
Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

Australian Law Reform Commission

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The High Court recently held that “marriage” in section 51(xxi) of the Australian Constitution means the union of any two natural people and includes a marriage between persons of the same sex. However, the <i>Marriage Act 1961 (Cth)</i> does not give effect to the width of the definition of “marriage” as held by the High Court. Indigenous cultural rights	50
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Introduction

1. The Law Council welcomes the opportunity to respond to the Australian Law Reform Commission's ("ALRC") Issues Paper Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (IP 46), published on 10 December 2014 (the "Issues Paper").
2. This submission responds to the Issues Paper by:
 - (a) identifying existing Commonwealth laws which may encroach upon the traditional rights and freedoms specified in the chapters of the Issues Paper; and
 - (b) considering in a high-level way whether those potential encroachments are justified.

Methodology for assessing justification

3. The key and well recognised¹ principle employed in determining whether an encroachment upon traditional rights, freedoms and privileges is justified, is 'proportionality'.
4. One of the earliest enunciations of the concept of proportionality in the development of western, liberal, legal theory is the Magna Carta Libertatum – The Great Charter of the Liberties,² which decreed that punishment must be proportional to the crime.³
5. In modern Australian legal discourse, our understanding of proportionality derives from several sources, including:
 - (a) common law jurisprudence in Australia and overseas;
 - (b) domestic human rights legislation.⁴
 - (c) international human rights instruments (such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR)); and
6. For the purposes of this Inquiry, the Law Council has adopted the approach taken by Dickson CJ of the Supreme Court of Canada in the case of *R v Oakes*,⁵ interpreting section 1 of the *Canadian Charter of Rights and Freedoms 1982*, which has been

¹ Engle, Eric, 'The History of the General Principle of Proportionality: An Overview' (2012) X.1 *Dartmouth Law Journal* 7.

² The 800th anniversary this year of the Magna Carta offers a particularly opportune time for the ALRC's current Inquiry.

³ See *The Eighth Amendment, Proportionality, and the Changing Meaning Of Punishments* (2009) 122 *Harvard Law Review* 960. In *Solem v. Helm* (1983) 463 U.S. 277, Justice Powell traced the history of the Cruel and Unusual Punishments Clause back to the Magna Carta and the English Bill of Rights of 1689, which he found to have embodied a strong principle of proportional punishment; See also *Harmelin v. Michigan* (1991) 501 U.S. 957, 111 S. Ct. 2680 (Eighth Amendment: punishment must be proportional to crime). In *Harmelin v. Michigan*, the US Supreme Court also pointed to the Magna Carta as an early source of its Eighth Amendment proportionality analysis. Chapter 20 of the Magna Carta prohibited the monarch from imposing a fine 'unless according to the measure of the offence.' It further provided that 'for a great offence [a free man] shall be [punished] according to the greatness of the offence. Under the Eighth Amendment to the American Constitution, the Supreme Court has echoed this principle by prohibiting state and federal governments from imposing fines and other forms of punishment that are disproportionate to the seriousness of the offence for which the defendant was convicted'.

⁴ For example, section 28 of the ACT Human Rights Act and section 7 of the Victorian Charter.

⁵ *R v Oakes* [1986] 1 SCR 103.

subsequently applied by the Victorian Court of Appeal in *R v Momcilovic*.⁶ Section 1 of the Canadian Charter states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. The process for determining whether a limit is ‘reasonable’ and ‘demonstrably justified’ under the test involves answering two instructive questions:
 - (a) Is the *purpose* of the limit justified?
 - (b) Are the *means* which the limit operates reasonable?
8. In responding to the first question, the purpose must be, on the balance of probabilities:
 - (a) lawful or “prescribed by law”- that is, not *ultra vires*, as well as clear and accessible to the public; and
 - (b) directed toward a “pressing and substantial” public interest.
9. In answering the second question, Dickson CJ set down a three-part proportionality test:
 - (a) The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.
 - (b) The means should impair the right in question as little as possible.
 - (c) There must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.
10. The Law Council has adopted the *R v Oakes* formulation because it has been applied in Australian domestic law⁷ and can produce logical and predictable outcomes when applied to legislation.
11. Where the justification for a limit on rights serves a competing and compelling public interest, for example the protection of national security, a greater degree of encroachment may be appropriate. That is, the more fundamental the right, the more weighty must be the countervailing consideration required to justify the encroachment. Further, the third stage of Dickson CJ’s proportionality test should consider the importance of the right encroached.
12. This submission also indicates other relevant principles and precedents, which might be drawn upon in the context of particular areas of law. For example, in criminal law, common law precedents defining the scope of the right to a fair trial, the Law Council’s *Rule of Law Principles* and general principles of criminal responsibility as set out in Part 2.1, Division 2 of the *Criminal Code Act 1995* (the Criminal Code) (Cth) may be instructive.
13. “Proportionality” is therefore a fluid test which requires those analysing and applying law and policy to have regard to the surrounding circumstances, including recent

⁶ *R v Oakes* [1986] 1 SCR 103. See also *R v Hansen* [2007] 3 NZLR 1 (NZSC).

⁷ *R v Momcilovic* (2010) 25 VR 436 (VSCA). In the High Court, this question was discussed directly only by Crennan and Kiefel JJ: *Momcilovic v The Queen* (2011) 245 CLR 1 at [541] – [559]. In adopting an analysis based on *R v Oakes*, the Law Council makes due allowance for the observation of Gummow and Hayne JJ that Australian courts must approach the questions presented by the Victorian Charter with a clear recognition of the constitutional framework within which those questions are to be decided, and the fact that both the structure and text of those other human rights systems (such as Canada’s) reflect the different constitutional frameworks within which they operate: *Momcilovic v The Queen* (2011) 245 CLR 1 at [148]–[161], [280].

developments in the law, current political and policy challenges and contemporary public interest considerations.

14. Currently, initial assessment of whether a proposed law is proportionate occurs at a number of instances during the policy and legislative process. This assessment should be subject to periodic review.

Chapter 2: Freedom of Speech

15. In Australia, freedom of speech is recognised as a right at common law, in particular protecting freedom of speech as it relates to political and governmental matters. However, this freedom is not absolute, and at the same time, the common law recognises that it can have a significant number of qualifications.⁸ Furthermore, the common law protection of this freedom may readily be overridden by statute, such as laws dealing with defamation, obscenity, public order, copyright, censorship and consumer protection. All of these categories of law recognise that there are legitimate countervailing interests which require the imposition of limitations upon freedom of expression.
16. In 1992, the High Court substantially increased legal protection for freedom of speech when it recognised an implied constitutional freedom of communication with respect to public and political matters.⁹ This now stands as the primary protection for the freedom in Australia but it is limited: it protects political speech, as an indispensable incident of representative government, provided the material was not published recklessly or with malice and the publication was reasonable in the circumstances.¹⁰ As set out in the *Issues Paper*, the High Court has developed a two-step test to determine whether a law imposes a burden on the freedom of political communication.¹¹
17. Australia is a party to the *International Covenant on Civil and Political Rights*¹² (ICCPR) and is consequently committed to the protection of freedom of expression as set down in the ICCPR.¹³ The ICCPR provides that freedom of expression may be limited in two significant circumstances, where it is provided for by law and is necessary:
- (a) for the rights or reputations of others; or
 - (a) for the protection of national security or of public order, or of public health or morals.¹⁴
18. The ICCPR is not directly incorporated into Australian law, despite being scheduled to the *Australian Human Rights Commission Act 1986* (Cth).

⁸ These include defamation, blasphemy, incitement to crime or violence, obscenity and the rules related to contempt of court.

⁹ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1

¹⁰ *Theophanus v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211; or was not actuated by malice: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; see *Eatock v Bolt* [2011] FCA 1103, at [230]

¹¹ At Chapter 2, [2.11], quoting *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976),

¹³ See art 19:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

¹⁴ *Ibid*, at art 19(3).

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19. Notwithstanding the lack of specific constitutional or legislative basis, it could be said freedom of expression and speech are highly valued and well observed in Australia, both in terms of freedom of the press, artistic and literary work and more generally in the process of robust public discussion.
 20. Nevertheless, there remain areas of challenge. For example, there is a lively debate about the appropriate balance between providing robust protection against discriminatory, hateful or defamatory treatment, whilst at the same time ensuring that clear limits are placed on the scope of liability for unlawful conduct in order to avoid unjustifiably infringing on the right to communicate freely.

Anti-Discrimination

21. Section 28A of the *Sex Discrimination Act 1974* (Cth) defines sexual harassment as unwelcome conduct of a sexual nature ‘in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be **offended, humiliated or intimidated**’ (emphasis added). Those provisions have not been found to be unreasonable in their operation in the context of that legislation.
22. The Law Council notes the recent public debate around the use of these words and the word ‘insult’ in the context of Part IIA of the *Racial Discrimination Act 1975* (Cth). . The Law Council has opined that from a civil and political rights perspective, there was a case for amendment of the current provisions. There was also a strong view among a number of constituent bodies of the Law Council that the balance was correctly struck in the existing legislation.
23. The Canadian Supreme Court has found that the government can employ a measure that restricts a right or freedom because it furthers the government’s objective in ways that other courses of action could not.¹⁵ The case *R v Keegstra*, concerned a charge of a high school teacher, under section 319(2) of the [Criminal Code](#) for ‘wilfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students.’ In that case, the majority found that the relevant sections of the criminal code did *not* infringe the Charter, and the infringements on the freedom of expression were justifiable. In applying *R v Oakes*, Dickson CJ for the majority stated that:

...the infringement of the respondent's freedom of expression as guaranteed by s. 2(b) should be upheld as a reasonable limit prescribed by law in a free and democratic society. Furthering an immensely important objective and directed at expression distant from the core of free expression values, s. 319(2) satisfies each of the components of the proportionality inquiry.

24. Following this case, and in contrast to *R v Keegstra*, the majority of the Supreme Court in *R v Zundel* held that section 181 of the *Criminal Code* – under which a person can be subject to criminal conviction and potential imprisonment on the basis of words that person has published – unjustifiably restricted freedom of expression. It was noted while it may be found that section 181 could serve legitimate purposes, Parliament had not identified a social problem, or a social problem of pressing concern, that justified the infringement. Section 181 was found by the Court to be unconstitutional.

Counter-terrorism legislation

25. Counter-terrorism legislation has the putative objective of preventing and detecting threats to national security. In this context, it is argued by government and security,

¹⁵ *R. v. Keegstra* [1990] 3 S.C.R. 697

law enforcement and intelligence agencies that the purpose of limits placed on the right to freedom of speech are justified by the counter-veiling objective of public protection from harm. Examples of such laws include:

- (a) Section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth), which prohibits disclosure by any person of information that relates to a special intelligence operation. Section 35P may not include sufficient safeguards for public interest disclosures (or “whistle-blowers”), suggesting a disproportionate infringement on freedom of speech. For example, members of the public, lawyers or journalists must either: refrain from making the public disclosure despite believing it is in the public interest; rely on the Inspector-General of Intelligence and Security’s (IGIS) processes to deal with the alleged conduct; or make the disclosure and hope that the Commonwealth Director of Public Prosecutions will not prosecute on public interest grounds and/or that the Attorney-General would not consent to a prosecution under section 35P.¹⁶ Broader public interest disclosures by current or former Commonwealth public officials are also prohibited.¹⁷
- (b) Division 80 and section 80.2C of the *Criminal Code Act 1995* (Cth) (urging violence and advocacy of terrorism offences) are framed broadly and may have the potential to unduly burden freedom of expression. The existence of the urging violence offences can have the effect of making people cautious about publishing material that may potentially be regarded as urging violence or advocating terrorism, even where there is no attempt to prosecute or no successful prosecution.¹⁸ The existence of the good faith defence (section 80.3) slightly allays these concerns. However, the fact that a court may exercise its discretion to find that a particular act that attracted a charge falls within the limited good faith exception after the fact, may not address concern of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the offences. Similar issues may arise in terms of subsection 102.1(1A) of the *Criminal Code Act 1995* (Cth), which enables advocacy in terms of promotion or encouragement to be included as a ground for terrorist organisation proscription.¹⁹
- (c) Section 9A of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth) (which amended Australia’s classification regime to provide that certain types of publications, films and computer games must be refused classification if they ‘advocate the doing of a

¹⁶ The Attorney-General announced on 30 October 2014 that he had given a direction to the DPP that no journalist may be prosecuted under section 35P (or the controlled operations or delayed notification search warrants unauthorised disclosure offences) without the AG’s consent: Attorney-General for Australia Senator the Hon George Brandis QC, *Press conference announcing the introduction of the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, (30 October 2014) <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/FourthQuarter2014/30October2014-PressConferenceAnnouncingIntroductionOfTelecommunicationsInterceptionAndAccessAmendmentDataRetentionBill.aspx>

¹⁷ See: Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the National Security Legislation Amendment Bill (No. 1) 2014*, 6 August 2014.

¹⁸ This view was shared by the Senate Legal and Constitutional Legislation Committee: Senate Legal and Constitutional Legislation Committee Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No. 2) 2005* (2005) 114 [5.169],

¹⁹ See: Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Anti-Terrorism Bill (No. 2) 2005*, 11 November 2005; Law Council of Australia, Submission to the Australian Law Reform Commission, *Review of Sedition Laws*, 19 July 2006; Law Council of Australia, Submission to the Attorney-General’s Department, *Inquiry into the Effectiveness of Chapter Two of the Model Criminal Code*, 19 December 2008.

terrorist act') – may inadvertently capture genuine political commentary and education materials, and stifle robust public debate on terrorist-related issues.²⁰

- (d) Section 11.4 and Part 5.3, Division 101 of the *Criminal Code Act 1995* (Cth) (relating to incitement and the terrorism offences, particularly the preparatory terrorism offences) – the preparatory nature of the terrorism offences, coupled with the broad and ambiguously defined terms on which the offences are based, makes it difficult to determine the precise ambit of the terrorist act offences. Under subsections 101.4(3) and 101.5(3), for example, these offences will be committed even if a terrorist act does not occur; or the thing or document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or the thing or document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

The definition of 'terrorist act' in the Criminal Code is also broadly framed. Such features, when combined with the offence of incitement may impact on freedom of speech more than is necessary to achieve the putative objective and is not specific enough to avoid capturing less serious conduct.²¹

Chapter 3: Freedom of Religion

26. Freedom of religion is a fundamental right and is subject to strong protections both domestically and internationally. The Law Council has not identified any laws imposing any specific restriction on the freedom of religion. However any specific encroachment is likely to arise in balancing religious freedom with other protected freedoms, such as freedom of speech.

Chapter 4: Freedom of Association

27. Freedom of association protects the right to form and join associations to pursue common goals.
28. There are various sources for the protection of freedom of association in Australian and international law :
- (a) while there is no express protection of association in the Constitution, sections 7 and 24 have been interpreted as providing an implied freedom of political communication.²² Any such protection would appear to be narrower in scope than the right to freedom of association as recognised under international law;

²⁰ See: Law Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007*, 13 July 2007.

²¹ See: Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No. 2] and Related Bills*, April 2002; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Anti-Terrorism Bill 2004*, 26 April 2004; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Anti-Terrorism Bill [No. 2] 2004*, 15 July 2004; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the National Security Legislation Amendment Bill 2010* and submission to the Parliamentary Joint Committee, *Inquiry into the Law Enforcement Bill 2010*, 10 May 2010; Law Council of Australia, Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document*, 29 August 2008.

²² *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ). See also: *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 [28]; *Unions NSW v State of New South*

- (b) noting protections under international law, including treaties to which Australia is a party, the principle of legality offers some basis for protection of the principle in the common law, which provides that 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;²³ and
- (c) international treaties to which Australia is a party, which require States-Party to protect the freedom, include the ICCPR (Articles 21 and 22),²⁴ the International Covenant on Economic, Social and Cultural Rights (Article 8(1)(a)),²⁵ the UDHR (Articles 18, 20(1) and 27(1)),²⁶ the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Article 5) and the Convention on the Rights of the Child (CROC) (Article 15), and the Convention on the Rights of Persons with Disabilities (CRPD) (Article 21).

29. The *Fair Work Act 2009* (Cth) protects freedom of association in the workplace by ensuring that persons are free to become, or not become, members of industrial associations, are free to be represented, or not represented, by industrial associations, and are free to participate, or not participate, in lawful industrial activities.

30. The *Australian Human Rights Commission Regulations 1989* also prescribes 'trade union activity' as a ground for discrimination in employment that engages the power of the Australian Human Rights Commission under the *Australian Human Rights Commission Act 1986*.

Criminal Code Act 1995

31. In the criminal law and national security context, certain legislative measures are for the legitimate purpose of preventing operation of criminal and terrorist associations and organisations. However, there are questions as to whether there are less restrictive means of achieving the desired ends and whether they impinge on freedom of association more than necessary. For example:

- (a) Part 5.3, Division 102 of the *Criminal Code Act 1995* (terrorist membership offences - it an offence to associate with a member of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist) – the offences may disproportionately shift the focus of criminal liability from a person's conduct to their membership of an organisation. Assessing justification for the offences is difficult given the broad executive discretion to proscribe a particular organisation and the absence of publicly available binding criteria to be applied. The proscription process also involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group. An organisation can be listed as a terrorist organisation on the basis that it 'advocates' the doing of a terrorist act. The offences may also disproportionately impinge on freedom of association as the current process of proscribing terrorist organisations set out in Division 102

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).

²³ *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.

²⁴ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

²⁵ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

²⁶ Article 18 provides that everyone has the right to freedom of thought, conscience and religion, and the freedom to manifest his religion or belief in teaching, practice, worship and observance either alone or in community with others; Article 20(1) provides that everyone has the right to freedom of peaceful assembly and association; Article 27(1) provides that everyone has the right freely to participate in the cultural life of the community.

does not afford affected parties the opportunity to be heard *prior to an organisation* being listed or to effectively challenge the listing of an organisation after the fact, without exposing themselves to prosecution; and the avenues for review *after* an organisation has been listed may also be inadequate.

- (b) Part 9.9, Division 390 of the *Criminal Code Act 1995* (criminal associations and organisations - includes four offence provisions relating to criminal organisations and associating with a person in a manner which may facilitate organised crime. The offences shift the focus of criminal liability from a person's conduct to their associations. Offences of this type have the potential to unduly burden freedom of association for individuals with a familial or community connection to a member of a criminal association.
- (c) Divisions 104 and 105 of the *Criminal Code Act 1995* (control orders and preventative detention orders respectively) – allow restriction of freedom of association based on suspicion rather than charge. A person's right to associate may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge the restriction of liberty.
- (d) Section 119.2 of the *Criminal Code Act 1995* (entering, or remaining in, declared areas) –the offence may have the unintended effect of preventing and deterring innocent Australians from travelling abroad and associating with persons for legitimate purposes out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequately displace the evidential burden. The breadth of the offence combined with the evidential burden on the defendant to establish a defence may indicate that the means is not reasonable to achieving the legitimate objective.

The Australian Charities and Not-for-profits Commission Act 2012 (Cth)

32. In the context of regulation of charities and not-for-profit organisations, the Queensland Law Society (QLS) also draws the ARLC's attention to the more recent work of the English academic Jonathan Garton who provides six justifications for restriction of the freedom:
- (a) preventing anti-competitive practices;
 - (b) controlling campaigning;
 - (c) ensuring trustworthiness;
 - (d) coordinating the sector;
 - (e) rectifying philanthropic favours; and
 - (f) preventing challenges to organisational quiddity.²⁷
33. *Preventing anti-competitive practices* underscores the idea that increased constraints on charitable institutions ought not be imposed unless an evidence-based need for regulation over and above that to which non-charitable institutions are subject can be demonstrated.
34. Section 100-25 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) provides that if a person is removed from the governing body of a charity, and that person communicates instructions or wishes to communicate with remaining members on the governing body with the knowledge that he or she is accustomed to act in accordance with the first person's wishes, or with the intention that they will act

²⁷ Jonathan Edward Garton, *The Regulation of Charities and Civil Society* (D Phil Thesis, University of London, 2005) 37b, Chapter 4 generally and 151.

in accordance with the first person's wishes, there is a penalty of 1 years imprisonment or 50 penalty units (or both).

35. While addressing legitimate concern over continuing influence of former directors and decision-makers, these powers may extend beyond those conferred upon the Australian Securities and Investments Commission over companies. The QLS has noted that it does not seem appropriate to regulate charities and other forms of voluntary association more rigorously than commercial enterprises and inquiry into this limitation on freedoms is a proper subject for investigation.

Chapter 5: Freedom of Movement

36. There are various sources of Australian and international law which provide for freedom of movement:

- (a) section 92 of the Australian *Constitution* provides that intercourse among the States shall be absolutely free;
- (b) section 117 of the Australian *Constitution* provides that a resident in any State shall not be subject in any other State to any disability or discrimination which would not apply if they were resident in that other State;
- (c) under Articles 9 and 12²⁸ of the ICCPR, which appears at Schedule 2 of the *Australian Human Rights Commission Act 1986* (Cth); and
- (d) the UDHR provides that everyone has a right to freedom of movement and to leave and return to their own country,²⁹ as well as the right to seek and to enjoy in other countries asylum from persecution.³⁰

37. There are also several expressions of freedom of movement in Australian law. For example:

- (a) *Australian Passports Act 2005* (Cth);³¹
- (b) *Mutual Recognition Act 1992* (Cth);³² and
- (c) *Human Rights Act 2004* (ACT)³³ and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).³⁴

38. For the purpose of determining whether laws unjustifiably interfere with freedom of movement, the Law Council considers that the preferable test is that set out by the Supreme Court of Canada in *R v Oakes*, unless otherwise identified in this Chapter.³⁵

²⁸ The UN Human Rights Committee in its *General Comment 27: Freedom of Movement*, [8] has described Article 12(2) of the ICCPR as providing everyone the right to leave any country, including his or her own (both leaving temporarily and for permanent emigration). This right is said to include the right to obtain the necessary travel documents (e.g. passport) required to travel internationally (at para 9). Article 12(3) of ICCPR sets out the permissible restrictions on this right being that they are enshrined in law, consistent with other ICCPR rights and are reasonably necessary for one or more of the enumerated purposes (protecting national security, public order, public health or morals, the rights and freedoms of others).

²⁹ At art 13.

³⁰ At art 14.

³¹ See s 7.

³² See s 3: The principal purpose of the Act is to enact legislation authorised by the Parliaments of States under 51 (xxxvii) of the Australian *Constitution*, and requested by the legislatures of the Australian Capital Territory and the Northern Territory, for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia.

³³ See s 13.

³⁴ See s 12.

³⁵ *R v Oakes* [1986] 1 SCR 103.

Commercial and Corporate Law

39. Following the High Court's decisions in *Street v Queensland Bar Association*,³⁶ agreements by the Council of Australian Governments (COAG) in the 1990s and later for the mutual recognition of professional and other occupational qualifications (of which the *Mutual Recognition Act 1992* (Cth) is an expression), civil issues with respect to freedom of movement have not been prominent.
40. Section 117 of the Australian *Constitution* does not apply to aliens, or arguably to corporations. However, given current national Corporations and other national or uniform business legislation, this is not a significant issue for companies.

Migration Laws - Indefinite detention

41. The Law Council's Asylum Seeker Policy³⁷ and its Policy Statement on Principles Applying to the Detention of Asylum Seekers³⁸ state that no-one should be subjected to arbitrary detention.
42. The *Migration Amendment Act 2013* (Cth) excludes any person who is assessed to be a direct or indirect risk to security³⁹ from applying for a protection visa, including those found to be refugees. Accordingly some refugees may be at risk of prolonged or indefinite immigration detention as a result of an adverse assessment issued by ASIO. Such refugees are unable to obtain a protection visa in Australia and unable to return to their country of origin due to a genuine fear of persecution. Under current policy settings, such refugees are also ineligible for release into community detention arrangements or other forms of conditional release. This may be an unjustified encroachment on freedom of movement.
43. The balance between freedom of movement and national security, may not have been achieved, as the UN Human Rights Committee found⁴⁰ that the Australia's treatment of refugees with adverse security assessments from ASIO (resulting in their indefinite detention as inadmissible and non-removable) involves 153 violations of Australia's international treaty obligations under the ICCPR:
- unlawful arbitrary detention in violation of Article 9(1) of the ICCPR (because Australia has not substantiated the necessity of their detention or the lack of feasible alternatives to it);
 - a failure to provide effective judicial remedies in violation of Article 9(4) (because the Australian courts cannot review the substantive necessity of detention and order release, but is a purely formal review of whether someone has a visa or not); and
 - cruel, inhuman or degrading treatment in detention contrary to Article 7 ('*The combination of the arbitrary character of (their) detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to (them) and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them*').

³⁶ (1989) 168 CLR 461

³⁷ See [10(c)].

³⁸ See [2(a)] and [6(a), (b) and (i)].

³⁹ within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979 (Cth)

⁴⁰ See: *FKAG v Australia*, UN Human Rights Committee Communication No 2094/2011 (26 July 2013) and *MMM v Australia*, UN Human Rights Committee Communication No 2136/2012 (25 July 2013).

Migration Laws - Right of re-entry

44. The ability of non-citizens to leave and re-enter Australia is dependent on the type of visa issued under Commonwealth legislation. Particularly, the Law Council notes some concerns may arise with respect to the newly re-introduced Temporary Protection Visa (TPV), and the Bridging Visa E (BVE).
45. TPVs were reintroduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).
46. The legislation⁴¹ provides that it is not possible under any circumstances for a TPV holder to return to the country from which they sought protection and any other departure from Australia must be authorised by the Minister in writing. These requirements encroach on the freedom of movement of the TPV holder. This may not be justified when consideration is paid to other forms of visas and the right of re-entry held by those individuals. This restriction on movement could also be considered contrary to the Law Council's Rule of Law Principle that 'the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds'.⁴²
47. Another form of visa that restricts freedom of movement is the BVE. BVEs allow the applicant to live in the community and are granted to asylum seekers who arrived by boat before 19 July 2013 and who are awaiting the resolution of their immigration status. A BVE is designed as a temporary measure.
48. A BVE holder will lose his or her visa upon departure from Australia, amounting to a restriction on his or her freedom of movement. Encroaching on this freedom may be supported by the need for administrative efficiency in the processing of visa applications. However such a justification may not outweigh the restriction placed on a large number of individuals who have remained on BVEs for some time⁴³ despite its intended operation as a temporary measure. On this basis, the restriction on freedom of movement for BVE holders may not be reasonable or proportionate.

Criminal and counter-terrorism legislation

49. Restricting a person's freedom of movement may be for the legitimate purpose of preventing individuals from taking part in hostilities, engaging in terrorist activities or crime. However, questions arise as to whether certain counter-terrorism legislative measures are proportionate to achieving this objective and justified. Examples of such laws include:
- (a) Section 119.2 of the *Criminal Code Act 1995* (entering, or remaining in, declared areas) – as discussed above in relation to freedom of association,

⁴¹ See *Migration Regulations 1994* (Cth), Schedule 8, Condition 8570:

The holder must not:

(a) *enter a country by reference to which:*

- (i) *the holder was found to be a person to whom Australia has protection obligations; or*
(ii) *for a member of the family unit of another holder--the other holder was found to be a person to whom Australia has protection obligations; or*

(b) *enter any other country unless:*

- (i) *the Minister is satisfied that there are compassionate or compelling circumstances justifying the entry; and*
(ii) *the Minister has approved the entry in writing.*

⁴³ At 30 September 2014, 24,775 of the 30,003 BVEs granted to those who arrived in Australia by boat up until 19 July 2013 remained in the community.

may provide an unreasonable deterrent or restriction on persons travelling for legitimate purposes.⁴⁴

- (b) Section 22A of the *Australian Passports Act 2005* (Cth) (the Minister for Foreign Affairs has the discretion to suspend a passport for a period of 14 days on receipt of recommendation from ASIO) and section 15A of the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) – the Law Council recognises the necessity for such a power but queries whether there are sufficient safeguards to ensure proportionality. For example, there is no legislative safeguard preventing multiple suspensions of a travel document. As long as new information that was not before ASIO at the time of the suspension request and during the period of the suspension multiple requests of suspension are conceivable. While the Explanatory Memorandum to the Bill notes that subsection 22A(3) is not intended to allow for consecutive rolling suspensions,⁴⁵ but the provisions do not preclude this outcome and accordingly questions arise as to whether there are adequate safeguards in place.
- (c) Section 48A of the *Australian Passports Act 2005* (Cth) – the refusal to issue a passport or the cancellation of an existing passport is a clear limitation on a person's freedom of movement. While this may be done to further national security or other legitimate purposes, the lack of a notification obligation when the refusal or cancellation is issued questions the justification for such an encroachment. . In the context of the test of proportionality in the ICCPR, the United Nations Human Rights Committee has interpreted this to require that reasons for the application of restrictive measures be provided.⁴⁶
- (d) Subsections 15AA(3C) and (3D) of the *Crimes Act 1914* (Cth) - provide for a grant of bail to be stayed if the prosecution notifies an intention to appeal. That is, even where a person charged with a terrorism offence is granted bail, he or she may be detained in custody for up to three days if the prosecution notifies an intention to appeal the bail decision. This may unjustifiably encroach on freedom of movement, given a bail authority has considered the application for bail and has been sufficiently satisfied to make an order that bail be granted.
- (e) Divisions 104 and 105 of the *Criminal Code Act 1995* (control orders and preventative detention orders respectively) – allow restriction of freedom of movement based on suspicion rather than charge. A person's liberty may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge the restriction of liberty.⁴⁷
- (f) Division 3A of Part 1AA of the *Crimes Act 1914* (Cth) (police search and seizure powers in relation to terrorist acts and terrorism offences) - empowers the Attorney-General to prescribe a security zone where anyone in the zone

⁴⁴ See: Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 3 October 2014.

⁴⁵ See Explanatory Memorandum to the Bill, p. 82.

⁴⁶ United Nations Human Rights Committee, *General Comment 27*, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

⁴⁷ See: Law Council of Australia, Submission and Supplementary Submission to the Independent National Security Legislation Monitor, *Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention orders*, 10 September 2012, and 10 December 2012; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Anti-Terrorism Bill (No. 2) 2005*, 11 November 2005; Law Council of Australia, Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document*, 29 August 2008; Law Council of Australia, Submission to the Attorney-General's Department, *Australia's response to the concluding observations of the UN Committee against torture*, 1 September 2008.

can be subject to police stop, search, questioning and seizure powers, regardless of whether or not the police officer has reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act. Detention for searching based only on an individual's presence in a particular geographical location is an encroachment on freedom of movement. The broad nature and significant scope of this power brings into question its proportionality, particularly as, once a security zone is prescribed, there are few restrictions on the exercise of the power.

- (g) Sections 23D, 23DA and 23DB-23DF of Part IC of the Crimes Act (how long and for what purposes a person may be detained without charge, upon arrest for a terrorism offence – police investigation powers in relation to those arrested for terrorism offences) – queries arise regarding whether the longer time limits for questioning in relation to terrorism offences are justified when compared with other serious offences. Allowing for up to seven days to be excluded from the calculation of the investigation period in terrorism cases may also be unjustified and may result in a possible period of detention without charge for up to eight days, or more. This is considerably longer than the period of pre-charge detention permitted under the Crimes Act in non-terrorism cases.⁴⁸ While national security is a balancing factor, detention for lengthy periods without charge brings into question whether the encroachment is proportionate or justified.

6: Property Rights

50. Property rights are among the oldest enduring and recognised form of rights in the Anglo-legal tradition. Property rights underpin a broad range of other rights and are regarded as essential to individual freedom and economic development.
51. There are various sources in Australian and international law for the protection of property rights:
- (a) Constitution Act s 51 (xxxi) – acquisition of property on just terms (although this does not apply to acquisitions by a State (*Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399).
 - (b) Common law presumption against acquisition of property unless by unambiguous statutory provisions (*Clissold v Perry* (1904) 1 CLR 363), coupled with a presumption that vested property will not be taken away without compensation.
 - (c) Expression in Australian statutes:
 - (i) *Lands Acquisition Act 1989* (Cth);
 - (ii) *Corporations Act 2001* (Cth), s 1350;
 - (iii) *Life Insurance Act 1995* s 251;
 - (iv) *Northern Territory (Self-Government) Act 1978* (Cth), s 50; *Australian Capital Territory Self-Government Act 1988* (Cth), s 23(1)(a);

⁴⁸ Law Council of Australia, Submission to Independent Monitor of National Security Legislation, *Inquiry into the review of the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth); Part 5.3 of the Criminal Code Act 1995 (Cth); Part IIIAAA of the Defence Act 1903; the Australian Passports Act 2005 (Cth); and section 15AA, 19AG and Division 3A of Part IAA and Part IC of the Crimes Act 1914 (Cth)*, 10 February 2014; Law Council of Australia, Submission to the Attorney-General's Department, *National Security Legislation Discussion Paper*, October 2009.

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- (v) *Native Title Act 1993* (Cth); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); and
 - (vi) Intellectual property laws (*Copyright Act 1968* (Cth), *Patents Act 1990* (Cth), *Trademarks Act 1995* (Cth) and *Designs Act 2003* (Cth)).
- (d) International law – UDHR Article 17; customary international law including the legality principle at common law (*Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502; *Plaintiff S157 v Commonwealth* (2003) 195 ALR 24).

52. As noted by the Commission, the main justification for encroachment on property rights is the public interest (e.g. environmental protection, payment of taxes or penalties, cultural heritage and native title, or other regulation). Other exceptions include:

- (a) where there is no “acquisition” (e.g. Commonwealth regulation which restricts certain property rights but does not involve any transfer or vesting of property in any other party or laws that prevent a person doing certain things or require a person to do certain things to property); and
- (b) where there is no “property” (i.e. a right to receive a benefit, such as social security).

53. Suggested additional criteria for determining whether a breach of property rights is lawful might be whether

- (a) the public interest in acquisition, abrogation or erosion of the property right outweighs the public interest in preserving the property right; and
- (b) is the acquisition, abrogation or erosion of the property right lawful.

Property rights as fundamental rights

54. For as long as the legal enforcement of property rights has been available, there has been conjecture around whether property rights, either inadvertently or by design, re-enforce the social and economic advantages. In theory, Western, free-market legal systems have evolved to protect individuals against exploitation by land owners, through the development of a complex range of legal rights and interests in land.

55. Among the most influential philosophers on property rights was John Locke, who established as his thesis that private property is essential for liberty:

“...every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.

“...The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property*.”⁴⁹

56. Apart from establishing property rights as a right, to be protected and enjoyed by all “freemen”, Locke’s theories have provided bedrock for liberal, free-market economics. His writings have also been expanded by other liberal-theorists, notably the United States congressman, James Madison, who expanded the notion of property to include not just land and buildings but opinions, conscience, and rights:

⁴⁹ John Locke (1690) *The Second Treatise of Civil Government*, sec 27 and 124. See <http://www.constitution.org/jl/2ndtreat.htm>

“In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.”⁵⁰

Interference with property rights under State laws

57. All acquisitions of property by the Commonwealth are subject to the broad constitutional protection in s 51(xxxi) of the *Constitution*. This serves largely to invalidate any Commonwealth acquisition of property (or federal law with that effect) which did not provide compensation on “just terms”. It is noted that this is broadly consistent with international law principles and a generally accepted remedy in respect of acquisitions made in the public interest.
58. However, a significant gap in property rights protection may exist due to the lack of any constitutional or general protection from acquisition other than on just terms under State constitutions or statutes. In some cases, this has resulted in States compulsorily or inadvertently acquiring or interfering with property rights, without any corresponding compensation for the right-holder. Of particular concern to this Inquiry is where this may have occurred due to intergovernmental arrangements or agreements between the Commonwealth and States, which require or encourage States to interfere with property rights but with no corresponding duty to compensate on just terms.
59. In such cases, there has been no remedy available to the land-owner because the scheme might have been established informally, through mutual agreement, rather than through a federal statute.

Spencer v the Commonwealth (2010) 241 CLR 118

60. One example is the case of *Spencer v the Commonwealth (2010) 241 CLR 118* where it was argued before the High Court that the power conferred in s 96 (Federal-State financial relations) did not permit the Commonwealth providing financial assistance to a State by way of agreement, rather than statute, on such conditions that would require the State to compulsorily acquire property other than on just terms.⁵¹
61. While, the case was struck out by the Federal Court and Full Federal Court as not having reasonable prospects of success, the High Court ruled that the Federal Court had erred in finding that the case did not have reasonable prospects of success and referred it back for reconsideration. The case appears to demonstrate a possible inconsistency in relation to protection of property rights under Australian law.

Criminal Law

62. Examples of criminal laws which may unjustifiably interfere with property rights include:
- (a) Subsections 3K(3) and 3K(3AA) of the *Crimes Act 1914* (electronic equipment may be temporarily removed from warrant premises for the purposes of examination) – under these provisions an executing officer need not inform the person where and when the equipment will be examined if he or she believes on reasonable grounds that having the person present might endanger the safety of a person or prejudice an investigation or prosecution. The time limit allowed for examination of removed electronic equipment is 14 days – see subsections 3K(3A) and 3K(3B)). The time period allowed for an examination of removed electronic equipment may involve a significant disruption to

⁵⁰ James Madison (1792), *Property*, National Gazette. See <http://www.heritage.org/initiatives/first-principles/primary-sources/madison-on-property>

⁵¹ Following *ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140*

business and unjustifiably interfere with property rights, if a more proportionate measure is available to achieve the same end.

- (b) *Proceeds of Crime Act 2002* (POCA) civil confiscation proceedings and unexplained wealth proceedings have the potential to interfere with property rights. Consideration should be given as to whether these schemes contain adequate safeguards to ensure proportionality and that intrusion upon property rights is justified.
- (c) Section 35K of the ASIO Act excuse the Commonwealth from liability to pay a person compensation for property damage in the course of or as a direct result of a special intelligence operation. This may not be justified in many cases as a matter of national security if, for example, the property is owned by a third party or becomes damaged incidentally to the special intelligence operation. Further, precluding payment of compensation tends to increase the likelihood that such an encroachment is disproportionate.
- (d) Part 1AAA of the *Crimes Act 1914* allows an AFP member or special member to search a property under a delayed notification search warrant without immediate notification to the occupier. As there is only provision for compensation for damage to electronic equipment (section 3ZZCI) rather than other property owned by an individual, questions arise as to whether the scheme reasonable or proportionate.

Chapter 7: Retrospective Laws

63. The Law Council considers that, in general, retrospective laws are unfair and inefficient policy instruments, contrary to the Law Council's rule of law principle that "the law must be both readily known and available, and certain and clear"⁵² and Lord Bingham's first rule of law principle that "the law must be accessible and so far as possible intelligible, clear and **predictable**"⁵³ (emphasis added).
64. In accordance with this principle, retrospective laws should only be used in exceptional circumstances, where the benefits of doing so heavily outweigh the costs.
65. Legislative retrospectivity raises a number of principles-based issues, including that:
- (a) Such laws run counter to the general rule of law principle that a citizen has a right to determine the law applicable to him or her at any given date. If such laws cannot be known ahead of time, individuals and businesses may not be able to arrange their affairs to comply with them. It potentially exposes individuals and businesses to sanctions for non-compliance and despite the high societal cost, such retrospective laws cannot guide action and so are unlikely to achieve their "behaviour modification" policy objectives in any event.
 - (b) Any retrospective change also has the potential to be unfair with increased potential for unintended consequences.
 - (c) The process of imposing retrospective laws may create confusion and unpredictability, and goes against the principle of transparency in the process of lawmaking. Stable and predictable regulation, even if suboptimal, is preferably to chaos and uncertainty.

⁵² Principle 1, Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

⁵³ <http://www.theguardian.com/law/2011/sep/07/rule-of-law-tom-bingham> Peter Willis comment: *Better to source to published monograph: T Bingham The Rule of Law* (Allen Lane, London 2010)

66. The Law Council considers that the Supreme Court of Canada, in *R v Oakes*⁵⁴, set out the preferable test for determining whether retrospective laws unjustifiably change legal rights and obligations or create offences with retrospective application.

Environmental Law

67. The Law Council's policy is that legislation should only be given retrospective effect in exceptional circumstances, as it is fundamental to the principle of predictable, stable civil society and that the public should be able to conduct their affairs on the assumption that legislation in place at the time decisions are taken, will be complied with by decision-makers.

68. One example is the *Environment Legislation Amendment Act 2013* (Cth) which amended the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in consequence of the decision in [Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities \[2013\] FCA 694](#). The legislative amendment had the effect of validating retrospectively Executive decisions that were not authorised by the EPBC Act when made.

Commercial and Corporate Law

69. The retrospective application of laws as it applies to businesses can take a number of forms, including both overtly retrospective provisions (law such as those described above), and those that are 'effectively' retrospective, such as changes which:

- (a) are introduced so abruptly that they do not give businesses sufficient time to adjust their business practices; or
- (b) capture activities which will occur after the law has commenced, but which are the result of arrangements that were entered into before the law commenced.

70. Legislation which is 'effectively' retrospective if key terms are not defined or its operation is overly reliant on guidance, such that business is unable to gauge the compliance burden and feasibility until after the legislation has commenced.

71. Legislative retrospectivity can cause a number of practical difficulties for business, and the wider economy, including:

- (a) Actual and reputational damage to the market (sovereign risk). Businesses place a premium on the certainty and stability of the legal systems within which they operate. They must know that the law in place when transactions occur will be the law that applies to them. Retrospective laws call into question the integrity of the legal system and undercut the integrity of existing and prospective rules. They have the potential to seriously damage the confidence that consumers and businesses place in the market to which they apply, as well as that market's national and international reputation. Such laws may reduce and place at risk Australia's standing as a place to do business, may deter people from doing business in the jurisdiction for fear of further unexpected changes to the rules, and may also have the effect of reducing competition and consumer choice in the market by affecting the solvency of businesses operating within it.
- (b) The application of retrospective laws may disrupt business planning processes for many businesses, and may result in high compliance costs. The imposition of such laws may also cause businesses to withdraw from the market for various reasons, including on the basis that they have no means of protecting

⁵⁴ *R v Oakes* [1986] 1 SCR 103.

themselves against retrospective changes which may bring the solvency of their firms into question.

- (c) The direct and indirect costs (including compliance costs) of retrospective laws may be passed on to innocent third parties such as investors and shareholders, with no material gain to government or achievement of policy objectives. As the impact of retrospective laws is likely to be less predictable than for prospective laws, so is the way in which the costs arising from such laws are passed on throughout the community.
- (d) Retrospective laws increase the complexity for businesses that need to comply with them, and this compliance burden may well frustrate the original policy objectives in introducing the laws. Furthermore, the effectiveness of such laws may well be reduced by the fact that the relevant changes may not have been the subject of a normal consultation process, with the result that the (unintended) consequences that may arise from the imposition of such laws may not have been fully tested prior to their introduction.

72. In applying the *R v Oakes* test, the following specific questions arise:

- (a) about whether the *purpose* of the limit is demonstrably justified:
 - (i) Is it absolutely necessary for the proposed retrospective law to be applied, and are the benefits of introducing such a provision commensurate with the substantial risks and costs to which it would give rise? **OR**
 - (ii) Is the likely harm that would result from the imposition of the measure sufficiently minimal to warrant its introduction such as where the measure simply confirms or clarifies a currently held interpretation of the law, without the introduction of new policy, or merely closes a 'loophole'?
- (b) about whether the *means* the limit uses are reasonable:
 - (i) Will the proposed law apply only in limited circumstances, given that it is important that retrospective legal change be the exception rather than the norm?
 - (ii) Is the imposition of the proposed retrospective provision consistent with the Government's published principles of good regulation about when and to what extent retrospective change should be introduced?

Taxation

73. Division 815 of the *Income Tax Assessment Act 1997* (Cth) was introduced by the *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012* (Division 815 Bill). The Law Council believes the law's application was retrospective and could not be justified as a proportionate response under the *Oakes* test.

74. Prior to the enactment of the Division 815 Bill was enacted, the Law Council submitted to the Senate Economics Legislation Committee that the process for its introduction was flawed, because:

- (a) there was no suggestion that the retrospective application of Division 815 was intended to close any loophole that was being exploited by taxpayers in the then applicable Division 13 of the *Income Tax Assessment Act 1936* (Cth); and
- (b) no 'references' (let alone clear and unambiguous public statements) were previously made to place taxpayers on notice of Parliament's intention to introduce this particular regime.

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75. The Law Council disagreed that previous transfer pricing law amendments enacted in 2003 (as referred to in paragraph 1.17 of the Explanatory Memorandum (**EM**) to the Division 815 Bill) evidenced a prior understanding that the transfer pricing rules would operate in the manner proposed by the Division 815 Bill. Furthermore, the Law Council questioned whether the Commissioner of Taxation's 'long held' view around certain matters that the amendments to the transfer pricing rules addressed necessarily equated with Parliament's intention. Moreover, as indicated in a speech given by Mr Jim Killaly of the ATO in 2008, the ATO was aware that there were differing views.
76. The Law Council noted that there had been no attempt by Parliament to clarify the law in the years since the 2003 amendments, despite the fact that questions had been raised by the Courts.
77. While the Law Council accepted that the retrospective application of the law might be justified in a limited number of cases, this was not such a case given that there was no evidence of avoidance behaviour.
78. More fundamentally, the proposed amendments could not be regarded as merely 'clarifying' the then existing law, as the Division 815 Bill introduced a new test for interpretation.
79. As such, the Law Council believes there was no justification for the retrospective application of the amendments to the transfer pricing rules, and that a significant burden was imposed on taxpayers as a result of this unannounced and unanticipated regime operating on a retrospective basis. Applying the first limb of the *R v Oakes* test, the Law Council believes that the change to the law was not demonstrably justified (either in terms of the need to stop avoidance behaviour, or on the basis of the change being merely a 'clarifying' measure), and that the (retrospective) means by which the changes were introduced were not reasonable in the circumstances.

Migration laws

80. The Law Council's Asylum Seeker Policy states that Australia's laws and policies concerning asylum seekers must adhere to the rule of law, including that laws and policies affecting asylum seekers may not have retrospective operation.⁵⁵ Set out below are some examples of laws which have been introduced in this area which have had retrospective operation.

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)

81. Schedule 2 of the Act provided for the conversion of visas so that an application for one type of visa could be validly taken to be an application for another type of visa. The amendments explicitly stated that sub-section 7(2) of the *Acts Interpretation Act 1913* (Cth) – prohibiting certain retrospective measures – did not apply. The Law Council considers that people who made a valid visa application under the law as it stood should be entitled to enjoy the rights attaching to that application. Also, Schedule 6 of the Act provided that children born to unauthorised maritime arrivals prior to the commencement of the legislation will be also considered unauthorised maritime arrivals, despite being born in Australia.
82. The Law Council considers it is unlikely that the laws would satisfy the test in *R v Oakes*, and may not be justified. The changes apply new standards to circumstances which have already occurred. This may not be proportionate as the retrospective loss

⁵⁵ At [9(f)].

of rights may arguably have little impact on present and future propensity to migrate to Australia or seek residency.

Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011 (Cth)

83. This legislation was introduced in response to disturbances that had taken place in the Villawood Immigration Detention Centre in April 2011.
84. Item 6 of the Bill provided that the amendments made by Items 2 to 5 of the Bill, (which included amendments made to the character test in subsection 501(6) and the Minister's power to refuse or cancel a person's Temporary Safe Haven Visa in section 500A), applied for the purposes of making a decision under those provisions on or after 26 April 2011, whether the conviction or immigration detention offence concerned occurred before, on or after that date.
85. The Law Council considers that it is unlikely that the laws would satisfy the test in *R v Oakes*, and may not be justified. While the changes impose a penalty on those responsible for disturbances in the detention centre, it applies a new standard to these circumstances which did not exist at the time and it is uncertain what legislative policy objective may be met by these changes

Criminal laws

Foreign Evidence Amendment Act 2010 (Cth)

86. Sections 15 and 16 of the *Foreign Evidence Amendment Act 2010 (Cth)* (which retrospectively amends the *Foreign Evidence Act 1994 (Cth)* to make admissible foreign testimony (s 22(1)(aa)) and foreign material (s 24(3) and s 24(4)) obtained *before or after* the commencement of the amending act). Although the purpose of the amendments – to streamline the process for adducing foreign testimony and material as evidence in Australian court proceedings to avoid operational difficulties or inconvenience faced in particular investigations – may be demonstrably justified, a question arises as to whether the retrospective application of the law is reasonable given a serious criminal conviction could be reached on previously inadmissible foreign evidence.

Crimes Legislation Amendment (Powers and Offences) Act 2012 (Cth)

87. Sections 7 and 12 of the *Crimes Legislation Amendment (Powers and Offences) Act 2012 (Cth)* retrospectively repeals the provisions for 'automatic parole' (under section 19AL of the *Crimes Act* as at 3 April 2012) Offenders sentenced *before* the commencement were also affected by amendments relating to conditions for supervision in parole orders, which effectively repealed the three year limit on supervision for offenders who had been sentenced to less than life imprisonment and allowed the Attorney-General or his/her delegate to impose a supervision condition up to the end of the parole order.
88. The retrospective application of these provisions means that offenders sentenced to less than 10 years imprisonment could no longer automatically be released on completion of the non-parole period, as they would have expected, and may also be subject to longer periods of supervision upon release.
89. While the purpose of the law (to enhance criminal investigation and enforcement) may be demonstrably justified, a question arises as to whether retrospective application of the law is reasonable or aids that purpose sufficiently to justify the potential injustice that might result.

Chapter 8: Fair Trial

90. Fair trial as a right and freedom draws from Magna Carta, which provides:

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled. Nor will we proceed with force against him except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.”⁵⁶

91. Today, the rights and freedoms which together ensure that a trial is fair derive from various sources, include:

- (a) common law principles.⁵⁷ For example, in *Dietrich v The Queen*⁵⁸ the High Court held that although there is no absolute right to have publicly funded counsel, in most circumstances and in the interests of a fair trial, a judge should grant requests for an adjournment or stay when an accused is unrepresented;
- (b) principles of unfair prejudice which apply in accordance with the uniform Evidence Acts;⁵⁹ and
- (c) chapter III of the Australian Constitution.⁶⁰ One important aspect of judicial power is judicial discretion which helps to ensure the court’s ability to ensure a fair trial.

92. International law, including Article 10 of the UDHR,⁶¹ Article 4 and 14 of the ICCPR,⁶² Article 40 of the CROC and Article 13 of the Convention on the Rights of Persons with Disabilities.

Criminal and national security law

93. Examples of Commonwealth laws which may unjustifiably limit the right to a fair trial include:

- (a) Section 34AA of the *Australian Security Intelligence Organisation Act 1979* (Cth)⁶³ – the right to a fair trial extends to the right to test evidence used against a defendant to a criminal charge. This principle requires that mechanisms designed to prevent disclosure of certain evidence must be considered exceptional, and limited only to those circumstances that can be

⁵⁶ Chapters 39 and 40 in the original 1215 version of Magna Carta

⁵⁷ As found, for example, in *Dietrich v The Queen* (1992) 177 CLR 292; *X7 v Australian Crime Commission* [2013] HCA 29; *Lee v NSW Crime Commission* [2013] HCA 39; *Lee v The Queen* [2014] HCA 20 (*Lee #2*).

⁵⁸ *Dietrich v The Queen* (1992) 177 CLR 292.

⁵⁹ *Evidence Act 1995* (Cth); Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005).

⁶⁰ This requires 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’ – see *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

⁶¹ Article 10 provides that ‘everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of... any criminal charge against him’.

⁶² Under article 4 of the ICCPR, countries may take measures derogating from the right to a fair trial and fair hearing ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed’. Such measures may only be taken ‘to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’.

⁶³ Section 34AA enables evidentiary certificates to be issued in relation to acts done by, on behalf of, or in relation to ASIO in connection with any matter in connection with a warrant issued under certain sections. These provisions relate to the use of special powers by ASIO, such as search warrants, computer search warrants, and listening and tracking device warrants.

shown to be necessary. The right to a fair trial may not have been appropriately balanced against the public interest in non-disclosure.

- (b) Sub-sections 154(6A) and 231A(2A) of the *Bankruptcy Act 1966* (Cth),⁶⁴ concerning confiscation proceedings. While civil confiscation proceedings are not strictly speaking a prosecutorial function, they are often punitive in nature.⁶⁵ For this reason, ordinary protections in respect of criminal matters should be applied, such as those ensuring a fair trial. The involvement of the Commonwealth DPP in the process offers a valuable safeguard and the guarantees that the person who commences and conducts the proceedings is an Officer of the Court and the Crown, with all the duties that entails, and thus has a personal obligation to ensure that the Court's powers and processes are adhered to in accordance with the right to a fair trial.
- (c) Section 266A of the *Proceeds of Crime Act 2002* (Cth) permits disclosure of information obtained under a compulsory examination to federal or state prosecutors. This means that the prosecution may obtain evidence under compulsion,⁶⁶ and that a defendant's ordinarily privileges and rights associated with a fair trial may be suspended or weakened.
- (d) Sections 179A–197U of the *Proceeds of Crime Act 2002* (Cth) do not provide a right of appeal in respect of an unexplained wealth declaration. While unexplained wealth proceedings are civil proceedings, they are nonetheless punitive in nature. Accordingly, a person should have the opportunity to have his or her judgment reviewed by a higher tribunal. The right to review is a fundamental right, encroachment upon which should be justified by reference to an over-riding and compelling public interest, which does not appear to have been made in this case.
- (e) Section 15YV of the *Crimes Act 1914* (Cth) requires a defendant to show that the evidence 'would have a substantial adverse effect' on their right to a fair hearing. This is a higher standard than that which is applied when the prosecution seeks to prevent a defendant from using the same kind of evidence under sub-section 15YV(2). This unequal onus creates an imbalance in favour of the prosecution and violates the right to the 'equality of arms principle'⁶⁷ protected by the fair trial right guarantees in articles 14(1) and 14(3)(e) of the ICCPR.⁶⁸
- (f) *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005* (Cth) – narrows judicial discretion to refuse such

⁶⁴ Under these provisions the AFP Commissioner can commence and conduct proceedings under the *Proceeds of Crime Act 2002* (Cth) (POCA) and POCA matters can be transferred between the CDPD and the AFP Commissioner.

⁶⁵ When laws are considered to be 'criminal' in nature they engage the criminal process rights under articles 14 and 15 of the ICCPR – Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 27 May – 6 June 2013 – Human Rights and Civil Penalties*, Appendix 2: Practice note 2 (interim), 19 June 2013, p 73.

⁶⁶ See for example *X7 v Australian Crime Commission* [2013] HCA 29; *Lee v NSW Crime Commission* [2013] HCA 39; *Lee v The Queen* [2014] HCA 20 (*Lee #2*).

⁶⁷ For example article 14(3)(e) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (e) 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.

⁶⁸ This view was shared by a number of groups, including the then Human Rights and Equal Opportunity Commission. See Report of the Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*, (November 2005) at [3.52]. See also Gilbert + Tobin Centre of Public Law, Submission to the Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*, 16 October 2005.

evidence when the prosecution seeks to call it, while maintaining the existing and broader test in respect of similar applications from the defendant. This unequal onus may create an imbalance in favour of the prosecution and violate the right to the 'equality of arms principle'⁶⁹ protected by the fair trial right guarantees in articles 14(1) and 14(3)(e) of the ICCPR.⁷⁰

- (g) Subsections 24(1) 39(2) and 39(3) and subparagraph s39(5)(b)(ii) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) may threaten the right to a fair trial by potentially restricting a person's right to a legal representative of his or her choosing and bringing this concept into tension with the legitimate purpose of protecting national security⁷¹. The security clearance system for lawyers which is prescribed in the NSI Act may unjustifiably encroach on the right to a fair trial in two ways. Firstly, it potentially restricts a person's right to a legal representative of his or her choosing, inconsistent with the rule of law, by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information. Secondly, the security clearance scheme threatens the independence of the legal profession by potentially allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information.

By eroding the independence of the legal profession in this way, the right to an impartial and independent trial with legal representation of one's choosing is undermined. Criminal defence lawyers were well used to dealing with confidential information in a variety of circumstances prior to the emergence of the NSI Act. No evidence was provided by the then Government to indicate that, in the experience of courts or disciplinary tribunals, lawyers frequently or even infrequently breached requirements of confidentiality imposed either by agreement or by the courts.

In the absence of a plausible justification for the security clearance system, the perception arises that the primary purpose of the system is to provide the executive arm of government with the ability to select the legal representatives permitted to appear in matters involving classified or security sensitive information. The Law Council is aware that, notwithstanding the NSI Act, to date terrorism prosecutions have, as a result of the use of undertakings, proceeded without the need for defendants' legal representatives to seek security clearances. Nonetheless, the security clearance provisions without adequate justification may not be a reasonable fetter on the rights of the accused.

- (h) Subsection 31(8) of the NSI Act may unduly restrict the court's discretion to determine how and when certain information may be disclosed in federal criminal proceedings. While this has been found not to be in breach of Chapter

⁶⁹ For example article 14(3)(e) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (e) 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.

⁷⁰ This view was shared by a number of groups, including the then Human Rights and Equal Opportunity Commission. See Report of the Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*, (November 2005) at [3.52]. See also Gilbert + Tobin Centre of Public Law, Submission to the Senate Legal and Constitutional Legislation Committee, *Inquiry into the provisions of the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005*, 16 October 2005.

⁷¹ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 4.

III of the *Constitution*,⁷² it may impact on a defendant's opportunity to examine the prosecution's case and may not be a proportionate response to the risk identified, in view of the potential prejudice.

- (i) Part 5.3, Division 105 of the *Criminal Code Act 1995* (Cth) (preventative detention orders) enables a person to be taken into custody and detained by the AFP in a State or Territory prison or remand centre for an initial period of up to 24 hours. Preventative detention orders restrict detainees' rights to legal representation by only allowing detainees access to legal representation for the limited purpose of obtaining advice or giving instructions regarding the issue of the order or treatment while in detention (Section 105.37 of the *Criminal Code*). Contact with a lawyer for any other purpose is not permitted. In addition, both the content and the meaning of communication between a lawyer and a detained person can be monitored. Such restrictions could create unfairness to the person under suspicion by preventing a full and frank discussion between a client and his or her lawyer and the ability to receive relevant legal advice.⁷³
- (j) Sections 34A, 34B and 34D of the *Australian Crime Commission Act 2002* (Cth) enable an ACC examiner to detain and refer an uncooperative witness to a court to be dealt with as if the person was in contempt of court. Individual's summonsed to provide evidence to the ACC can include domestic partners and other family members associated with someone who is the target of an ACC investigation. Further, in 2007, the ACC Act was amended to bring serious violence or child abuse committed by or against an Indigenous person within the lawful scope of the ACC's intelligence gathering and investigative operations⁷⁴. If the coercive powers are used in relation to the investigation of Indigenous violence and child abuse, the nature of the witnesses summonsed is likely to be markedly different. The Law Council submits that discussion about appropriate mechanisms for securing cooperation from witnesses should be based upon a proper understanding of the full range of people from whom information is sought and the competing pressures which operate upon them, including, the fear of harm and retribution if they provide information to the ACC.

The Law Council has long been concerned that the use of the coercive powers may expose people to criminal prosecution who are otherwise not directly involved in criminal activity in any way. That is, a person who is not alleged to

⁷² In *Lodhi v R* [2007] NSWCCA 360 the constitutionality of Part 3 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act) was challenged on the grounds that by requiring the Court to give "greatest" weight to the risk of prejudice to national security (pursuant to section 31(8)) the Parliament had usurped the judicial function by directing the judge hearing the case how the case must effectively be decided. The Court of Appeal held that subsection 31(8) was constitutionally valid. The Court found that while the word 'greatest' meant that greater weight must be given to the risk of prejudice to national security than to any other of the circumstances weighed, the subsection did not usurp judicial power because it did not require that the balance must always come down in favour of the risk of prejudice to national security. *Lodhi v R* [2007] NSWCCA 360 at [40]-[49], per Spigelman CJ with whom Barr and Price JJ agreed.

⁷³ See: Law Council of Australia, Submission and Supplementary Submission to the Independent National Security Legislation Monitor, *Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention orders*, 10 September 2012, and 10 December 2012; Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Anti-Terrorism Bill (No. 2) 2005*, 11 November 2005; Law Council of Australia, Submission to the United Nations Human Rights Committee, *Shadow Report to Australia's Common Core Document*, 29 August 2008; Law Council of Australia, Submission to the Attorney-General's Department, *Australia's response to the concluding observations of the UN Committee against torture*, 1 September 2008.

⁷⁴ The ACC Act was amended by Schedule 2, Part 1 of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007

have been an accessory to any criminal offence, to have aided and abetted the commission of an offence or to have perverted the course of justice may be summonsed to provide information under compulsion against a family member, partner, community member or employer. Although not involved in any criminal activity, that person may suddenly face the prospect of choosing between the risk of harm and/or desertion and/or extreme financial hardship and the risk of criminal prosecution. The introduction of a procedure allowing ACC examiners to authorise the detention of an allegedly non-cooperative witness and to refer him or her to a superior court to face immediate contempt proceedings, brings these concerns into sharper focus.

Nonetheless, the Law Council acknowledges that the unambiguous policy behind the ACC Act is that, in the interests of investigating and disrupting certain types of criminal behaviour, anyone thought to have access to relevant information can and should be compelled to provide assistance. The Law Council further acknowledges that review of the operation of the ACC Act has revealed that the contempt procedure would significantly assist in the implementation of this policy.

However, the Law Council supports the position of the ALRC that "*the concept of contempt should not be applied to bodies established by the executive arm of government. The law of contempt was developed to protect the administration of justice, and is not directly applicable to public inquiries. Applying the concept of contempt to Royal Commissions and other public inquiries confuses the role and functions of the judiciary with the role and functions of public inquiries.*"⁷⁵ This confusion of the role may be inconsistent with an accused's right to a fair trial.

- (k) Subsection 236B(5) of the Migration Act requires a mandatory minimum sentence for conviction of an aggravated people smuggling offence. This may disproportionately limit judicial discretion and, thus, to have relevant factors given due weight in the circumstances.
- (l) The *Extradition Act 1988* (Cth) permits extradition of a person notwithstanding that his or her right to a fair trial may not be observed. Section 27D of the *Foreign Evidence Act 1994* permits evidence of foreign material and foreign government material obtained indirectly by torture or duress. This is contrary to the right to a fair trial and is inconsistent with the prohibition on evidence obtained by torture, which Australia has accepted under Article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ([1989] ATS 21).⁷⁶

94. Some Commonwealth laws reverse the presumption in favour of bail, which may undermine the presumption of innocence, as a key component of a fair trial.

Examples of such laws include:

- (a) Subsection 15(6) of the *Extradition Act 1988* (Cth) (requires that special circumstances must be established before a person remanded under the Extradition Act can be granted bail) – this provision may be contrary to the presumption of innocence.

⁷⁵ ALRC Discussion Paper 75, *Royal Commissions and Official Inquiries*, at 19.57

⁷⁶ Article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

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- (b) Section 15AA of the *Crimes Act 1914* (Cth) (the Crimes Act) (reverses the presumption in favour of bail for terrorism offences) – operates to reverse the burden of proof in a manner that may be inconsistent with the right to be presumed innocent. No evidence was put forward, for example, to suggest that persons charged with terrorism offences are more likely to abscond while on bail, re-offend, threaten or intimidate witnesses or otherwise interfere with the investigation. Further, section 15AA does not define the ‘exceptional circumstances’, required to rebut the presumption against bail. Such factors may suggest that the provision is unjustified.

Access to justice

95. As Chief Justice Mason and Justice McHugh said in *Dietrich v. The Queen* [1992] HCA 57:

“In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.”

96. The 2013 United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice System (“Principles and Guidelines”) recognise that legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. The Principles and Guidelines incorporate global best practices for the provision of legal aid that are applicable to all nations. They aim to ensure that states adopt measures and establish systems that provide persons accused of crimes with prompt and effective legal aid services. Commonwealth laws should incorporate the Principles and Guidelines into the regulatory frameworks for the provision of legal services.
97. Article 14 of the ICCPR provides that in the determination of any criminal charge against someone, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The ALRC cites these obligations at paragraph 8.10, as requiring that:
- (a) the defendant must be tried without undue delay; and
 - (b) 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’.
98. The Law Council considers that the right to a fair trial and effective access to justice is undermined by a failure of successive governments to commit sufficient resources to support legal assistance services, as evidenced by increasingly stringent restrictions on eligibility for legal aid.

Chapter 9: Burden of Proof

99. The Law Council suggests that the following considerations are relevant in determining whether a law that reverses or shifts the burden of proof is justified:

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- (a) Applying the test in *Oakes*, whether the public interest being observed is sufficient to justify any encroachment on individual rights.
 - (b) Whether there is a matter peculiarly within the defendant's knowledge and such knowledge is not available to the prosecution, which suggests that the defendant bear the onus of establishing that matter (noting that, even then, the defendant should ordinarily bear an evidential, as opposed to a legal burden).⁷⁷
 - (c) General principles of proof of criminal responsibility arising under Australian law and prosecutorial policy, including the centrality of the matter in question to proof of culpability, the gravity of the alleged offence, any potential impact on public health or safety,⁷⁸ and the extent of the burden imposed (e.g. whether the defendant is required to satisfy a legal or evidential burden).⁷⁹

Criminal and national security law

100. Reverse onus provisions challenge a fundamental principle of the criminal law that it is the duty of the prosecution to prove a person's guilt beyond reasonable doubt.⁸⁰ The following are examples of Commonwealth laws that may unjustifiably reverse or shift the burden of proof:

- (a) Section 119.2 of the *Criminal Code* requires a defendant to prove that they entered or remained in a declared area for a legitimate purpose. This is central to the question of culpability and the offence also carries a high penalty (10 years' imprisonment). If a person travels to a certain area for an illegitimate purpose the prosecution could adduce evidence suggesting that purpose. These factors may suggest reversal of the onus of proof may be unjustified.
- (b) Subsection 179E(3) of the POCA requires an accused to prove that unexplained wealth was not unlawfully acquired, which is contrary to the fundamental presumption of innocence.⁸¹ Civil confiscation proceedings are often criminal in nature.⁸² For this reason, traditional criminal court processes should apply, whereby the onus remains with the prosecution to establish that the property was unlawfully acquired.

⁷⁷ CF: Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 3, which provides that all people are entitled to the presumption of innocence and to a fair and public trial. The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence.

⁷⁸ For example, *Criminal Code Act 1995* (Cth) s13.1 – 13.6. These sections set out that the prosecution bears a legal burden of proving every element of an offence and disproving any matter in relation to which the defendant has discharged an evidential burden of proof. A legal burden of proof on the prosecution must be discharged beyond reasonable doubt whereas a legal burden of proof on the defendant must be discharged on the balance of probabilities. See also Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.

⁷⁹ Where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden. Provisions that place a legal burden of proof on a defendant should be kept to a minimum. The Scrutiny of Bills Committee expressed similar comments in Reports 5/2010 at p 191-192 and 3/2010 at p 71.

⁸⁰ *Woolmington v DPP* [1935] AC 462.

⁸¹ The reverse onus means that the respondent may lose legitimately obtained assets if he or she cannot show that they have been lawfully obtained, which may be difficult for particular defendant's, for example, due to age, language ability or poor record-keeping skills.

⁸² When laws are considered to be 'criminal' in nature they engage the criminal process rights under articles 14 and 15 of the ICCPR – Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 27 May – 6 June 2013 – Human Rights and Civil Penalties*, (2013) 73.

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- (c) Paragraph 390.3(6)(d) of the Criminal Code provides a defence for criminal association offences where the association is only for the purpose of providing legal advice or legal representation in connection with judicial or administrative proceedings under a law of the Commonwealth, a State, a Territory or a foreign country. However, the defence for legal practitioners only covers association engaged in for the purpose of providing certain limited types of legal advice and legal representation. A legal practitioner seeking to rely on the defence bears an evidential burden. In order to meet this burden it is likely that he or she will have to present at least some evidence about the nature of the legal advice or legal representation that he or she claims to have given in the course of the relevant association. This may prove difficult given that information of that sort is protected by client legal privilege and only the client, and not the legal practitioner, can waive that privilege. Moreover, this would appear to undermine another fundamental common law privilege, which is discussed further below.
- (d) Part 5.3, Division 102, subsection 102.6(3) of the Criminal Code requires a person to demonstrate that they have received funds from a terrorist organisation for the sole purpose of providing legal representation or assistance to the organisation, to avoid conviction of a section 102.6 offence. The defendant bears the legal burden, contrary to traditional criminal law principles that even when it is appropriate to reverse the onus of proof, the defendant should ordinarily bear an evidential, not legal, burden. The justification for the departure is unclear in this case and may be unjustified.
- (e) Subsection 272.9(5) of the Criminal Code imposes a legal burden on a defendant to prove that they did not intend to derive gratification from a child being present during sexual activity. The gravity of the subject matter of the offence, coupled with the serious penalty it attracts, could have very serious consequences for a person charged with this offence. In such circumstances, it may not be appropriate that the only recourse available to a defendant is to discharge a legal burden and establish on the balance of probabilities that he or she did not intend to derive sexual gratification from the presence of the child.

Taxation Law

101. Division 815 of the *Income Tax Assessment Act 1997* (Cth) which deals with cross-border transfer pricing, shifts in the 'information balance' between the Commissioner and taxpayers, by the move away from traditional transaction methods to profit methods. This is the case because the Commissioner has access to information on profits across the full taxpayer pool, whereas taxpayers are limited to information from their related parties and what could be gleaned from commercial databases.
102. By comparison, in many jurisdictions, the tax administration bears the burden of proof to show that the taxpayer's pricing is not consistent with the arms-length principle.
103. The OECD Guidelines indicated that the allocation of the burden should be decided after an assessment of the fairness of the features of the jurisdiction's tax system. In making such an assessment, the OECD Guidelines suggest that it is necessary to consider penalties, examination practices, administrative appeals processes, rules regarding payment of interest with respect to tax assessments and refunds, whether proposed tax deficiencies must be paid before protesting an adjustment, the statute of limitations, and the extent to which rules are made known in advance.

Tax penalties

104. There is also in taxation laws an unjustifiable burden of proof placed on taxpayers in respect of the application of penalties.
105. The Law Council adopts the following views expressed by the Inspector-General of Taxation in his *Review into the Australian Taxation Office's Administration of Penalties* dated February 2014:

2.37 It could be argued that placing the burden of proof on taxpayers should be the same for penalties and primary taxes as taxpayers have better understanding of facts involved. However, the imposition of a penalty for a false or misleading statement, unlike a primary tax matter, may also be understood by taxpayers as a pejorative judgment on their behaviour and that it effectively requires them to prove their innocence.

2.38 Under other areas of the law involving such judgments of behaviour, for example torts, the burden is placed on the person seeking to pursue remedies for another's culpable behaviours. This burden exists notwithstanding the fact that the respondent may be better placed to provide information about their behaviours.

2.39 Furthermore, although this burden technically arises on appeal, it can shape ATO auditor approaches to address shortcomings in the evidentiary basis for penalty decisions. In these cases, it is incumbent upon the taxpayer to prove the basis for any remission of the penalty or that the application of the penalty itself is incorrect. There are ATO staff instructions that emphasise an expectation that penalty decisions will be supported by facts and evidence. However, this may not necessarily take place and may be a reason for a significant proportion of unsustainable penalty decisions being adjusted due to evidentiary issues as discussed in more detail in the next two chapters of this report.

2.40 Taxpayers may experience substantial adverse impacts arising from unsustainable penalty decisions, including commercial and other regulatory implications and damage to reputation. The ATO's administrative costs in correcting unsustainable penalty decisions may also be significant.

Liability of Directors and Company Officers

106. Section 8Y of the *Taxation Administration Act 1953* (Cth) makes directors and company officers liable for the conduct of their companies, deeming them automatically liable unless they prove the availability of a defence may unjustifiably reverse the onus of proof. The presumption of innocence is a fundamental and important freedom which requires a significant justification to be reversed and may not be met by a deemed liability approach in taxation matters for a deterrent effect.

Chapter 10: The Privilege against Self-incrimination

107. The following general principles apply to help determine whether a law that excludes the privilege against self-incrimination is justified:

- (a) Common law principles that a person should not be required to give information that would tend to incriminate him or herself.⁸³
- (b) Subsections 128(1) and (4) of the *Uniform Evidence Acts* allows a witness to object to giving particular evidence that 'may tend to prove' that they may have committed an offence or are liable to a civil penalty (subject to the court's discretion to allow the evidence).
- (c) International law principles, including Article 14(3)(g) of the ICCPR which provides that the accused in criminal proceedings shall be entitled to the right 'not to be compelled to testify against himself or herself, or to confess guilt'.

108. These principles generally require an assessment that the public benefit which will derive from negation of the privilege must decisively outweigh the resultant harm to the maintenance of civil rights.⁸⁴ As noted in the Issues Paper, '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'.⁸⁵ 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 privileges. Abrogation might also be justified where there is an immediate need for information to avoid risks such as danger to human life, serious personal injury or damage to human health, serious damage to property or the environment, or significant economic detriment, or where there is a compelling argument that the information is necessary to prevent further harm from occurring.⁸⁶

109. Other considerations include whether the information could not reasonably be obtained by any other lawful means;⁸⁷ whether the abrogation is no more than is necessary to achieve the identified purpose,⁸⁸ and the consequences of abrogation.⁸⁹

110. If the privilege is removed, it is relevant to consider whether either or both 'use' or 'derivative-use' immunity apply.⁹⁰ In principle, forced disclosure should be available for use in criminal proceedings only when they are proceedings for giving false or misleading information in the statement which the person has been compelled to make,⁹¹ and information should only be capable of being compelled when there is a reasonable belief or suspicion of misconduct.⁹²

⁸³ *Sorby v The Commonwealth* (1983) 152 CLR 281. See also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

⁸⁴ *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) and Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998-October* (2001) 27-28.

⁸⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* IP, Issues Paper 46 (2014) 78 [10.25]

⁸⁶ Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No. 59, (2004) [6.51].

⁸⁷ *Ibid*, 62.

⁸⁸ *Ibid*, 63.

⁸⁹ For example, provisions removing the privilege should only be enacted for 'serious offences and to situations where they are absolutely necessary': Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* No 4 of 2000, 5 April 2000, 12, 20; see also, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* No 6 of 2000, 10 May 2000, 31.

⁹⁰ Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998-October* (2001) 28.

⁹¹ *Ibid*.

⁹² *Ibid*.

Criminal and National Security Law

111. The following Commonwealth laws may unjustifiably exclude the privilege against self-incrimination:
- (a) Section 30 of the *Australian Crime Commission Act 2002* (Cth)⁹³ abrogates the privilege in ACC examinations without derivative-use immunity being provided. The lack of provision for derivative-use immunity means that evidence of information subsequently gathered as a result of evidence or information obtained under the coercive powers may be used against the person in criminal proceedings, subject to directions by the examiner.
 - (b) Section 39A of the *POCA* expressly states that the privilege against self-incrimination is not a basis for refusing to provide a sworn statement under paragraph 39(1)(d). This provision may unduly infringe the right to silence, particularly when the mere suspicion that a person may have information about, or assets derived from, the suspected criminal activities of others may be sufficient for the person to be compelled to provide a sworn statement.
 - (c) Section 198 of the *POCA* may unjustifiably abrogate the privilege against self-incrimination as a person may be compelled to provide information under the mere suspicion of suspected criminal activities. It also removes derivative use immunity for information given during the course of a proceeds of crime examination conducted by the DPP or the Commissioner of the AFP.
 - (d) Section 34L of the *Australian Security and Intelligence Act 1979* may unjustifiably exclude derivative use immunity in relation to ASIO's questioning and detention powers. A person may be required to give information regardless of whether doing so might tend to incriminate the person or make them liable to a penalty. The mandatory presence of a police officer throughout questioning, required by ASIO's Statement of Procedures, ensures law enforcement agencies have ready access to information and material provided to ASIO by the detained person, and thus may increase the likelihood of derivative use of information in a subsequent prosecution brought against the person who has been compelled to divulge it.

Chapter 11: Client Legal Privilege

112. The primary rationale for client legal privilege is that it promotes the administration of justice and compliance with the law by ensuring frankness and candour in lawyer/client communications. Accordingly, client legal privilege exists in the public interest of protecting the administration of justice.
113. As Deane J in [Baker v Campbell](#) (1983) 153 CLR 52 stated at [8]:
- "From at least the eighteenth century however, it has been generally accepted that the explanation of the privilege is to be found in an underlying principle of the common law that, subject to the above-mentioned qualifications, a person should be entitled to seek and obtain legal advice in the conduct of his affairs and legal assistance in and for the purposes of the conduct of actual or anticipated litigation without the apprehension of being thereby prejudiced".*

⁹³ Section 30 of the *Australian Crime Commission Act 2002* (Cth) provides that if a person does not attend an examination, does not answer questions or does not cooperate or produce documents or things at the examination, he or she will be guilty of an offence.

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114. There has been a shift in emphasis, from the right of the individual to the public interest rationale underlying the privilege. While client legal privilege is ‘a bulwark against tyranny and oppression’,⁹⁴ and ‘represents some protection of the citizen against the leviathan of the modern state’,⁹⁵ it promotes the public interest by ensuring frank discussion and candour between a legal practitioner and a client, thereby advancing the administration of justice and promoting compliance with the law.⁹⁶ Client legal privilege is not just a rule of evidence, but an important common law immunity.⁹⁷
115. One qualification to client legal privilege is that it must first be claimed before it can have any effect⁹⁸. Nevertheless, section 132 of the *Uniform Evidence Act* (and equivalent sections) requires the Court to satisfy itself that the witness or party is aware of the effect of s 118 of the *Evidence Act*, so that the witness or party can take objection to the adducing of evidence which would otherwise disclose the content of a confidential communication which is otherwise the subject of client legal privilege.
116. While client legal privilege exists to assist in protecting the public interest, it is not available if there is, in a particular case, a higher public interest.⁹⁹
117. Where privilege is limited, by way of clear statutory language, use and derivative-use immunity should ordinarily apply to documents or communications revealing the content of legal advice, to minimise harm to the administration of justice and individual rights.

Restrictions on client legal privilege: Royal Commissions

118. The *Royal Commissions Act 1902*, s 6AA and 6AB, makes it an offence, carrying a penalty of \$1000 or 6 months imprisonment, to fail to produce a document to a Commissioner over which privilege has been claimed.
119. The [Explanatory Memorandum](#) accompanying the *Royal Commission’s Amendment Bill 2006* states that the “Amendments were requested by the Commissioner of the current Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme” and that “Essentially, the Bill is intended to reflect the position that the Australian Government understood was the case.”
120. On a broad reading of *Oakes*, it could be said that the purpose of the restriction is justified, as the purpose is to enable a Royal Commissioner a process to quickly determine claims of client legal privilege.
121. However, arguably the means are unreasonable. In this case, the amendments were made in response to a specific request by the Royal Commissioner in the AWB Royal Commission, in response to a specific decision by the Federal Court which cast doubt on the Royal Commissioner's power to require production of documents over which privilege is claimed.

⁹⁴ *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 92, per Kirby J.

⁹⁵ *Baker v Campbell* (1983) 153 CLR 52, 120, per Deane J.

⁹⁶ By way of example, in the corporate sphere, lawyers assist clients to comply with relevant legal regulatory regimes, by ensuring that the client understands the legal constraints within which it operates. Most corporations genuinely attempt to fulfil their legal obligations. Lawyers play an important role in enabling them to do this by advising on relevant obligations, and helping to detect and address potential and actual breaches.

⁹⁷ *Grant v Downs* (1976) 135 CLR 674, 685; *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

⁹⁸ Dr Ronald Desitanik ‘*Legal Professional Privilege in Australia*’ 2nd ed, 2005 Lexis Nexis Butterworths at p 74

⁹⁹ See the High Court decisions in *R v Bell; Ex parte Lees* (1980) 146 CLR 141, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and *Waterford v The Commonwealth* (1987) 163 CLR 54.

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122. The suggestion that s 6AA restored the position that was thought to exist prior to the decision of Young J in *AWB Ltd v Cole* (No. 5) [2006] FCA 571 is contestable. In its submission in response to the Bill, the Law Council noted that the ordinary process in a Royal Commission was for the Royal Commissioner to refer questions of privilege to the Federal Court for determination, in the same way that such questions, if contested, were usually dealt with by the Federal Court in a *voir dire*, by a separate judge.
123. There is also a question of the proportionality of the restriction, which was implemented in the course of a politically contentious Royal Commission, in which the principle of upholding privilege was arguably overridden by the political expediency in enabling the Royal Commission to proceed quickly. An alternative, if the Executive prerogative were seen as a sufficient justification for impugning privilege in this case, might have been to restrict its effect to the AWB Ltd Royal Commission, which was the approach in the NSW Royal Commission into James Hardy.¹⁰⁰
124. While parties retain the right to appeal to the Federal Court against a finding by a Royal Commissioner that a document is not privileged, there remains a concern that the proceedings may be tainted by the knowledge of privileged – and potentially, prejudicial – matters, notwithstanding the provision that the Commissioner is to disregard matters subject to privilege.
125. Further, while there is an argument that Royal Commissions deal with matters of significant public interest, over-riding the private interest in protection of privilege, the reasonableness of such a claim in respect of *all* Royal Commissions is belied by the fact that the question of amending the *Royal Commissions Act* in this way had not previously been raised – presumably because it was not considered necessary. Accordingly, a more targeted approach may have been appropriate in the circumstances.

Criminal and national security laws

126. Paragraph 390.3(6)(d) of the *Criminal Code* provides a defence for criminal association offences where the association is only for the purpose of providing legal advice or legal representation in connection with judicial or administrative proceedings under a law of the Commonwealth, a State, a Territory or a foreign country. A legal practitioner seeking to rely on the defence bears an evidential burden. In order to meet this burden it is likely that he or she will have to present at least some evidence about the nature of the legal advice or legal representation that he or she claims to have given in the course of the relevant association. This may prove difficult given that information of that sort is protected by client legal privilege and only the client, and not the legal practitioner, can waive that privilege.
127. A concern also arises in relation to agencies exercising covert investigatory powers, including under the *Telecommunications (Interception and Access) Act 1979* (Cth) or other powers exercised without the knowledge of the person whose privilege is affected, or their legal adviser.

Chapter 12: Strict or Absolute Liability

128. The Law Council suggest that the following principles should be applied to help determine whether a law imposing strict or absolute liability for a criminal offence is justified:

¹⁰⁰ *James Hardy (Investigations and Proceedings) Act 2004* (NSW)

- (a) There is a rebuttable presumption that, to establish guilt, fault must be proven for each physical element of an offence.¹⁰¹
- (b) Instances where this presumption is overridden should be rare and the intention of the legislature to override it should be explicit and unambiguous. The defences of mistake of fact¹⁰² and intervening conduct or event¹⁰³ should also be maintained.
- (c) The prosecution should be required to prove that a person intended, or at the very least was reckless about, each physical element of an offence in order for a person to be found guilty of that offence. Strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of the relevant regulatory regime.¹⁰⁴
- (d) Strict or absolute liability offences should be of a category where failure to comply is both obvious and deserves liability on a strict liability basis,¹⁰⁵ such as speeding and parking offences which are readily proven and easy to understand.
- (e) Strict liability and absolute liability may also be appropriate when the only purpose of the fault element is to ensure that the creation of the offence is within the legislative power of the Commonwealth.¹⁰⁶

129. The following are examples of Commonwealth laws that may unjustifiably impose strict or absolute liability:

- (a) Paragraphs 102.5(2)(b), 102.8(1)(b) and (2)(g) of the Criminal Code impose strict liability for 'training or receiving training from, or associating with a terrorist organisation. This may contravene the principle that where criminal offences involve heavy penalties of imprisonment (for example, 25 years imprisonment), applying strict liability to the offences or elements of them is inappropriate and may be an unjustified encroachment.
- (b) Administrative penalties in the *Customs Act 1901* (Cth) and its related legislation are broad and detailed, and rely upon interpretation of provisions which are either unclear (for example, the Valuation provisions for the Customs Act) or very complex, for example:
 - (i) the failure to report the entry of cargo on time or in an untimely or incorrect fashion (s64AB(10) of the *Customs Act 1901*) may be an unjustified use of strict liability where the provision of that information has been made in an untimely or incorrect fashion by a contracting party overseas. In that case the imposition of a penalty may be unfair on the Australian party who becomes strictly liable for the offence;¹⁰⁷
 - (ii) the *Border Security Legislation Amendment Act 2002*, including section 213A(5) and 64ACD(2) of the *Customs Act 1901* as well as section

¹⁰¹ Part 2.1, Division 2, Chapter 2 of the Criminal Code, particularly section 5.6.

¹⁰² *Criminal Code Act 1995* (Cth) s6.1

¹⁰³ *Ibid* s 10.1

¹⁰⁴ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011.

¹⁰⁵ Law Council of Australia, Preliminary Submission to the Senate Standing Committee for the Scrutiny of Bills, Inquiry into the application of Absolute and Strict Liability Offences in Commonwealth Legislation, 2002, p. 7.

¹⁰⁶ That is 'jurisdictional elements': Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011).

¹⁰⁷ Law Council of Australia's preliminary submission to the Senate Standing Committee for the Scrutiny of Bills' inquiry into the application of Absolute and Strict Liability Offences in Commonwealth Legislation (2002)

245N(2) of the *Migration Act 1958* create strict liability offences which may be unjustified; and

- (iii) the broad application of administrative penalties on strict liability basis under the *Customs Act 1901* may be inappropriate, there may be a high number of transactions and activities in an affected industry, along with many parties are relying on the actions or advice of third-parties.¹⁰⁸
- (c) Strict liability offences imposed in a family law context including subsections 160(3) and 161(3) of the *Child Support Assessment Act 1989* and subsections 23(7), 33(2), 34(2), 72W(2), 111(3), 113A (3) and 120(3) of the *Child Support (Registration and Collection) Act 1988*. Proceedings under the family law legislation govern the property of litigants and their family relationships. The imposition of penalties in that context is serious. Further, an offence in a family law context usually will occur whilst other litigation is pending and can impact upon it.¹⁰⁹

Chapter 13: Appeal from Acquittal

130. The Law Council notes that the right to the finality of an acquittal is fundamental and derives from a number of fundamental sources, including:
- (a) common law principles;¹¹⁰
 - (b) international law, including Article 14(7) of the ICCPR, which requires that “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.”
131. The Hon Michael Kirby,¹¹¹ discussing the case of *The Queen v Carroll*¹¹², noted:
- “It has been pointed out that, in Australia, the rule against double jeopardy does not constitute an independent doctrine¹¹³ but a description of the result of many differing rules and principles applicable at different stages of criminal proceedings. Nonetheless, Australian law has an ‘aversion to placing an individual twice in jeopardy of criminal punishment for the one incident or series of events’¹¹⁴.*
- “The foundation of this ‘broader precept or value’¹¹⁵ may, in the particular case, lie in doctrines of estoppel and merger, in pleas of autrefois acquit and autrefois convict, in principles redressing an abuse of process, in restrictions upon the admissibility of evidence, in sentencing practices and in approaches to statutory construction. However, no one doubts that these mechanisms come together in a unifying concept that may be described, in general terms, as producing a rule against ‘double jeopardy’¹¹⁶. Subject to valid legislation, the courts of Australia uphold that rule where it applies.”*

¹⁰⁸ Law Council of Australia ‘s submission to the Senate Legal and Constitutional Legislation Committee for the inquiry into the Border Security Legislation Amendment Bill 2002 (2002) 5.

¹⁰⁹ Law Council of Australia’s submission to the Standing Committee for the Scrutiny of Bills’ inquiry into Absolute and Strict Liability Offences (2002) 7.

¹¹⁰ *Davern v Messel* (1984) 155 CLR 21

¹¹¹ *Carroll*, Double Jeopardy and International Human Rights Law, CLJ 2013.

¹¹² (2002) 77 ALJR 157.

¹¹³ *Pearce v The Queen* (1998) 194 CLR 610 at 629 [66], 637 [92]; cf *Davern v Messel* (1984) 155 CLR 21 at 62-64, 67-70.

¹¹⁴ *The Queen v Carroll* (2002) 77 ALJR 157 at 171 [84], per Gaudron and Gummow JJ.

¹¹⁵ *Ibid* at 171 [84].

¹¹⁶ *Ibid* at 171 [84].

132. His Honour went on to identify ten separate grounds or explanations offered by the law for upholding a rule against double jeopardy:

- (a) controlling state power;¹¹⁷
- (b) upholding accusatorial trial;¹¹⁸
- (c) accused's right to testify;¹¹⁹
- (d) desirability of finality;¹²⁰
- (e) confidence in judicial outcomes;¹²¹
- (f) substance not technicalities;¹²²
- (g) differential punishment;
- (h) upholding the privilege against self-incrimination;
- (i) increasing conviction chances;¹²³ and
- (j) denial of basic rights.¹²⁴

133. Because of these principles, in Commonwealth matters tried on indictment there ought to be no appeal from an acquittal by a jury other than where the acquittal was a verdict by direction which was wrong in law. Likewise, there ought not be any appeal from an acquittal by a magistrate other than on a question of law alone. There may be circumstances in which a law allowing an appeal against an acquittal obtained by fraud, perjury or some other serious offence against the administration of justice might be justified, subject to strict limitations.

134. Apart from s 73 of the Constitution, which allows appeals to the High Court, the Law Council is unable to identify any Commonwealth laws which permit an appeal after acquittal. It is noted that some State laws may breach this principle and the law in relation to such appeals is the law of the State or Territory where the matter is prosecuted.¹²⁵

Chapter 14: Procedural Fairness

135. In Australia there is no constitutional guarantee of 'due process', 'fundamental justice' or general statutory code of fair procedures.¹²⁶

136. However, it is said that procedural fairness will promote better decision-making in government because the decision-maker will have before him or her all the relevant information required. The procedural rigour required in a hearing and the injunction to behave impartially is likely to make a decision-maker more conscientious and objective in reaching his or her conclusions.

¹¹⁷ *Ibid* at 161 [21].

¹¹⁸ *Ibid*

¹¹⁹ *Ibid* at 170 [76]-[80].

¹²⁰ *Amphill Peerage* [1977] AC 547 at 569 cited in *Carroll* (2002) 77 ALJR 157 at 161 [22] per Gleeson CJ and Hayne J

¹²¹ *The Queen v Carroll* (2002) 77 ALJR 157 at 171 [86].

¹²² *The Queen v Storey* (1978) 140 CLR 364 at 372

¹²³ *Green v United States*, above n 39, cited Thomas, above n 5, 50

¹²⁴ *Coco v The Queen* (1994) 179 CLR 427 at 437 cited *Carroll* (2002) 77 ALJR 157 at 181 [146]. See also *Plaintiff S 157 of 2002* (2003) 195 ALR 24 at [30] per Gleeson CJ.

¹²⁵ For a relatively recent discussion of the NSW law as it applies to Commonwealth matters prosecuted on indictment, see *R v JS* [2007] NSWCCA 272; (2007) 230 FLR 276; (2007) 175 A Crim R 108

¹²⁶ Cf The requirement of 'due process' in Fifth and Fourteenth Amendments to the United States *Constitution*; and the codification of 'due process' in the federal *Administrative Procedure Act 1946* (5 USC), S 554.

137. Although a number of considerations are relevant to determining when the rules of procedural fairness apply, the primary rule is whether a decision adversely affects a right, interest or legitimate expectation held by a person. The effect or impact of a decision upon a person is also a significant factor.

Migration laws

138. In its submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), the Law Council expressed its concern that some aspects of the Act were contrary to procedural fairness guarantees. Specifically:

- (a) Schedule 1 prevents people intercepted and detained at sea under the *Maritime Powers Act 2013* (Cth) from accessing judicial review;
- (b) Schedule 4 introduces the Immigration Assessment Authority (IAA) that only provides for limited merits review for certain protection visa applicants; and
- (c) Schedule 5 increases Minister's non-reviewable powers, for example in relation to *non-refoulement*.

139. In relation to the IAA process, that Law Council noted that the new process will apply only to all unauthorised maritime arrivals who arrived on or after 13 August 2012 and whose visa status has not yet been finally determined,¹²⁷ replacing the existing refugee status determination process that is currently available to these applicants and their children.¹²⁸ The Act will also exclude some people – excluded fast track review applicants – from this process entirely.

140. Fast track applicants will no longer be entitled to merits review at the RRT. In some cases – but not all – they will be entitled to a fast track review by a new independent body within the RRT – the IAA. The IAA will provide merits review of the initial decision with instruction to 'pursue the objective of a mechanism of limited review that is efficient and quick'.¹²⁹

141. Fast track applicants will not have an automatic right of review. They may only be referred to the IAA by the Minister. The IAA will not generally hold hearings. It will not allow a fast track applicant to respond to or correct adverse information raised at the immigration stage or consider new information provided by the fast track applicant. Further, IAA applications will be conducted 'on the papers', with applicants asked to present further information only in exceptional circumstances.

142. It may therefore be considered that the objective of administrative efficiency is not sufficient to deny procedural fairness.

143. Further, the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) amends the *Migration Act 1958* (Cth) to provide, in sections 133C(4), 133A(4), and 501BA(3), that the rules of natural justice do not apply to decisions of the Minister under the *Migration Act* to cancel a visa if the Minister is satisfied that a person does not pass the character test on certain grounds and the Minister is satisfied that it would be in the public interest or national interest to do so.

144. The curtailment of procedural fairness guarantees may be considered to be for a purpose that is demonstrably justified, but is unlikely to be considered a reasonable means for limiting procedural fairness.

¹²⁷ Schedule 4, Part 1, Item 1 – definition of 'fast track applicant' at sub-s (a)(i)-(iii).

¹²⁸ This will also apply to children of fast track applicants who are born in Australia.

¹²⁹ Schedule 4, Part 1, Item 21, new s 473BA.

Immigration Detainees with adverse ASIO security assessments

145. The Law Council understands that over 50 asylum seekers who have obtained refugee status in Australia, have remained in immigration detention, in some cases for almost five years, on the basis of adverse ASIO security assessments. Neither they nor their legal representatives are permitted to know the grounds upon which the assessments have been made, hampering their ability to obtain judicial review, compared to other refugees remaining in detention who may be provided reasons for that decision. An informal review procedure conducted by a former Federal Court judge is now available, to re-examine the appropriateness of the adverse assessments. This review has resulted in some 15 of the detainees being released. However, the Law Council does not consider this process to be a substitute for a proper judicial consideration of the matters at issue, in accordance with procedural fairness requirements.

Administrative Decisions (Judicial Review) Act (Cth)

146. The Law Council notes that many types of administrative decisions have been scheduled as exemptions to the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Law Council considers that it may be useful for the ALRC to examine these, and critically consider their justification for the purposes of the present Inquiry.

Criminal laws

147. The following are examples of criminal laws that may unjustifiably deny procedural fairness:

- (a) Subsection 3K(3AA) of the *Crimes Act 1914* (Cth) allows an officer, during the execution of a warrant, to remove a thing for the purpose of examination or processing, without giving notification to the occupier of the premises. The officer need not inform the person where and when the equipment will be examined, if he or she believes on reasonable grounds that to do so might endanger the safety of a person or prejudice an investigation or prosecution. Although the purposes of the legislation, to safeguard forensics and other police staff during an examination, and to protect sensitive information about investigative practices and procedures, may be demonstrably justified, a question arises as to whether this law unjustifiably denies procedural fairness.
- (b) Part III Division 3 of the *Australian Security and Intelligence Act 1979* allows ASIO broad discretion to detain people and prevent a detained person from contacting anyone not specified in ASIO's warrant. The secrecy surrounding detention under an ASIO warrant makes it very difficult for a detained person to both know and challenge the lawfulness of detention. It is permitted, in certain circumstances, for persons questioned and/or detained under a Part III Division 3 ASIO warrant to contact a lawyer of their choice. However, this contact can be tightly controlled and limited by the prescribed authority.¹³⁰

¹³⁰ See: Law Council of Australia, Submission to the Independent National Security Legislation Monitor, *Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention orders*, 10 September 2012; Law Council of Australia, Submission to the Parliamentary Joint Committee, *Inquiry on ASIO, ASIS, DSD*, and to the Senate Legal and Constitutional Affairs Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 29 April 2002; Law Council of Australia, Submission to the Parliamentary Joint Committee, *Inquiry on ASIO, Review of ASIO Questioning and Detention Powers*, 4 April 2005.

Chapter 16: Authorising what would otherwise be a Tort

148. The key principle or criteria that should be applied in addition to the *Oakes* test is whether a law that authorises what would otherwise be a tort is, on balance, in the public interest.
149. For example, if the threat of tortious action would prevent a greater public duty from being performed, then some restriction may be justified, such as in the case of rescue and emergency operations.
150. Exemptions should be narrowly circumscribed and carefully defined, to ensure authorisation of damaging or tortious conduct is closely limited to addressing the public interest identified by the legislature. For example, fiscal restraint or administrative convenience would not constitute a "greater public purpose" in this context.
151. This approach is reflected at common law in "rescuer" or "good samaritan" cases,¹³¹ which has also been codified in legislation.¹³²

Trespass and breach of privacy

152. There are a number of Commonwealth laws which authorise trespass to private property by government authorities for law enforcement or regulatory purposes. These powers are referred to generally in other chapters, but include, for example, telecommunications interception powers exercised by the AFP, ASIO and other law enforcement bodies, powers of search and seizure, right of entry into workplaces by workplace inspectors, etc. Customs and the Australian Defence Force also have powers in certain circumstances to stop, search and seize.
153. In most cases, such encroachment will be justified if it is done for a lawful purpose and subject to certain safeguards, including a judicial warrant procedure, application of relevant immunities where applicable and ensuring the coercive power is sufficiently circumscribed to achieve the legitimate objective identified.

Chapter 17: Executive Immunities

154. As stated in the Issues Paper, crown immunity from suit for the Commonwealth was abolished by the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), and arguably under section 75(iii) of the *Australian Constitution*.
155. Other legislation conferring executive immunities in Commonwealth law include:
- (a) section 2A of the *Competition and Consumer Act 2010* (Cth),¹³³ concerning the application of the Act to the Commonwealth and its Authorities; and
 - (b) *Administrative Appeals Tribunal Act 1975* (Cth)¹³⁴ Providing an immunity to tribunals discharging quasi-judicial functions.

¹³¹ See P Vines et al "Duty of Care" in Sappidean and Vines (Editors) *Flemings The Law of Torts*, 10th Edition, Thompson Reuters, Sydney, pp 195-198.

¹³² For example, section 5 of the *Civil Law (Wrongs) Act 2002* (ACT), Part 8 of the *Civil Liability Act 2002* (NSW).

¹³³ At s 158.

¹³⁴ At s 60.

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156. In general, the whole course of the development of Australian law (which led the common law world in removing domestic immunity for the Government, beginning in the nineteenth century in Queensland¹³⁵) points to removal of executive immunity.
157. There is uncertainty about the width of the consent of the Commonwealth to actions by ordinary citizens. Sections 56-8 of the *Judiciary Act 1903* (Cth) are expressed to relate to claims in contract or tort. There is debate as to whether those words encompass all civil claims against the Commonwealth¹³⁶ or are words of limitation.¹³⁷
158. The ALRC considered this in detail in its Review of the *Judiciary Act 1903* (Cth) in 2000 – 2001. In its submissions to the ALRC in 2001,¹³⁸ the Law Council recommended that sections 56-8 of the *Judiciary Act 1903* (Cth) be amended so that these sections clearly provide that any claim for relief on any ground may be brought against the Commonwealth.
159. The Law Council considers that the ALRC's recommendations 23-1 to 23-3 should be adopted.¹³⁹
160. Developing and simplifying the law after *Bropho v Western Australia*¹⁴⁰ and *McNamara v Consumer Trader and Tenancy Tribunal*,¹⁴¹ the *Acts Interpretation Act 1901* (Cth) should be amended to provide that all Acts are to be taken to bind the Crown in all its capacities, unless expressly stated otherwise. As is now standard Commonwealth drafting style (and reflects *Cain v Doyle*¹⁴²), it may go on to provide that this does not make the Crown liable to be prosecuted for an offence, except where expressly stated (as is, unusually, the case in the *Work Health and Safety Act 2011* (Cth)¹⁴³).
161. The law with respect to the liability of Government in tort for incorrect advice or failure to fulfil statutory duties is highly complex and uncertain.¹⁴⁴ There would be considerable benefit in clarifying that area of the law.¹⁴⁵ As part of such a reform, individual public servants could be granted immunity or indemnity by the Commonwealth, with the liability for their acts resting with the Commonwealth. Further, a statute could be modelled on the US *Federal Tort Claims Act 1946*.¹⁴⁶
162. Further, Part III, Division 4 of the ASIO Act, which provides ASIO employees immunity from criminal and civil liability for conduct engaged in during a special intelligence operation or SIO, may not contain adequate safeguards to ensure the

¹³⁵ Paul Finn 'Claims Against the Government Legislation' in Finn (ed) *Essays on Law and Government*, vol 2 (*The Citizen and the State in the Courts*) (LBC: 1996), 25 – 32 traces the history, which he contends embodies an 'Australian attitude' to removing immunity of the Government.

¹³⁶ As contended by Finn, *op cit*, 32, n 59; *Commissioner For Railways (Qld) v Peters* (1991) 24 NSWLR 407 at 443-444, 449 (by majority; Kirby P dissenting)

¹³⁷ *The Commonwealth v Mewett* (1997) 191 CLR 471 per Gummow and Kirby JJ at 551.

¹³⁸ Law Council of Australia, Submission to ALRC, J037, 6 April 2001.

¹³⁹ ALRC 92 *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*

¹⁴⁰ (1990) 171 CLR 1

¹⁴¹ (2005) 221 CLR 646

¹⁴² (1942) 72 CLR 409

¹⁴³ At ss 10(2), 245, 246

¹⁴⁴ See esp Mark Aronson "Government Liability in Negligence" (2008) 32 *MULR* 44; Graeme Hill "Private Law Actions against the Government (Part 1) - Removing the Government's Immunity from Suit in Federal Cases" (2006) 30 *MULR* 23; Peter Hogg, W Monahan, W Wright *Liability of the Crown* 4th ed (Carswell: 2011), ch 7; Peter Cane "Suing Public Authorities in Tort" (1996) 112 *LQR* 13; Mark Aronson and Harry Whitmore *Public Torts and Contracts* (Law Book Co: 1982), ch 2.

¹⁴⁵ See: *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540

¹⁴⁶ (28 USC s 2680). There is a detailed discussion of that law and its cases to early 1982 in Aronson and Whitmore, *Public Torts and Contracts* (Law Book Co, 1982), 36 – 60.

proportionality of the SIO scheme. For example, it does not include similar safeguards as those contained in the AFP's controlled operations scheme (under Part 1AB of the Crimes Act 1914). That is, it does not:

- (a) limit to the most significant/serious intelligence-gathering operations;
- (b) require an ASIO employee to be involved in an SIO;
- (c) limit the proposed protections from civil and criminal liability provided under the SIO scheme so that:
 - (i) civil indemnification, rather than immunity, is provided to participants.
 - (ii) compensation in respect of serious property damage or personal injury is required;
 - (iii) participants would not be immune or indemnified from liability if their conduct was *likely* to cause death, serious injury or result in the commission of a sexual offence;
 - (iv) civilians would need to act in accordance with the instructions of an ASIO employee;
 - (v) more specific guidance as to the nature and scope of the SIO, and the conduct to be authorised, including differentiating between the role of civilian participants from ASIO employees is provided; and
 - (vi) detailed reporting to the Inspector-General of Intelligence and Security (the IGIS) and Minister, clear record-keeping obligations and obligations on the IGIS to regularly inspect and report to the Minister is included.

Chapter 18: Judicial Review

163. The Law Council considers that, in general, there must be judicial review of Executive actions, as required by Principle 6 of the Law Council's Rule of Law Principles, which states that:

The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law

164. The right to seek judicial review of the actions of Commonwealth officers derived from numerous sources in Australian law, primarily Chapter III of the Australian *Constitution*, which confers original jurisdiction on the High Court under s 75.

165. The Law Council notes that in 2012, the Administrative Review Council (ARC) cited the Australian Government's *Strategic Framework for Access to Justice in the Federal Civil Justice System* that referred to the access to justice principles of 'accessibility, appropriateness, equity, efficiency and effectiveness' and that these had been adopted by the then Standing Committee of Attorneys-General in November 2009.¹⁴⁷ The ARC noted that 'the existence of an effective and accessible system of judicial review is essential to maintaining the rule of law and ensuring respect for fundamental human rights.'¹⁴⁸

166. Judicial review is recognised as fundamental to the common law tradition and is an essential tool for the preservation of liberty of the subject and vindication of human rights.

¹⁴⁷ Administrative Review Council, *Federal Judicial Review in Australia*, September 2012, 21.

¹⁴⁸ Administrative Review Council, *Federal Judicial Review in Australia*, September 2012, 20.

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167. There are several enactments scheduled to the *ADJR Act*, for which judicial review is excluded. These exclusions are justified predominantly on the grounds of either convenience, impracticability of review rights within the scheme of the legislation or to limit scrutiny of matters falling within Executive prerogative (such as national security). The appropriateness of these exclusions is likely to vary, depending on the circumstances of any given case, which tends to bring into question the application of blanket exemptions to exclude fundamental judicial review rights.
168. The Law Council considers that it may improve transparency for the Commonwealth to undertake a review of the *ADJR Act* exclusions with a view to establishing clear guidelines or criteria for the exclusion of Commonwealth laws or classes of decisions from the operation of the Act.
169. Some examples of instances in which judicial review is abrogated for specific legislative schemes are examined below. For the sake of the present submission, it has not been possible for the Law Council to undertake an exhaustive review of the exclusions or limitations on judicial review rights under Commonwealth law, which are varied and many.

Environmental Law

170. Although access to the judicial review of decisions made under Commonwealth statutes is guaranteed by section 75(v) of the Australian *Constitution* by way of writs of mandamus and prohibition and injunctions, and is provided for more generally in the *ADJR Act*, the rules of standing are still applied quite narrowly for third parties, limiting the scope for public interest litigation.¹⁴⁹
171. While a number of Acts do extend standing to seek review, the following do not provide for statutory third party review rights:
- (a) *Agricultural and Veterinary Chemicals Act 1994* (Cth)¹⁵⁰
 - (b) *National Environment Protection Council Act 1994* (Cth)
 - (c) *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth)
172. Some Acts expressly prevent the institution of any legal proceedings except in relation to specified matters:
- (a) *Biological Control Act 1984* (Cth)¹⁵¹
 - (b) *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth)¹⁵²

Criminal law and national security

173. Laws that may unjustifiably restrict access to judicial review include:
- (a) Paragraph (dac) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* excludes from judicial review the validity of detention under

¹⁵⁰ The AAT can have duties, functions and powers conferred under a corresponding law and the Federal Court has civil jurisdiction in matters arising under the Act, but not with extended standing provisions: s 18, 20.

¹⁵¹ The AAT can have duties, functions and powers conferred under a corresponding law and the Federal Court has civil jurisdiction in matters arising under the Act, but not with extended standing provisions: s 18, 20.

¹⁵² This Act prevents the institution of legal proceedings in respect of the release of alien organisms but s 36 provides an exception for proceedings to recover for loss or damage in circumstances prescribed in s 35.

¹⁵³ s 101 provides that no action or other proceeding lies against the Commonwealth or an officer in respect of any loss incurred, or any damage suffered, because of reliance on an assessment made or a report prepared under the Act.

a preventative detention order. The Law Council agrees with the Administrative Review Council's assessment that: 'as a general principle, administrative decisions made in relation to criminal investigation processes where proceedings have not yet commenced are not excluded from review.'¹⁵³ The Council suggests that this exemption is achieving little, and could be removed, but notes that an application could be made in relation to a detention decision under s 39B of the *Judiciary Act* or using the merits review process in section 105.51 of the *Criminal Code*.¹⁵⁴ COAG also agreed with the Administrative Review Council's assessment and added that the availability of review under the *ADJR Act* would appropriately give an aggrieved person the ability to apply for a statement of reasons from the decision-maker. In practical terms, the re-instatement of a right of review would have the capacity to provide a person in detention with a statement of reasons, albeit, in some cases, a redacted one.¹⁵⁵

- (b) Part III Division 3 of the *Australian Security and Intelligence Act 1979* provides limited ability to challenge the lawfulness of detention. For example, Part 3 Division 3 of the *ASIO Act* authorises the arrest of individuals for the purpose of questioning but provides no mechanism by which the person arrested shall be informed, at the time they are apprehended, of the reasons for their detention. A copy of the warrant itself is the only document required to be provided to the detained person's lawyer. Access to information relating to a warrant is also restricted by section 34ZS which makes it an offence for a person to disclose information that indicates the fact that a warrant has been issued or any information relating to the use of a warrant. Access by a lawyer to relevant information may be further restricted by regulation 391 or by the provisions of the *NSI Act*. Under the *ASIO Act* the prescribed authority is required to inform the person being questioned of his or her right to seek a remedy from a federal court, although decisions by ASIO are exempt from judicial review under the *ADJR Act*.
- (c) As a result, the only real mechanism for judicial review is the prerogative writ of habeas corpus, which in any event, would be difficult to obtain unless the detained person could demonstrate that the relevant opinions of the Minister and issuing authority were not genuinely entertained or that the relevant opinions were wholly unreasonable. It is unlikely that such an argument could be mounted when the person detained only has access to the warrant itself, and no other information specifying the grounds supporting the warrant. As a result, there may be in reality almost no effective means by which a person who has been detained can persuade a court that his or her detention is not lawful, or challenge the conditions of their detention.

Migration laws

174. The Law Council's Asylum Seeker Policy¹⁵⁶ provides that:

- (a) in accordance with the rule of law, all people seeking protection in Australia must have access to legal assistance, including in relation to judicial review applications;¹⁵⁷

¹⁵³ Administrative Review Council, *Federal Judicial Review in Australia* (2012) 210.

¹⁵⁴ *Ibid*

¹⁵⁵ Australian Government, Council of Australian Governments, Review of Counter-Terrorism Legislation (2013) 73.

¹⁵⁶ See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf

¹⁵⁷ At [9(c)].

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- (b) in accordance with the rule of law, detention of asylum seekers should be subject to judicial review;¹⁵⁸ and
 - (c) asylum seekers who are subject to adverse security assessments must be given the opportunity to be heard and the right to seek effective merits review and judicial review of the adverse security assessment and any decision based on the assessment.¹⁵⁹

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)

175. In its submission to the Senate Legal and Constitutional Affairs Committee Inquiry into this legislation, the Law Council raised concern that:

- (a) Schedule 1 of the Act excludes decisions by the Minister in relation to Maritime Powers from review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*; and
- (b) Schedule 4 of the Act provides for only a limited form of judicial review – available in the High Court – for ‘excluded fast track applicants’.¹⁶⁰

176. The legitimate objective of the Act – administrative efficiency – may not be a sufficient justification to encroach on judicial review of executive decision making.

Chapter 19: Other Rights, Freedoms and Privileges

177. Australia is a party to seven key international human rights treaties,¹⁶¹ and has committed to implement and observe its treaty undertakings in good faith, through domestic legislation where appropriate, and to observe peremptory norms and customary international law as a good citizen of the international community. However these obligations have not always been adopted effectively into domestic law.

Rights of the Disabled

178. Australia has signed and ratified the Convention on the Rights of Persons with Disabilities (CPRD) as well as the Optional Protocol to the CPRD. To a limited degree the CPRD has been implemented at the Commonwealth level through the *Disability Discrimination Act 1992 (Cth)*, the *Disability Services Act 1986 (Cth)* the National Disability Strategy and the National Disability Insurance Scheme. In a 2013 submission to the Committee on the Rights of Persons with Disabilities, the Australian Human Rights Commission identified a range of issues that have not been sufficiently address by the *Disability Discrimination Act 1992*, including violence against people

¹⁵⁸ At [10(b)].

¹⁵⁹ At [20].

¹⁶⁰ Excluded fast track applicants are unauthorised maritime arrivals who arrived on or after 13 August 2012, whose visa status has not yet been finally determined and who are excluded from the fast track process for those reasons stipulated in the Bill.

¹⁶¹ Including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), Convention Against Torture (CAT), Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and Convention on the Rights of Persons with Disabilities (CRPD).

with disability in institutional settings, access to justice and involuntary and non-therapeutic sterilisation of people with disability.¹⁶²

179. Further, the Law Council identified a number of shortcomings with protections for disabled persons in its submissions to the ALRC's Inquiry into Equality, Capacity and Disability in Commonwealth Laws.¹⁶³ The Law Council makes the following points with respect to Commonwealth legislation and its impact upon rights of the disabled:

- (a) Lack of appropriate funding to legal assistance services has undermined the capacity of legal assistance providers to meet the legal needs of specific and vulnerable target groups, particularly people with disabilities¹⁶⁴. This has, in turn, impacted on the capacity of disabled people to enjoy and enforce traditional rights, including freedom of speech, freedom from discrimination, freedom from arbitrary detention, freedom from civil wrongs (often authorised by restrictions on common law rights), etc.
- (b) The 'best interests' of an individual should be consistent with that person's will and preferences in the majority of circumstances. If these are inconsistent, or if one is unable to be ascertained, the objective and subjective elements of each approach can be balanced by reference to appropriate international human rights standards.
- (c) Decision-making mechanisms should promote the autonomy of a person with disabilities and ensure supporters are properly accountable, consistently with Article 16(1) of the CRPD.
- (d) The criteria for unfitness to stand trial should focus on the person's ability to make rational decisions in order to effectively participate in the trial process. The *Crimes Act 1914* (Cth) should be amended to provide that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial.
- (e) If it can be demonstrated that decision-making support will assist a person to make rational decisions that should be taken into account in determining fitness to stand trial.¹⁶⁵ There are practical difficulties associated with ensuring that supporters are indeed supporting a person to make decisions. Safeguards against undue influence are required.
- (f) Legal representation is not a substitute for decision-making assistance and support to stand trial.
- (g) The rules for the Family Court and Federal Circuit Court should provide that a litigation support representative be appointed where a person cannot understand, retain, use, weigh or communicate information so as to give instructions, provide information or answer questions in relation to the conduct legal proceedings, after taking into account any available support in doing

¹⁶² Australian Human Rights Commission, Australian Human Rights Commission Submission to the UN Committee on the Rights of Persons with Disabilities, 11 March 2013. Available at www.humanrights.gov.au/submissions/information-concerning-australia-and-convention-rights-persons-disabilities.

¹⁶³ Law Council of Australia, Submission to *Inquiry into Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper, Australian Law Reform Commission, 11 August 2014; and Law Council of Australia, Submission to *Inquiry into Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper, Australian Law Reform Commission, 21 February 2014.

¹⁶⁴ CF – Law and Justice Foundation of NSW, *Legal Australia-Wide Survey*, 2012.

¹⁶⁵ However the Law Council noted the difficulty for a court to assess whether that support is sufficient to enable a defendant to stand trial where the person would otherwise be unfit to stand trial. Taking into account decision-making assistance and support available to a person who would otherwise be determined unfit to stand trial may water down the test for unfitness.

such things. Government funding needs to be adequate to cover the cost of such representatives, and they should be indemnified against any costs order.

- (h) Any mechanisms for supported or substituted decision-making in relation to superannuation should include an objective verification mechanism that superannuation trustees can rely on.

Court filing fees

180. The Terms of Reference to the Freedoms' Inquiry refer to laws that 'restrict access to the courts'. Notwithstanding the apparent focus on formal restrictions on access, subordinate legislation restricting access to the courts is equally relevant, including Commonwealth regulations on filing fees.

181. Filing fees have increased substantially since 2010, restricting access to the courts. Significant fee increases have placed a disproportionate burden on people with legitimate and enforceable rights wishing to access the Courts, impacting significantly on low to middle income Australians and small to medium sized businesses, which do not qualify for legal aid or any fee exemption or waiver.¹⁶⁶

182. The *Strategic Framework for Access to Justice in the Civil Justice System* (Strategic Framework) in 2009 identified factors that are relevant considerations in determining a government's policy approach toward cost recovery in the courts, including:

- (a) the balance between the public and private benefits accorded by different types of proceedings in the courts;
- (b) recognition that cost recovery may be inappropriate where certain parties are involved (such as matters involving children or human rights matters), or where the courts hold an effective monopoly over the provision of a service;
- (c) fees must still ensure that price is not a barrier to access to the courts; and
- (d) full cost pricing could encourage litigants to pursue less expensive dispute
- (e) resolution mechanisms.¹⁶⁷

183. There are a range of considerations relevant to the setting of court fees which should be subject to appropriate scrutiny by the Parliament, given the restriction this places on the capacity of litigants to have their matters heard and determined according to law. The provision of court services should not be on a cost-recovery basis. It is a fundamental element of maintenance of the rule of law in a civil society that citizens have fair and reasonable access to dispute resolution mechanisms.

¹⁶⁶ Law Council of Australia, *Inquiry into the impact of filing fee increases since 2010 on access to justice*, Senate Legal and Constitutional Affairs References Committee, 15 April 2013.

¹⁶⁷ AGD, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. 48.

Same-Sex Marriage

The High Court recently held that “marriage” in section 51(xxi) of the Australian Constitution means the union of any two natural people and includes a marriage between persons of the same sex.¹⁶⁸ However, the *Marriage Act 1961 (Cth)* does not give effect to the width of the definition of “marriage” as held by the High Court. Indigenous cultural rights

184. The Law Council suggests that the ALRC consider the lack of adequate protection for indigenous cultural and intellectual property rights. These may include for example, traditional knowledge about plant species, hunting, fishing and gathering rights, rights over water and other resources, language and other aspects of traditional or cultural life. Such rights, which often arise from land, are afforded incomplete protection the *Native Title Act 1993*, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, *Environmental Protection and Biodiversity Conservation Act 1999*, and *Copyright Act 1968*. It is arguable that such rights are not subject to specific or adequate protection in Commonwealth law.

¹⁶⁸ *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 (statement, 12 December 2013).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.