'vested property rights'. 'Vested' is primarily a technical legal term to differentiate a presently existing interest from a contingent interest.[20] However, particularly in the United States, the term has acquired rhetorical force in reinforcing the right of the owner not to be deprived of the property arbitrarily or unjustly by the state[21] or, in disputes over land use, to reflect the confrontation between the public interest in regulating land use and the private interest of the owner—including a developer—in making such lawful use of the land as he or she desires.[22] The tension is particularly strong with respect to retrospective legislation.[23]

Protections from statutory encroachments

Australian Constitution

6.17 The *Australian Constitution* protects property from one type of interference: acquisitions by the Commonwealth other than on just terms. Section 51(xxxi) of the *Constitution* provides that the Commonwealth Parliament may make laws with respect to:

> the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

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19 *Milirrpum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn J). This judgement was quoted in Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (Lexis Nexis Butterworths, 9th Edition, 2013) 5. Some property rights may however be unassignable: see, Ibid 6.

20 That is, contingent on any other person's exercising his or her rights: 'an immediate right of present or future enjoyment': *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 496, 501. See also, *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30. The term 'vested' has been used to refer to personal property, including a presently existing and complete cause of action: See below at 6.20 *Georgiadis v AOTC* (1994) 179 CLR 297.

21 *American States Water Service Co v Johnson* 31 Cal App 2d 606,614; 88 P2d 770,774 (1939).

22 Walter Witt, 'Vested Rights in Land Uses —A View from the Practitioner's Perspective' (1986) 21 *Real Property, Probate and Trust Journal* 317. A right is described as immutable and therefore 'vested' when the owner has made 'substantial expenditures or commitments in good faith reliance on a validly issued permit': Terry Morgan, 'Vested Rights Legislation' (2002) 34 *Urban Lawyer* 131.

23 'There is no remedial act which does not which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side': *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434 (Isaacs J). For further discussion, see Ch 7.

6.18 There is no broader constitutional prohibition on the making of laws that interfere with vested property rights. Nevertheless, this constitutional protection is significant. The provision reflects the ideal enunciated by Blackstone in the 1700s that where the legislature deprives a person of their property, fair payment should be made: it is to be treated like a purchase of the property at the market value.[24]

6.19 A question often arises as to whether or not a person whose rights are affected by a Commonwealth statute had a 'property' right. The High Court is said to have taken a wide view of the concept of 'property' in interpreting this section. 'It means any tangible or intangible thing which the law protects under the name of property.'[25]

6.20 A statute extinguishing a vested cause of action or right to sue the Commonwealth at common law for workplace injuries was treated as an acquisition of property in *Georgiadis v AOTC* (1994).[26] Similarly, the High Court in *Greville v Williams* (1906) treated the plaintiff's right to receive a pension from his superannuation contributions on the abolition of his office as a vested property right attracting the presumption.[27]

6.21 However, many claimants have failed to show an acquisition of property,[28] either because there was no acquisition,[29] or because there was no property right.[30]

Principle of legality

6.22 The principle of legality provides some protection to vested property rights.[31] When interpreting a statute, courts will presume that Parliament did not intend to

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24 'It was and has remained the case in England and Australia that compulsory acquisition and compensation for such acquisition is entirely the creation of statute': *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [41] (French CJ). See also *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270.

25 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 295 (McTiernan J). In the *Bank Nationalisation Case* (1948), Dixon J said s 51(xxxi) 'extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property': *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349.

26 *Georgiadis v AOTC* (1994) 179 CLR 297. This was upheld in *Commonwealth v Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493. A majority in *Georgiadis v AOTC* held that the Commonwealth acquired a direct benefit or financial gain in the form of a release from liability for damages: see further, Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) 1280.

27 *Greville v Williams* (1906) 4 CLR 694, 703 (Griffiths CJ). This decision was reversed on other grounds by the Privy Council in *Williams v Curator of Intestate Estates* (1909) 8 CLR 760.

28 Eg, intellectual property laws based on s 51(xviii) of the Constitution may 'impact upon existing proprietary rights' or adjust or regulate competing rights, claims, obligations or liabilities without infringing s 51(xxxi): *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

29 What amounts to an acquisition is contentious. Generally, acquisition involves the acquirer receiving something; it involves more than the mere extinguishment of rights. See further, *JT International SA v Commonwealth* (2012) 250 CLR 1.

30 'A right to receive a benefit to be paid by a statutory authority in discharge of a statutory duty is not susceptible of any form of repetitive or continuing enjoyment and cannot be exchanged or converted into any kind of property ... That is not a right of a proprietary nature': *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 243–244 (Brennan J).

31 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

interfere with vested property rights, unless this intention was made unambiguously clear. More narrowly, legislation is presumed not to take vested property rights away without compensation.[32]

6.23 The general presumption in this context is longstanding and case law suggests that the principle of legality is particularly strong in relation to property rights.[33] The presumption is also described as even stronger as it applies to delegated legislation.[34] The wording of a statute may of course be clear enough to rebut the presumption.[35]

6.24 As early as 1904, Griffith CJ in *Clissold v Perry* (1904) referred to the rule of construction that statutes 'are not to be construed as interfering with vested interests unless that intention is manifest'.[36] More recently in 2009, French CJ stated in the High Court of Australia:

> Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. ... The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights.[37]

International law

6.25 Article 17 of the Universal Declaration of Human Rights provides:

> (1) Everyone has the right to own property alone as well as in association with others.
>
> (2) No one shall be arbitrarily deprived of his property.[38]

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32 The narrower presumption is useful despite the existence of the Constitutional protection because, first, 'It is usually appropriate (and often necessary) to consider any arguments of construction of legislation before embarking on challenges to constitutional validity': *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 414 [27] (Kirby J). Second, the Constitutional limitation in s 51(xxxi) does not apply to acquisitions of property by a state. See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [5.21]–[5.22].

33 'This rule certainly applies to the principles of the common law governing the creation and disposition of rights of property. Indeed, there is some ground for thinking that the general rule has added force in its application to common law principles respecting property rights': *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 683 (Mason J). See also, *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 623 [37] (Gaudron J).

34 *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1986) 120 CLR 400, 406 (Kitto J). Kitto J was citing *Newcastle Breweries Ltd v The King* [1920] 1 KB 854. See also, *UWA v Gray* [2008] FCA 498 [87] (French J).

35 'It is of little assistance, in endeavouring to work out the meaning of parts of that scheme [allowing an offeror to compulsorily acquire shares after a takeover on certain conditions under the *Corporations Law NSW*], to invoke a general presumption against the very thing which the legislation sets out to achieve. Furthermore, for the reasons given in the preceding paragraph, it does not help to say that legislation enabling abrogation of property rights should be strictly confined according to its terms, when the legislation confers a power upon a regulatory authority (subject to procedures of review) to alter those terms': *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321, 340 [43].

36 *Clissold v Perry* (1904) 1 CLR 363, 373.

37 *R & R Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 618–619, [43] (French CJ).

38 A right to property is not provided for in the ICCPR or the ICESCR.

6.26 This and other international instruments cannot be used to 'override clear and valid provisions of Australian national law'.[39] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[40]

Bills of rights

6.27 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Constitutional and ordinary legislation prohibits interference with vested property rights in some jurisdictions, for example the United States,[41] New Zealand[42] and the state of Victoria.[43]

Justifications for encroachments

6.28 The most general justification for laws that interfere with vested property interests is that the interference is necessary and in the public interest.

6.29 Protocol 1, Article 1 of the *European Convention on Human Rights* provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

6.30 Bills of rights and international law commonly provide exceptions to the right not to be deprived of property, usually provided the exception is reasonable, in accordance with the law, and/or subject to just compensation.[44] For example, the Fifth Amendment to the *United States Constitution*, part of the Bill of Rights ratified in 1791, provides:

> No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[45]

6.31 There are many laws and regulations that interfere with property rights. Laws limit land use to protect the environment,[46] to balance competing private interests or for the public interest. Other laws might regulate the content and advertising of products, such as food, drinks, drugs and other substances, to protect the health and safety of Australians. Many such laws will of course be justified. The ALRC invites submissions identifying those Commonwealth laws that interfere with property rights and that are *not* justified, explaining why these laws are not justified.

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

40 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

41 *United States Constitution* amend V.

42 *Bill of Rights Act 1990* (NZ) s 21.

43 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

44 See, *Bill of Rights Act 1990* (NZ) s 21; *Charter of Human Rights and Responsibilities 2006* (Vic) s 20.

45 *United States Constitution* amend V.

46 See Lee Godden and Jacqueline Peel, *Environmental Law* (2010) Ch 4.

7. Retrospective Laws

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The common law

7.1 People should generally not be prosecuted for conduct that was not an offence at the time the conduct was committed. If on Wednesday it is not an offence to go fishing at Bondi Beach, then people will usually expect that a law will not be enacted on Thursday making it an offence to have gone fishing the day before. But this principle does not only apply to criminal laws. More generally it might be said that laws should not retrospectively change legal rights and obligations.[1]

7.2 This chapter discusses: the source and rationale of limiting retrospective laws; how the principle is protected from statutory encroachment; and when retrospective laws may be justified. The ALRC calls for submissions on two questions.

Question 7–1 What general principles or criteria should be applied to help determine whether a law that retrospectively changes legal rights and obligations is justified?

Question 7–2 Which Commonwealth laws retrospectively change legal rights and obligations without justification? Why are these laws unjustified?

7.3 The common law on the subject of retrospective law making was influenced by Roman law. It may also be reflected in cl 39 of the *Magna Carta* (1215), which

1 The Terms of Reference refer both to laws that 'retrospectively change legal rights and obligations' and to laws that 'create offences with retrospective application'. These are treated together in this chapter.

prohibited the imprisonment or persecution of a person 'except by the lawful judgement of his peers and by the law of the land'.[2]

7.4 In *Leviathan* (1651), Thomas Hobbes wrote that 'harm inflicted for a fact done before there was a law that forbade it, is not punishment, but an act of hostility: for before the law, there is no transgression of the law'.[3] William Blackstone wrote in his *Commentaries on the Laws of England* (1765):

> Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement.[4]

7.5 Retrospective laws are commonly considered inconsistent with the rule of law. In his book on the rule of law, Lord Bingham wrote:

> Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.[5]

7.6 Retrospective laws make the law less certain and reliable.[6] A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints 'justified expectations'.[7]

7.7 The criminal law 'should be certain and its reach ascertainable by those who are subject to it', the High Court said in *Director of Public Prosecutions (Cth) v Keating* (2013).[8] This idea is 'fundamental to criminal responsibility' and 'underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability'.[9] The Court then quoted *Bennion on Statutory Interpretation,* 5th ed (2008):

> A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is

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2 Ben Juratowitch, *Retroactivity and the Common Law* (Bloomsbury Publishing, 2008) 28. Juratowitch notes however, that this clause is more concerned with placing limits on the exercise of *executive* power.

3 Thomas Hobbes, *Leviathan* (Oxford University Press 1996, 1651) 207.

4 William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol 1, 46.

5 Tom Bingham, *The Rule of Law* (Penguin UK, 2011).

6 Lord Diplock said: 'acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591.

7 HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276. ('retrospective law-making is unjust because it 'disappoints the justified expectations of those who, in acting, having relied on the assumption that the legal consequences of their acts will be determined by the known state of the law established at the time of their acts')

8 *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell And Keane JJ).

9 Ibid [48] (French CJ, Hayne, Crennan, Kiefel, Bell And Keane JJ).

> substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.[10]

7.8 In *Polyukhovich v Commonwealth* (1991), Toohey J said:

> All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.[11]

7.9 The Terms of Reference refer to both laws that retrospectively change legal rights and obligations and laws that create offences with retrospective application. This chapter deals with both of these types of law, but the second type of law is more difficult to justify. In *Retroactivity and the Common Law* (2007), Ben Juratowich writes:

> Retroactive creation of a criminal offence is a particularly acute example of infraction by the state of individual liberty ... Holding a person criminally liable for doing what it was lawful to do at the time that he did it, is usually obviously wrong. The retroactive removal of an actual freedom coupled with the gravity of consequences that may accompany a breach of the criminal law mean that retroactive imposition of a criminal liability is rarely justified.[12]

Protections from statutory encroachment

Australian Constitution

7.10 There is no express or implied prohibition on the making of retroactive laws in the *Australian Constitution*. In *R v Kidman* (1915), the High Court found that the Commonwealth Parliament had the power to make laws with retrospective effect.[13] In that case, which concerned a retrospective criminal law, Higgins J said:

> There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit. ... The British Parliament, by Acts of attainder and otherwise, has made crimes of acts after the acts were committed, and men have been executed for the crimes; and—unless the contrary be provided in the Constitution—a subordinate Legislature of the British Empire has, unless the Constitution provide to the contrary, similar power to make its Statutes retroactive.[14]

10 Ibid.

11 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

12 Ben Juratowich, *Retroactivity and the Common Law* (University of Oxford, 2007) 52.

13 *R v Kidman* (1915) 20 CLR 425.

14 Earlier in that case: ‘No doubt a provision making criminal and punishable future acts would have more direct tendency to prevent such acts than a provision as to past acts ; but whatever may be the excellence of the utilitarian theory of punishment, the Federal Parliament is not bound to adopt that theory. Parliament may prefer to follow St Paul (Romans IX 4), St Thomas Aquinas, and many others, instead of Bentham and Mill’: Ibid 450.

7.11 The power of the Australian Parliament to create a criminal offence with retrospective application has been affirmed in a number of cases, and is discussed in *Polyukhovich v Commonwealth* (1991).[15] In that case, McHugh J said that '*Kidman* was correctly decided'[16] and that

> numerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that the Parliament of the Commonwealth has power to pass laws having a retrospective operation. Since *Kidman*, the validity of their retrospective operation has not been challenged. And I can see no distinction between the retrospective operation of a civil enactment and a criminal enactment.[17]

Principle of legality

7.12 The principle of legality provides some protection from retrospective laws.[18] When interpreting a statute, courts will presume that Parliament did not intend to create offences with retrospective application, unless this intention was made unambiguously clear.[19] For example, in *Maxwell v Murphy* (1957), Dixon CJ said:

> the general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.[20]

7.13 However, this presumption does not apply to procedural (as opposed to substantive) changes to the application of the law. Dixon CJ went on to say:

> given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are enforced or their enjoyment is to be secured by judicial remedy is not within the application of the presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed.[21]

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15 *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

16 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J).

17 Ibid 718 [23] (McHugh J).

18 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

19 See also, *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *WBM v Chief Commissioner of Police* [2012] VSCA 159 (30 July 2012) [67] (Warren CJ with whom Hansen JA expressed general agreement at [133]. Chief Justice Spigelman in *Attorney-General of New South Wales v World Best Holdings Ltd* [2005] enunciated a slightly different test for the principle of legality as it applies to the interpretation of criminal offences which have retrospective effect.

20 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ). See also *Rodway v The Queen* (1990) 169 CLR 515, 518 ((Mason CJ, Dawson, Toohey, Gaudron & McHugh JJ). In that case, the Justices stated, 'the rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation'.

21 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

International law

7.14 There are prohibitions on retrospective criminal laws in international law. Article 15 of the International Covenant on Civil and Political Rights (ICCPR), expressing a rule of customary international law,[22] provides:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

7.15 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[23] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[24]

Bills of rights

7.16 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. There are prohibitions on the creation of offences that apply retrospectively in the United States,[25] the United Kingdom,[26] Canada[27] and New Zealand.[28] For example, the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right

> not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.[29]

7.17 The right not to be charged with a retrospective offence is also protected in the Victorian and ACT human rights stautes.[30]

Justifications for encroachments

7.18 Are retrospective laws necessarily unjust? In *George Hudson Limited v Australian Timber Workers' Union* (1923) Isaacs J quoted the principle in *Maxwell on Statutes*, 6th ed, that 'Upon the presumption that the Legislature does not intend what

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22 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ).
23 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).
24 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.
25 *United States Constitution* art I § 9, 10. ('No Bill of Attainder or ex post facto Law shall be passed': § 9).
26 *Human Rights Act 1998* (UK)) c 42, sch 1 pt I, art 7.
27 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 11(g).
28 *Bill of Rights Act 1990* (NZ) s 26(1).
29 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 11(g).
30 *Charter of Human Rights and Responsibilities 2006* (Vic) s 27; *Human Rights Act 2004* (ACT) s 25.

is unjust rests the leaning against giving certain statutes a retrospective operation' and then said:

> That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.'[31]

7.19 After quoting this passage, Pearce and Geddes write that while 'a legislative instrument may take away some rights it may confer others and the overall aggregate justice may indicate that retrospectivity was intended'.[32] It may also suggest that the retrospective law was justified. But are there more specific principles that might help determine whether a retrospective law is justified?

7.20 Creating retrospective *criminal* offences may be more difficult to justify than other retrospective laws. Article 4 of the ICCPR provides that some rights may be derogated from in 'times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'—but this expressly excludes art 15, which concerns the creation of retrospective criminal offences. However, art 15(2) itself contains one specific limitation:

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

7.21 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[33]

7.22 Some Australian laws that operate retrospectively may be justified. The ALRC invites submissions identifying those that are *not* justified, and explaining why they are not justified.

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31 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434.

32 Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014) [10.8].

33 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

8. Fair Trial

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A common law right

8.1 The right to a fair trial has been described as 'a central pillar of our criminal justice system',[1] 'fundamental and absolute',[2] and a 'cardinal requirement of the rule of law'[3].

8.2 Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes. It protects people's life, liberty and reputation. Being wrongly convicted of a crime has been called a 'deep injustice and a substantial moral harm'.[4] By helping prevent the punishment of the innocent, fair trials also promote the prosecution and punishment of the guilty.[5]

8.3 This chapter discusses the source and rationale of the right to a fair trial; how the right is protected from statutory encroachment; and when, if ever, laws that encroach on the right may be justified. The ALRC calls for submissions on two questions about this right.

Question 8–1 What general principles or criteria should be applied to help determine whether a law that limits the right to a fair trial is justified?

Question 8–2 Which Commonwealth laws unjustifiably limit the right to a fair trial, and why are these laws unjustified?

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1 *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
2 *Brown v Scott* [2003] 1 AC 681, 719.
3 Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.
4 Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 247. Ashworth goes on to say: 'It is avoidance of this harm that underlies the universal insistence on respect for the right to a fair trial, and with it the presumption of innocence': Ibid.
5 Civil trials should also be fair, but this chapter focuses on criminal trials.

8.4 The High Court of Australia has said that a right to a fair trial is 'commonly manifested in rules of law and of practice designed to regulate the course of the trial'.[6]

8.5 Many attributes of a fair trial are now set out in international treaties, conventions, human rights statutes and bills of rights,[7] but many of these attributes have their roots in older statutes and the common law.

8.6 Although a fair trial may now be called a traditional and fundamental right, what amounts to a fair trial has changed over time. Many criminal trials of history would now seem strikingly unfair. In his book, *Criminal Discovery: From Truth to Proof and Back Again*, Dr Cosmas Moisidis writes:

> The earliest forms of English criminal trials involved no conception of truth seeking which would be regarded as rational or scientific by modern standards. The conviction of the guilty and the acquittal of the innocent were to be achieved by means which appealed to God to work a miracle and thereby demonstrate the guilt or innocence of the accused. No consideration was given as to whether an accused should be a testimonial resource or be able to enjoy a right to silence and put the prosecution to its proof. Instead, guilt and innocence were considered to be discoverable by methods such as trial by compurgation, trial by battle and trial by ordeal.[8]

8.7 Even later, trials by jury—an important element of a fair trial—remained in many ways unfair. In his *Introduction to English Legal History*, J H Baker wrote that for some time the accused remained 'at a considerable disadvantage compared with the prosecution':

> His right to call witnesses was doubted, and when it was allowed the witnesses were not sworn. The process for compelling the attendance of witnesses for the prosecution, by taking recognisances, was not available to the defendant. The defendant could not have the assistance of counsel in presenting his case, unless there was a point of law arising on the indictment; since the point of law had to be assigned before counsel was allowed, the unlearned defendant had little chance of professional help. ... The same jurors might have to try several cases, and keep their conclusions in their heads, before giving in their verdicts; and it was commonplace for a number of capital cases to be disposed of in a single sitting. Hearsay evidence was often admitted; indeed, there were few if any rules of evidence before the eighteenth century.[9]

8.8 Baker describes the 'unseemly hurry of Old Bailey trials in the early nineteenth century' and calls it 'disgraceful':

> the average length of a trial was a few minutes, and 'full two thirds of the prisoners, on their return from their trials, cannot tell of any thing which has passed in court, nor even, very frequently, whether they have been tried'. It is impossible to estimate how

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6 *Jago v The District Court of NSW* (1989) 168 CLR 23, 29 (Mason CJ).

7 Eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 (discussed further below).

8 Cosmas Mosidis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology Press, 2008) 5.

9 J. Baker, *An Introduction to English Legal History* (Butterworths, 1971) 417. ('So the prosecutor could tell the jury why the defendant was guilty, but there was no advocate to say why he was not': Bingham, above n 3. 'Until the late 18th century, it was typical for defendants in criminal trial to respond in person to all accusations': Mosidis, above n 8, 10.)

> far these convictions led to wrong convictions, but the plight of the uneducated and unbefriended prisoner was a sad one.[10]

8.9 The most important reforms, Baker writes, 'were put off until the nineteenth century':

> In 1836 prisoners on trial for felony were at last given the right to 'make full answer and defence thereto by counsel learned in the law'. In 1867 they were given facilities, comparable to those of the prosecution, for calling witnesses to depose evidence before the trial and having such witnesses bound over to attend the trial. And in 1898 prisoners were accorded the dangerous privilege of giving sworn evidence themselves.[11]

Protections from statutory encroachment

International law

8.10 Article 14 of the *International Covenant on Civil and Political Rights* sets out many elements of a fair trial, including the following:

- the court must be 'competent, independent and impartial';
- the trial should be held in public and judgment given in public;
- the defendant should be presumed innocent until proved guilty (the prosecution therefore bears the onus of proof and must prove guilt beyond reasonable doubt);[12]
- the defendant should be informed of the nature and cause of the charge against him—promptly, in detail, and in a language which he understands;
- the defendant must have time and the facilities to prepare his defence;
- the defendant must be tried without undue delay;
- the defendant must be 'tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it';
- the defendant must have the opportunity to 'examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him';
- the defendant is entitled to the 'free assistance of an interpreter if he cannot understand or speak the language used in court';

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10 Baker, above n 9, 417.
11 Ibid 418. These reforms were made by Acts of Parliament.
12 See Ch 9.

- the defendant 'is entitled to disclosure of material which is helpful to him because it weakens the prosecution case or strengthens his'; and
- the defendant has a right not 'not to be compelled to testify against himself or to confess guilt'.[13]

8.11 International instruments, such as the ICCPR, cannot be used to 'override clear and valid provisions of Australian national law'.[14] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[15]

Bills of rights

8.12 In other countries, bills of rights or human rights statutes provide some protection to fair trial procedures. Bills of rights and human rights statutes protect the right to a fair trial in the United States,[16] the United Kingdom,[17] Canada[18] and New Zealand.[19] For example, the Sixth Amendment to the US Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8.13 Principles of a fair trial are also set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[20]

Australian Constitution

8.14 The *Australian Constitution* does not expressly provide that criminal trials must be fair, nor does it set out the elements of a fair trial.

8.15 Trial by jury is commonly considered a feature of a fair trial, and s 80 of the *Constitution* provides a limited guarantee of a trial by jury:

> the trial on indictment of any offence against any law of the Commonwealth shall be by jury.

8.16 However, the High Court has interpreted the words 'trial on indictment' to mean that Parliament may determine whether a trial is to be on indictment, and thus, whether

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13 This list is drawn from *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14. See also Bingham, above n 3, Ch 9. The privilege against self-incrimination is discussed in Ch 10.

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

15 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

16 *United States Constitution* amend VI.

17 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6.

18 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* ss 11, 14.

19 *Bill of Rights Act 1990* (NZ) ss 24, 25.

20 *Charter of Human Rights and Responsibilities 2006* (Vic) ss 24–25; *Human Rights Act 2004* (ACT) ss 21–22.

the requirement for a trial by jury applies.[21] This has been said to mean that s 80 provides 'no meaningful guarantee or restriction on Commonwealth power'.[22]

8.17 The concept of Commonwealth judicial power provides some limited protection to the right to a fair trial. The text and structure of Chapter III of the *Constitution* implies that Parliament cannot make a law which 'requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the *essential character of a court or with the nature of judicial power*'.[23] After quoting this passage, Gaudron J, in *Nicholas v The Queen* (1998), said:

> In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.[24]

8.18 However, regulating judicial processes (for example the power to exclude evidence) is considered permissible, and is not an incursion on the judicial power of the Commonwealth.[25]

Principle of legality

8.19 The principle of legality may provide some protection to fair trials.[26] When interpreting a statute, courts are likely to presume that Parliament did not intend to interfere with fundamental principles of a fair trial, unless this intention was made unambiguously clear.

8.20 Discussing the principle of legality in *Malika Holdings v Stretton* (2001), Justice McHugh said it is a fundamental legal principle that 'a civil or criminal trial is to be a fair trial',[27] and that 'clear and unambiguous language is needed before a court will

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21 *R v Archdall and Roskruge; Ex pate Carrigan and Brown* (1928) 41 CLR 128, 139–140; *R v Bernasconi* (1915) 19 CLR 629, 637; *Kingswell v The Queen* (1985) 159 CLR 264, 276–277; *Zarb v Kennedy* (1968) 121 CLR 283.

22 George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 355. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 58 CLR 556, 581–2 (Dixon and Evatt JJ).

23 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (emphasis added).

24 *Nicholas v The Queen* (1998) 193 CLR 173, 208–209 (Gaudron J).

25 *Nicholas v The Queen* (1998) 193 CLR 173.

26 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

27 Other cases identifying the right to a fair trial as a fundamental right: *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541–42; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575, 585.

find that the legislature has intended to repeal or amend' this and other fundamental principles.[28]

Justifications for encroachments

8.21 Factors which may inform whether a limitation is justified include:

- the nature of the right affected;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation; and
- its connection to the underlying purpose.

8.22 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[29]

8.23 The ALRC calls for submissions identifying Commonwealth laws that encroach on accepted principles of a fair trial and that are *not* justified, and explaining why these laws are not justified.

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28 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28] (McHugh J, in a passage discussing why 'care needs to be taken in declaring a principle to be fundamental').

29 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

9. Burden of Proof

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A common law principle

9.1 In criminal trials, the prosecution bears the burden of proof. This has been called 'the golden thread of English criminal law'[1] and, in Australia, 'a cardinal principle of our system of justice'.[2] This principle and the related principle that guilt must be proved beyond reasonable doubt are fundamental to the presumption of innocence.[3]

9.2 However, Parliament can reverse the onus of proof:

> It has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof.[4]

9.3 This chapter discusses the source and rationale for this principle; how this principle is protected from statutory encroachment; and when laws that reverse the onus of proof in criminal trials may be justified.[5] The ALRC calls for submissions on two questions about this presumption.

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1 *Woolmington v DPP* [1935] AC 1 481–482 (Viscount Sankey). This statement was affirmed in *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501 (Mason CJ and Toohey J). See also, Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2012) [7085]; Glanville Williams, *The Proof of Guilt* (Steven & Sons, 3rd ed, 1963) 184–5.

2 *Sorby v The Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ). See also, *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ). See also Heydon, above n 1, [7085]; Williams, above n 1, 871; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 71.

3 In *Momcilovic v The Queen* (2011), French CJ said: 'The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt': *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [54].

4 *Kuczborski v Queensland* [2014] HCA 46 [240] (Crennan, Kiefel, Gageler & Keane JJ). The majority of the High Court was relying on the decision in *The Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12, 17–18.

5 This chapter is about the burden of proof in criminal, rather than civil, law.

Question 9–1 What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

Question 9–2 Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

9.4 The presumption of innocence developed at common law towards the end of the 18th century.[6] In his *Commentaries on the Laws of England* (1765), William Blackstone said that 'it is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer'.[7]

9.5 In 1935 the UK House of Lords said the presumption of innocence principle was so ironclad that 'no attempt to whittle it down can be entertained'.[8] More recently, the House of Lords has said that shifting the burden of proof onto a defendant was 'repugnant to ordinary notions of fairness'.[9]

9.6 In the High Court of Australia, French CJ called the presumption of innocence 'an important incident of the liberty of the subject'.[10]

9.7 Andrew Ashworth has summarised some of the rationales for the presumption of innocence.

> [T]he presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.[11]

9.8 The *Guide to Framing Commonwealth Offences* provides that 'placing a legal burden of proof on a defendant should be kept to a minimum'.[12] This rule is also reflected in the *Criminal Code Act 1995* (Cth) which provides that where the law imposes a burden of proof on the defendant, it should be an evidential burden,[13] unless the law expresses otherwise.[14]

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6 John Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1994) 92 *Michigan Law Review* 1047, 1070.

7 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) 352.

8 *Woolmington v DPP* [1935] AC 1 [7].

9 *Sheldrake v DPP* [2004] UKHL 43 [9].

10 *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ).

11 Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

12 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 53.

13 *Momcilovic v The Queen* (2011) 245 CLR 1; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. There are two types of burdens: legal and evidentiary. The legal burden is 'the obligation of a party to meet the requirement of the rule of law that a fact in issue must be proved'. The evidential burden is an obligation to show, if called upon to do so, that there is 'sufficient evidence to raise the existence of a fact'. An evidentiary burden will be discharged where a defendant leads evidence

Protections from statutory encroachments

Australian Constitution

9.9 While the *Australian Constitution* does not expressly protect the presumption of innocence, academic and juridical discussion has suggested that the presumption may be considered part of the broader concept of a fair trial entrenched in common law.

9.10 In *Carr v Western Australia* (2007), Kirby J spoke about an 'important feature of the Australian criminal justice system':

> Trials of serious crimes, such as the present, are accusatorial in character. Valid legislation apart, it is usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence. Ordinarily ... the accused does not need to prove his or her innocence.

9.11 Kirby J said that this feature of the criminal justice system is 'not always understood', yet

> it is deeply embedded in the procedures of criminal justice in Australia, inherited from England. It may even be implied in the assumption about fair trial in the federal *Constitution*.[15]

9.12 In separate judgments in *Dietrich v The Queen* (1992), Deane and Gaudron JJ also relied on Chapter III of the *Australian Constitution,* which establishes the judicial branch of government, as authority for the protection of a fair trial.[16]

Principle of legality

9.13 The principle of legality provides some protection for the principle that the prosecution should bear the burden of proof in criminal proceedings.[17] When interpreting a statute, courts will presume that Parliament did not intend to reverse or shift the burden of proof, unless this intention was made unambiguously clear.[18] In *Momcilovic v The Queen* (2011)*,* French CJ held that

> The common law 'presumption of innocence' in criminal proceedings is an important incident of the liberty of the subject. The principle of legality will afford it such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment. On that basis, a statute which could be construed as imposing either a legal burden or an evidential burden upon an

to prove a fact in dispute or cross-examines a prosecution witness: Heydon, above n 1, [7015]. This chapter is concerned with laws that reverse or shift the *legal* burden of proof.

14 *Criminal Code Act 1995* (Cth) ss 13.1–13.3.

15 *Carr v Western Australia* (2007) 232 CLR 138, 172 (Kirby J in dissent, obiter). See further, Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 *University of Tasmania Law Review* 132; *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J) and 362 (Gaudron J); Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 248.

16 *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J) and 362 (Guadron J). See also, *Nicholas v The Queen* (1998) 193 CLR 173, 208–209 (Gaudron J). On fair trials more generally, see Ch 8.

17 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

18 *Momcilovic v The Queen* (2011) 245 CLR 1.

> accused person in criminal proceedings will ordinarily be construed as imposing the evidential burden.[19]

9.14 The question in *Momcilovic* was whether s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) imposed a legal or evidentiary burden on a defendant to prove on the balance of probabilities that they had no knowledge of the presence of drugs in their possession:

> The principle of legality at common law would require that a statutory provision affecting the presumption of innocence be construed, so far as the language of the provision allows, to minimise or avoid the displacement of the presumption. But, for the reasons which follow, its application to s 5 cannot yield a construction other than that required by the clear language of that section, which places the legal burden of proof on the accused.[20]

International law

9.15 The ICCPR protects the presumption of innocence:

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[21]

9.16 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[22] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[23]

Bills of rights

9.17 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The Fourteenth Amendment to the US Constitution guarantees a right not to be deprived of 'life, liberty or property'[24] and has been interpreted by the US Supreme Court as including a presumption of innocence.[25] The *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be presumed innocent until proven guilty.[26]

9.18 The *European Convention for the Protection of Human Rights and Freedoms* provides

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19 Ibid [44] (French CJ).

20 Ibid [512] (Crennan & Kiefel JJ).

21 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).

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

23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

24 *United States Constitution* amend IV.

25 *Re Winship* [1970] 397 US 358 (1970).

26 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 11(d). The protection provided by bills of rights and human rights statutes is discussed more generally in Ch 1.

> Everyone charged with a criminal offence shall be presumed to be innocent until proved guilty according to law.[27]

9.19 The Victorian *Charter of Human Rights* protects the presumption that the legal onus of proving the facts of a case rests on the party asserting a wrong.[28] As does the ACT's *Human Rights Act* (2004).[29]

Justifications for encroachments

9.20 Lord Bingham has noted that although the presumption of innocence has been recognised since at latest the early 19th century, it has 'not been uniformly treated by Parliament as absolute and unqualified'.[30]

9.21 Laws reversing the onus of proof have been justified for a few reasons. For example, it is sometimes said to be justified where it is particularly difficult for a prosecution to meet a legal burden.[31] For example, in cases concerning offences against the *Migration Act 1958* (Cth) such as *Williamson v Ah On* (1926), Isaacs J explained that the evidentiary burden will necessarily shift depending on which party has the requisite knowledge and evidence to adduce the truth in proceedings:

> The burden of proof at common law rests where justice will be best served having regard to the circumstances both public and private.[32]

9.22 The seriousness of an offence is also sometimes used to justify reversing the onus of proof, particularly where there appears to be a significant threat to the safety of the public.[33]

9.23 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[34]

9.24 Some laws reversing the onus of proof may be justified. The ALRC invites submissions identifying such Commonwealth laws that are *not* justified, and explaining why these laws are not justified.

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27 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(2).

28 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).

29 *Human Rights Act 2004* (ACT) s 22(1).

30 *Sheldrake v DPP* [2004] UKHL 43 [9].

31 *Williamson v Ah On* (1926) 39 CLR 95, 113 (Isaacs J).

32 Ibid 113 .

33 However, in the South African Constitutional Court, Sachs J said: 'The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases': *State v Coetzee* [1997] 2 LRC 593, 677 [220].

34 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

10. The Privilege against Self-incrimination

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A common law privilege

10.1 The privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'.[1] It reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.[2]

10.2 This chapter discusses the source and rationale of the privilege; how this privilege is protected from statutory encroachment; and when laws that encroach on this privilege may be justified.

10.3 The ALRC calls for submissions on two questions about this privilege.

> **Question 10–1** What general principles or criteria should be applied to help determine whether a law that excludes the privilege against self-incrimination is justified?
>
> **Question 10–2** Which Commonwealth laws unjustifiably exclude the privilege against self-incrimination, and why are these laws unjustified?

10.4 The right to claim the privilege against self-incrimination in criminal law and against self-exposure to penalties in civil and administrative law entitles a natural

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1 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008).*X7 v Australian Crime Commission* (2013) 248 CLR 92, 136–137 [104] (Hayne & Bell JJ).

2 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 [1] (French CJ).

person[3] to refuse to answer any question or produce any document if it would tend to incriminate them.[4]

10.5 In its 2008 report on privilege in federal investigations, the ALRC explained the three categories of the privilege:

> Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).[5]

10.6 The privilege arose from the common law maxim *nemo tenetur prodere seipsum,* meaning that people should not be compelled to betray themselves.[6] The *ius commune* or common law of the 12th and 13th centuries, a combination of the Roman and canon laws, included an early privilege against self-incrimination that influenced the modern iteration of the privilege at common law.[7]

10.7 In his *Commentaries on the Laws of England* (1765-1769)*,* William Blackstone explained that the maxim was enlivened where a defendant's 'fault was not to be wrung out of himself, but rather to be discovered by other means and other men'.[8]

10.8 Jeremy Bentham was a fierce critic of the privilege, arguing in 1827 that the privilege had the inevitable effect of excluding the most reliable evidence of the truth—that which is available only from the person accused.[9]

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3 While companies are not entitled to claim the privilege against self-incrimination, company directors can claim the privilege where a disclosure would make them personally liable: *Upperedge v Bailey* (1994) 13 ACSR 541.

4 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [159] (Kiefel J). *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v The Commonwealth* (1983) 152 CLR 281; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 512 (Brennan J). See also, Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2012) [25065]. While the privilege is often used synonymously with the 'right to silence', the privilege against self-incrimination is just one facet of the 'right to silence': Queensland Law Reform Commission, 'The Abrogation of the Principle against Self-Incrimination' (59, 2004) 54. The right to claim the privilege against self-incrimination has been interpreted broadly by Australian courts: 'The privilege is often expressed, and sometimes authoritatively so, in circumstances where the answer or production would tend to expose the person to incrimination…Generally where that is done it is to express the privilege widely and inclusively of circumstances where answer or disclosure would expose the person to incrimination': *Griffin v Pantzer* (2004) 137 FCR 209, [38] (Allsop J).

5 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [15.89].

6 R. Helmholz, 'Introduction' in R. Helmoholz (ed), *The privilege against self-incrimination: its origins and development* (University of Chicago Press, 1997).

7 Ibid 7.

8 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, 293.

9 Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Publishers, 1827) Bk 9, Ch 1, 339.

10.9 There is some debate among legal historians about the origins of the privilege.[10] Professor John Langbein points to the development of the privilege as part of the rise of the adversarial criminal justice system where the prosecution is charged with proving the guilt of a defendant beyond a reasonable doubt and subject to protections surrounding the manner of criminal discovery.[11]

10.10 Others point to the development of the privilege in the 17th century as a response to the unpopularity of the Star Chamber in England whose practices included requiring suspects on trial for treason to answer questions without protection from self-incrimination.[12]

10.11 The protection afforded by the privilege may encourage people to cooperate with investigators and prosecutors, where otherwise they may fear the risk of self-incrimination:

> it is thought that without such protections witnesses might be loath to come forward to give evidence.[13]

10.12 In criminal law, the privilege offers some protection against any perceived power imbalance between the prosecution and a defendant.[14]

10.13 It has also been suggested that the right to claim the privilege against self-incrimination may protect individuals from unlawful coercive methods used to obtain confessions.[15]

10.14 A corollary of this rationale is that the stressful environment of police interviews may be 'conducive to false confessions on account of the authority of police, the isolation, uncertainty and anxiety of the suspect and the expectations of the interrogation officer'.[16] These factors may place pressure on defendants to provide information which may incriminate them, is prejudicial to their case, or even information which is false. The right to claim the privilege against self-incrimination can act as one safeguard against the false confession of nervous, yet innocent, defendants.[17]

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10 For instance, in *Azzopardi* McHugh J in dissent rejects the conventional historical understanding of the development of the privilege: 'now turns out that the views of Wigmore and Levy concerning the origin and development of the self-incrimination privilege were dead wrong. In the last 25 years, research by modern scholars has demonstrated a very different—almost opposite—view of the history and origin of the principle': *Azzopardi v R* (2001) 205 CLR 50, 91 [120] (McHugh J). See also, Cosmas Mosidis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology Press, 2008); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100] (Hayne and Bell JJ).

11 John Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1994) 92 *Michigan Law Review* 1047, 1047.

12 Leonard Levy, *Origins of the Fifth Amendment* (Macmillan, 1986); John Wigmore, *Evidence in Trials at Common Law* (Little Brown, 1961) vol 1. See also, *Sorby v The Commonwealth* (1983) 152 CLR 281, 317; *Griffin v Pantzer* (2004) 137 FCR 209 [40]. For further background, see, David Dolinko, 'Is There a Rationale for the Privilege against Self-Incrimination?' (1986) 3 *UCLA Law Review* 1063, 1079.

13 Heydon, above n 4 [25140].

14 Mosidis, above n 10, 136.

15 Ibid 133.

16 Ibid 129.

17 Queensland Law Reform Commission, above n 4 [3.20].

10.15 The privilege has been described by the High Court as a 'fundamental bulwark of liberty'.[18] The privilege has also been said to protect human dignity by providing a 'shield against conviction by testimony wrung out of the mouth of the offender'.[19] In *Pyneboard Pty Ltd v Trade Practices Commission*, Murphy J stated that

> The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.[20]

Statutory protection

10.16 Some legislative provisions codify the principle against self-incrimination. For example, s 128(1) of the uniform Evidence Acts provides that where a witness objects to giving particular evidence that 'may tend to prove' that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty, a court may determine whether there are 'reasonable grounds' for an objection to providing that evidence.

Protections from statutory encroachments

Constitution

10.17 The privilege is not expressly protected by the *Australian Constitution,* nor has it been implied by the courts.

Principle of legality

10.18 The principle of legality provides some protection to the privilege against self-incrimination.[21] When interpreting a statute, courts will presume that Parliament did not intend to interfere with the privilege, unless this intention was made unambiguously clear.[22] In *Pyneboard Pty Ltd v Trade Practices Commission* (1985)*,* the High Court held that the right to claim the privilege against self-incrimination could be revoked where a statutory body, like the Trade Practices Commission, was authorised to compel individuals to produce information which may incriminate that individual. In that case, s 155(1) of the *Trade Practices Act 1974* (Cth) required a person to provide information or documents to the Commission. The High Court held that

> The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from

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18 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (Mason CJ, Wilson & Dawson JJ).

19 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 541 (Brennan J).

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

21 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

22 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Crafter v Kelly* [1941] SASR 237.

> the character and purpose of the provision that the obligation was not intended to be subject to any qualification. That is so when the object of imposing the obligation is to ensure the full investigation on the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. [23]

International law

10.19 The right to claim the privilege against self-incrimination is enshrined in art14(3)(g) of the ICCPR which provides that, in the determination of any criminal charge, everyone shall be entitled not to be compelled to testify against himself or to confess guilt.

10.20 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[24] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[25] The High Court has confirmed the 'influence' of this article on the common law.[26]

Bills of rights

10.21 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The European Convention on Human Rights enshrines the privilege against self-incrimination.[27] In the UK case of *R v Lambert* (2001), Lord Hope explained that art 6(2):

> Is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality.[28]

10.22 The privilege is enshrined in bills of rights and human rights statutes in the United States,[29] the United Kingdom,[30] Canada[31] and New Zealand.[32] For example, s 11(c) of the *Canadian Charter of Rights and Freedoms* provides:

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23 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 618 (Mason ACJ, Wilson & Dawson JJ).

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

25 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

26 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ & Toohey J).

27 *European Convention for the Protection of Human Rights and Fundamental Freedoms* 4XI, 1950 (entered into Force 3 September 1953) art 6. The European Court of Human Rights has upheld the centrality of the presumption of innocence as part of the inquisitorial systems of European nations' criminal justice systems: *Funke v France* [1993] 16 EHRR 297 (1993).

28 *R v Lambert* [2001] UKHL 37 [88].

29 *United States Constitution* amend V.

30 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6. The right against self-incrimination is implied by art 6 of the ECHR according to the European Court of Human Rights; as the European Court states, 'the right is one of certain generally recognised international standards which lie at the heart of a fair procedure under Article 6': *Heaney and McGuinness v Ireland* (2001) 33 Eur Court HR 12, 40.

31 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 13.

32 *Bill of Rights Act 1990* (NZ) s 25(d).

> 11. Any person charged with an offence has the right …
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence.[33]

10.23 The right or privilege against self-incrimination is also protected in the Victorian *Charter of Human Rights and Responsibilities* and the ACT's *Human Rights Act*.[34]

Justifications for encroachments

10.24 The High Court has on several occasions held that the privilege is not immutable and can be abrogated in order to balance competing rights and the public interest:

> The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.[35]

10.25 This public interest may be enlivened in circumstances where the information gleaned from a witness or defendant as a result of suspending the privilege reveals an issue of major public importance that has a significant impact on the community in general or on a section of the community.[36] For example, an inquiry or investigation into allegations of major criminal activity, organised crime or official corruption or other serious misconduct by a public official in the performance of his or her duties might justify the abrogation of the privilege. It may also be justified to exclude the privilege where there is an immediate need for information, for example, to avoid risks such as personal injury, and where authorities have reasonable cause for believing that an individual can provide that information.

10.26 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[37]

10.27 Some laws exclude the privilege against self-incrimination. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why they are not justified.

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33 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 11(c).

34 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(k); *Human Rights Act 2004* (ACT) s 22(i).

35 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J). See also, *Sorby v The Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ). In the UK courts have been 'willing to find breaks and knots in the golden thread even where the relevant statute was silent as to the allocation of burdens of proof': Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) 374.

36 Queensland Law Reform Commission, above n 4, [6.3].

37 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

11. Client Legal Privilege

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A common law privilege

11.1 Client legal privilege is an 'important common law immunity'[1] and a 'fundamental and general principle of the common law'.[2] It 'exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers'.[3]

11.2 The common law protects confidentiality in a lawyer-client relationship by giving people immunity from laws that might otherwise require them to disclose communications with their lawyer.[4] This is referred to as client legal privilege[5] or lawyer-client privilege.[6]

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1 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 565.

2 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

3 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 64 [35] (Gleeson CJ, Gaudron and Gummow JJ).

4 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217. Generally, there are two types of client legal privilege: advice privilege and litigation privilege. Client legal privilege is also protected by statute. See for example, *Evidence Act 1995* (Cth) ss 118–119.

5 The term 'client legal privilege' is used in the *Evidence Act 1995* (NSW) pt 3.10, div 1. For more discussion, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [1.16].

6 Client legal privilege at common law applies to confidential communications between clients, lawyers and in some instances third parties, where the dominant purpose of the communication was to give or receive legal advice. There are two limbs of common law privilege—advice privilege and litigation privilege—although these two have blurred somewhat: Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.28]. The privilege covers civil and criminal matters or proceedings. Communications may be oral or written as long as the communication is necessary for the purpose of carrying on the proceeding for which the legal practitioner is employed: *Gillard v Bates* [1840] 6 M & W 547 (1840) 548. Further, privilege will only attach to

11.3 This chapter discusses the source and rationale of client legal privilege; how this privilege is protected from statutory encroachment; and when laws that abrogate this privilege may be justified.

11.4 The ALRC calls for submissions on two questions about this privilege.

Question 11–1 What general principles or criteria should be applied to help determine whether a law that abrogates client legal privilege is justified?

Question 11–2 Which Commonwealth laws unjustifiably abrogate client legal privilege, and why are these laws unjustified?

11.5 Protecting the confidentiality of communications between lawyers and clients facilitates a relationship of trust and confidence.[7] A confidential relationship encourages clients to communicate in a frank and honest way with their legal representative. Without that confidence, a person may not use a lawyer at all. The privilege therefore 'assists and enhances the administration of justice'.[8] In *Greenough v Gaskell* (1833), Lord Brougham said:

> It is out of regard to the interests of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in the matters affecting rights and obligations which form the subject of all judicial proceedings. If a privilege did not exist at all, everyone would be thrown on his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half of his case.[9]

11.6 In order for lawyers to provide rigorous and targeted legal advice they need to be made aware of all the facts of their client's case—facts which a client may only feel comfortable disclosing under the protection of confidentiality.[10]

> [it is] necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client, this privilege is granted to ensure that the client can consult his lawyer with freedom and candor; it being thought that if the privilege did not exist a man would not venture to consult any skilled person.[11]

communications made by a lawyer whilst acting their professional capacity: *Trade Practices Commission v Sterling* (2004) 36 FLR 357, 245 (Lockhart J). The common law doctrine of client legal privilege applies to ancillary legal procedures like subpoenas, interrogatory applications and discovery. For more, see Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2012) [25255].

7 The Honourable Justice John Gilmour, 'Legal Professional Privilege: Current Issues and Latest Developments' (Paper presented at the Law Society of Western Australia, Perth, 13 March 2012) 3. There are a range of rationale for client legal privilege, including instrumental rationales and rights-based rationales. For more on this, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.5]–[2.61].

8 *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ). See also, Sue McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—the Demise of Implied Statutory Abrogation' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 1.

9 *Greenough v Gaskell* (1833) ER 39, 621 (Lord Brougham).

10 *Due Barre v Livette* (1791) Peake 109, 110.

11 *Baker v Campbell* (1983) 153 CLR 52, 66 (Gibbs CJ).

11.7 In *Esso Australia Resources v Commissioner of Taxation* (1999), Kirby J spoke about the fundamental purpose of the privilege:

> It arises out of 'a substantive general principle of the common law and not a mere rule of evidence'. Its objective is 'of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law'. It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as 'a bulwark against tyranny and oppression' which is 'not to be sacrificed even to promote the search for justice or truth in the individual case'.[12]

11.8 Client legal privilege quite clearly interacts with other rights and privileges at common law, including the right to a fair trial.[13] It has also been described as a human right,[14] derived from the right to privacy and the right to protection from the state. In *Baker v Campbell* (1983), Deane J said that it 'represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state'.[15]

11.9 American legal historian, Professor John Wigmore, described the privilege as 'the oldest of the privileges for confidential communications'.[16]

11.10 The privilege dates from Elizabethan times[17] when it was developed by the courts as a mechanism to underscore the 'professional obligation of the barrister or attorney to preserve the secrecy of the client's confidences'.[18] The privilege developed significantly in the 18th and 19th centuries when it was considered to be an evidentiary rule.[19]

Protections from statutory encroachments

Australian Constitution

11.11 The *Australian Constitution* does not expressly protect client legal privilege, nor has it been found to protect the privilege by implication.

Principle of legality

11.12 The principle of legality provides some protection to client legal privilege.[20] When interpreting a statute, courts will presume that Parliament did not intend to

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12 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 92 [111] (Kirby J in obiter). Kirby J is quoting Deane J in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490.

13 The right to a fair trial is discussed in Ch 8.

14 For an explanation on the rights-based rationales for client legal privilege, see, eg, Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.35]–[2.61].

15 *Baker v Campbell* (1983) 153 CLR 52, 120.

16 John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940) [2290].

17 Heydon, above n 6 [25215]. See also, Max Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1928) 16 *California Law Review* 487.

18 *Baker v Campbell* (1983) 153 CLR 52, 66 (Deane J).

19 *Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 581 (Kirby J).

20 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

interfere with client legal privilege, unless this intention was made unambiguously clear.[21] In *Baker v Campbell* (1983), Deane J said:

> It is to be presumed that if the Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms.[22]

International law

11.13 Article 14 of the ICCPR protects the right to a fair and public trial but also a limited right to privacy in relation to proceedings.[23] This suggests communications between client and lawyer should be treated as confidential.

11.14 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[24] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[25]

Bills of rights

11.15 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The *Victorian Charter of Human Rights and Responsibilities* provides that a person has the 'right not to have his or her privacy or correspondence unlawfully or arbitrarily interfered with'[26] and the right to a fair hearing and to communicate with his or her lawyer in criminal proceedings.[27] The ACT's *Human Rights Act* provides protection for a fair hearing.[28]

Justifications for encroachments

11.16 The High Court has spoken of the 'obvious tension' between the policy behind client legal privilege and 'the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case'.

> Where the privilege applies, it inhibits or prevents access to potentially relevant information. The party denied access might be an opposing litigant, a prosecutor, an accused in a criminal trial, or an investigating authority. For the law, in the interests of

21 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 582 [106] (Kirby J); *Valantine v Technical and Further Education Commission* (2007) 97 ALD 447, [37] (Gzell J, Beazley and Tobias JJA agreeing). Legislative intention to displace the privilege may be clearer where the privilege against self-incrimination is also abrogated: *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319.

22 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

23 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

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

25 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

26 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13a.

27 Ibid ss 24–25.

28 *Human Rights Act 2004* (ACT) s 21.

> the administration of justice, to deny access to relevant information, involves a balancing of competing considerations.[29]

11.17 Jeremy Bentham was critical of the privilege, arguing that removing it would result 'in a guilty person not being able to derive quite so much assistance from his law advisor', assuming that it is mainly the guilty who need protection from the law.[30] A corollary of Bentham's argument is that client legal privilege may be used to shield vexatious or frivolous claims.

11.18 Claims to privilege may delay investigations. One example is a claim for privilege attached to communications which were the subject of a warrant executed by ASIC in an investigation in November 2003.[31] The privilege claim was the subject of a federal court hearing which was dismissed at first instance and on appeal. As a consequence, the documents were only made accessible to ASIC in December 2004, a year after the original warrant was executed.

11.19 Similarly, claims for privilege may frustrate proceedings where a party seeks 'blanket' privilege on all communications with their lawyer, irrespective of whether they are relevant or useful to a particular matter. In one case, an unsuccessful claim for a blanket privilege may have partly caused a six year delay in a police investigation.[32]

11.20 The capacity of some federal investigative bodies such as ASIC, the ACCC and the ATO to conduct investigations may be limited by the application of client legal privilege.[33]

11.21 It may also be appropriate for the privilege to be limited or even abrogated in the context of specific investigations.[34] This may be particularly important in the case of ad-hoc investigative bodies like Royal Commissions or special investigations where time and resources are finite.[35]

11.22 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[36]

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29 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 64–65 [35] (Gleeson CJ, Gaudron and Gummow JJ).

30 Jeremy Bentham, *Rationale of Judicial Evidence* (1827) vol VII, 474.

31 See *Kennedy v Wallace & Ors* (2004) 208 ALR 424.

32 See *Hart v Commissioner of Australian Federal Police* (2002) 196 ALR 1, [25]–[35].

33 This view was advanced by Kirby J in *Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 581. In that case, Kirby J explained that: 'it has been suggested that a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into "disrepute", principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters'.

34 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.

35 Ibid Rec 6–2.

36 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

11.23 Some laws that abrogate client legal privilege may be justified. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why they are not justified.

12. Strict and Absolute Liability

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A common law principle

12.1 There is a common law presumption that '*mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence'.[1] The general requirement of *mens rea* is said to be 'one of the most fundamental protections in criminal law',[2] and it reflects the idea that

> it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).[3]

12.2 Ashworth and Horder write:

> The essence of the principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and consequences.[4]

12.3 Some criminal offences, however, do not require proof of fault—these are described as strict liability and absolute liability offences. The Terms of Reference for this Inquiry ask the ALRC to consider laws that apply strict or absolute liability to *all* physical elements of a criminal offence. However, at this stage of its inquiry, the ALRC is interested in submissions on offences with any strict or absolute liability element which people consider to be unjustified.

12.4 This chapter discusses the source and rationale of the *mens rea* principle; how the principle is protected from statutory encroachment; and when it may be justified to create a criminal offence that does not require proof of fault. The ALRC calls for submissions on two questions.

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1 *Sherras v De Rutzo* [1895] 1 QB 918, 921.
2 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011).
3 Ibid.
4 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 155.

Question 12–1 What general principles or criteria should be applied to help determine whether a law that imposes strict or absolute liability for a criminal offence is justified?

Question 12–2 Which Commonwealth laws unjustifiably impose strict or absolute liability for a criminal offence, and why are these laws unjustified?

12.5 In Australia, criminal offences are generally characterised in one of three ways:

- *mens rea* offences—the prosecution must prove a physical element (*actus reus*) and a mental element (*mens rea*);
- strict liability offences—the prosecution is not required to prove fault, but there is a defence of reasonable mistake available;[5] and
- absolute liability offences—proof of fault is not required and no defences are available.[6]

12.6 In *He Kaw Teh v R* (1985), Brennan J explained the operation of *mens rea* as an element in criminal offences:

> It is implied as an element of the offence that, at the time when the person who commits the *actus reus* does the physical act involved, he either—
>
> (a) knows the circumstances which make the doing of that act an offence; or
>
> (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.[7]

12.7 Historically, criminal liability at common law necessarily involved proof of *mens rea.*[8] In *Williamson v Norris* (1899), Lord Russell CJ said:

> The general rule of the English law is that no crime can be committed unless there is *mens rea.*[9]

12.8 In his *Commentaries on the Laws of England* (1765), William Blackstone wrote that, to 'constitute a crime against human laws, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will'.[10]

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5 Generally, an honest and reasonable mistake in a set of facts, which, if they had existed, would make the defendant's act innocent, affords an excuse for doing what would otherwise be an offence: *Proudman v Dayman* (1941) 67 CLR 536, 541 (Dixon J).

6 *Wampfler v R* (1987) 67 CLR 531. See further, Australian Law Reform Commission, *'Principled Regulation: Federal Civil and Administrative Penalties in Australia',* Report 95 (2003) [4.4].

7 *He Kaw Teh v R* (1985) 157 CLR 523, 582.

8 Sir William Holdsworth, *A History of English Law* (Methuen, 2nd ed, 1937) vol 8, 432.

9 *Williamson v Norris* [1899] I Q.B 14 (Lord Russell CJ).

10 Sir William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) Book IV, Ch 2, 21.

12.9 However, as discussed further below, strict liability offences were increasingly developed in the mid to late 19th century, particularly so-called ‘regulatory offences’.[11]

12.10 In Australia, the common law presumption of fault-based liability is also reflected in statute. Section 5.6 of the *Criminal Code* (Cth) creates a rebuttable presumption that, to establish guilt, fault must be proven for each physical element of a Commonwealth offence.

Protections from statutory encroachments

Australian Constitution

12.11 The *Australian Constitution* does not expressly require that criminal offences include the element of *mens rea.*

Principle of legality

12.12 The principle of legality provides some protection to the principle of *mens rea*.[12] When interpreting a statute, courts will presume that Parliament did not intend to create a strict liability offence, unless this intention was made unambiguously clear.[13]

12.13 In *He Kaw Teh* (1985), a majority of the High Court interpreted a provision in the *Customs Act 1901* (Cth), which made it an offence to import drugs, as requiring the prosecution to prove that the defendant had an intention to traffic the drugs. Gibbs CJ stated:

> [i]t is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so.[14]

Justifications for encroachments

12.14 Professor Richard Singer has written that defences of strict liability crimes essentially rest on four grounds:

> (1) only strict criminal liability can deter profit-driven manufacturers and capitalists from ignoring the well-being of the consuming public;
>
> (2) the inquiry into mens rea would exhaust courts, which have to deal with thousands of ‘minor’ infractions every day;
>
> (3) the imposition of strict liability is not inconsistent with the moral underpinnings of the criminal law generally because the penalties are small, and conviction carries no social stigma;
>
> (4) the legislature intended to create strict liability, and can constitutionally do so.[15]

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11 Before this time, convictions for criminal offences without proof of intent were found ‘only occasionally, chiefly among the nuisance cases’: Francis Bowes Sayre, ‘Public welfare offenses’ (1933) 33 *Columbia Law Review* 56.

12 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

13 *He Kaw Teh v R* (1985) 157 CLR 523, 528 (Gibbs CJ); *Sherras v De Rutzo* [1895] 1 QB 918.

14 *He Kaw Teh v R* (1985) 157 CLR 523, 530 (Gibbs CJ).

12.15 Ashworth and Horder write:

> The main argument [for strict liability offences] is a form of protectionism or ‘social defence’. It maintains that one of the primary aims of the criminal law is the protection of fundamental social interests. Why should this function be abandoned when the violation of those interests resulted from some accident or mistake by D?[16]

12.16 Strict liability offences began to be developed in the mid to late 19th century.[17] Regulatory offences were created that were designed to protect individuals from the risks that came with greater industrialisation and mass consumerism. For example, Professor Richard Singer highlights England’s *Sale of Food and Drug Act 1860* as one of the first legislative moves towards strict liability.[18]

12.17 A landmark English strict liability case is *R v Woodrow* (1846) in which a tobacco supplier was convicted of selling adulterated tobacco despite having no knowledge of this fact.[19] On appeal, the Court of Exchequer held that while a conviction was appropriate, so too was a smaller penalty.[20] *R v Woodrow* and subsequent decisions marked the ‘conscious beginning in England of the movement to do away with the requirement of *mens rea* for petty police offences’.[21]

12.18 Some may argue that because it is easier to convict a person of a strict liability offence, strict liability offences are a more effective deterrent to criminal conduct.[22] For example, people may be less likely to drive dangerously if they know they can be convicted of a driving offence whether or not it can be shown that they intended to drive dangerously.[23]

12.19 Another reason sometimes given to justify strict liability offences is that it is onerous on the prosecution to prove the state of mind of the accused.[24] ‘The inquiry into *mens rea* would exhaust courts, which have to deal with thousands of “minor” infractions every day.’[25]

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15 Richard Singer, ‘The Resurgence of Mens Rea: The Rise and Fall of Strict Liability’ (1989) 30 *Boston College Law Review* 337, 389. Singer then discusses the merits of these arguments.

16 Ashworth and Horder, above n 4, 161.

17 Before this time, convictions for criminal offences without proof of intent were found ‘only occasionally, chiefly among the nuisance cases’: Sayre, above n 11, 56. Whereas at common law it was generally true to say that to convict D, P had to prove *actus reus* and *mens rea,* in modern times a doctrine has grown up that in certain classes of statutory offences, which may be called for convenience ‘regulatory offences’, D can be convicted on proof of P by *actus reus* only: Colin Howard, *Strict Responsibility* (Sweet & Maxwell, 1963) 1.

18 Singer, above n 15, 345.

19 *R v Woodrow* (1846) 15 M & W 404, 153 ER 907. This case was cited in *Sherras v De Rutzo* [1895] 1 QB 918.

20 *R v Woodrow* (1846) 15 M & W 404, 153 ER 907 908.

21 Sayre, above n 11, 59.

22 See Senate Standing Committee for the Scrutiny of Bills, ‘Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation’ (26 June 2002) 263; Singer, above n 15, 389.

23 On strict liability for reckless driving, see: Parliament of New South Wales, ‘Legislation Review Committee: Strict and Absolute Liability’ (Discussion Paper No 2, 2006) 11.

24 *R v Woodrow* (1846) 15 M & W 404, 153 ER 907 913 (Baron Parke). See also, Senate Standing Committee for the Scrutiny of Bills, above n 22, 285.

25 Singer, above n 15, 389.

12.20 In some cases strict or absolute liability offences may also assist prosecuting agencies where offences need to be dealt with expeditiously to ensure public confidence in the regulatory regime.[26]

12.21 The Commonwealth Guide to Framing Offences 2011 provides that the application of strict and absolute liability to *all* physical elements of a criminal offence should only be considered appropriate where:

> The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.
>
> There are legitimate grounds for penalising persons lacking 'fault', for example because they will be placed on notice to guard against the possibility of any contravention. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact.[27]

12.22 Although some laws that apply strict or absolute liability to all physical elements of a criminal offence may be justified, the ALRC invites submissions identifying laws that are *not* justified, and explaining why these laws are not justified.

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26 Senate Standing Committee for the Scrutiny of Bills, above n 22, 264.
27 Attorney-General's Department, above n 2, 23.

13. Appeal from Acquittal

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A common law principle

13.1 'It is a golden rule, of great antiquity, that a person who has been acquitted on a criminal charge should not be tried again on the same charge.'[1] It is said that to try a person twice is to place them in danger of conviction twice—to 'double their jeopardy'. However, critics of the principle argue that justice is not served when a guilty person is wrongly acquitted.

13.2 This chapter discusses the source and rationale of the rule against double jeopardy; how the rule is protected from statutory encroachment; and when laws that encroach on the rule may be justified. The ALRC calls for submissions on two questions.

> **Question 13–1** What general principles or criteria should be applied to help determine whether a law that allows an appeal from an acquittal is justified?
>
> **Question 13–2** Which Commonwealth laws unjustifiably allow an appeal from an acquittal, and why are these laws unjustified?

13.3 It said to be 'an elementary principle' that 'an acquittal made by a court of competent jurisdiction and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned and brought before any other Court'.[2]

13.4 Usually the rule against double jeopardy is discussed in the context of whether a person can be re-tried in fresh proceedings for the same offence after an acquittal.

1 *Davern v Messel* (1984) 155 CLR 21, 338 (Murphy J).

2 Ibid 31 (Gibbs CJ) and 62 (Murphy J) citing *Benson v Northern Ireland Road Transport Board* [1942] AC 520, 526 (HL) quoting in turn *R v Tyrone County Justices* (1906) 40 Ir LT 181, 182.

However, the rule also underpins a long-established aversion to allowing appeals from an acquittal, that is, in the same proceedings. In *Davern v Messel* (1984), Gibbs CJ explained the purpose of the rule of double jeopardy in both contexts:

> The purpose of the rule is of course to ensure fairness to the accused. It would obviously be oppressive and unfair if a prosecutor, disappointed with an acquittal, could secure a retrial of the accused person on the same evidence, perhaps before what the prosecutor 'considered to be a more perspicacious jury or tougher judge'. It might not be quite so obvious that it would be unfair to put an accused upon his trial again if fresh evidence, cogent and conclusive of his guilt, came to light after his earlier acquittal, but in such a case the fact that an unscrupulous prosecutor might manufacture evidence to fill the gaps disclosed at the first trial, and the burden that would in any case be placed on an accused who was called upon repeatedly to defend himself, provide good reasons for what is undoubtedly the law, that in such a case also the acquittal is final.
>
> When the prosecution seeks to appeal from an acquittal, the rule against double jeopardy has an indirect application... The view has been taken that the common law rule against double jeopardy would be infringed by allowing an appeal from an acquittal, since the rule requires than an acquittal be treated as final.[3]

13.5 The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General said in a 2003 discussion paper that the general principles underlying the double jeopardy rule include:

> the prevention of the State, with its considerable resources, from repeatedly attempting to convict an individual; the according of finality to defendants, witnesses and others involved in the original criminal proceedings; and the safeguarding of the integrity of jury verdicts.[4]

13.6 The Committee spoke of the desirability of achieving 'a balance between the rights of the individual who has been lawfully acquitted and the interest held by society in ensuring that the guilty are convicted and face appropriate consequences'.[5]

13.7 The principle applies where there has been a hearing on the merits—whether by a judge or a jury. It does not extend to appeals from the quashing or setting aside of a conviction,[6] or appeals from an acquittal by a court of appeal following conviction by a jury.[7]

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3 Ibid 30–31. Justice Black of the US Supreme Court provided a similar rationale for the rule against double jeopardy in *Green v United States* (1957): 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty ... It may be seen as a value which underpins and affects much of the criminal law': *Green v The United States* 355 US 184 (1957), 187-188, quoted in *Pearce v The Queen* (1998) 194 CLR 610, 614 [10] (McHugh, Hayne and Callinan JJ).

4 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals, Discussion Paper, Chapter 2' (2003).

5 Ibid.

6 *Davern v Messel* (1984) 155 CLR 21, 62, (Murphy J).

7 Ibid 39–40 (Gibbs CJ); *R v Benz* (1989) 168 CLR 110, 112 (Mason CJ).

13.8 The rule against double jeopardy can be traced to Greek, Roman and Canon law, and is considered a cardinal principle of English law.[8] At common law, the principle originated in the dispute between King Henry II and Archbishop Thomas Becket over the role of the King's courts in punishing clerks convicted in the ecclesiastical courts. By the 1660s it was considered a basic tenet of the common law.[9] For instance, Blackstone in his *Commentaries on the Laws of England* grounds the pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction for the same identical crime) on the 'universal maxim of the common law of England, that no man ought to be twice brought in danger of his life for one and the same crime'.[10]

13.9 The principle is also enshrined in the Fifth Amendment of the United States Constitution (1791).[11]

Protections from statutory encroachments

Australian Constitution

13.10 There is no express prohibition on appeals from acquittals in the *Australian Constitution.*

13.11 Section 73 of the *Constitution* provides the High Court with extensive jurisdiction, including, the High Court has held, jurisdiction to hear appeals from an acquittal made by a judge or jury at first instance.[12] While it is within the High Court's power to hear an appeal from an acquittal, it will generally not grant special leave, unless issues of general importance arise.[13] In *The King v Wilkes* (1948), Dixon CJ said the High Court should

> be careful always in exercising the power which we have, remembering that it is not in accordance with the general principles of English law to allow appeals from acquittals, and that it is an exceptional discretionary power vested in this Court.[14]

13.12 In *Thompson v Mastertouch TV Service Pty Ltd* (1978), Deane J said that to 'recognize how drastic such a departure from a time-honoured principle of the common law would be is not to question the legislative competence of the Australian Parliament to enact provisions' having the effect of allowing an appeal against an acquittal.[15]

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8 See the judgment of Murphy J, which provides an account of the history of this principle: *Davern v Messel* (1984) 155 CLR 21, 62–63 (Murphy J).

9 Martin Friedland, *Double Jeopardy* (Clarendon Press, 1969) 5–6.

10 William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol 1, ch XXVI.

11 *Davern v Messel* (1984) 155 CLR 21, 40: Gibbs CJ notes that the US constitutional protection does not have as wide an operation as some would argue.

12 Deane J discusses the history of the consideration of section 73 of the *Constitution*, including the decision in *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [17] – [19] (Deane J).

13 Ibid [18] (Deane J).

14 *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon CJ). This suggests the High Court is unlikely to interfere with a verdict of not guilty entered by a jury: see *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [19].

15 *Thompson v Mastertouch Television Service Pty Ltd* (1978) 38 FLR 397, 408 (Deane J).

Principle of legality

13.13 The principle of legality provides some protection to this principle.[16] When interpreting a statute, courts will presume that Parliament did not intend to permit an appeal from an acquittal, unless such an intention was made unambiguously clear.[17]

13.14 For example, in *Thompson v Mastertouch TV Service Pty Ltd* (1978), the Federal Court found that the court's power to 'hear and determine appeals' under s 19 of the *Federal Court Act 1970* (Cth) should not be interpreted as being sufficient to override the presumption against appeals from an acquittal. [18] In that case, Deane J said:

> the right to be spared the jeopardy of an appeal from an acquittal after a hearing on the merits of a criminal charge by a court of competent jurisdiction, is not, upon proper principles of statutory interpretation, to be swept aside by the general terms of a statute which has no underlying policy requiring that such terms be given such an effect and which contains nothing that points clearly or unmistakably or, indeed, at all, to that effect as having been either contemplated or intended.[19]

13.15 In *Davern v Messel* (1984)*,*the decision in *Thompson* was approved, with Gibbs noting:

> An appeal is a remedy given by statute; the scope of the appeal must be governed by the terms of the enactment creating it. The question whether an appeal lies from an acquittal therefore must be decided as a matter of statutory interpretation.[20]

International law

13.16 Article 14 (7) of the *International Covenant on Civil and Political Rights* states:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

13.17 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[21] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[22]

Bills of rights

13.18 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Bills of rights and human rights statutes

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16 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

17 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J); *R v Snow* (1915) 20 CLR 315, 322 (Griffith CJ); *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon J); *Macleod v Australian Securities and Investments Commission* 211 CLR 287, 289.

18 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J).

19 Ibid 413.

20 *Davern v Messel* (1984) 155 CLR 21.

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

22 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

prohibit laws that permit an appeal from an acquittal in the United States,[23] Canada[24] and New Zealand.[25] For example, section 26(2) of the *Bill of Rights Act 1990* (NZ) provides:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.[26]

13.19 The prohibition is also recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[27] For example, the Victorian Act provides:

> A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with the law.

Justifications for encroachments

13.20 Victims of crime and their families will sometimes believe a guilty person has been wrongly acquitted. For these people particularly, the application of the principle that a person should not be tried twice may be not only unjust, but deeply distressing. The principle will seem acceptable when the person acquitted is believed to be innocent, but not when they are believed to be guilty.

13.21 The Law Commission of England and Wales considered the rule against double jeopardy and prosecution appeals following a reference in 2001. Its findings and recommendations have laid the foundation for laws limiting the rule in UK and in other jurisdictions, such as New South Wales. The Law Commission concluded that interference with the rule may be justified where the acquittal is 'manifestly illegitimate ... [and] sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy'.[28] The scope of the interference must be clear-cut and notorious.[29]

13.22 The Law Commission recommended that additional incursions on the rule against double jeopardy be limited to acquittals for murder or genocide. [30] This built on existing rights of appeal from an acquittal where the accused has interfered with or intimidated a juror or witness.[31]

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23 *United States Constitution* amend V.

24 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 11(h).

25 *Bill of Rights Act 1990* (NZ) s 26(2).

26 Ibid.

27 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26; *Human Rights Act 2004* (ACT) s 24.

28 The Law Commission, 'Double Jeopardy and Prosecution Appeals: Report on Two References under Section 3(1)(e) of the *Law Commissions Act 1965*' [4.30].

29 Ibid [4.35].

30 Ibid [4.30] – [4.36].

31 In order for an appeal to lie, it must not be contrary to the interests of justice, and there must be a real possibility that the accused would not have been acquitted absent the interference or intimidation: *Criminal Procedure and Investigations Act 1996* (UK) ss 54–57.

13.23 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[32]

13.24 Some Australian laws that permit an appeal from an acquittal may be justified. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why these laws are not justified.

32 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

14. Procedural Fairness

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A common law duty

14.1 The common law recognises a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.[1] In *Kioa v West* (1985), Mason J said:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[2]

14.2 This chapter discusses the source and rationale of the principles of procedural fairness; how procedural fairness is protected from statutory encroachment; and when laws that encroach on it may be justified. The ALRC calls for submissions on two questions about this duty.

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1 *Kioa v West* (1985) 159 CLR 550. See also David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) [12.34]. The common law doctrine has a 'wide application and is presumed by the courts to apply to the exercise of virtually all statutory powers': Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 285. The 'particular requirements of compliance with the rules of natural justice will depend on the circumstances': *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, 16–17 [48].

2 *Kioa v West* (1985) 159 CLR 550, 582 (Mason J). Justice Mason's approach to natural justice in *Kioa* is at odds with that of Justice Brennan in *Kioa* who reasoned that 'there is no freestanding common law right to be accorded natural justice by the repository of a statutory power … There is no right to be accorded natural justice which exercise independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power': Ibid 610–12. In *Plaintiff M16/2010E* a unanimous decision of the High Court suggested that the different approaches in *Kioa* to the foundation of the duty have not affected the application of the principle in subsequent cases: *Plaintiff M16/2010E* (2010) 243 CLR 319, 352 [74].

Question 14–1 What general principles or criteria should be applied to help determine whether a law that denies procedural fairness is justified?

Question 14–2 Which Commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?

14.3 Issues of procedural fairness generally arise in the context of decisions made by government departments and officials as well as quasi-judicial bodies such as tribunals.[3] Such decisions may affect people in a range of contexts;

- decisions may curtail a person's liberty, for example by detaining them in immigration detention; or
- affect their freedom of movement such as through deportation or resettlement; or
- have a significant effect on their economic well-being, for example, by decisions determining their entitlements to government pensions or other support.

14.4 Principles of procedural fairness recognise the power imbalance which may exist between an administrative decision-maker, such as a delegate representing a government agency, and an individual citizen.

14.5 While procedural fairness is protected at common law, statute also provides some protection for individuals. For instance, a breach of the rules of natural justice is a ground for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[4]

14.6 In extra-curial commentary, Chief Justice Robert French has said that procedural fairness is 'indispensable to justice', and has highlighted five inter-related rationales for the duty to afford procedural fairness:

> - That it is instrumental, that is to say, an aid to good decision-making;
> - that it supports the rule of law by promoting public confidence in official decision-making;
> - that it has a rhetorical or libertarian justification as a first principle of justice, a principle of constitutionalism;
> - that it gives due respect to the dignity of individuals; and
> - by way of participatory or republican rationale—it is democracy's guarantee of the opportunity for all to play their part in the political process.[5]

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3 Principles of procedural fairness overlap with the principles of a fair trial and principles of judicial review, discussed in Chapters 8 and 18.

4 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 1(a).

5 Chief Justice Robert S French, 'Procedural Fairness—Indispensable to Justice?' (2010) 1–2.

14.7 Procedural fairness usually involves two requirements: the fair hearing rule and the rule against bias.[6] The hearing rule requires a decision-maker to inform a person of the case against them and provide them with an opportunity to be heard. The extent of the obligation on the decision-maker depends on the relevant statutory framework and on what is fair in all the circumstances. In *Commissioner of Police v Tanos* (1985), Dixon CJ and Webb J held that

> it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by an judicial or quasi-judicial proceeding he must be afforded an adequate opportunity to be heard.[7]

14.8 The bias rule of procedural fairness requires that a decision-maker must not be biased (actual bias) or be seen by an informed observer to be biased in any way (apprehended or ostensible bias).

14.9 The rule against bias and the hearing rule are drawn from natural law and influenced by the work of the medieval philosopher and theologian, Thomas Aquinas.[8] Chief Justice French explained:

> As a normative marker for decision-making it [the rule against bias] predates by millennia the common law of England and its voyage to Australian colonies.[9]

14.10 Procedural fairness in its contemporary form, developed in the common law in the early 17th century.[10] Starting as a principle relating only to judicial functions, the application of natural justice was extended in the mid-19th century to all 'quasi-judicial' decisions in *Cooper v Board of Works for the Wandsworth District* (1863).[11]

14.11 In *Lam* (2003)*,* Callinan J explained that 'natural justice by giving a right to be heard has long been the law of many civilised societies':

> That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.[12]

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6 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

7 *Commissioner of Police v Tanos* (1985) 98 CLR 383, 395. 'The fundamental rule is that a statutory authority having power to effect the rights of a person is bound to hear him before exercising the power': *Kioa v West* (1985) 159 CLR 550, 563 (Gibbs CJ) quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

8 French, above n 5. The hearing rule appeared in cases in the medieval Year Books: HH Marshall, *Natural Justice* (Sweet & Maxwell, 1959) 18–19.

9 French, above n 5.

10 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012) [10.1.9]; French, above n 5, 3.

11 *Cooper v Board of Works for the Wandsworth District* [1863] 143 ER 414 Court of Common Pleas (1863). The court in this case extended natural justice to decisions interfering with property rights.

12 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, 45 [140]. Callinan J was quoting Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed, 1995) 378–379.

Protections from statutory encroachments

Australian Constitution

14.12 The *Australian Constitution* does not provide express protection for procedural fairness.

14.13 However, at least in respect of judicial functions, s 71 of the *Constitution* may provide some protection for procedural rights. Section 71 provides:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

14.14 In *Re Tracey; Ex parte Ryan* (1989), Deane J stated that s 71 is the 'Constitution's only general guarantee of due process'.[13] Similarly in *Leeth v Commonwealth* (1992), a majority of the High Court stated:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.[14]

Principle of legality

14.15 The principle of legality provides some protection for procedural fairness.[15] When interpreting a statute, courts will presume that Parliament did not intend to limit procedural fairness, unless this intention was made unambiguously clear.[16] In *Miah* (2001), McHugh J held that the 'the common law rules of natural justice…are taken to apply to the exercise of public power unless clearly excluded'.[17]

14.16 In *Annetts v McCann* (1990), Mason CJ, Deane and McHugh JJ said:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.[18]

Bills of rights

14.17 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The right to procedural fairness for persons

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13 *Re Tracey; ex parte Ryan* (1989) 166 CLR 518, 580.

14 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

15 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

16 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

17 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 93.

18 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).Quoted with approval in *Saaed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [11] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

affected by the exercise of public power is expressed differently in other jurisdictions. In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.[19] In New Zealand, the human rights legislation requires observance of natural justice principles.[20]

14.18 In Canada, any deprivation of life, liberty and security of the person must be informed by principles of fundamental justice according to the Canadian *Charter of Rights and Freedoms*.[21]

Justifications for encroachments

14.19 In some circumstances 'urgent action'[22] to prevent a greater harm may be said to justify limits on procedural fairness.[23] For example, a prison warden may place a prisoner in isolation without notice if they suspect the prisoner is planning a riot.[24] In other circumstances, it might be justified to isolate people in quarantine, to avoid the spread of infectious diseases.[25]

14.20 There may also be circumstances where an area of law or policy is overly complex and would be better served by the application of an exhaustive legislative code, rather than common law procedural fairness. While this will be rare, it can arise in planning law where decisions may be overly difficult and involve a range of interested parties.[26]

14.21 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[27]

14.22 Although some laws that deny or limit procedural fairness may be justified, the ALRC invites submissions identifying laws that are *not* justified, and explaining why these laws are not justified.

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19 *United States Constitution* amend V.

20 *Bill of Rights Act 1990* (NZ) s 27(1).

21 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 7.

22 Wilcox J referred to cases of 'urgency' which may legitimate the suspension of procedural fairness in *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234, 421.

23 Matthew Groves argues that 'courts have generally been reluctant to exclude *all* elements of natural justice': Groves, above n 1, 305.

24 See for example, *McEvoy v Lobban* [1990] 2 Qd R 235.

25 *R v Davey* [1899] 2 QB 301, 305–6.

26 For more on this issue, see Alexandra O'Mara, 'Procedural Fairness and Public Participation in Planning' (2004) 62 *Environmental and Planning Law Journal*.

27 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

15. Delegating Legislative Power

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A constitutional principle

15.1 Under the constitutional doctrine of the separation of powers, parliaments make laws, the executive administers or enforces laws, and the judiciary adjudicates disputes about the law.[1] But these powers are not as separate and the distinctions not as clear as some might imagine. For one thing, in Australia, members of the executive (the Cabinet and other government ministers) are also members of the legislature.

15.2 Nevertheless, from the separation of powers doctrine[2] may be derived the principle that legislative power should not be inappropriately delegated to the executive. Although it is common for parliaments to delegate the power to make certain laws to the executive—not only government ministers, but also government agencies—this chapter is about when this would not be appropriate.[3] It briefly discusses the source and rationale for this aspect of the separation of powers doctrine and how the principle is protected from statutory encroachment. The ALRC calls for submissions on two questions.

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1 MJC Vile formulated a 'pure doctrine' of the separation of powers as follows: 'It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the Same time a member of more than one branch': MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998) 13.

2 The doctrine is reflected in the structure of the *Australian Constitution*: Ch 1 concerns the Parliament, Ch II the Executive Government, and Ch III the Judicature.

3 This chapter is primarily concerned with the delegation of power, rather than how such powers are then used.

Question 15–1 What general principles or criteria should be applied to help determine whether a law that delegates legislative power to the executive is justified?

Question 15–2 Which Commonwealth laws unjustifiably delegate legislative power to the executive, and why are these laws unjustified?

15.3 While delegating legislative power to the executive is commonplace and said to be essential for an efficient and effective government, some laws are more properly made by Parliament. Professor Denise Meyerson has written:

> we know that the legislative and executive branches are closely connected in a parliamentary system of government and we also know that for reasons of practical necessity it is impossible to confine the executive to the performance solely of executive tasks. But this does not mean that the ideal of dividing legislative and executive power is altogether illusory. On the contrary, it is clear that if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it.[4]

15.4 The primary arguments directed against the use of delegated legislation are:

> first, that if the executive has power to make laws, the supremacy or sovereignty of parliament will be seriously impaired and the balance of the *Constitution* altered. Second, if laws are made affecting the subjects, it can be argued that they must be submitted to the elected representatives of the people for consideration and approval.[5]

15.5 Although it is not clearly a right, freedom or privilege itself, the principle that legislative power should not inappropriately be delegated to the executive may be an important way of protecting other rights, freedoms and privileges. MJC Vile said the separation of powers doctrine (which supports the principle discussed in this chapter) was ‘essential for the establishment and maintenance of political liberty’.[6]

Protections from statutory encroachment

Australian Constitution

15.6 The *Australian Constitution* does not expressly authorise the Commonwealth Parliament to delegate power to make laws, but nor is it expressly prohibited.

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4 Denise Meyerson, ‘Rethinking the Constitutionality of Delegated Legislation’ (2003) 11 *Australian Journal of Administrative Law* 45, 52.

5 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3rd ed, 2005) [1.10].

6 Vile, above n 1, 14.

15.7 The High Court's decision in *Baxter v Ah Way* (1910) has been held to support the Parliament's power to delegate power. In this case O'Connor J stated that:

> Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied.[7]

15.8 In *Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931), Dixon J noted the 'logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation'.[8] Dixon J went on in that case to say that *Roche v Kronheimer* (1921)[9] decided that

> a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the *Constitution* does not operate to restrain the power of the Parliament to make such a law.[10]

15.9 Dixon J suggested when a delegation of legislative power may not be valid:

> This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.[11]

15.10 Whether constitutionally valid or not, a 'wide' and 'uncertain' delegation of legislative power, some would argue, will not be appropriate.

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7 *Baxter v Ah Way* (1910) 8 CLR 626, 637–8.

8 It is 'one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation': *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 91 (Dixon J).

9 *Roche v Kronheimer* (1921) 29 CLR 329.

10 *The Victorian Stevedoring and General Contracting Company Proprietary Limited v Dignan* (1931) 46 CLR 73, 101 (Dixon J).

11 Ibid.

Justifications for delegating legislative power

15.11 The ability of a legislature to empower others to make legislation has been described as 'an essential adjunct to the practice of government'.[12] The 'modern state depends on reams of delegated legislation'.[13]

15.12 Pearce and Argument write that the delegation of legislative power is 'generally considered to be both legitimate and desirable' in three situations:

- to save pressure on parliamentary time;
- when the legislation would be too technical or detailed; and
- where the legislation must deal with rapidly changing or uncertain situations.[14]

15.13 But when would a delegation of legislative power not be appropriate? Overly wide and uncertain delegations of legislative power may not be appropriate, as suggested by Dixon J's comments in *Victorian Stevedoring*, quoted above. Discussing insufficiently specific delegations of power, Morris and Molone cite the following provision in a New Zealand statute:

> The Governor-General may from time to time, by Order-in-Council, make such regulations ... as appear to him to be necessary or expedient for the general purpose of this Act and for giving full effect to the provisions of this Act for the due administration of this Act.[15]

15.14 For all intents and purposes, Morris and Molone write, this section grants the executive 'a free hand to legislate to implement any policy it liked, provided that the regulation carrying the policy could be linked with maintaining prices'.[16]

15.15 Although many laws delegating legislative power may be justified, the ALRC invites submissions identifying *inappropriate* delegations of legislative power, and explaining why these delegations are not appropriate.

12 Pearce and Argument, above n 4, [12.3].

13 George Winterton, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Company, 2013) [3.500].

14 Pearce and Argument, above n 4, [1.9]. Similar and other reasons justifying delegated legislation were set out in the 'Report of the Committee on Ministers' Powers (Donoughmore Committee)' (United Kingdom, 1936). See Caroline Morris and Ryan Malone, 'Regulations Review in the New Zealand Parliament' (2004) 4 *Macquarie Law Journal* 7, 9.

15 *Economic Stabilisation Act 1948* (NZ) s 11(1).

16 Morris and Malone, above n 13, 11.

16. Authorising what would otherwise be a Tort

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The right to sue in tort

16.1 A tort is a legal wrong which one person or entity (the tortfeasor) commits against another person or entity and for which the usual remedy is an award of damages. Many torts protect fundamental liberties, such as personal liberty, and fundamental rights, such as property rights, and provide protection from interferences by other people or entities and by the Crown. In short, torts protect people from wrongful conduct by others and give claimants a right to sue for compensation or possibly an injunction to restrain the conduct. Like criminal laws, laws creating torts also have a normative or regulatory effect on conduct in society:

> When the legislature or courts make conduct a tort they mean, by stamping it as wrongful, to forbid or discourage it or, at a minimum, to warn those who indulge in it of the liability they may incur.[1]

16.2 A statute authorising conduct that would otherwise be a tort may therefore reduce the legal protection of people from interferences with their rights and freedoms.

16.3 This chapter discusses: the source and rationale of tort law; how the right to sue in tort is protected from statutory encroachment; and when laws that authorise what would otherwise be a tort may be justified.[2] The ALRC calls for submissions on two questions.

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1 Tony Honore, 'The Morality of Tort Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 75.

2 Immunities granted to government entities are considered in Ch 15.

Question 16–1 What general principles or criteria should be applied to help determine whether a law that authorises what would otherwise be a tort is justified?

Question 16–2 Which Commonwealth laws unjustifiably authorise what would otherwise be a tort, and why are these laws unjustified?

Common law

16.4 Torts are generally created by the common law,[3] although there are statutory wrongs which are analogous to torts.[4] In addition, many statutes extend[5] or limit[6] tort remedies, while statutory duties and powers may form the basis of duties or liability in tort, either in the common law tort of breach of statutory duty[7] or the common law tort of negligence.[8] Common law torts mostly have a long history, some dating as far back as the 13th century.[9]

16.5 Although a tort may also amount to a crime, claims in torts are civil claims brought by the individual concerned, who seeks compensation from the tortfeasor for injury or loss. Torts may be committed by individuals, corporate entities or public authorities, including government departments or agencies. Tort liability includes both personal liability and vicarious liability (for torts committed by employees or agents).

16.6 Torts include assault, battery, false imprisonment, trespass to land or goods, conversion of goods, private and public nuisance, intimidation, deceit, and the very expansive tort of negligence. Negligence occurs in many different social contexts, including on the roads, in the workplace, or through negligent medical care or

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3 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) Bk III; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed) vol II, ch VIII.

4 For example, the statutory liability for misleading or deceptive conduct in trade or commerce: see, for example, state fair trading Acts and the *Australian Consumer Law* (Cth) s 18.

5 Eg, *Compensation to Relatives Act 1987* (NSW). See also equivalent acts in other states and territories that extend tort liability to fatal accidents.

6 Eg, *Civil Liability Act 2002* (NSW). See also, how workers compensation legislation limits common law claims, and how state and territory *Uniform Defamation Acts* 2005 regulate defamation claims.

7 Caroline Sappideen and Prue Vines, 'The Tort of Breach of Statutory Duty', *Fleming's Law of Torts* (Thomson Reuters (Professional) Australia, 10th ed, 2011).

8 Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 2012) 583; Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 149–150; 215–222.

9 SFC Milsom, *Historical Foundations of the Common Law* (Lexis Nexis Butterworths, 2nd ed, 1981) 283; Pollock and Maitland, above n 3; J. Baker, *An Introduction to English Legal History* (Butterworths, 1971) 82–85. Despite their common law origins, most tort actions are subject to some statutory variation of the common law principles by state and territory legislation. Numerous statutes limit actions or defences, provide limitation periods, cap or exclude awards of damages, and provide for survival of actions. The *Uniform Defamation Acts 2005* in all states and territories modifies the common law action of defamation.

professional services. The common law tort of defamation has long protected personal reputation from untruthful attacks.[10]

16.7 While not all consequences of tortious conduct result in an award of damages, generally people have a right to legal redress if they can prove on the balance of probabilities that they have been the victim of a tort. In some cases, the affected person may seek an injunction from the courts to prevent the tort happening or continuing.[11]

Australian Constitution

16.8 The *Australian Constitution* does not create rights in tort nor does it expressly authorise any conduct that would otherwise constitute a tort.

16.9 However, the implied constitutional freedom of political communication, recognised in a series of decisions of the High Court of Australia, has been held to preclude the unqualified application of the common law of defamation:

> The common law of libel and slander could not be developed inconsistently with the *Constitution*, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the *Constitution*.[12]

16.10 However, the implied constitutional freedom, recognised by the High Court as a restriction on the ability of people to sue for defamation, is not absolute. In *Lange v ABC* (1997), the High Court formulated the constitutional defence as one of 'qualified privilege' to speak freely on government and political matters, drawing in concepts of reasonableness and subject to an absence of malice on the part of the speaker.[13]

Principle of legality

16.11 The principle of legality provides some protection from statutes that authorise what would otherwise be a tort.[14] Courts are reluctant to hold that a statute authorises the commission of what would otherwise be a tort, unless the statute does so clearly and unambiguously.

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10 A person's reputation is regarded as integral to his or her dignity, standing in the community and, in many cases, ability to earn income. According to William Blackstone, 'The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right': Blackstone, above n 3, Bks 1–2. See also, Pollock and Maitland, above n 3, 536–538; Sappideen and Vines, above n 8, Ch 25. The recognised defences to defamation at common law and in statutes provide important but not complete protection of freedom of speech.

11 For example, to prevent a trespass or a nuisance: Sappideen and Vines, above n 8, 58; 522–523. The courts are however especially cautious of granting injunctions in defamation cases, because of the risk of undue restriction on freedom of speech: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

12 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566. The *Constitution* also impliedly restricts the curtailment of the protected freedom by the exercise of legislative or executive power: Ibid 560, 566.

13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

14 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

16.12 For example, in *Coco v The Queen* (1994),[15] the High Court considered whether s 43(2)(c) of the *Invasion of Privacy Act 1971* (Qld), which conferred authority on a judge to authorize the installation and maintenance of a listening device, extended to authorising entry onto private premises to install the device. They held it did not authorise what would be otherwise be a trespass onto the accused's land to install the device. The majority said:

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law.
>
> Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon* (1991): 'Inconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights'.[16]

International law and bills of rights

16.13 While international covenants typically do not refer to the right of an individual not to be subject to tortious conduct in such terms, many of their articles set out fundamental freedoms and rights which might be infringed by a person committing a tort.

16.14 Torture, for example, would constitute the torts of assault and/or battery and breach art 7 of the *International Covenant on Civil and Political Rights*. Imprisoning a person without lawful authority would constitute the tort of false imprisonment and breach art 9 of the ICCPR. Defaming a person would constitute the tort of defamation and breach art 17. While there is as yet no settled tort of invasion of privacy in Australian common law, the equitable action of breach of confidence protects correspondence from interferences in breach of art 17.[17]

16.15 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[18] However, where a statute is ambiguous, courts will

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15 *Coco v The Queen* (1994) 179 CLR 427.

16 Ibid [8] (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).

17 See, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report 123 (2014) Ch 13.

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

generally favour a construction that accords with Australia's international obligations.[19]

Justifications for encroachments

16.16 Authorising what would otherwise be a tort has been justified for a number of reasons. Because torts may be committed in many different social contexts, the justifications for statutes authorising or granting immunity or a defence to what would otherwise be tortious conduct will vary and depend closely on the particular context. Justifications commonly include:

- law enforcement and prevention of crime;
- national security;
- public health;
- protecting vulnerable people from hurting themselves; and
- the encouragement of desirable practices by imposing conditions for the immunity.

16.17 Statutes give various powers to Commonwealth law enforcement agencies, customs officials, defence personnel, immigration officials, security agencies and others. These include powers to arrest or detain persons, to seize or retain property, and to carry out intrusive investigations—conduct that might otherwise amount to a tort. These powers are commonly justified on the grounds that they are necessary to prevent crime and terrorism and to otherwise protect national security. They may also be necessary to properly enforce laws, including customs, quarantine and immigration laws.

16.18 Statutes providing immunity from tort liability are generally based, not on the justification for particular intentional acts or omissions out of social necessity, but on the need to give general protection to socially worthwhile agencies, activities or services from liability for negligence or strict liability. This applies particularly to various forms of immunity given to government agencies discussed in Ch 17.[20]

16.19 The limited immunity provided to protected industrial action is unusual in that it applies to individuals or non-government groups such as employee or employer associations. It may be seen to have several justifications, differing over time as community attitudes to workplace disputes have changed. The immunity in Australia originally had the object of encouraging parties to bring their disputes within the new industrial relations and dispute resolution framework of 1993. It also regulates conduct by setting out conditions for the protection. The overall object is that disputes proceed

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19 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

20 Eg, *Archives Act 1983* (Cth) s 57. This provision provides that no action will lie for defamation, breach of confidence or infringement of copyright arising from providing access to an archived record, where access is given in good faith in the ordinary course of administration of the *Archives Act*.

in an orderly, safe and fair way, without duress; that parties are properly and efficiently represented; and that undue risks to those caught up in the dispute are minimised.[21]

16.20 A statute may restrict a person's right to sue another in tort in several ways, for example, by:

- authorising certain conduct that *would* otherwise be a tort;
- providing a defence of statutory authority to conduct or activities that *may*, particularly if reasonable care is not taken, constitute a tort;[22] and
- giving a person an exemption or immunity from civil liability in tort.[23]

16.21 Many laws that authorise what would otherwise be a tort are no doubt justified. The ALRC does not consider it useful to attempt to list or analyse the justification for *every* statutory provision where authority is given to Commonwealth agencies or officers to arrest or detain a person, to seize or detain property, or to enter property, because such conduct would otherwise amount to a tort. The ALRC therefore invites submissions identifying those Commonwealth laws that authorise torts without good justification, and explaining why these laws are not justified.

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21 See, for example, *Industrial Relations Reform Act 1993* (Cth) s 4.

22 For example a nuisance. See, eg, *Allen v Gulf Oil Refinery Ltd* [1980] AC 1001; *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660, 666 [16]; *Benning v Wong* (1969) 122 CLR 249, 324–337 (Owen J); Barker et al, above n 8, [4.1.6.3]; *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79 [121]–[123].

23 Immunities provided by statutes to government bodies are discussed in Ch 15.

17. Executive Immunities

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A common law principle

17.1 It is a fundamental tenet of the rule of law that no one is above the law. This principle applies to the government, its officers and instrumentalities: their conduct should be ruled by the law. AV Dicey wrote that the rule of law encompasses:

> equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[1]

17.2 In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.[2]

17.3 While various statutes now provide for immunities for the executive arm of the Commonwealth in a wide range of specific contexts, these immunities should have no wider application than is necessary to achieve the specific legislative purpose.

17.4 This chapter considers immunities granted by statute to the executive arm of government. It discusses the source and rationale of the principle that executive immunities from legal liability should be limited; how this principle is protected from statutory encroachment; and when laws that give the executive a wide immunity may be justified.

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1 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, Third, 1889) 190.

2 The issues in this chapter overlap considerably with those in Ch 16 on statutes authorising conduct that would otherwise be a tort.

17.5 The ALRC calls for submissions on two questions.

Question 17–1 What general principles or criteria should be applied to help determine whether a law that gives executive immunities a wide application is justified?

Question 17–2 Which Commonwealth laws unjustifiably give executive immunities a wide application, and why are these immunities not justified?

17.6 The executive historically had the benefit of the broad common law immunity of 'the Crown'.[3] However, that general immunity has been abrogated by statute in all states and territories.[4] For the federal government, crown immunity from suit was abolished by the *Judiciary Act 1903* (Cth)[5] ('*Judiciary Act'),* and arguably under section 75(iii) of the *Australian Constitution*.[6] Under ss 56 and 64 of the *Judiciary Act* the executive is, so far as possible, subject to the same legal liabilities as the citizen.[7]

17.7 Thus the Commonwealth of Australia now has no general Crown immunity from liability in tort or other civil actions and is subject to the same procedural and substantive laws as those which govern claims by one individual against another.[8] The Crown is also now subject to vicarious liability for the torts of its servants and agents, and may also have a non-delegable duty, to the same extent as an individual.[9]

17.8 Many statutes, however, provide an express immunity from liability arising out of certain functions or operations of government.[10] There is also a general presumption of statutory interpretation (which has been called 'a presumption of crown immunity from statute'[11]) that statutes were not intended to bind the Crown,[12] in the absence of

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3 The term 'the Crown' refers to 'the government and its myriad components': Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (LBC Information Services, 1982) 2, and following. This arises in the discussion of the history of Crown immunity and its abrogation. In contrast to the government, separate public authorities did not come within crown immunity: Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 215. Whether or not a government instrumentality is to be regarded as 'the Crown' may be significant on a purely procedural level of deciding who to sue: Aronson and Whitmore, 30.

4 See further Aronson and Whitmore, above n 3, Ch 1.

5 *Judiciary Act 1903* (Cth) ss 64, 56.

6 Cf *Commonwealth v Mewett* (1997) 191 CLR 471.

7 Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 4th ed, 2009) 176.

8 *Maguire v Simpson* (1977) 139 CLR 362. See further Aronson and Whitmore, above n 3, 7.

9 The Crown was not, at common law, vicariously liable for its servants' or officers' torts and also had no direct liability to its citizen: Sappideen and Vines, above n 3, 215. But the laws abrogating Crown immunity reverse that position. For example, the Commonwealth was held to have a non-delegable duty in negligence as a school authority to its pupils: *Commonwealth v Introvigne* (1982) 150 CLR 258.

10 Immunities of non-government actors from liability in tort were considered in Ch 16.

11 Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Discussion Paper No 64 (2000) [5.171]–[5.172].

12 'Generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect': *R v Cook* (1790) 3 TR 519, 521 (Lord Kenyon). See also: *Attorney-General v Donaldson* (1842) 10 M&W 117, 124 (Alderson B); *Ex Parte Post Master General; In re Bonham* (1879) 10 Ch D 595, 601 (Jessel MR).

clear words or necessary implication.[13] In 1990, the High Court in *Bropho v Western Australia* held that this presumption only provides limited protection to the government from liability under or control by statute. Contrary to some conflicting authority, the High Court emphasised that the presumption was simply a rule of statutory interpretation, and should not be elevated to any higher status.[14] It gives way to an express or implied intention that legislation binds the executive.[15] Where this rebuttable presumption applies and legislation is interpreted as not binding government, it may be said to give the executive a form of 'immunity' from laws which apply to ordinary citizens.[16]

17.9 However, this chapter is concerned only with express immunities from civil and criminal liability provided in Commonwealth statutes to the executive and its officers, employees, and agents.

17.10 An express immunity will often be qualified by a good faith requirement.[17] So for example, s 99ZR of the *National Health Act 1953* (Cth) provides:

> (1) ... neither the Commonwealth, the Chief Executive Medicare nor any person performing duty as a Customs officer or as a Departmental employee ... is liable for any act done in good faith by such a Customs officer, by the Chief Executive Medicare, or by such an employee in the performance of functions or duties, or the exercise of powers, under this Division.

Protections from statutory encroachments

Australian Constitution

17.11 Section 75(iii) of the *Australian Constitution* may be taken to impliedly extinguish common law crown immunity. It states:

> In all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, the High Court shall have original jurisdiction.

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13 *Province of Bombay v The Municipal Corporation of Bombay* [1947] AC 58; *The Commonwealth v Rhind* (1966) 119 CLR 584.

14 *Bropho v Western Australia* (1990) 171 CLR 1, 15 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), 28 (Brennan J).

15 Ibid 18–19.

16 In modern times, with the increased outsourcing of governmental functions, the principle could provide protection to parties contracting with the Crown, but only where the application of statutory liability would impair the Crown's legal interests, or prevent the divestment of proprietary, contractual or other legal rights and interests of the Crown: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 36–37 [64]–[68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

17 For example, the *Environmental Planning and Assessment Act 1979* (NSW) provides that a council issuing a planning certificate in respect of land 'shall not incur any liability in respect of any advice provided in good faith': *Environmental Planning and Assessment Act 1979* (NSW) s 149. Such a section would prevent a council incurring liability for negligent misstatement in a certificate, as had occurred in *Shaddock v Parramatta City Council* (1981) 150 CLR 225.

17.12 Further, crown immunity is removed by s 64 of the *Judiciary Act*:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.[18]

17.13 However, s 64 of the *Judiciary Act* may be superseded or overridden by legislation providing for a specific immunity to a person or entity.

The principle of legality

17.14 The principle of legality provides some protection for the principle that executive immunities should be only as wide as necessary to achieve the legislative purpose, and should not unduly derogate from individual rights.[19] When interpreting a statute, courts will presume that Parliament did not intend to grant the executive a wide immunity from liability, unless this intention was made unambiguously clear.[20] In the absence of clear language, the courts will narrowly construe any provision providing a immunity.

17.15 In *Board of Fire Commissioners v Ardouin* (1961)[21] the High Court considered a section of a New South Wales statute giving immunity from liability for the Board of Fire Commissioners where damage was caused by a bona fide exercise of statutory authority under that Act. Kitto J expressed the principle of interpretation which arose:

> Section 46 operates to derogate, in a manner potentially most serious, from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow.[22]

17.16 In the same case, Dixon J pointed out that the immunity in that case was confined to aspects of the executive's operations that justified special protection from liability:

> It was not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority. [23]

17.17 Further, in *Puntoriero v Water Administration Ministerial Corporation* (1999),[24] McHugh J pointed out that statutes providing for immunities were to be read in the same way as statutes authorising what would otherwise be unlawful:

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18 See also, *Judiciary Act 1903* (Cth) s 56; *Australian Constitution* s 78.

19 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

20 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 30–33 [42]–[46]; *Evans v State of New South Wales* (2008) 168 FCR 576, [72] (French CJ); *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115 130.

21 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105.

22 Ibid.

23 Ibid 110.

24 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

> In principle, there is no reason for construing a statutory provision limiting liability for government action differently from a statutory provision authorising government action. The reasons which require provisions of the latter kind to be read narrowly apply to provisions of the former kind. For that reason, provisions taking away a right of action for damages of the citizen are construed 'strictly', even jealously.[25]

17.18 Kirby J, although dissenting, also stated:

> It has been stated in a series of decisions in this Court that immunity provisions, such as the one in question here, will be construed jealously or strictly so as to confine the scope of the immunity conferred. The reason for this attitude on the part of courts is not, ostensibly, to defeat the purposes of the legislature. It is no function of courts to do that. Rather, it is to ascertain the true purpose of the provision upon an hypothesis, attributed by the courts to Parliament, that legislators would not deprive a person of legal rights otherwise enjoyed against a statutory body, except by the use of clear language. A similar rule applies in the construction of legislation defensive of liberty. A like approach is taken to the construction of legislation said to deprive the individual of procedural fairness.[26]

International law and bills of rights

17.19 While international covenants typically do not refer to prohibitions on excessively wide executive immunities as such, art 17 of the *International Covenant on Civil and Political Rights* provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

17.20 Article 17 may represent some limit on excessively wide executive immunities for arbitrary or otherwise unlawful interferences with a person's privacy, home, honour or reputation. International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[27] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[28]

Justifications for encroachments

17.21 The key rationale for executive immunities is that the executive performs unique functions. The executive may need special powers and privileges to discharge its functions properly and effectively in what the government judges to be the broader public interest. The discharge of government functions goes beyond the adjudication of

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25 Ibid [34] (McHugh J).
26 Ibid [59].
27 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).
28 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

rights, interests and obligations between persons, and is focused on the public good, community and distributive justice.[29]

17.22 As discussed in Chapter 16, statutes providing immunity from tort liability are generally based on the need to protect socially worthwhile agencies, activities or services from liability for negligence or strict liability. This is especially so where certain types of liability would make the agency's task almost impossible. An example is the immunity given under s 57 of the *Archives Act 1983* (Cth) to the Commonwealth against liability for defamation where access is given to records required to be made available for public purposes.

17.23 Some Australian laws that give executive immunities a wide application may be justified. The ALRC is seeking submissions identifying those Commonwealth laws that are *not* justified, and explaining why these laws are not justified.

29 Steven Price, 'Crown Immunity on Trial: Desirability and Practicality of Enforcing Statute Law against the Crown' (1990) 20 *Victoria University of Wellington Law Review* 213, 219, 228; David Cohen, 'Thinking about the State: Law Reform and the Crown in Canada' (1987) 24 *Osgoode Hall LJ* 379, 391.

18. Judicial Review

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A common law principle

18.1 Judicial review is about setting the boundaries of government power.[1] It is about ensuring government officials obey the law and act within their prescribed powers.[2]

18.2 This chapter discusses the source and rationale of this common law principle; how the principle is protected from statutory encroachment; and when laws that limit judicial review may be justified.[3] The ALRC calls for submissions on two questions.

> **Question 18–1** What general principles or criteria should be applied to help determine whether a law that restricts access to judicial review is justified?
>
> **Question 18–2** Which Commonwealth laws unjustifiably restrict access to judicial review, and why are these laws unjustified?

18.3 In *Church of Scientology v Woodward* (1982), Brennan J said:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from

1 'The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised and upon that the whole system was constructed': *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

2 'The reservation to this Court by the *Constitution* of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–514 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

3 The Terms of Reference refer to laws that 'restrict access to the courts'. The ALRC understands this to refer to the common law power of judicial review, rather than to the broader but related subject of access to justice.

> exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[4]

18.4 Access to the courts for the purpose of judicial review is an important common law right. In his *Introduction to Australian Public Law*, David Clark gives a brief history of judicial review of administrative action:

> Judicial review in the administrative law sense originated in the 17th century when various prerogative writs, so called because they issued in the name of the Crown, began to be issued against administrative bodies. These writs, such as certiorari, prohibition and mandamus originated in the 13th century, but were originally confined to review of the decisions of inferior courts. ... By the late 17th century the writs began to be used against administrative agencies such as the Commissioners of Sewers, and the Commissioners for Bridges and Highways. With the dramatic expansion of State functions in the 19th century and the emergence of innumerable statutory bodies, committees, commissions, and other administrative agencies, the way was open for the expansion of judicial review in this sense.
>
> The power to judicially review what were once called inferior jurisdictions (lower courts and administrative agencies) arrived in Australia with the opening of the first Supreme Courts in Van Diemen's Land and New South Wales in 1824 ... The power to review by certiorari, prohibition and mandamus was, in origin, a common law power and was, therefore, a power of jurisdiction created by the courts through their judicial decisions.[5]

18.5 However, as noted further below, statutes sometimes provide that certain administrative or judicial decisions may not be reviewed by courts. A privative clause—also known as an ouster clause—is a statutory provision that attempts to restrict access to the courts for judicial review of administrative decisions. They are 'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.[6]

18.6 Other means are also sometimes used to limit judicial review, such as placing time limits on when proceedings can be initiated.

Protections from statutory encroachment

Australian Constitution

18.7 The *Australian Constitution* gives important powers of judicial review to the High Court which cannot be taken away by statute. Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.[7] Chief Justice Gleeson said that this provision 'secures a basic element of the rule of law':

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4 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

5 David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) 247.

6 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Matthew Groves, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 277.

7 *Australian Constitution* s 75(v).

> The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the *Constitution*, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.[8]

18.8 In light of this Constitutional power, courts may give privative clauses a much narrower interpretation than the text of the provision suggests. So much narrower, in fact, that such clauses may sometimes be largely or even entirely deprived of effect.

Principle of legality

18.9 The principle of legality provides further protection to judicial review.[9] When interpreting a statute, courts will presume that Parliament did not intend to restrict access to the courts, unless this intention was made unambiguously clear.[10] For example, in *Magrath v Goldsborough Mort & Co Ltd* (1932), Dixon J said:

> The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably.[11]

18.10 In *Public Service Association (SA) v Federated Clerks' Union* (1991), Dawson and Gaudron JJ said:

> Privative clauses ... are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.[12]

18.11 Dawson and Gaudron JJ went on to say:

> Thus, a clause which is expressed only in general terms may be construed so as to preserve the ordinary jurisdiction of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted by failure to exercise jurisdiction or by an act in excess of jurisdiction.[13]

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8 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ).

9 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

10 *Momcilovic v The Queen* (2011) 245 CLR 1, 46–47 [43]–[44] (French CJ).

11 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134.

12 *Public Service Association (SA) v Federated Clerks' Union of Australia (CLR)* (1991) 173 (Unreported, 1991) 132, 160 (Dawson and Gaudron JJ). Quoted with approval in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492–493 [30]–[32] (Gleeson CJ). The *Plaintiff S157/2002* case concerned 'privative clause decisions' in the *Migration Act 1958* (Cth). Section 474(1) of that Act provided: 'A privative clause decision: (a) is final and conclusive; and (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.'

13 *Public Service Association (SA) v Federated Clerks' Union of Australia (CLR)* (1991) 173 (Unreported, 1991) 132, 160 [18] (Dawson and Gaudron JJ).

18.12 *Hockey v Yelland* (1984) also concerned a privative clause—specifically, a Queensland statute that provided that determinations by a medical board 'shall be final and conclusive' and the claimant 'shall have no right to have any of those matters heard and determined by an Industrial Magistrate, or, by way of appeal or otherwise, by any Court or judicial tribunal whatsoever'.[14] Gibbs CJ said that this provision did not 'oust the jurisdiction of the Supreme Court to issue writs of certiorari':

> It is a well recognized principle that the subject's right of recourse to the courts is not to be taken away except by clear words.... The provision that the board's determination shall be final and conclusive is not enough to exclude certiorari... The words of the further provision... are in my opinion quite inapt to take away from the Court its power to issue certiorari for error of law on the face of the record. [15]

Justifications for encroachments

18.13 Limits on judicial review have been justified on a number of grounds, including the need for certainty and efficiency. Professor Simon Young has written that privative clauses

> have been employed by parliaments over many years for many reasons—a desire for finality or certainty, a concern about sensitivity or controversy, a wish to avoid delay and expense, or a perception that a matter requires specialist expertise and/or awareness of executive context.[16]

18.14 These reasons may not, however, justify laws that limit judicial review of jurisdictional errors. Administrative decision makers, no matter how expert, should presumably be required to act within their prescribed powers.

18.15 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[17]

18.16 Some laws that limit judicial review may be justified. The ALRC invites submissions identifying Commonwealth laws that limit judicial review without justification, and explaining why these laws are not justified.

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14 *Workers' Compensation Act 1916* (Qld) (repealed), quoted in *Hockey v Yelland* (1984) 157 CLR 124, 128 (Gibbs CJ).

15 Ibid.

16 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Groves, above n 6, 277.

17 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.

19. Other Rights, Freedoms and Privileges

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Introduction

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

19.2 The ALRC invites submissions addressing the following question.

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

List of other rights, freedoms and privileges

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

- abrogate the liberty of the individual and authorise detention;[3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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