
Interim Report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws

Australian Law Reform Commission

9 October 2015

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Executive Summary

The Law Council of Australia makes the following comments and recommendations with respect to the matters raised in the Australian Law Reform Commission's (ALRC's) Interim Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Interim Report):

- (1) An Australian Bill of Rights would provide the most effective mechanism to identify and prevent encroachments on rights and freedoms.
- (2) In its final report, the ALRC should draw more extensively from the substantial body of international law commentary and jurisprudence with respect to Australia's international legal undertakings, including recommendations by relevant United Nations (UN) treaty bodies.
- (3) The ALRC should emphasise the interdependence and indivisibility of rights and freedoms, including with those not listed in the terms of reference.
- (4) Proportionality is a central and well understood concept in both international and domestic jurisprudence and an appropriate test should be identified, to ensure legislators have appropriate guidance and to assist in scrutinising legislation which purports to vitiate certain rights or freedoms.
- (5) Legislative action which may abrogate, rebalance or curtail recognised rights, privileges or freedoms should be the subject of careful scrutiny. This should begin at the stage of legislative development and consultation, and be dealt with comprehensively through Parliamentary scrutiny processes. In particular:
 - a. the Parliamentary Joint Committee on Human Rights (PJCHR) should be better resourced, not simply to review legislation but to conduct own-motion inquiries;
 - b. those tasked with preparing Statements of Compatibility with Human Rights should be given appropriate training to address concerns identified by the PJCHR and the Law Council with respect to their analysis of impacts on human rights;
 - c. the Government should appoint an Independent Monitor of Migration Legislation, based on the framework governing the existing Independent National Security Legislation Monitor (INSLM), to report to Parliament on issues arising from immigration and border protection, including the administration of Australia's offshore detention regime;
 - d. increasing the functions and resourcing of the Australian Human Rights Commission (AHRC) and Parliamentary Joint Committee on Human Rights (PJCHR), to enable those bodies to expand their role in advising Parliament and the Government with respect to human rights issues arising from Commonwealth legislation;

- e. Amend existing guides to best-practice regulation to require consideration of impacts on individual or collective rights and freedoms when preparing legislation; and
 - f. Consideration should be given to establishing statutory timeframes for conducting parliamentary legislative reviews processes, which can be adjusted having regard to the public interest or concern regarding legislation with implications for civil and political rights, the length or complexity of the Bill.
- (6) The Law Council broadly supports the ALRC's interim conclusions suggesting further review of specific legislative arrangements to ensure and limitations on rights are proportionate and justified.
- (7) The Law Council suggests a number of recent legislative initiatives warrant further review, including in relation to national security, migration and immigration detention, citizenship, law enforcement, corporate conduct, the environment, including laws which are merely proposed or have not yet received Royal Assent, or restrictions on rights arising from administrative action, rather than legal or legislative action.

The Law Council congratulates the ALRC on its extensive work and consultative approach throughout this Inquiry and looks forward to further assisting the ALRC in the development of its final report and recommendations.

1 Introduction and general comments

1. The Law Council is pleased to provide this submission in response to the Interim Report of the ALRC's *Inquiry into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (the Inquiry).
2. This submission is the second by the Law Council to the Inquiry. Its [first submission](#) on 15 March 2015 sets out the Law Council's preferred test for proportionality, based on the test outlined by the Canadian Supreme Court in *R v Oakes*¹ and adopted by the Supreme Court of Victoria in *R v Momcilovic*.²
3. The present Inquiry is very timely, coming at a time in which there has been a significant drive to rebalance public expectations of democratic freedoms³ and to enact legislation with significant implications for important rights. In many cases, laws restricting freedoms are arguably justified or proportionate to their objective. However, there may be in certain cases a reasonable concern about the proportionality of laws which impose additional limitations on rights and freedoms, including human rights.
4. However, the Law Council is concerned about the readiness of all governments to implement restrictions on traditional rights and freedoms with sometimes inadequate attempts to engage in reasoned consideration of alternative, less intrusive methods of addressing legitimate concerns.
5. This submission responds to a number of the proposals and conclusions put forward in the interim report and makes recommendations with respect to those matters.
6. The Law Council is grateful to several of its advisory and sections committees for their contributions to this submission, including members of the Freedoms Inquiry Working Group, National Human Rights Committee, National Criminal Law Committee and the Industrial Law, Environment and Planning Law and Migration Law committees of the Federal Litigation and Dispute Resolution Section.
7. The Law Council also notes that a separate submission has been made in response to the Interim Report by the Corporations Law Committee of the Business Law Section, which should be read in conjunction with this submission.

Terms of Reference

8. On 19 May 2014, the Attorney-General issued terms of reference to the ALRC under s 20 of the *Australian Law Reform Commission Act 1996* (Cth) (ALRC Act) to
 - (a) identify Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and
 - (b) examine those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.

¹ [1986] 1 SCR 103 (Supreme Court of Canada)

² (2010) 25 VR 436 (VSCA)

³ See, for example, David Hurst, "Abbott: reduction in freedom necessary to save lives from terrorist threat", *The Guardian Australia*, 22 September 2014. Available at <http://www.theguardian.com/world/2014/sep/22/abbott-reduction-in-freedom-necessary-to-save-lives-from-terrorism-threat>

9. In making the reference, the Attorney-General had regard to the "rights, freedoms and privileges recognised by the common law", which are selectively enumerated in the Terms of Reference for the Inquiry.
10. In accordance with its terms of reference, the ALRC's Interim Report is based primarily on an examination of the common law, and has as its focus freedom from encroachment upon rights, rather than protection against encroachment upon rights.
11. The Law Council recognises the long-standing commitment of the common law to the protection of human rights. The common law human rights tradition is reflected in, amongst other documents, the *Magna Carta* 1297⁴, the *Bill of Rights* 1689 and *Act of Settlement* 1701, and the first ten amendments to the *Constitution of the United States* 1788 (the *Bill of Rights* 1791).
12. Fundamental common law rights in Australia include the right of access to the courts, immunity from deprivation of property without compensation, legal professional privilege, privilege against self-incrimination, immunity from the extension of the scope of a penal statute by a court, freedom from extension of governmental immunity by a court, immunity from interference with vested property rights, immunity from interference with equality of religion, the right to access legal counsel when accused of a serious crime, no deprivation of liberty except by law, the right to procedural fairness when affected by the exercise of public power, and the freedoms of speech and movement.⁵
13. At the same time, it is recognised that since the establishment of the UN in 1945, Australia has been an active participant in the development of an international system for the protection and promotion of human rights. The Law Council endorses a continuing, central and constructive role for Australia in the international human rights system.
14. In ratifying the *Charter of the United Nations* in 1945, Australia accepted as a purpose of the UN the achievement of international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.⁶ In becoming a member of the UN, Australia pledged to take joint and separate action in co-operation with the UN for the achievement of the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁷ The Law Council recognises the purpose of the UN, and the pledge of Australia, to act to promote universal respect for and observance of human rights and fundamental freedoms.
15. The Law Council endorses an approach, consistent with international law and practice, which confirms that all human rights are universal, indivisible, interdependent and interrelated.⁸ The Law Council also endorses an approach, consistent with international law and practice, which recognises three types or levels of obligations *to respect, to protect* and *to fulfil* human rights. The obligation to respect requires States to refrain from interfering directly or indirectly with, or curtailing the enjoyment of,

⁴ This is the usually cited first "*enactment*" of the original 1215 pact.

⁵ Chief Justice RS French "The Common Law and the Protection of Human Rights", Anglo Australasian Lawyers Society, 4 September 2009, Sydney, referring to and expanding upon the list provided by J Corrin, "Australia: Country Report on Human rights" (2009) *Victoria University of Wellington Law Review* 37 at 41-42.

⁶ Article 1(3).

⁷ Articles 55 and 56.

⁸ See, for example, *Vienna Declaration and Programme of Action*, adopted by consensus at the World Conference on Human Rights on 25 June 1993 (Part 1, para 5); Convention on the Rights of Persons with Disabilities (Preamble, at (c)).

human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil requires States to adopt appropriate positive measures to facilitate the enjoyment of human rights.

16. The Law Council notes that in accordance with s 24(1)(b) of the ALRC Act, in performing its functions, the ALRC must aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.
17. In the Law Council's view, the analysis in the ALRC's Interim Report (in accordance with its terms of reference) appears to be regrettably detached from the important international framework of human rights. The focus upon freedoms ignores the important aspect in international human rights law of obligations of protection.

An Australian Charter or Bill of Rights

18. The emphasis upon the common law and the piecemeal approach to human rights in the ALRC's Interim Report (in accordance with its terms of reference) highlights the lack of an overarching statement of human rights in Australia.
19. In its *Policy on a Federal Charter or Bill of Human Rights*, the Law Council supports the development of a federal charter or bill of rights.
20. The Law Council submits that an Australian charter or bill of rights would advance an analysis by the ALRC in accordance with, rather than in isolation from, human rights law. It would confirm that all human rights are universal, indivisible and interdependent and interrelated, and invite attention to important obligations of protection.
21. The Law Council submits that an Australian charter or bill of rights, in accordance with Australia's international human rights obligations, would most appropriately prevent encroachment upon rights and freedoms, and at the same time secure the protection of the human rights, identified in the Terms of Reference for this Inquiry.

International human rights law as a body of relevant jurisprudence

22. The analysis in the ALRC's Interim Report is based primarily upon an examination of the common law. The Interim Report makes note of relevant international instruments, but does not consider the body of jurisprudence they have given rise to.
23. The result is that in considering the impact of Commonwealth laws that encroach upon "traditional rights, freedoms and privileges", the ALRC has not drawn a large body of relevant international jurisprudence, which is consistent with its mandate in s 24(1)(b) (referred to above).
24. This is particularly important in the present Inquiry, in view of the considerable influence of the common law and domestic rights instruments on the development of the international human rights system. As a result, many rights remain related and interdependent, regardless of whether they appear in the list of "traditional rights" enumerated in the terms of reference for this Inquiry.
25. There also a risk that the Inquiry may be a missed opportunity to consider relationships between different rights and freedoms, and to consider how interrelated

rights and freedoms can be harmonised to achieve more comprehensive and coherent protection of human rights

26. The Law Council submits that, consistent with its statutory functions, and in recognition of Australia's role in the international human rights system, the ALRC should draw more extensively on international human rights law in addressing the terms of reference for this Inquiry.

Proportionality

27. The Law Council has considered the discussion in Chapter 1 of the Interim Report on the application of the proportionality rule in Australia and its usefulness in examining legislation which encroaches on civil rights.
28. As noted by the ALRC, the Law Council recommends that the principle developed by the Supreme Court of Canada in *R v Oakes*⁹, and applied by the Supreme Court of Victoria in relation to the *Charter of Rights and Responsibilities 2006 (Vic)* (“Victorian Charter”), be adopted as the relevant test.¹⁰ In its Interim Report, the ALRC does not propose a specific test for adoption, preferring a flexible approach.
29. The Law Council supports flexible application of the proportionality rule, but remains concerned that a sufficiently structured test is required to enable its consistent application. The *Oakes* test provides a reasonable structure, while offering sufficient flexibility to ensure its adaptability to different circumstances. The Law Council considers there is a risk that excessive flexibility may dilute the principle of its effectiveness.
30. If the *Oakes* test is not adopted, the Law Council recommends that an alternative two-stage approach for assessing proportionality be outlined by the ALRC (preferably with further consultation prior to the finalisation of its report).

2 Scrutiny mechanisms

31. The Law Council welcomes the attention given to scrutiny and review mechanisms by the ALRC in the new chapter to the Interim Report.
32. Scrutiny and review mechanisms play an integral role in the identification of encroachments on rights and freedoms. As an active participant in and observer of legislative scrutiny mechanisms, the Law Council has a strong interest in how they are structured and administered. The effectiveness of such mechanisms influences the extent to which stakeholders and the broader public can participate in law reform and development.

⁹ [1986] 1 S.C.R. 103

¹⁰ Interim Report, 32-33. It is noted that the 2015 Review of the Victorian Charter recommended no change to the proportionality test set out in s 7(2) of the Victorian Charter, as it is applied by the Courts. It further recommends clarification that the proportionality test applies to the test for conduct by public authorities that is incompatible with the rights set out in the Victorian Charter (consistent with the High Court’s decision in *Momcilovic v The Queen* (2011) 245 CLR 1): Mike Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Rights and Responsibilities Act 2006 (Vic)*, September 2015, 152, 154-5. See file:///C:/Users/nick/Downloads/Full_Report_-_From_Commitment_to_Culture_-_The_2015_Review_of_the_Charter_of_Human_Rights_and_Responsibilities_Act_2006.pdf

Human Rights Monitoring Bodies

33. The Law Council notes the interrelation between the role of human rights monitoring bodies, particularly the AHRC and the PJCHR. The AHRC's functions are broader, reflecting of its role as a statutorily independent national human rights institution, with the capacity to conduct inquiries (including on its own motion),¹¹ undertake research and provide educational programs on human rights.¹² Meanwhile the PJCHR is tasked with a legislative scrutiny function, through the examination of bills and acts for compatibility with human rights.¹³

Australian Human Rights Commission

34. The Law Council notes recent strident public criticism of the President of the Australian Human Rights Commission, Professor Gillian Triggs, and the AHRC.¹⁴ The AHRC's necessary independence could foreseeably be interfered with by the nature of this criticism, including the suggestion that its President resign. This position is consistent with the Principles relating to the Status of National Institutions.¹⁵

Resourcing for the Australian Human Rights Commission

35. The Law Council notes that there has been a steady decrease in funding for the AHRC. According to the 2015-16 Budget Papers, Commonwealth funding to the the Commission in 2015-16 decreased by \$3.126m, from a revised 2014–15 estimate of \$18.641m to \$15.515m (or more than 16 per cent). The Law Council is concerned that these very large funding cuts seriously undermine the capacity of te AHRC to perform its function.

Government responses to AHRC Reports

36. The Law Council notes that many publications of the AHRC are still awaiting a formal response from the Federal Government. The Law Council supports a requirement that the Federal Government should table a response to any AHRC report on complaints within six months of receiving that report. This recommendation is consistent with the recommendations arising from the National Human Rights Consultation Committee Report.¹⁶

Parliamentary Joint Committee on Human Rights

37. The ALRC notes that the PJCHR is hampered in its important role of scrutinising the human rights implications of legislation due to insufficient attention to these issues in explanatory memoranda.

38. In addition to the matters outlined below, the Law Council supports the implementation of procedures for government agencies, to assist the PJCHR's functions. Such procedures should be designed to ensure appropriate consideration of compatibility of legislative or regulatory instruments with Australia's domestic human rights protections and international obligations.

¹¹ Section 14(1) of the *Australian Human Rights Commission Act 1986* (Cth).

¹² *Ibid*, section 11(1)(h).

¹³ Section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

¹⁴ Australian Bar Association and Law Council of Australia, Media Release, Personal attacks on Human Rights Commissioner alarming say the legal profession's leaders, 14 February 2015.

¹⁵ *Principles relating to the Status of National Institutions* (Paris Principles), adopted by General Assembly resolution 48/134 20 December 1993.

¹⁶ National Human Rights Consultation Committee Report, 2009, Recommendation 13.

Own-motion inquiries

39. The Law Council submits that the PJCHR's functions should be extended to initiating its own inquiries in relation to human rights issues, without requiring a reference from the Attorney-General.
40. Since its establishment in March 2012, the PJCHR has developed substantial experience in the interpretation of legislation for consistency with human rights. The Law Council notes that s 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which enables a matter relating to human rights to be referred to the PJCHR by the Attorney-General, has not been used since the PJCHR's establishment. Extending the PJCHR's powers to include own-motion inquiries would be consistent with the approach adopted in the United Kingdom.
41. A potential amendment to s 7(c) might extend the Committee's functions:
- “...to inquire into any matter relating to human rights, including a matter which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.”

Expand the PJCHR's functions to include monitoring

42. The Law Council submits that the PJCHR should be invested with a broader human rights monitoring role. While the PJCHR has a broad basis for undertaking legislative scrutiny in line with the seven core human rights treaties to which Australia is a party, it does not enable the PJCHR to monitor Australia's performance and implementation of its obligations under these treaties. Nor does it allow the PJCHR to assist the Government in its interactions with, and responses to recommendations, communications and views from treaty monitoring bodies, such as the UN Human Rights Committee.
43. The Law Council is of the view that the PJCHR would be well-placed to assist the Australian Government in its interactions with the UN treaty monitoring bodies. In exercising its scrutiny functions, the PJCHR has developed experience and expertise at analysing how the rights contained in the seven core treaties apply in Australia. This experience and expertise would prove useful when Australia is reporting on the performance of its international human rights obligations, or responding to recommendations from the treaty monitoring bodies.
44. The Law Council recommends, in this regard that the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended to clarify that the PJCHR's functions include (under a new ss 7(d)):
- “(d) to monitor Australia's compliance with UN human rights treaties, including monitoring implementation of concluding observations, recommendations, communications and views of UN treaty bodies and the Universal Periodic Review.”

Resourcing for the PJCHR

45. The Law Council notes the PJCHR has one part-time legal adviser to conduct human rights assessments of hundreds of bills (and thousands of pages of legislation) per year. In the 2014-2015 financial year, the PJCHR examined 240 bills and 2,000 legislative instruments, requesting further information in relation to 69 bills and 28

legislative instruments.¹⁷ In order to adequately scrutinise human rights implications of so many bills, a full-time legal adviser should be appointed or, alternatively, panel of external lawyers to share the load.

Bills raising human rights concerns

46. The Law Council notes that 68 per cent of bills are enacted, notwithstanding a finding by the Committee that the bill raises human rights concerns. The Law Council supports a requirement that if the government proposes to enact a bill which encroaches upon human rights (according to a finding by the PJCHR) without making amendments, it should be required to table a statement in Parliament justifying why it is proceeding with the bill in that form, that is without mitigating the human rights impacts.

47. As noted below at [61], the Law Council also considers that an 'after-the-fact' review mechanism might assist the Parliament in addressing concerns about encroachments on rights and freedoms in relation to legislation which is not amended, or which proceeds before the PJCHR has completed its assessment.

Statements of Compatibility

48. The Law Council notes that the Attorney-General's Department (AGD) has an important position to play in educating and advising government agencies on the preparation of statements of compatibility. This role is acknowledged on the AGD website through the provision of templates and the offer of assistance by the International Human Rights and Anti-Discrimination Branch at AGD. Additionally, the PJCHR also plays a role in guiding departments on statements of compatibility. The PJCHR's Guide to Human Rights focuses on 25 of the key rights found in the seven international human rights treaties against which it considers questions of human rights compatibility.

49. Despite access to these resources, the Law Council is concerned that statements of compatibility with human rights, contained in explanatory memoranda to bills, sometimes fail to provide sufficient legal analysis of human rights impacts. By way of example:

- (a) Radiocommunications (Citizen Band Radio Stations) Class Licence 2015; Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015
 - (i) Paragraph 6(f) of the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 and subsection 8(4) of the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 set out limits to the conditions which apply to a person operating a CB radio or amateur stations. These limits could give rise to concerns about limits on the right to freedom of expression, requiring assessment by the Australian Communications and Media Authority (ACMA).
 - (ii) In its statement of compatibility, the ACMA's justification for the encroachment on freedom of expression, associated with the CB Class Licence, was that the licence condition in paragraph 6(f) had been in force for thirteen years and has been previously used to

¹⁷ Statistics obtained from the Legislative Scrutiny Unit, Parliamentary Joint Committee on Human Rights.

investigate complaints and prosecute operators of CB stations. In the PJCHR's view this was not an adequate explanation. As the PJCHR stated:

“The committee’s usual expectation where a measure may limit a human right is that the accompanying statement of compatibility provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. This conforms with the committee’s Guidance Note 1, and the Attorney-General’s Department’s guidance on the preparation of statements of compatibility, which states that the ‘existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important’. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law. Simply stating that the provision has been in force for some time and has been used to prosecute persons in the past does not justify the limitation on the right to freedom of expression.”¹⁸

- (b) Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth)
- (i) The Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth) (the Bill) seeks to repeal s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act). Section 487 identifies a 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), as including individuals and organisations who, at any time in the preceding two years, have engaged in a series of activities for the protection or conservation of, or research into, the Australian environment. Removal of s 487 may encroach upon the right to health and thus required further assessment by the Department of the Environment.
- (ii) Despite this, the Department of the Environment’s statement of compatibility did not explore whether the right to health and a healthy environment was engaged by the proposed removal of section 487. The PJCHR expressed concerns with this approach and repeated its comments quoted above in reference to the Radiocommunications (Citizen Band Radio Stations) Class Licence 2015 and the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015, indicating that the statement of compatibility failed to provide sufficient legal analysis of human rights impacts.¹⁹
- (c) Migration Amendment (Regional Processing Arrangements) Bill 2015

¹⁸ Parliamentary Joint Committee on Human Rights, *Twenty-Sixth report of the 44th Parliament*, 18 August 2015, 18-19

¹⁹ Parliamentary Joint Committee on Human Rights, *Twenty-seventh report of the 44th Parliament*, 8 September 2015, 6-7.

- (i) The Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth) amended the *Migration Act 1958* (Cth) to provide statutory authority for the Commonwealth to:
- take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
 - make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country; and
 - do anything that is incidental or conducive to the taking of such action or the making of such payments.
- (ii) The statement of compatibility with human rights accompanying the Bill issued by the Department of Immigration and Border Protection (DIBP) provided that:
- “The Bill does not engage with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011, because the Government’s view is that the Regional Processing Centres are managed and administered by the governments of the countries in which they are located, under the law of those countries.”²⁰
- (iii) However, the PJCHR clearly had concerns with the way in which the statement of compatibility considered human rights issues arising from the Bill, concluding that:
- “As the bill empowers the Commonwealth to take broad action in regional processing countries, the bill, as with the previous package of legislation relating to regional processing, engages and limits multiple rights. The committee reiterates the concerns set out in its previous reporting relation to the regional processing regime, which applies equally to this bill...”²¹

Improving Statements of Compatibility

50. The Law Council recommends that further resources be made available to the AGD to assist in training government officers to draft statements of compatibility with human rights, in addition to templates and guidance notes.
51. Consideration could also be given to some other means of preparing compatibility statements – for example, by an independent statutory office holder. There may be considerable value in an independent assessment in the process, to enhance integrity and depoliticize human rights assessments. The AHRC might be an appropriate body to prepare such statements.

²⁰ Minister for Immigration and Border Protection, the Hon. Peter Dutton MP, Explanatory Memorandum, Migration Amendment (Regional Processing Arrangements) Bill 2015, 24 June 2015, 9.

²¹ Parliamentary Joint Committee on Human Rights, *Twenty-Fifth Report of the 44th Parliament*, 11 August 2015, 58.

Independent Monitors

Establishment of an Independent Monitor for Migration Laws

52. The Law Council submits that the ALRC should consider recommending the appointment of an Independent Monitor for Migration Laws. The Monitor's role should include reviewing immigration legislation and focus on how those laws are implemented and administered. This position is discussed in more detail in the Law Council's response to Chapters 9, 15 and 18 of the Interim Report.

Independent National Security Legislation Monitor (INSLM)

53. The Law Council notes that to date there has been no Government response to any of the INSLM's recommendations.²²

54. The lack of response highlights a need for the *Independent National Security Legislation Monitor Act 2010* (Cth) to be strengthened, for example, by requiring the Government to respond to the INSLM's recommendations within certain timeframes – for example, six months. This recommendation was put forward in the Law Council's [submission](#) to the Senate Legal and Constitutional Affairs Committee Inquiry into the Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

Amending the Legislation Handbook

55. The Law Council recommends that the Legislation Handbook published by the Department of Prime Minister and Cabinet provide a more thorough description of the procedures involved in making Commonwealth laws, including reference to human rights considerations. At present the only treaty referred to under the heading of 'international obligations under human rights instruments' is the *International Covenant on Civil and Political Rights* (ICCPR). The Law Council recommends the Legislation Handbook refer to all human rights treaties to which Australia is a party.

Amending the Australian Government Guide to Regulation

56. The Law Council recommends that the Office of Best Practice Regulation's Australian Government Guide to Regulation and its User Guide²³ be amended to include reference to human rights considerations.

57. The Law Council further recommends that consideration be given to:

- (a) including, as a key question for policy makers, what are the likely human rights impacts of the proposal?²⁴
- (b) amending Principle 8 of the ten principles for Australian Government policy makers, to state that "regulators must implement regulation with common

²² Independent National Security Legislation Monitor, *Annual Report*, 7 November 2013, 6; reiterated in Independent National Security Legislation Monitor, *Annual Report*, 28 March 2014, 2.

²³ <http://cuttingredtape.gov.au/handbook/australian-government-guide-regulation>

²⁴ Department of Prime Minister and Cabinet, *User Guide to the Australian Government Guide to Regulation*, July 2014, 5.

sense, empathy, respect and in a manner consistent with Australia's human rights obligations."²⁵

Time constraints for lodging submissions

58. Parliamentary review bodies are subject to reporting timeframes imposed by Parliament. Due to the often narrow timeframes imposed on Legislation Committees by Parliament, in some cases submissions are not invited or, where they are invited, allow very limited time for stakeholders to consider the legislation and register their views.
59. Narrow consultation timeframes undermine inclusive, open and informed participation by civil society in legislative processes, which in some cases have profound implications with respect to rights and freedoms.²⁶
60. An additional concern is that bills sometimes proceed before a Committee inquiry has been completed.²⁷ In instances where this has occurred, there is a concern that a central purpose of the Parliamentary committee review system has been impaired.
61. Consideration should be given to:
 - (a) establishing statutory timeframes for conducting Parliamentary legislative review processes, which can be adjusted having regard to the level of public interest or concern regarding the legislation and the length or complexity of the bill; and
 - (b) introducing a mechanism for Parliamentary review of legislation after its enactment, to address any unjustified restrictions on rights or freedoms after the fact (noting that this should be reserved for exceptional circumstances).

3 Freedom of speech

62. Commonwealth laws that impose restrictions on freedom of speech and expression have traditionally arisen in the context of enforcement activity and national security, defamation, anti-discrimination, broadcasting, media classification and regulation of Commonwealth Government officers and those that engage with them.
63. As recognised by the ALRC, there exists a tension between certain legitimate objectives sought to be achieved by Commonwealth laws and the right of individuals and other entities to freely express ideas, opinions or messages. Ultimately, it is a matter for the Parliament to determine the appropriate balance between competing objectives in civil society, with reference to a range of community concerns.
64. The following discussion considers a number of high-profile examples of laws engaging this tension. Clearly, freedom of speech is not an absolute right and is

²⁵ Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation*, March 2014, 2.

²⁶ For example, the Senate Legal and Constitutional Affairs Legislation Committee provided only five days for public comment on the Australian Citizenship and Other Legislation Amendment Bill in 2014; and the Northern Territory National Emergency Response legislation was enacted in less than 2 weeks in 2007.

²⁷ For example, the Migration Amendment (Regional Processing Arrangements) Bill 2015 was introduced on 24 June 2015 and received Royal Assent on 30 June 2015. The PJCHR examined the Bill in its 25th Report of the 44th Parliament, dated 11 August 2015. Its previous report was dated 24 June 2015, and it therefore did not have the opportunity to consider and report on the Bill before it was enacted.

subject to a broad range of important and necessary encroachments under Commonwealth legislation, which promote social harmony objectives, implement international undertakings or provide for necessary secrecy involved in official activity. Such restrictions are deemed necessary by the Parliament in pursuing legitimate objectives, such as combatting terrorism and criminal behaviour, or addressing discrimination and harassment.

Section 18C of the *Racial Discrimination Act 1975 (Cth) (RDA)*

65. The Law Council considers that freedom from racial discrimination and freedom of opinion and expression can and should be robustly protected and promoted in a way that reinforces their indivisible and complementary nature. Laws designed to protect against the identifiable harm caused by racial vilification must have due regard to the central position that the right to free speech holds in our community. However it also recognises that the exercise of this right can justifiably be limited where necessary to ensure the equal enjoyment of other fundamental rights.
66. The Law Council addressed the above views in more detail in its [submission](#) to the Attorney-General's Department on the Exposure Draft Reforms to the *Racial Discrimination Act 1975 (Cth)*.²⁸
67. The Law Council's only additional comment is that s 18 of the RDA is consistent with Australia's undertakings under international law. In *Toben v Jones*²⁹ and *Bropho v Human Rights and Equal Opportunity Commission*³⁰, the Federal Court found that section consistent with the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the ICCPR.
68. The Law Council notes that the CERD Committee reached the following conclusion in its concluding observations on Australia in 2000:
- “The Committee acknowledges the adoption of the *Racial Hatred Act 1995* which has introduced a civil law prohibition of offensive, insulting, humiliating or intimidating behaviour based on race. The Committee recommends that the State party continue making efforts to adopt appropriate legislation with the view to giving full effect to provisions of, and withdrawing its reservation to, Article 4(a) of the Convention.”
69. Further, in September 2013, the CERD Committee recommended, among other things, the following:

As article 4 is not self-executing, States parties are required by its terms to adopt legislation to combat racist hate speech that falls within its scope. In the light of the provisions of the Convention and the elaboration of its principles in general recommendation No. 15 and the present recommendation, **the Committee recommends that the States parties declare and effectively sanction as offences punishable by law:** (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means; (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin; (c) Threats or incitement to violence against persons or groups on the grounds in (b) above; **(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt**

²⁸ [Law Council submission](#), *Exposure Draft – Freedom of Speech (Repeal of s18c) Bill*, 2 May 2014

²⁹ (2003) 129 FCR 515

³⁰ (2004) 135 FCR 105

or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination; (e) Participation in organizations and activities which promote and incite racial discrimination.³¹ [Emphasis added]

70. It is noted that the Government abandoned its 2014 proposal to amend s 18C, following strong community reaction. In its submission, responding to the Exposure Draft Amendment, the Law Council acknowledged that “from a civil and political rights perspective, there is a case for amendment of the current provisions.”³² Many of the Law Council’s concerns, and those of its constituent bodies, arose from identified deficiencies in the model proposed for amendment. The Law Council will consider any amendment proposed in the future having regard to Australia’s relevant international legal obligations.

Potential Review of Section 18C

71. The Law Council notes that the ALRC has suggested that s 18C could be the subject of further review. In the event of any review of s 18C, the Law Council submits that the ALRC or the PJCHR would be appropriate bodies to conduct a review.

National Security Legislation

72. A number of aspects of counter-terrorism legislation may unjustifiably interfere with freedom of speech and the Law Council supports ongoing review of those laws by the INSLM, to consider whether any restrictions on rights are proportionate.³³ Some areas of concern, which may warrant review by the INSLM include:

- (a) some *Criminal Code Act 1995* (Cth) (Criminal Code) provisions, including:
 - (i) s 80, the offence of advocating terrorism (s 80C of the Criminal Code);
 - (ii) s 102.1(2), which enables a terrorist organisation to be prescribed under regulations where the organisation ‘is directly or indirectly engaged in, prepare, planning, assisting in or fostering the doing of a terrorist act’ or ‘advocates the doing of a terrorist act’; and
 - (iii) sections 11.4 and 11.5, concerning the impact of incitement and conspiracy offences respectively when combined with the broad nature of the terrorism offences; and
- (b) secrecy offences, including: disclosure of information by Commonwealth officers (*Crimes Act 1914* (Cth) (Crimes Act), s 70); official secrets (Crimes Act, s 79); disclosure that a person is in preventative detention (Criminal Code, s 105.41); and disclosure of information relating to an Australian Security Intelligence Organisation (ASIO) special intelligence operation (*Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), s 35P).

73. The INSLM is currently inquiring into s 35P of the ASIO Act, which is an important step in ensuring that this provision remains necessary and appropriate.

³¹ UN CERD Committee, General recommendation No. 35 : Combating racist hate speech, 26 September 2013, CERD/C/GC/35, 4 (available at <http://www.refworld.org/docid/53f457db4.html>)

³² *Ibid*, *op cit*, 29.

³³ *Independent National Security Monitor Act 2010* (Cth), s 6(1)(b).

74. The Law Council recommends that the Australian Government give further consideration to the recommendations of the ALRC in its 2009 report on secrecy laws.³⁴ The ALRC recommended that ss 70 and 79(3) of the Crimes Act should be repealed and replaced by new offences in the Criminal Code.³⁵ Implementation of the ALRC's recommendations would assist in ensuring that official secrecy is justified, proportionate and necessary to achieving legitimate objectives.

Secrecy provisions

75. The *Australian Border Force Act 2015* (Cth) (ABF Act) came into force on 1 July 2015. The Law Council is concerned that the ABF Act may unjustifiably encroach on freedom of speech because it:

- (a) does not include an adequate public interest disclosure exception to the secrecy provisions; and
- (b) operates extraterritorially without the associated protections that apply in Australia.

76. Subsection 42(1) of the ABF Act makes it an offence for someone who is, or has been an 'entrusted person' to make a record of, or disclose "protected information".

77. An 'entrusted person' is the Secretary, the Australian Border Force (ABF) Commissioner and all staff of the DIBP, including a person who is engaged as a consultant or contractor to perform services for the DIBP.³⁶ The Secretary or the ABF Commissioner may, by written determination, specify a person who is deemed to be an 'entrusted person'.³⁷

78. The definition of entrusted person is a DIBP worker, which can include external consultants, contractors or service providers such as doctors and welfare workers performing work by contract for the Department. Any person employed by an entrusted person will also be caught.

79. The first people to find themselves silenced under this law will be those who work in Australia's regional processing centres in Nauru and Papua New Guinea (PNG). However, the law may reach far beyond this, to silence every person involved in the provision of legal, counselling and welfare services to refugees, if their non-government employer is in receipt of government funding. This would constitute a serious incursion on freedom of speech in Australia and in Australia's regional facilities. This may be so even if the disclosure of the information would cause no harm to the public interest.

80. "Protected information" is defined in s 4 of the ABF Act as being information "obtained by a person in the person's capacity as an entrusted person". This will therefore mean information obtained in a person's capacity as an "Immigration and Border Protection worker", and in particular, their capacity as a person engaged as a consultant or contractor to perform services for the DIBP.

³⁴ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

³⁵ *Ibid*, Recommendation 4-1.

³⁶ Pursuant to s 4.

³⁷ Pursuant to s 5.

81. The maximum penalty for an offence under ss 42(1) is imprisonment for two years. This is the same penalty applying to unauthorised disclosures by a Commonwealth officer under s 70 of the Crimes Act.
82. Australian citizens, residents or body corporates engaging in the offence outside of Australia,³⁸ including Australia's regional processing centres on Nauru and PNG, may be captured by the provision.
83. Part 6 of the ABF Act details certain limited exemptions, but this does not include disclosure in the public interest.³⁹ Unauthorised disclosure is only permissible if the entrusted person 'reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual' and "the disclosure is for the purposes of preventing or lessening that threat".
84. The Explanatory Memorandum to the ABF Bill notes that:
- "These provisions are necessary to provide assurances to law enforcement and intelligence partners in Australia and internationally and to industry that information provided to the Department will be appropriately protected... The application of the secrecy provisions across the integrated department will ensure the disclosure of sensitive information is appropriately regulated."⁴⁰
85. The ABF Act, with its heightened secrecy provisions and broader powers to dismiss staff and contractors, may discourage legitimate whistle-blowers from informing the public about conditions in offshore detention centres.
86. All Australian States and Territories have legislation requiring mandatory disclosure of suspected child abuse by relevant professionals.⁴¹ There are also two other types of duties to report suspected child abuse and neglect, which can co-exist with a legislative duty, or which can exist in the absence of a legislative duty. These include the duty of care and duties under professional or industry regulation.

³⁸ Section 42(3) stipulates that s 15.2 of the *Criminal Code Act 1995* (Cth) concerning extended geographical jurisdiction, applies to an offence against subsection (1).

³⁹ Subsection 42(2) provides that the offence does not apply if: (a) the making of the record or disclosure is authorised by ss 43, 44, 45, 47, 48 or 49; or (b) the making of the record or disclosure is in the course of the person's employment or service as an entrusted person; or (c) the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, a State or a Territory; or (d) the making of the record or disclosure is required by an order or direction of a court or tribunal. A defendant bears an evidential burden in relation to a matter listed above, in accordance with ss 13.3(3) of the *Criminal Code Act 1995* (Cth). Ss 43, 44, 45, 47, 48 and 49 set out circumstances in which use and disclosure of protected information is permitted, in particular where: the recording or disclosure is for the purposes of the *Australian Border Force Act 2015* (Cth) or the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (s 43); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to certain bodies and persons in Australia, including government agencies and police, for certain purposes (s 44); the person has written authorisation from the Secretary of the Department to disclose information, or a class of information, to a foreign country, agency or authority of a foreign country, or public international organisation, that has entered into an agreement with the Commonwealth or one of its agencies, for certain purposes (s 45); the disclosure is in accordance with consent given by the person or body to whom the information relates (s 47); an entrusted person reasonably believes it is necessary to prevent or lessen a serious threat to the life or health of an individual (s 48) or the information has already been lawfully made available to the public (s 49).

⁴⁰ Explanatory Memorandum to the *Australian Border Force Bill 2015* (Cth), 14.

⁴¹ *Children and Young People Act 2008* (ACT) ss 356, 357; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27, 27A; *Public Health Act 2005* (QLD) ss 158, 191; *Child Protection Act 1999* (QLD) ss 22, 186; *Children's Protection Act 1993* (SA) ss 6, 10, 11; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3, 4, 14; *Children, Youth and Families Act 2005* (Vic) ss 162, 182, 184; *Children and Community Services Act 2004* (WA) ss 124A-H; *Family Law Act 1975* (Cth) ss 4, 67ZA.

87. The DIBP and the Minister for Immigration and Border Protection have stated that mandatory reporting requirements would not be affected, and that whistleblowers would be protected under the *Public Interest Disclosure Act 2013* (Cth) (PID Act).⁴² While this remains to be seen, there is likely to be a chilling impact on public interest disclosures, as whistleblowers can expect to face penalties and potential prosecution. Further, the apparent conflict between mandatory reporting obligations and Commonwealth secrecy provisions creates ample confusion for those with both a professional and moral obligation to speak out, but a statutory requirement to stay quiet.
88. The legislative reporting requirement protections also do not apply to Australia's regional processing centres in Nauru and PNG. Further, the PID Act does not permit public disclosures of information that consists of, or includes, "sensitive law enforcement information".
89. In these circumstances, the ABF Act may warrant further review with a particular focus on freedom of speech and whether the Act disproportionately hinders public interest disclosures or reporting requirements. The review may wish to consider whether the definition of "entrusted person", for example, should be more narrowly defined, to ensure that it does not disproportionately impact on freedom of speech.

Access to stored telecommunications data

90. Mandatory telecommunications data retention legislation may have a chilling effect on free speech and may also require review to ensure that it does not disproportionately impact on freedom of speech. The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) (Data Retention Act) requires service providers such as telecommunications companies to retain customer's metadata for two years. This data may be accessed by prescribed Commonwealth agencies.
91. An independent review should be asked to consider whether access to telecommunications data should be permitted without judicial warrant, as is presently the case. The reviewer should also determine whether the currently-extensive designation of prescribed government agencies is necessary and proportionate and whether the method for expanding the list of prescribed agencies allows sufficient Parliamentary scrutiny.
92. For example, the ABF Act also amends the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) enabling the DIBP to access stored telecommunications data. Agencies that fall within the definition of a 'law enforcement agency' including 'criminal law enforcement agencies' in the TIA Act are able to access telecommunications data warrants.
93. Law-enforcement agencies were deliberately limited under the *Data Retention Act* to ensure that only law enforcement agencies with a demonstrated need for such information had access to telecommunications data.⁴³
94. Under the ABF Act, the DIBP is defined as a "criminal law enforcement agency". The Explanatory Memorandum notes that:

⁴² The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, "Minister – inaccurate media statements on ABF Act", 1 July 2015, available at:

<http://www.minister.border.gov.au/peterdutton/2015/Pages/Inaccurate-media-statements-on-abf-act.aspx>

⁴³ Explanatory Memorandum to the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth), 4.

“This will enable the continued operation capability of key activities currently performed by the ACBPS, which will in the future be undertaken within the integrated Department.”⁴⁴

95. However, the ABF, as the DIBP’s operational enforcement arm, will be the area of the DIBP responsible for delivering on national security, law enforcement and security priorities.
96. Given the intrusive nature of stored communications warrants and their ability to reveal private information, the Law Council considers access should be closely confined to agencies exercising law enforcement powers, which requires clear limits with respect to the DIBP.

4 Freedom of religion

97. As noted in the Law Council’s submission to the ALRC’s Discussion Paper, freedom of religion is a fundamental right subject to strong protections in Australia.
98. The Law Council has some brief comments on the legislative provisions identified in the ALRC’s Chapter 4 conclusions.

Sex Discrimination Act 1984 (Cth)

99. Section 37 of the *Sex Discrimination Act 1984* (Cth) (SDA) has relatively limited operation when compared with State discrimination laws. State laws give wider protections to religious bodies and to individuals who seek to justify discrimination by reference to religious beliefs.⁴⁵
100. State and Territory counterparts show that, if there is a 'conflict' between religious freedoms and equality before the law, the right to discriminate on religious grounds may be justified, but only when and if necessary. The approach taken in *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors*⁴⁶ shows how a 'balance' can be struck.
101. The Law Council considers that ss 37 and 38 of the SDA reflect a reasonable balance between religious freedom and measures promoting non-discrimination.

Marriage Act 1961 (Cth)

102. The Law Council is of the view that the provisions in the *Marriage Act 1961* (Cth), including ss 47 and 113(5) and (6) on solemnisation do not disproportionately impinge on religious freedoms in a way that is disproportionate.

5 Freedom of association

103. The ALRC has suggested areas of potential concern may include:

⁴⁴ Explanatory Memorandum to the *Australian Border Force Bill 2015* (Cth) , 95.

⁴⁵ For example, s 56 of the *Anti-Discrimination Act 1977* (NSW).

⁴⁶ [2014] VSCA 75

- (a) counter terrorism offences under the Criminal Code – associating with a member of a terrorist organisation. Review of these laws falls within purview of the INSLM;
- (b) the freedom to associate and right to organise under Australia’s workplace relations framework;
- (c) the character test under the *Migration Act*, which provides ministerial discretion to refuse a visa to a person who the minister reasonably suspects has an association with certain groups or persons; and
- (d) anti-discrimination laws, which may impact on religious freedom.

Counter-terrorism provisions

104. The Law Council supports ongoing review of counter-terrorism laws by the INSLM to identify any undue encroachment on freedom of association. For example, the following provisions of the Criminal Code may warrant consideration by the INSLM:

- (a) control order and preventative detention order regimes under divisions 104 and 105;
- (b) offence of entering or remaining in a declared area contained in s 119.2; and
- (c) offence of associating with a member of a terrorist organisation in s 102.8.

105. The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) (Citizenship Bill), if enacted, may also warrant review in this respect. The Bill would automatically cancel the Australian citizenship of dual nationals/citizens in certain circumstances.

106. The role of the INSLM is to review the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation and other related laws. It also includes consideration of whether those laws contain appropriate safeguards, remain proportionate to any threat to national security and remain necessary.

107. While the former INSLM has reviewed a number of aspects of these laws, they do not appear to have been fully assessed for the appropriateness of their encroachment on freedom of association.

108. Implementation of some of the former INSLM’s recommendations may also address, in part, concerns about the impact of the Allegiance Bill on freedom of association. For example, the former INSLM recommended that s 102.8 of the Criminal Code be amended to include an “exception for activities that are humanitarian in character and are conducted by or in association with the [International Committee of the Red Cross], the UN or its agencies, or (perhaps) agencies of like character designated by the Minister.”⁴⁷

⁴⁷ Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013) 89.

Migration law ‘character test’

109. The Law Council considers that the character test in s 501 of the Migration Act encroaches on freedom of association and should be reviewed by the INSLM.⁴⁸
110. Section 501 gives the Minister discretion to refuse a visa on grounds that s/he reasonably suspects a person has associated with a terrorist organisation. The INSLM could consider whether providing definitions of “association” and “membership” consistent with the Full Federal Court’s findings in *Minister for Immigration and Citizenship v Haneef*⁴⁹ may address concerns about proportionality.

6 Freedom of movement

111. Commonwealth law identified by the ALRC as potential encroaching on freedom of movement include:
- (a) restricted access to world heritage areas, national parks and areas protected under the EPBC Act;
 - (b) counter terrorism measures under the Criminal Code including:
 - (i) control orders and preventative detention;
 - (ii) offence of entering into and remaining in a “declared area”; and
 - (iii) ASIO questioning and detention powers (noting discussion above with respect to review of these areas by the INSLM); and
 - (c) s 77 of *Bankruptcy Act 1996* (Cth), which requires a bankrupt to give their passport to the trustee.
112. Broadly speaking, every person lawfully within Australia has the right to move freely within Australia; to enter and leave it; and to choose where to live.⁵⁰

Foreign fighters legislation

113. The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act) contains provisions which permit the suspension of a citizen’s passport, preventing them freely leaving or entering the country.
114. These laws may be thought to reflect what the official historians of Australian passport documentation have described as “the belief of all Australian governments

⁴⁸ Subparagraph 6(1)(a)(ii) of the *Independent National Security Legislation Monitor Act 2010* (Cth).

⁴⁹ (2007) 163 FCR 414. In *Haneef*, the Full Federal Court found that a Minister’s decision made on the basis of any association with persons suspected of criminal conduct, no matter how long ago, how innocent or how fleeting, was insufficient to enliven his discretion to cancel a visa. ‘Association’ under the provision excluded merely professional, social or familial relationships. It had to reflect adversely on Dr Haneef’s character in some way.

⁵⁰ Australian Human Rights Commission, “Freedom of Movement”, available at: <https://www.humanrights.gov.au/freedom-movement>

after 1914 that they, as the national government, had the right to exercise a discretionary power to issue, withhold or cancel passports to Australians.”⁵¹

115. In an age where a passport is indispensable to international movement, such a ‘discretionary power’ is at odds with that part of freedom of movement which seeks to guarantee that “everyone shall be free to leave any country, including his own” (ICCPR, article 12(2)). Article 12(3) of the ICCPR qualifies this right by exempting restrictions provided by law that are necessary to protect national security.
116. There are detailed provisions in the *Australian Passports Act 2005* (Cth) defining the Minister’s power to refuse to issue, suspend or cancel a passport (ss 11-17 and 22). Some grounds are straightforward, for example where there is an order of the Family Court or a tax debt or other obligation, and the underlying facts are usually reviewable.⁵²
117. Matters affecting rights and freedoms, including human rights, arise in decisions on grounds of a threat to national security. In practice, such decisions are unchallengeable due to non-disclosure directions given by the Executive, which prevent the affected party from knowing of or addressing the information relied on.⁵³ The Minister’s power, therefore, can be exercised on the basis of undisclosed material and in the knowledge that judicial review is hampered. This results in a very significant restriction on the right of movement, with very limited scope to test its proportionality to the purported threat.
118. On the other hand, Article 12(4) of the ICCPR confers a right, not qualified by Article 12(3), but with its own inherent condition that “no-one shall be arbitrarily deprived of the right to enter his own country.” In the past, there have been occasional cases where Australian citizens have had their passports suspended or revoked while overseas, impeding or preventing their return. As a matter of principle, all citizens should be entitled to return to Australia.
119. The Law Council suggests the Foreign Fighters Act warrants further review by the INSLM.

Other counter-terrorism provisions

120. The Law Council supports review of various counter-terrorism provisions by the INSLM, with a particular focus on determining any undue encroachment on freedom of movement, including the:
- (a) control order and preventative detention order regimes under divisions 104 and 105 of the Criminal Code;
 - (b) offence of entering or remaining in a declared area contained in s 119.2 of the Criminal Code;

⁵¹ Jane Douman, David Lee, 2008, *Every Assistance and Protection: A History of the Australian Passport*, Department of Foreign Affairs and Trade, The Federation Press, 1.

⁵² *R v Paterson, Ex parte Purves* (1937) 10 ALJR 468 per Evatt J.

⁵³ See, for example, *Hussain v Minister for Foreign Affairs and Director-General of Security* [2008] FCAFC 128.

- (c) questioning and detention powers contained in the ASIO Act and the Crimes Act;⁵⁴
- (d) powers to suspend a person's Australian travel documents for a period of 14 days if requested by ASIO;⁵⁵ and
- (e) Citizenship Bill, if enacted.

7 Property rights – personal property

121. As noted in the Law Council's first submission to this Inquiry, property rights comprise a bundle of rights, from which a range of other rights and interests have emerged. It is one of the earliest rights recognised both in practice and written law, affecting both legal persons and nation states, the interaction between states and between states and individuals or entities.

Proceeds of crime

122. The ALRC's Interim Report provides a useful outline of the encroachment of proceeds of crime legislation on property rights, particularly following changes in 2015, and having regard to the review of the 2002 amendments in 2006.

123. The Law Council supports a review of the width of Commonwealth proceeds of crime legislation by the Parliamentary Joint Committee on Law Enforcement to determine whether it unduly interferes with vested personal property rights. In particular, the review should take into account the impact on:

- (a) personal property rights;
- (b) the equality-of-arms principle;
- (c) the presumption of innocence;
- (d) legal aid commissions; and
- (e) consistency with the *United Nations Convention Against Corruption*.

124. This is particularly important in light of:

- (a) the recent introduction of unexplained wealth measures into the *Proceeds of Crime Act 2002* (Cth) (POCA); and
- (b) the enactment of the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2014* (Cth), which amended the POCA to prevent restrained assets being used to meet reasonable legal expenses for the purposes of defending unexplained wealth proceedings.

125. Consideration should be given to whether such a scheme is proportionate and that such significant intrusion upon property rights is justified.

⁵⁴ *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 3; *Crimes Act 1914* (Cth) ss 23DB-23DF.

⁵⁵ *Australian Passports Act 2005* (Cth), s 22A. See also the *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) ss 15A, 16A.

Border Force law

126. The ABF Act amended paragraph 213(3)(g) so that the Comptroller-General of Customs (instead of CEO of Customs) may issue notices to financial institutions. It also repealed and replaced paragraph (c) of the definition of 'authorised officer' to include a DIBP worker who is an Australian Public Service (APS) employee and who is authorised by the Comptroller-General of Customs.
127. The effect of this is that any authorised DIBP employee may apply for a freezing order where there is suspicion that funds in an account are proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concerns or is wholly or partly an instrument of a serious offence.⁵⁶ A magistrate must then make the freezing order if satisfied that there is a risk that the balance of the account will be reduced.⁵⁷
128. The granting of a freezing order is a low threshold which leaves the court with limited discretion to refuse to make such an order once the requirements of s 15B of the POCA have been met. The freeze order suspends a person's right to deal with his or her property, without:
- (a) establishing beyond reasonable doubt that the person whose property is subject to the order has committed an offence; and
 - (b) the affected party being heard.
129. The Law Council considers that the officers authorised to make a freeze order application should be limited to those with a demonstrated need to do so in the law enforcement context. It has not been demonstrated that such a need exists for APS employees within the broader DIBP and therefore may be unjustified. It is also noted that there is no time restriction on the power to freeze assets, which suggests its use may be disproportionate in its impact on those subjected to a freeze order. The Law Council recommends that the law be amended to impose a maximum time period, requiring authorised officers to justify the ongoing need for a freeze order.
130. Any further changes to unexplained wealth legislation that may be required as part of the national cooperative scheme on unexplained wealth⁵⁸ should also be reviewed.

8 Property rights – real property

131. Areas of potential concern highlighted by the ALRC include:

⁵⁶ Subsection 15B(1) of the *Proceeds of Crime Act 2002* (Cth).

⁵⁷ An application for a freezing order: must be accompanied by an affidavit by the authorised officer, which currently includes an authorised Customs officer (section 15C of the *Proceeds of Crime Act 2002* (Cth)); can be made by telephone, fax or other electronic means in an urgent case or if delay would occur if an application were made in person which would frustrate the effectiveness of the order (section 15D); and may be extended by an application by an authorised officer, which currently includes an authorised Customs officer (section 15P).

⁵⁸ On 17 August 2015, the Government announced that it will seek to implement further changes to unexplained wealth legislation - see Michael McKenna, 'PM to give anti-Bikie ice watchdog more bite', *The Australian*, 17 August 2015 at <http://www.theaustralian.com.au/business/legal-affairs/pm-to-give-anti-bikie-ice-watchdog-more-legal-bite/story-e6frg97x-1227486098873>

- (a) whether the Commonwealth should establish a mechanism to ensure investigation of effects on rights and interests in land arising from consensual arrangements not otherwise caught by s 51(xxxi) of the Constitution; and
- (b) review of the EPBC Act and *Water Act 2007* (Cth) to ensure they do not unjustifiably interfere with rights pertaining to real property.

132. Both issues are identified in the Law Council's earlier submission to this Inquiry. The Law Council supports a review of the EPBC Act and the investigation into a mechanism for ensuring all effective acquisitions of property are subject to the same protections afforded by s 51(xxxi). The Law Council further notes that:

- (a) the common law presumption can be displaced by plain words of the legislature.⁵⁹ This may accord inadequate protection for so fundamental a right;
- (b) subject to satisfaction of other applicable legislation (for example, non-discrimination legislation such as the RDA, ss 9 and 10), State Parliaments have the power to deprive a person of property without compensation;⁶⁰ In Victoria, by way of local government declaring private land to be a road;
- (c) some limits on the use of property are not an "acquisition" by the Commonwealth;⁶¹ and
- (d) alterations, including termination, of certain statutory rights, which are treated as being inherently defeasible or in the gift of the executive of Parliament, are not treated as an "acquisition" for the purposes of the Australian Constitution.⁶²

9 Retrospective laws

133. The Law Council's initial submission to the ARLC highlighted a number of laws with retrospective application that may be unjustified, including migration, taxation, commercial, corporations, environmental and criminal laws. These laws may merit further review to ensure that they do not unjustifiably, retrospectively change legal rights, obligations or penalties unnecessarily.

Citizenship laws

134. The Citizenship Bill should be reviewed by the INSLM should it be enacted with retrospective application.

⁵⁹ *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399.

⁶⁰ *Mabo v Queensland [No. 1]* (1988) 166 CLR 186 at 202, 213, 224; *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399.

⁶¹ *Commonwealth v Tasmania* (1983) 158 CLR 1 (Tasmanian Dams case).

⁶² For example *Health Insurance Commission v Peverill* (1994) 179 CLR 226 (Medicare rebates); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 (offshore petroleum exploration permit); *ICM Agriculture Pty Ltd v the Commonwealth* (2009) 240 CLR 140 (groundwater irrigation rights).

135. The Law Council has raised a number of concerns with the retrospective application of s 35A of the Citizenship Bill,⁶³ including that it raises questions of whether the loss of citizenship would be regarded as punishment, and if so, whether:
- (a) in the case of past convictions, the judicial function is satisfied in circumstances where loss of citizenship was not contemplated as part of the sentence; and
 - (b) in the case of conduct without a conviction, the judicial function has been usurped by the legislature in an impermissible way.
136. In the case of convictions for offences referred to in s 35A, the class of persons who were convicted of such an offence prior to the commencement of the enactment is definite. The class of persons who are dual nationals must necessarily be a smaller subset of the former class. If the retrospective application of the legislation were narrowed to a smaller class of offences, the class of affected persons would reduce again, until it might be said that the exact identity of the persons affected by any retrospective operation of the legislation was known at the time of the enactment.
137. The danger, therefore, of enacting retrospective legislation to automatically apply to past convictions is that (on the assumption that loss of citizenship is a punishment) it amounts to a form of bill of attainder and therefore lies beyond the competence of the Parliament.⁶⁴
138. The Law Council's principled objection to laws with retrospective effect can be traced to principles enshrined in the rule of law, which requires that "the law must be readily known and available, and certain and clear" and "legislative provisions which create criminal or civil penalties should not be retrospective in their operation."⁶⁵
139. This concern has informed the approach of courts to the interpretation of statutes, such that courts will not readily interpret a statute as having retrospective effect unless the intention of the legislature to do so is clear.⁶⁶

Migration Laws

140. As identified in its first submission to the Inquiry, the Law Council considers that the retrospective application of certain provisions of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) and *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth) may unreasonably encroach upon the rule of law. These same concerns apply to the *Deterring People Smuggling Act 2011* (Cth).

⁶³ See Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 14 August 2015.

⁶⁴ A bill of attainder is a statute that finds 'a specific person or specific persons guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence' – *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J). In *Polyukhovich*, the High Court held that a bill of attainder would contravene Ch III of the *Constitution* which requires judicial powers to be exercised by courts, and not the legislature. An ex post facto law includes one that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed – *Ibid*, [109] (Toohey J citing Chase J in *Calder v Bull*). It may also be considered in certain circumstances to contravene Ch III of the *Constitution* – *Ibid*, [32] (Mason CJ).

⁶⁵ Law Council of Australia, *Rule of Law Principles- Policy Statement*, March 2011, Key Principle 1, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>

⁶⁶ *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *WBM v Chief Commissioner of Police* [2012] VSCA 159 (30 July 2012) [67] (Warren CJ, with whom Hansen JA expressed general agreement at [133]).

141. The Law Council notes that there are several existing oversight mechanisms in respect of migration laws, including:

- (a) the Immigration Ombudsman, established in 2005 in the Office of the Commonwealth Ombudsman, administers general complaints procedures and reviews cases involving long-term immigration detention, monitors administration of coercive powers and offshore processing of immigration cases, and inspects immigration detention facilities, including those offshore;
- (b) the AHRC, which, amongst other activities in respect of asylum seekers and refugees, investigates complaints of alleged breaches of human rights in immigration detention, conducts visits to immigration detention facilities and publishes reports on those visits. The AHRC has developed minimum standards for the protection of human rights in immigration detention and conducts own-motion inquiries concerning the treatment of people in immigration detention;
- (c) the PJCHR, which has powers to examine bills, acts and legislative instruments for compatibility with human rights, and inquire into any matter relating to human rights which is referred to it by the Attorney-General; and
- (d) the Independent Reviewer for Adverse Security Assessments, which examine material relied upon by ASIO in making security assessments against a refugee who has been refused a permanent visa as a result of an adverse security assessment. The Senate Legal and Constitutional Affairs References Committee, which exercises general powers of inquiry under the Standing Orders.

Independent Monitor of Immigration Legislation

142. As noted earlier in this submission, the Law Council considers that there would be benefit in establishing an independent, specialist body to review migration-specific legislation. In respect of retrospective laws, the Monitor should be able to inquire into whether retrospective migration laws:

- (a) should be changed;
- (b) had an identifiable purpose requiring retrospective application; and
- (c) have achieved those purposes.

143. The Monitor's role should also focus on how those laws are implemented and administered, including at sea and offshore in Australia's regional processing centres. Any actions or omissions affecting rights of individuals subject to Australia's immigration and border control powers should fall within the Monitor's jurisdiction.⁶⁷

144. Further, migration laws and practices will need to be reviewed if Australia ratifies the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). OPCAT requires that States designate a 'national preventive mechanism' (NPM) to carry out visits to places of detention, to monitor the treatment of and conditions for detainees and to make recommendations regarding the prevention of ill-treatment. These visits should lead to reports and

⁶⁷ Law Council of Australia, *Asylum Seeker Policy*, September 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf

recommendations to improve the protection of persons deprived of liberty. NPMs can also make comments on laws, regulations and propose reforms.

10 Fair trial

145. The Law Council's initial submission to the ALRC highlighted a number of laws limiting fair trial rights, which may merit further review. The Law Council makes the following additional comments.

Access to legal assistance

146. The Law Council notes the discussion with respect to access to justice and legal assistance funding in the Interim Report and the ALRC's conclusion that:

"The positive right to be provided with a lawyer at the state's expense is not a traditional common law right."⁶⁸

147. This broad statement is no doubt consistent with one aspect of the ruling of the High Court in *Dietrich v the Queen*,⁶⁹ but fails to address the clear indication by the Court that the prospect of an unfair trial is greatly increased without legal representation. The Court refers specifically to a presumption that proceedings will be stayed in certain circumstances if the unavailability of legal assistance may compromise a fair trial.⁷⁰ While this is noted in the Interim Report, its full implications for the right to a fair trial appear have not been explored.

How does lack of legal representation affect the right to a fair trial?

148. The Law Council encourages the ALRC to look more deeply into this issue. Access to justice is a core tenet of a fair and equitable legal system. The 'fairness' of a trial depends greatly on a range of factors, which do not include the relative seriousness of the charge, or whether the potential loss to a party is their liberty or an entitlement. Fairness will often depend on the relative resources available to one party or the other and, crucially, their capacity to present their best case and identify the weaknesses in their opponent's. Practically this entails legal representation.

149. As noted by the ALRC, contemporary understanding of the right to a fair trial has evolved over centuries to include a range of fundamental principles, such habeas corpus, the right to silence, procedural fairness, double jeopardy, client legal privilege and open justice. These principles are thought to enhance the rule of law and prevent oppression by the state or a wealthier opponent.

150. Yet it is clear that the dwindling availability of public legal assistance limits the extent to which a substantial (and growing) number unrepresented litigants or defendants can enjoy these protections. The fact that the High Court in *Dietrich v the Queen*⁷¹ concluded that trials on serious offences, involving an unrepresented defendant, should proceed only in exceptional circumstances,⁷² does little to assuage concerns about fairness in trials on lesser charges. The Law Council considers that a more principled position with respect to a 'fair trial' should be an assumption that an

⁶⁸ Australian Law Reform Commission, *ALRC Interim Report 127*, July 2015 (Interim Report), 301.

⁶⁹ (1992) 177 CLR 292.

⁷⁰ *Ibid*, per Mason CJ and McHugh J.

⁷¹ *Ibid*

⁷² *Ibid*, 299.

accused will be represented unless they waive that right, having regard to the universal use of professional prosecutors and the equality-of-arms principle.

How limited is the availability of legal assistance?

151. The Law Council refers to the table appended to this submission at **Attachment B**, which has been prepared with the assistance of the Law Council's National Criminal Law Committee.

152. As illustrated, in most jurisdictions there are three key preconditions to receiving legal aid:

- (a) the defendant must meet the means test, which in most jurisdictions means that an eligible defendant would be living below the Henderson Poverty Line;⁷³

then

- (b) if they plead not guilty, they will be eligible if, upon conviction, there is a real possibility of imprisonment;⁷⁴ or
- (c) if they plead guilty, they may be eligible if imprisonment is one of the options available on conviction; or
- (d) they may be eligible if a special circumstances exception applies and the commission decides to grant legal aid.

153. A number of legal aid guidelines contain restrictions in relation to repeat offenders or those charged with certain offences (e.g. traffic offences). It is not clear what amounts to a "serious offence" invoking the power of the Court to stay proceedings. However, it is clear that under existing guidelines it is possible to convict and imprison a person who is not deemed eligible for legal aid.

154. It is also deeply concerning that:

- (a) a person likely to receive a conviction and a non-custodial sentence (e.g. a large fine, community service order, etc.) would likely be denied legal assistance, regardless of their means, which can have serious consequences for the person charged; and
- (b) the guidelines provide an incentive to plead guilty to a charge, as legal aid is more likely to be available.

155. Even a decision by a court to stay proceedings for lack of legal representation will have a serious impact. The accused person may be kept on remand or left to wait while the delay is resolved. If "justice delayed is justice denied," there are certainly

⁷³ PricewaterhouseCoopers, 2009, *Legal Aid Funding: Current Challenges and the Opportunities for Cooperative Federalism*, Report prepared for National Legal Aid, 6. Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload099f.pdf>

⁷⁴ The position in NSW has changed since the table was prepared in August 2013. Legal aid was available if a term of imprisonment is an *available penalty*. Currently, legal aid will only be available for Local Court defended hearings where there is a *real possibility* of a 'term of imprisonment' being imposed for the matter or Legal Aid NSW is satisfied there are exceptional circumstances (see http://www.legalaid.nsw.gov.au/data/assets/pdf_file/0005/17798/2013-No-6-13-Local-Court-Defended-Hearings.pdf).

broader implications for traditional rights and freedoms arising from a decision to stay proceedings in these circumstances.

156. Further, imprisonment seldom results from a single offence or verdict. Many who face imprisonment do so because of their conviction history, which may in turn have involved one or more instances of involvement in the legal system without representation.

Previous inquiries

157. The ALRC refers to the fact that there have been numerous previous inquiries into access to justice and legal assistance funding. However, the Law Council is not aware of any in-depth inquiry into the consequences of denials of legal assistance. While the ALRC references these inquiries, it does not refer to their findings, including:

- (a) The observations by the Productivity Commission in 2014 that:
 - (i) the provision of legal assistance services by providers is increasingly ‘targeted’ due to funding restrictions, notwithstanding the fact that they are “integral part of ensuring that the justice system is accessible to all”;⁷⁵
 - (ii) the absence of legal assistance services can contribute to a lack of understanding of, and compliance with, the law, and undermines fairness in the justice system;⁷⁶
 - (iii) the underfunding of legal assistance services is substantial, contributing to social problems, enhancing disadvantage and increasing the likelihood of larger legal problems emerging;⁷⁷ and
 - (iv) “there is some evidence that the provision of legal assistance is regarded by many as a social norm. As part of a recent survey, Australians were asked who should receive government funded legal aid. Just 4 per cent of respondents said that everyone should have to pay for their own lawyer if they needed one.”⁷⁸
- (b) The AGD’s declarations that:
 - (i) “access to justice is an essential element of the rule of law and supports democracy. Justice institutions enable people to protect their rights against infringement by government or other people or bodies in society, and permits parties to bring actions against government to limit executive power and ensure government is accountable”;⁷⁹ and

⁷⁵ Productivity Commission, *Access to Justice Arrangements*, September 2014, Final Report, Commonwealth of Australia, 665. 672-3.

⁷⁶ *Ibid*, 666.

⁷⁷ *Ibid*, 734-

⁷⁸ *Ibid*, 758. It continues: “Other results from the survey were that around one-quarter of respondents (26 per cent) said only the very poor should receive government funded legal aid; 44 per cent said everyone, except the rich and 19 per cent said everyone, regardless of wealth.”

⁷⁹ Attorney-General’s Department, ‘*A Strategic Framework for Access to Justice in the Federal Civil Justice System*’, (2009), Commonwealth of Australia, 2.

(ii) “legal assistance has a key role in providing access to justice.”⁸⁰

158. The Law Council reiterates its position, stated in its earlier submission to this inquiry:

“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.”

159. The protection of traditional rights and freedoms depends on meaningful access to justice. In the area of the most acute threat to traditional rights and freedoms – where the state engages professional prosecutors to conduct criminal trials – a “fair trial” requires legal representation for the accused. While the common law has not recognised right to counsel, the Law Council urges ALRC to find that traditional rights and freedoms are hollowed by its absence.

The LELAP Act

160. The *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth) (the LELAP Act) should be reviewed, to ensure it does not unduly encroach on the right to a fair trial.

161. The LELAP Act, amended the *Australian Crime Commission Act 2002* (Cth) (ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act), authorises:

- (a) an ACC examiner to conduct an examination pre-charge, post-charge, pre-confiscation application or post-confiscation application and compel answers to questions relating to an ACC special operation or special investigation into serious and organised criminal activity; and
- (b) the Integrity Commissioner to conduct a hearing pre-charge, post-charge, pre-confiscation application or post-confiscation application and compel answers to questions relating to an investigation into law enforcement corruption.

162. In such an examination or a hearing, a person cannot refuse to answer a question or produce a document or thing on the basis that it might incriminate them, or expose them to a penalty.

163. Notwithstanding a number of safeguards contained in the LELAP Act to protect the right to a fair trial,⁸¹ there is a real risk that the administration of justice will be affected by requiring a person to answer questions, on pain of punishment, designed to establish that he or she is guilty of the offence with which he or she is charged.⁸² The fact that a person may be examined, in detail, as to the circumstances of the alleged offence or confiscation proceedings, is very likely to prejudice that person in his or her defence.

⁸⁰ Ibid, 139.

⁸¹ See Law Council submission to the Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee *Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015*, page 9, [25] (available at http://www.lawcouncil.asn.au/lawcouncil/images/3013_-_S-LCA_submission_LELAP_Bill_2015.pdf).

⁸² *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ (with whom Mason and Murphy JJ agreed).

164. The Law Council's concerns with the LELAP Act are outlined in detail in its submission to the Senate Legal and Constitutional Affairs Committee on the Bill.⁸³

Border Force laws

165. As noted earlier in this submission, the significant law enforcement powers conferred on the DIBP are otherwise available only to a small number of Commonwealth law enforcement agencies. As previously noted, the Law Council does not believe that a reasonable case has been made for delegation of such powers to non-ABF officers of the DIBP. The same concerns outlined previously extend to the potential deleterious impact on fair trials arising from law enforcement powers being extended beyond the restricted ambit of law enforcement activity.

Citizenship laws

166. The Citizenship Bill, if enacted, may also warrant review by the INSLM.

167. Proposed new ss 33AA and 35 provide that:

- (a) a person's citizenship may be cancelled on the basis of a suspicion that they have committed an offence or may intend to commit an offence, which is inconsistent with the presumption of innocence;
- (b) the person would then become an unlawful non-citizen subject to mandatory immigration detention,⁸⁴ which means that the decision to detain is made by officers of the executive rather than being connected with a judicial process; and
- (c) in order to be released from detention the person will, in practical terms, have to prove their own innocence (effectively reversing the normal burden of proof in relation to criminal offences and operating inconsistently with the presumption of innocence).⁸⁵

11 Burden of proof

168. The Law Council supports:

- (a) review of deeming provisions in drug offences and directors' liability in taxation offences, which reverse the legal burden of proof; and

⁸³ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015, 4 June 2015. Available at: http://www.lawcouncil.asn.au/lawcouncil/images/3013 - S- LCA_submission_LELAP_Bill_2015.pdf

⁸⁴ Subsection 189(1) of the Migration Act imposes an imperative duty upon 'an officer' – broadly defined to include officers of the Department of Immigration and Border Protection, customs officers, AFP officers, State and territory police officers, and any class of persons authorised by the Minister – to *detain* a person "if the officer knows or reasonably suspects that a person in the migration zone ... is an unlawful non-citizen".

⁸⁵ The Law Council's concerns are detailed in its submission to the Parliamentary Joint Committee on Intelligence and Securities Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, on 17 July 2015. Available at: http://www.lawcouncil.asn.au/lawcouncil/images/17.7.15_Submission_Australian_Citizenship_Amdt_Allegiance_to_Aus_Bill.pdf.

- (b) consideration of whether shifting the evidential burden only would be sufficient to balance the presumption of innocence with other legitimate objectives pursued by these laws.

169. Civil laws that have been identified by the ALRC, which in some cases have taken on a criminal character, may also warrant careful review.

Criminal law

170. The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth) (Crimes Bill 2015) seeks to remove the 'intent to manufacture' element from border controlled precursor offences in ss 307.11 to 307.13 of the Criminal Code.

171. Offences 307.11 to 307.13 of the Criminal Code relate to importing and exporting border controlled precursors and incur maximum penalties ranging from 7 to 25 years imprisonment. These offences are supported by a rebuttable presumption in section 307.14 of the Criminal Code which operates so that, where the defendant imported or exported the substance without appropriate authorisation, he or she is presumed to have the relevant intention or belief that the border controlled precursor would be used to manufacture a controlled drug. A defendant can rebut the presumption by proving on the balance of probabilities that he or she did not have the relevant intention or belief.

172. As noted in the Explanatory Memorandum to the Crimes Bill 2015, "this presumption was included in the Criminal Code in an effort to assist the prosecution in proving a defendant's state of mind in importing a precursor."⁸⁶ It further states:

... the [Commonwealth Director of Public Prosecutions] has faced formidable difficulties in prosecuting offenders for importing precursor chemicals. Those difficulties are particularly pronounced where individuals are part of a larger operation and who deliberately operate with limited knowledge about how their actions fit into the broader criminal enterprise. In these circumstances, it is very difficult to prove the intention or belief of the persons involved in undertaking discrete parts of the importation, even where each person knew or believed they were involved in some form of illicit activity... These difficulties are compounded where the prosecution involves an extension of criminal liability under Part 2.4 of the Criminal Code because the prosecution cannot rely on the presumption in section 307.14.⁸⁷

173. The Law Council suggests that a more appropriate way to address the CDP's concern may be to amend the Criminal Code so that the prosecution can rely on the presumption in s 307.14 for the offences in ss 307.11 to 307.13 where there is an extension of criminal liability under Part 2.4 of the Criminal Code.

174. Alternatively (if there is some difficulty with bringing presumptions into sections under Part 2.4 of the Criminal Code) or in addition to the presumption, the fault elements in ss 307.11 to 307.13 could be broadened. For example, there could be a requirement for the prosecution to prove that the person intends to use any of the substance to manufacture a controlled drug or the person believes that any of the substance has been imported for the purposes of manufacture of a controlled drug. Such a formulation would relate the importation to an expectation that it would be used

⁸⁶ Explanatory Memorandum to the Crimes Legislation Amendment (Powers, Offences and Measures) Bill 2015 (Cth), 16.

⁸⁷ Ibid.

in manufacture of a controlled drug, while avoiding the requirement under current provisions for detailed knowledge of the enterprise.

175. It is well known that precursor substances have uses that are not proscribed by law. In the Criminal Code, where subjective intent is the default fault element for conduct, intent to manufacture is regarded as the appropriate mental standard. It is not appropriate to subject a person to a maximum of 25 years imprisonment on the basis that he or she knew there was a substantial and unjustifiable risk that the substance was a border controlled precursor, even if they had an innocent reason for the importation.

12 Privilege against self-incrimination

176. Privilege against self-incrimination is a core protection, which requires that a person may not be compelled to answer questions, or produce documents or things, if to do so might tend to incriminate that person, or expose them to conviction of a crime or a penalty (criminal or civil) or any forfeiture or disability in the nature of a penalty.

177. The common law privilege against self-incrimination and against penalty is a substantive right of very long standing, applicable to criminal and civil penalties and forfeiture. It is deeply ingrained in the common law and is not to be taken to be abrogated by statute except in the clearest terms.⁸⁸ Its protection is required by the ICCPR and is protected under Australia's legislative framework.⁸⁹

Guiding principles for legislators

178. The ALRC notes that it is interested in comment as to whether further review of the use and derivative use immunities is necessary.⁹⁰

179. The Law Council is concerned that there is an increasing tendency in laws supporting investigative or enforcement activity to remove the privilege against self-incrimination and replace it with immunity from use. Where the immunity does not extend to derivative-use of the information, this enables a regulatory or enforcement agency to rely on the same information from a different source, notwithstanding that the original information was revealed by the incriminated party.

180. The Law Council considers that the guiding principle for legislators should be that privilege is not to be abrogated except:

- (a) in circumstances where there is a real and foreseeable risk to public health and safety;
- (b) by clear, express statutory provisions;

⁸⁸ *Smith v Read* (1736) 1 Atk 526 at 527; [26 ER 332], *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742, 744; *Sorby v Commonwealth* (1983) 152 CLR 281, at 309–310 and 316; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 554; *Rich v ASIC* (2004) 220 CLR 129 at 141 - 143

⁸⁹ *Evidence Act 1995* (Cth), 1995 (NSW), 2001 (Tas), 2008 (Vic), 2011 (ACT), *Evidence (National Uniform Legislation) Act* (NT), ss 128, 128A; *Human Rights Act 2004* (ACT), s 22(2)(i); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 25(2)(k). See also *Australian Securities and Investments Commission Act 2001* (Cth), s 68; *Banking Act 1959* (Cth), s 52F; *Competition and Consumer Act 2010* (Cth), ss 155(7), 155B, 159; *Corporations Act 2001* (Cth), ss 597(12) and (12A), *Work Health and Safety Act 2011* (Cth), s 172; *Royal Commissions Act 1903* (Cth), ss 6A (3), (4),

⁹⁰ Interim Report, [12.105]–[12.106].

- (c) where both use and derivative-use immunity are provided; and
- (d) where it is restored when the immediate danger, the subject of the investigation or enforcement activity which triggered the abrogation, has been averted or downgraded.

181. In addition to the matters raised in the Law Council's initial submission, other laws have been introduced that may unjustifiably remove the privilege against self-incrimination, including the LELAP Act and the Crimes Bill 2015.

LELAP Act

182. The LELAP Act (summarised above) would allow derivative use to be made of post-charge examination material, which could then be made available to the prosecutor of the person being examined, which may affect the right to a fair trial. As the majority of the High Court held in *X7 v Australian Crime Commission*:

“Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.”⁹¹

183. Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence (whatever answer is given). Even if the answer cannot be used in any way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging that aspect of the prosecution's case.

184. The Bill was passed in the Parliament without amendment, despite the Senate Legal and Constitutional Affairs Legislation Committee adopting the Law Council's recommendation that an ACC examiner or the Integrity Commissioner be required to seek judicial authorisation prior to commencing a post-charge examination or hearing.⁹² The Law Council considers that such a provision could help to ensure that a court retains a level of discretion over post-charge investigations and, as such, would provide a further safeguard to the right to a fair trial.

Anti-money laundering/counter terrorism financing

185. Crimes Schedule 10 of the Crimes Bill 2015, if enacted, will apply in circumstances where the protection of the privilege against self-incrimination is removed for individuals who are required to respond to a notice issued by the Australian Transaction Reports and Analysis Centre (AUSTRAC). Information and documents produced by the person would be able to be used against that person in a broader range of civil and criminal proceedings.

186. Under s 167 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) an authorised officer of AUSTRAC has the power to issue a notice to a person that requires the person to give information or produce documents. A person is not excused from giving information or producing a document on the

⁹¹ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 127 [70]-[71] (Hayne and Bell JJ, with whom Kiefel J agreed).

⁹² Senate Legal and Constitutional Affairs Committee, *Law Enforcement Legislation Amendment (Powers) Bill 2015 Report*, June 2015, 18.

ground that the information or the production of the document might tend to incriminate the person or expose the person to a penalty.

187. Section 169 currently provides that the information or documents, or the fact that they have been provided, is not admissible in evidence against the person:
- (a) in civil proceedings other than proceedings under the POCA that relate to the AML/CTF Act; or
 - (b) in criminal proceedings other than:
 - (i) proceedings for a failure to comply with the notice (section 167(3) of the AML/CTF Act); or
 - (ii) proceedings for giving false or misleading information or producing false or misleading documents in response to the notice (ss 136 or 137 of the AML/CTF Act or ss 137.1 or 137.2 of the Criminal Code).
188. The proposed amendment to s 169 will further abrogate the privilege against self-incrimination in relation to:
- (a) civil proceedings instituted for any offence against the AML/CTF Act; or
 - (b) criminal proceedings for any offence against the AML/CTF Act or any offence against the Criminal Code that relates to the AML/CTF Act.
189. The provisions do not provide for derivative-use immunity.
190. As a general proposition, it is the Law Council's view that the exercise of coercive information gathering powers should be regarded as exceptional, particularly when used in executive rather than judicial processes, because of the intrusive impact on individual rights. The Law Council's position is that the use of such powers is justified only when necessary to achieve a legitimate purpose and proportionate. The proposed amendments may warrant further review if enacted.

13 Client legal privilege

191. The Law Council covered this topic extensively in its submissions to the ALRC Review of Client Legal Privilege: Encroachments on Client Legal Privilege by Commonwealth Investigatory Powers.⁹³
192. As a core principle, client legal privilege requires that a person (the client) may not be compelled to disclose confidential communications between themselves and their legal advisers or between their legal advisers and others for the client's benefit, where the communication is for the dominant purpose of contemplated or pending litigation or for obtaining or giving legal advice. Central to this is that the privilege belongs to the client, not to the legal adviser.
193. There are a number of features of the privilege that bear mentioning, including:

⁹³ Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008).

- (a) the 'dominant purpose' test is now the accepted and preferred test by the High Court for determining whether or not legal professional privilege should apply to documentation and evidence in general;⁹⁴
- (b) client legal privilege is now recognised as a substantive rule of law, and consequently, the privilege is not confined to the processes of discovery and inspection, or the production of evidence in judicial proceedings;⁹⁵
- (c) the privilege applies to a range of legal proceedings and can be claimed at interlocutory stages of a civil proceeding, during the course of civil or criminal trials, and in non-judiciary proceedings (such as administrative and investigative proceedings or in derogation of a search warrant);⁹⁶ and
- (d) the onus is on the party asserting the privilege to present the facts that give rise to the claim.

194. Further, a key limitation arising at common law⁹⁷ is that privilege does not protect communications made for a purpose that is contrary to the public interest, such as where the communication is made in furtherance of an illegal or improper purpose, whether or not the legal adviser knows of that purpose.⁹⁸

195. Client legal privilege is weakened under Australian law in a number of instances, which are dealt with in detail in the ALRC's 2007 Report. More recent incursions have arisen in relation to national security measures.

National security legislation

196. The Law Council supports the review of various counter-terrorism measures by the INSLM with a particular focus on determining whether the laws may undermine client legal privilege and confidentiality. Such an exercise would fall within the ambit of the INSLM, as the right to a fair trial under Article 14 of the ICCPR suggests communications between clients and lawyers should be treated as confidential.⁹⁹ The following provisions may warrant further consideration by the INSLM in this regard:

- (a) s 34ZQ(2) of the ASIO Act, which requires that all contact between a person subject to a questioning and detention warrant and their lawyer is able to be monitored by an ASIO official;
- (b) ss 105.38(1) of the Criminal Code, which requires any contact between a lawyer and a person being detained under a preventative detention order be capable of being monitored by a police officer; and

⁹⁴ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

⁹⁵ See *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217. To successfully claim the privilege, a relationship between a lawyer and their client must be in existence or at the very least, contemplated: *Minter v Priest* [1930] AC 558, 568. There are exceptions to this rule, for instance, a person may claim client legal privilege where they do not have a direct relationship with a lawyer but they have an interest in common with the client, such as in a joint tenancy; See generally, Suzanne McNicol, *Law of Privilege* (Law Book Company Ltd, 1992) 76.

⁹⁶ Suzanne McNicol, *Law of Privilege* (Law Book Company Ltd, 1992) 76, 52.

⁹⁷ Section 125 of the uniform evidence law creates a legislative exception.

⁹⁸ *Baker v Campbell* (1983) 153 CLR at 409–410; *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141 at 147, 156, 159, 161; *Attorney General (NT) v Kearney* (1985) 158 CLR 500 at 514-515; Propend C at 514

⁹⁹ ALRC Interim Report, 371.

- (c) the Data Retention Act, which requires service providers such as telecommunications companies to retain customers' metadata for two years and avail it to prescribed law enforcement agencies without a judicial warrant.

197. Client legal privilege is fundamental to the administration of justice and our democracy. Lawyers are also subject to professional obligations to maintain the confidentiality of client communications.

198. While these laws do not expressly abrogate client legal privilege, they may nonetheless undermine it by impairing full and frank discussions between legal advisers and their clients. This may in turn hinder the administration of justice and compliance with the law.¹⁰⁰

Data Retention Act

199. The Law Council recommends that the Data Retention Act be amended to require agencies to obtain a warrant to access a lawyer's metadata for the purpose of identifying a client, to protect privileged information. Alternatively, the Law Council suggests that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be asked to inquire into and report on the adequacy of safeguards to prevent access to privileged information through lawyers' telecommunications data. Further safeguards may be important, for example, where:

- client legal privilege attaches to a client's identity or contact details which may be revealed by telecommunications data;¹⁰¹
- a prosecuting agency can access information revealing how an individual seeks to defend her/himself; or
- whistle-blowers seek legal advice prior to or while communicating with a journalist.

200. At common law, client legal privilege attaches to the content of privileged communications, not to the fact of the existence of a communication between a client and their lawyer.¹⁰² Nonetheless, client legal privilege may potentially apply to telecommunications data where that data would disclose a client's identity and where it is provided for the purpose of obtaining or giving legal advice.¹⁰³ For example, in the United Kingdom it has recently been held that in certain circumstances a client's telephone number and email address are protected from disclosure by client legal privilege.¹⁰⁴

201. The potential for client legal privilege to attach to the disclosure of a client's identity and contact details suggests heightened protections for client/lawyer telecommunications information are required, for example by a judicial warrant process.

¹⁰⁰ Law Council of Australia submission to the Australian Law Reform Commission, *Inquiry into Client Legal Privilege and Federal Investigatory Bodies*, November 2007, 5, 9.

¹⁰¹ See *Z v NSW Crime Commission* [2007] HCA 7 per Gleeson CJ, Kirby and Callinan JJ; *Ex parte Lees* at 144-145 per Gibbs J; *Hamden v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1267; *SRJ v Person(s) Unknown being the author and commenters of Internet blogs and D & Co.* [2014] EWCH 2293 (QB); *JSC BTA Bank v Ablyazov* [2012] EWHC 1252 (Comm).

¹⁰² *National Crime Authority v S* [1991] FCA 234.

¹⁰³ *Ibid*, *op cit* 103.

¹⁰⁴ See *JSC BTA Bank v Ablyazov* [2012] EWHC 1252 (Comm).

202. A person should also be able to seek legal advice and assistance without apprehension of prejudice.¹⁰⁵ Weakened protections for client/lawyer communications may dissuade some clients from seeking legal advice out of fear (whether or not unfounded) that, if revealed, the very fact that they have contacted a lawyer might evidence guilt.

14 Strict and absolute liability

203. Generally, the Law Council considers that offences subject to strict or absolute liability should be limited to those of a relatively minor or regulatory nature. Increasingly, strict or absolute liability has become a feature of more serious offences, including terrorism offences, copyright infringement, corporate, family and immigration law.

Counter terrorism offences

204. The Law Council supports the review of various counter-terrorism measures by the INSLM with a particular focus on determining whether laws that impose a strict or absolute liability for a criminal offence are justified. For example, counter-terrorism and national security legislation may warrant consideration by the INSLM including:

- (a) financial transactions related to freezable assets—ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth);
- (b) associating with a terrorist organisation—ss 102.5 and 102.8 of the Criminal Code;
- (c) the disclosure of operational information concerning a warrant issued under s 35D of the ASIO Act —s 34ZS; and
- (d) a person's presence in a declared area—s 119.2 of the Criminal Code.

Other offences

205. Other strict or absolute liability offences identified in the Interim Report as potentially warranting review include:

- (a) directors duties relating to insolvent trading in the Corporations Act;
- (b) reporting requirements under the *Customs Act 1901* (Cth); and
- (c) commercial scale infringement in the *Copyright Act 1968* (Cth).

206. In addition to these provisions, further examples include:

- (a) s 245N(2) of the Migration Act; and
- (b) strict liability offences imposed in a family law context including ss 160(3) and 161(3) of the *Child Support Assessment Act 1989* (Cth) and ss 23(7), 33(2), 34(2), 72W(2), 111(3), 113A (3) and 120(3) of the *Child Support (Registration and Collection) Act 1988* (Cth). Proceedings under the family law legislation govern the property of litigants and their family relationships. The imposition

¹⁰⁵ *Baker v Campbell* (1983) 153 CLR 52, per Deane J at 115.

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.¹⁰⁶

Review

207. The Law Council notes and supports the recommendation made by the Senate Standing Committee for the Scrutiny of Bills, referred to in the Interim Report, that ‘the Attorney-General’s Department should coordinate a new project to ensure that existing strict and absolute liability provisions are amended where appropriate to provide a consistent and uniform standard of safeguards’.¹⁰⁷ Such a project should involve consideration of the policy merits of imposing strict or absolute liability.

15 Procedural fairness

208. Procedural fairness is denied by legislation, regulation or process, which unduly limits the right to a fair hearing, such as through denying access to relevant information or the reasons for a decision, or impeding access to legal advice and representation.

National security law

209. The Law Council’s initial submission to the ALRC’s inquiry raised concerns that the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) may unjustifiably affect the common law duty to afford procedural fairness. Ss 29(3)(c), 31, 38L and 38I(3) of the NSI Act set out the closed hearing requirements that apply to certain federal criminal and civil proceedings, where a court may exclude a defendant’s legal representative on the grounds that a disclosure of information may lead to a national security risk.

210. The former INSLM in his third Annual Report (2013) made a number of recommendations for improvements to the NSI Act.¹⁰⁸

211. The Law Council recommends that the Government respond to the INSLM’s reports and consider accepting these recommendations as soon as possible.

212. Falling short of this, the Law Council does see some practical advantages in further considering the use of ‘special advocates’, provided that fundamental safeguards are met. The Law Council notes that the INSLM is currently inquiring into the adequacy of control order safeguards. The Law Council additionally supports focus on procedural fairness by the INSLM, including:

- (a) the process for ASIO security assessments for non-citizens in the ASIO Act;
- (b) ASIO Act ss 35 and 38(2), which allow ASIO to issue an adverse security assessment against an Australian citizen in order to recommend administrative action be taken against an individual (e.g. passport

¹⁰⁶ Law Council of Australia submission to the Standing Committee for the Scrutiny of Bills’ inquiry into Absolute and Strict Liability Offences (2002) 7.

¹⁰⁷ Senate Standing Committee for the Scrutiny of Bills, ‘Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation’ (26 June 2002), 284.

¹⁰⁸ Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2013), Recommendations VII/1-VII/6.

cancellation). While an adverse security assessment of a citizen may be challenged in the Administrative Appeals Tribunal under s 54, the Attorney-General may issue a public interest certificate that means any sensitive national security information will be withheld from the applicant;

- (c) Migration Act s 134A, which provides that the rules of natural justice do not apply to the Minister's decision to cancel or revoke a visa on security grounds under ss 109 and 134B. ; and
- (d) exclusion of natural justice in ss 33AA and 35 of the Citizenship Bill, should it be enacted.

213. The Law Council also recommends that consideration be given by the Government to adopting the former INSLM's recommendation that questioning and detention warrants be repealed. The Law Council is opposed to the extended detention of persons who have not been charged with a criminal offence. Officers of the executive have no common law power to detain arrested persons for the purpose of furthering their investigations, notwithstanding any detrimental effects this may have on the investigation of criminal conduct or the collection of intelligence. The questioning and detention powers under Part III Division 3 of the ASIO Act abrogate this common law principle.

Corporate Law

214. In its Interim Report, the ALRC's discusses the submission by the Australian Securities and Investments Commission (ASIC) and the identification of possible denials of procedural fairness in respect to corporate law.

215. In respect of the discussion of s 739 of the Corporations Act, the Law Council notes that a 'stop order' for offers of securities made under a disclosure document which operates for 21 days is a legitimate temporary emergency measure which, by its nature, appropriately operates in the absence of a right to a hearing before it is exercised. It may only be exercised on the basis that the advertisement or statement is 'defective', being a misleading or deceptive statement, an omission of information required under legislation or fitting within the circumstances set out in ss 739(6)(c) and 734(5)(b).¹⁰⁹

216. As ASIC submitted to the ALRC, there is a public interest in exercising such an emergency power in avoiding financial loss caused by fraud or improper management. If there is not sufficient justification for the stop order to be made, it would be open to an affected party to take immediate proceedings to have it set aside.¹¹⁰ In any event, the lack of a right of a hearing prior to the stop order being made is ameliorated by it only operating for 21 days, after which a hearing is provided to determine whether the order should continue in effect. That hearing is conducted in accordance with principles and procedures in a Regulatory Guide, which outlines mandatory relevant considerations for ASIC to take into account, and so provides an adequate set of criteria to accord procedural fairness to an affected party.

¹⁰⁹ A similar power exists under s 1020E in relation to financial products.

¹¹⁰ However, the Law Council is advised that, in practice, entering court proceedings in these circumstances is unlikely to be of practical assistance to the issuer and is rarely, if ever, actually done. The court may be unwilling to intervene in any event, given the process for a hearing by ASIC within 21 days, and the interim nature of the stop order. Moreover, the right to seek to have an executive action set aside cannot as a matter of logic be a justification that the action does not infringe the relevant right.

217. In respect of the discussion of section 915B of the *Corporations Act*, the Law Council notes that ASIC has power to ‘suspend or cancel’ an Australian financial services licence (AFSL) by notice, where the person has ceased to carry on the financial service business, becomes insolvent under administration, is convicted of serious fraud or becomes mentally or physically incapable of managing his or her affairs. In those instances, there is a reasonable public interest in suspending the licence without a hearing.
218. However, the Law Council considers that AFSL suspension procedures would be more consistent with the right to procedural fairness if it was only operative for a limited period of time, such as 21 days, within which an opportunity was provided to show cause as to why the suspension should not continue. The Law Council does not consider that there is justification for cancellation of the licence without first giving notice of an intention to cancel and affording an opportunity for an affected party to make submissions to ASIC as to why the cancellation should not come into effect. A similar process for suspension or cancellation after a hearing, as is afforded by section 915C, should apply to a cancellation under section 915B.

Migration laws

219. The Law Council reiterates its general view that there is no justification for denying the application of the rules of procedural fairness to executive decision-making in relation to the operation of migration laws.
220. Specifically, and in respect of the Migration Act, the Law Council offers the following analysis:
- (a) Subsections 133A(4), 133C(3) and 134A provide that natural justice does not apply to visa cancellation decisions. Further, the Minister is not required to consider proportionality when cancelling visas;
 - (b) Subsections 500A(11), 501A(3) and 501(5) and may unjustifiably deny natural justice, by preventing review of visa decision on character grounds; and
 - (c) Part 7AA, relating to unauthorised maritime arrivals, may unjustifiably deny natural justice, whereby initial review by departmental officials is severely constrained, merits review of decisions will only proceed as a matter of Ministerial discretion and review may be conducted on the papers without new information from the applicant.
221. The Law Council notes that denial of procedural fairness in migration legislation may have negative consequences for public confidence in open justice and accountability of administrative decision-making. The Law Council supports a review of these provisions.
222. Further:
- (a) Section 36 ASIO Act, the Law Council considers that denies to the person affected the right to a hearing and an opportunity to respond to evidence on the basis of which an adverse security assessment is made, without clear justification.
 - (b) Section 22B(1) of the *Maritime Powers Act 2013* (Cth) applies broadly to the exercise of powers under the relevant division, rather than specific powers. There does not appear to be any real public interest served by excluding

natural justice. It is also difficult to properly consider the appropriateness of the exclusion, given different considerations will apply in relation to each particular maritime power impacted by the exclusion of natural justice.

223. As set out in the Law Council's response to Retrospective Laws, whether migration laws disproportionately impinge on procedural fairness would most effectively be considered by an Independent Monitor of Migration Legislation. As with the Immigration Ombudsman, the Monitor should have the power to examine the practical effects of these migration laws both onshore and offshore. These powers should also extend to enhanced screening processes that take place at sea, in accordance with Australia's international law undertakings.

16 Delegating legislative power

224. The Law Council supports the finding in the ALRC's Interim Report that:

"The proportionality principle, which is useful to test limits on many rights, may be less helpful in determining whether a delegation of legislative power is appropriate. For one thing... the proportionality principle would suggest that delegations of legislative power should be rare and only made when strictly necessary. However, delegating legislative power to the executive is very common and is a widely accepted method of law making, particularly if subject to parliamentary control."¹¹¹

225. The Australian system of government relies on the separation of powers. It is impractical for all legally binding rules to be made by the Parliament. Appropriate delegation of legislative powers to members of the executive is necessary for the effective administration of Government. Guidance on what are appropriate matters for primary and delegated legislation may, as the ALRC's Interim Report notes, be found in the Legislation Handbook.

226. The Law Council's primary example relates to biometrics law.

Biometrics law

227. The *Migration Amendment (Strengthening Biometrics Integrity) Bill 2015* (Cth) expanded the existing powers of collection of personal information, including sensitive biometric data, under the Migration Act. Under new ss 257A(1) a person can be required to provide one or more personal identifiers for any purposes under the Migration Act or *Migration Regulations 1994* (Cth).

228. The Law Council considers that the power to prescribe both a purpose for which personal identifiers may be collected and the collection of biometric data via regulation raises the potential for the scheme to go beyond the initial intention of the Bill and the Migration Act, without adequate parliamentary scrutiny. Permitting changes to the purposes of collection of biometric data by regulation can result in significant incursions into privacy, while escaping general public awareness. This can lead to lack of clarity or understanding about the scope of the legislation. As a matter of good legislative practice, significant matters should be specified in primary legislation which

¹¹¹ Interim Report, 449.

generally undergoes extensive consultation, not potentially subject to change by Ministerial decision and regulation.¹¹²

229. The Rule of Law requires that the law must be readily known, available, certain and clear,¹¹³ and where legislation allows for the Executive to issue regulations, the scope of that delegated authority should be carefully confined and subject to Parliamentary supervision.¹¹⁴ Such a requirement ensures that executive powers are defined by law, such that it is not left to the executive to determine for itself what powers it has and when and how they may be used.¹¹⁵
230. The categories of biometric data and the purposes for which it should be collected raise privacy implications. Given that citizens and non-citizens will be required to provide one or more personal identifiers that are sensitive information under the *Privacy Act 1988* (Cth),¹¹⁶ the types of biometric data should be prescribed by legislation, with changes subject to appropriate public scrutiny and awareness.

17 Immunity from civil liability

231. The rule of law requires that the Executive Government be responsible in law to the same extent and in the same way as an ordinary citizen, including when the Government contracts or commits an intentional act or omission.
232. The entire course of the development of Australian law (which led the common law world in removing immunity for the Government, beginning in the nineteenth century in Queensland) points to removal of executive immunity.
233. As was stated by Sir John Downer of South Australia at the Constitutional Convention in 1898:
- “Why, because you have the longer purse, and a greater power of fighting your opponent, should you be exempt from action if you do wrong as state, when the humblest citizen is not exempt from any responsibility for any injury done by him to his fellows.”
234. Executive immunity has been in decline in Australia, with all jurisdictions winding back legislation limiting the state’s liability in tort or contract. The principle is well established and arises principally from the High Court’s original jurisdiction in all matters in which the Commonwealth or a person suing the Commonwealth is a party.¹¹⁷

¹¹² Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No 16 of 2014, 26 November 2014, 3; Peter Leonard, *Internet Data Retention in Australia – A Quick (but Deep) Dive into the new Bill*, (Gilbert and Tobin Lawyers, November 2014) 3.

¹¹³ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 1. See also Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 1: Drafting statements of compatibility* (2014) 1.

¹¹⁴ *Ibid*, Principle 6(a).

¹¹⁵ *Ibid*, Principle 6.

¹¹⁶ This means that agencies are only able to collect sensitive biometric information about an individual in defined circumstances, including where: the individual has consented to the collection; the collection is authorised or required by or under law, or the collection is necessary to prevent a serious threat to the life, health or safety of any individual – see Australian Privacy Principle 3 in Schedule 1 of the *Privacy Act 1988* (Cth).

¹¹⁷ Australian Constitution, s 73(iii).

235. Notwithstanding this, the extent of the Commonwealth's abrogation of executive immunity is unclear. A number of government agencies and offices continue to enjoy executive immunity, generally justified on the basis of operational necessity or secrecy.

Judiciary Act

236. Uncertainty about the width of the consent of the Commonwealth to actions by ordinary citizens arises under ss 56 to 58 of the *Judiciary Act 1903* (Cth) (Judiciary Act), which relates to claims in contract or tort. There is rational debate as to whether those words encompass all civil claims against the Commonwealth or are words of limitation. The ALRC considered this in detail in its Review of the Judiciary Act in 2000 – 2001, and recommended:

- (a) enactment of legislation to abolish the Commonwealth's procedural immunities from being sued;
- (b) review of laws providing immunity in relation to wrongful administrative action; and
- (c) the circumstances in which any exceptions against the presumption against immunity should be removed.¹¹⁸

237. The Law Council also considers that there is scope to:

- (a) develop and simplify the law after *Bropho v Western Australia*¹¹⁹ and *McNamara v Consumer Trader and Tenancy Tribunal*,¹²⁰ by amending the *Acts Interpretation Act 1901* (Cth) to provide that all Acts are to be taken to bind the Crown in all its capacities, unless expressly stated otherwise; and
- (b) clarify the law with respect to the liability of Government in tort for incorrect advice or failure to fulfil statutory duties.¹²¹ 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. A statute could be modelled on the US Federal Tort Claims Act 1946.¹²²

Criminal and national security laws

238. Immunities in the ASIO Act for special intelligence operations should be reviewed by the INSLM with particular focus on whether immunity from civil liability is appropriate in light of the need for an effective remedy under international law.

239. As previously noted, the ABF Act extends access to certain law enforcement powers previously available to Customs. These include powers under the Crimes Act relating to controlled operations (covert operations in which participants are protected from criminal or civil liability that may otherwise arise), to acquire and use an assumed identity, and witness identity protection certificates for operatives.

¹¹⁸ Recommendations 23-1 to 23-3.

¹¹⁹ (1990) 171 CLR 1

¹²⁰ (2005) 221 CLR 646

¹²¹ *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.

¹²² (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), pp 36 – 60

240. Previously Customs was defined as a ‘law enforcement agency’ for the purposes of controlled operations in the Crimes Act. Controlled operations are covert operations in which law enforcement officers and other participants are protected from criminal and civil liability for conduct that might otherwise attract sanction, for the purpose of obtaining evidence of a serious Commonwealth offence or a serious State offence that has a Commonwealth aspect (offences relating to particular matters and that have a maximum penalty of three years imprisonment or more).¹²³
241. As noted earlier, powers relating to controlled operations should be expressly limited to the ABF in certain instances. Broader application to the DIBP may be an unjustifiable extension of executive immunity.

18 Judicial review

242. Judicial review is a key common law and statutory protection, which enjoys reasonable protection in Australian law.
243. Removing access to the Courts is the corollary to increased Executive power; both encroach on traditional rights and freedoms. This point was as noted by Brennan J in *Church of Scientology v Woodward*,¹²⁴ referred to by the ALRC in its Interim Report. Increasingly the Law Council has observed that in the national security and migration spaces, even where judicial review is provided, its effectiveness is vitiated because Executive powers are increasingly broad and discretionary. The Law Council encourages the ALRC to consider this issue in light of its final recommendations on judicial review.

Criminal and National Security law

244. The Law Council supports prompt Government consideration of the Administrative Review Council’s (ARC’s) recommendations in its Federal Judicial Review in Australia Report (2012). With respect to national security law, it is recommended that the limits on judicial review under Schedule 1 of the ADJR Act should be removed in relation to:
- (a) the findings of the Inspector-General of Intelligence and Security (IGIS), on the basis that the findings of an accountability body ought to be subject to review; and
 - (b) decisions under division 105 of the Criminal Code, on the basis that there is no judicial oversight of the making of preventative detention orders.
245. The ARC also recommended that the blanket exemption for all ASIO decisions be reviewed.
246. The Law Council supports these recommendations as a step towards ensuring that limitations on judicial review are proportionate and justified.

Citizenship laws

247. There is uncertainty about the application of the ADJR Act to the Citizenship Bill, if enacted. Under the proposed scheme, a person’s citizenship may be automatically

¹²³ *Crimes Act 1914* (Cth), Part IAB.

¹²⁴ [1982] HCA 78.

removed and their liberty restricted before the person is notified of the allegations against him or her, and before they are afforded the opportunity to challenge the cessation.

248. Loss of Australian citizenship under proposed ss 33AA(1), 35(1) would occur by force of the Act upon commencement of the relevant conduct, and without any decision being taken under the Act. That operation of the law would not in itself involve a 'decision' which could be reviewed under any specific regime for judicial or administrative review.
249. Ultimately, a Court would need to determine whether the person was an Australian citizen (i.e., whether a relevant disqualifying event under ss 33AA(1) and 35(1) had occurred).
250. It is less clear whether a person subject to a notice under proposed ss 33AA(6), 35(5) or 35A(5) could commence proceedings in a federal court, seeking a declaration that he or she was an Australian citizen, in the absence of a concrete dispute of the kind referred to in the previous paragraph. Such an application might encounter a threshold objection that it raised a question which was academic and was not a proper subject for a grant of declaratory relief.¹²⁵
251. Subject to that possible objection, the proceedings could be brought in the Federal Court under paragraph 39B(1A)(c) of the Judiciary Act. Whether such a proceeding could be brought under the ADJR Act is doubtful as it would not fasten upon anything readily identifiable as a "decision".
252. This difficulty could possibly be avoided, at least in part, by framing the application as one seeking judicial review of the Minister's decision to issue a notice. Although the notice does not appear from the terms of the Bill to have any legal effect in itself, a court would probably be inclined to regard the decision to issue it as one which was amenable to review under s 39B of the Judiciary Act or the ADJR Act and could be the subject at least of declaratory relief.
253. An attempt to commence proceedings in the High Court under s 75(v) of the Constitution may encounter difficulty, as none of the constitutional writs (one or more of which must be sought in order to engage the jurisdiction) seems apt to deal with a notice which (apparently) has no purported legal force and merely records the Minister's conclusion.
254. However, in any proceeding where a person sought to set aside a notice, the applicant would most likely need to prove that the relevant disqualifying event had not occurred (and therefore he or she had not ceased to be an Australian citizen). Each of the relevant subsections would require the Minister to issue the notice if he or she "becomes aware of [conduct] because of which a person has, under this section, ceased to be an Australian citizen." This leaves ambiguity as to whether the relevant trigger is:
- (a) an actual disqualifying event, of which the Minister becomes aware; or
 - (b) the Minister forming the view that a disqualifying event had occurred.
255. If the latter construction is the correct one, the applicant would be limited to attempting to show that the Minister had erred in law in reaching that understanding or

¹²⁵ See for example *Ainsworth v Criminal Justice Commission* (1992) 173 CLR 564, 582

opinion, an exercise that might be of limited utility, as it would leave unresolved the underlying question whether the person had ceased to be an Australian citizen.

256. A person who loses their citizenship under the Bill would have standing to apply for judicial review, but they would need someone in Australia to file the application.¹²⁶ A family member with a “special interest” in the subject matter may have standing to file the application.¹²⁷
257. In some cases (for example, where paragraphs 33AA(2)(c), (f) or (g) are said to apply), it may be unclear whether a loss of citizenship has occurred.
258. The purpose and effect of the notice required to be issued by the Minister is also unclear. No particular legal consequences are given to the notice (except that there must be a notice before the Minister’s dispensing powers come into operation). Other provisions refer to a decision to ‘rescind’ a notice. The notice is presumably intended to inform decision-making by other arms of the executive government in relation to the person to whom it relates. However, its opaque legal status creates uncertainty as to whether and how it may be challenged.
259. The PJCIS reviewed the Citizenship Bill and recommended that the Bill be amended to require the Minister for Immigration and Border Protection to provide an explanation of the person’s review rights.¹²⁸ However, the Committee does not seem to have outlined the preferred extent of review rights under the self-executing provisions.
260. The Law Council submits that the ALRC should recommend that the Bill be amended to provide greater clarity around the availability of judicial review under the Citizenship Bill, to ensure that any limitations are justifiable.

Administrative Review Council – Federal Judicial Review in Australia Report

261. The Law Council was disappointed with the decision to discontinue the ARC as a separate advisory body. The ARC provided a valuable role in ensuring that the administrative decision-making processes of the Commonwealth Government are correct according to law and accord with administrative law values, by working with all relevant interests — political, bureaucratic and community based.
262. The ARC’s Federal Judicial Review Report, referred to in the Interim Report recommended that the limits on judicial review under schedule 1 of the ADJR Act should be removed with respect to a series of national security laws, including:

¹²⁶ Generally, the common law test for standing in Australia is that the person applying for standing have either a private right, or be able to demonstrate that he or she has a ‘special interest’ in the subject matter of the action. The ‘special interest’ does not need to involve a legal or pecuniary right but has to be more than a ‘mere intellectual or emotional concern’ and must be an interest that is different than that of an ordinary member of the public – see: *Australian Conservation Fund v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. If standing is sought under a prerogative writ or equitable remedy rather than a statute, different rules of standing may apply to each remedy. The ADJR Act provides that proceedings can be instituted by ‘a person who is aggrieved’ by a reviewable decision or conduct (sections 5, 6). This test is often interpreted consistently with the test of ‘special interest’ developed at common law for declaration and injunction.

¹²⁷ *Ibid.*

¹²⁸ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, September 2015, Recommendation 13.

- (a) the findings of the IGIS, on the basis that the findings of an accountability body ought to be subject to review;
- (b) decisions under division 105 of the Criminal Code, on the basis that there is no court involvement in the making of preventative detention orders; and
- (c) the blanket exemption for all ASIO decisions be reviewed.

263. The Law Council supports implementing these recommendations and notes that further review is unlikely to be necessary, given the ARC's comprehensive report and the ALRC's current review.

Other issues

ABF Act

264. Section 32 of the ABF Act provides that a written declaration made with respect to termination of employment does not impact legal rights provided by other legislation or the common law and the declaration is still reviewable under the ADJR Act. However, the provision does exclude the operation of the *Fair Work Act 2009* (Cth) (except for Part 3-1 and Division 9 of Part 3-3) in the case of such a declaration made by the Secretary or the ABF Commissioner. Its effect is to limit the right to an effective remedy, which may not be consistent with the principles of Article 2(3) of the ICCPR.¹²⁹

Migration Amendment Act

265. Section 197BF of the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) is drafted as a privative clause, preventing commencement or continuation of proceedings against the Commonwealth in relation to an exercise of power under section 197BA if the power was exercised in good faith.¹³⁰

Migration and Maritime Powers Act

266. In its earlier submission in response to the ALRC's Issues Paper, the Law Council raised concern with respect to Schedule 1 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) which excludes decisions by the Minister in relation to maritime powers from review by the Federal Court under the ADJR Act. The Law Council supports the ALRC's suggestion that the Government should consider reviewing this restriction, as well as the restriction contained in Schedule 4, limiting judicial review for excluded fast track applicants. Review of these restrictions is particularly important, given criticism by the Senate Standing Committee for the Scrutiny of Bills and the PJCHR.¹³¹

¹²⁹ The Law Council expressed concerns with this provision in its submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Border Force Bill 2015, 9 April 2015. Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/2969 - Final Submission Border Force Bills 2015.pdf>

¹³⁰ The Law Council expressed concerns with this provision in a submission to the Senate Legal and Constitutional Affairs Legislation Committee into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, 13 April 2013. Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/2967 - Good Order Bill.pdf>

¹³¹ Senate Standing Committee on Scrutiny of Bills, *Fifteenth Report of the 44th Parliament*, 28 October 2014, 908ff; and Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, 28 October 2014, 70ff

Open standing in public law proceedings

267. The laws and practices which govern who can commence or participate in legal proceedings affect access to and the effectiveness of courts and tribunals. The Law Council is of the view that the law on standing should be harmonised across Australia and extended to those who have shown a substantial interest in an issue. This is an overdue access to justice law reform issue.
268. The Law Council notes the ALRC recommended the introduction of open standing in public law proceedings, in its 1996 Inquiry into Standing in Public Law Proceedings.¹³²
269. Courts have mechanisms for managing frivolous or vexatious applications and there are numerous disincentives to litigate. The Law Council does not anticipate that a large volume of litigation would flow from open standing in legal proceedings.

Conclusion

270. The Law Council considers there is a lack of an overarching human rights narrative in Australia. Despite overwhelming support for a bill of rights emerging from the 2008 National Human Rights Consultation. The human rights or traditional rights and freedoms referred to this inquiry are often fragmented and derive from a range of sources, but require a framework within which there are strong and appropriate checks and balances on encroachments by Commonwealth laws.
271. The Law Council reiterates its primary submission that the ALRC should give further analysis of the international law jurisprudence and commentary with respect to the recognition and protection of the rights and freedoms included in the terms of reference.
272. The Law Council also believes that the *Oakes* test, or a similar formulation, could provide an important guide to legislators and those applying the proportionality principle. Having regard to a number of the conclusions reached by the ALRC and additional examples raised in this submission, there are reasonable concerns about whether the proportionality principle is sufficiently applied in legislative processes.
273. The Law Council generally supports the ALRC's proposals for further review of legislation which restricts civil, political and procedural rights. The ALRC should, where appropriate, recommend that each review address the issue of proportionality consistently and not be limited in examining the interdependence and indivisibility of rights and freedoms recognised in Australia and internationally.
274. The Law Council would be pleased to offer further assistance to the ALRC in concluding this important inquiry and looks forward to its Final Report.

¹³² Australian Law Reform Commission, *Beyond the Doorkeeper – Standing to Sue for Public Remedies*, Report 78, May 1996, Commonwealth of Australia. Available at: <http://www.alrc.gov.au/report-78>

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 Law Firms Australia, 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
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 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 as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark AM, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

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

Legal Aid in Magistrates Court and/or Local Courts (in addition to satisfying the means and merits test)

QLD	Where a conviction is likely to result in a term of imprisonment or special circumstances apply. Where a plea of guilty is entered there must be a real likelihood of imprisonment for the first time . ¹
TAS	Where a conviction is likely to result in an imposition of a gaol sentence. ²
SA	There must be a 'real chance of gaol' or a special circumstance applies. ³ Legal aid is not given for first offences where the accused has a good defence but where there is no realistic prospect of imprisonment.
WA	There must be a likelihood of immediate imprisonment or a specified order. Aid will also be granted if 'special circumstance/disadvantage' applies. ⁴
ACT	Where a conviction is likely to result in a term of imprisonment or special circumstances apply. ⁵
VIC	If a person faces an immediate term of imprisonment or special circumstances apply ⁶ . Legal aid is not available for any traffic prosecutions even if imprisonment is a real possibility, or even a likelihood.
NSW	Legal aid is available if a term of imprisonment is an available penalty . Legal aid is available for traffic offences only if there is a 'real possibility' of a term of imprisonment.
NT	Where a conviction is likely to result in a term of imprisonment or has a disability or disadvantage. Legal aid is also not routinely granted if conviction is likely to have a significantly detrimental effect on the defendant's livelihood or employment in spite of the guidelines. ⁷ NT Legal Aid advised that the guidelines will be reviewed shortly with a view to tightening up the criteria.

1 Special circumstances in this case is if conviction would be likely to have a detrimental effect on the defendant's livelihood or employment (actual or prospective); or the defendant suffers from a disability or disadvantage which prevents self representation; or the applicant is a child. Does not include minor traffic prosecution or regulatory offences. See <http://www.legalaid.qld.gov.au/ABOUT/POLICIES-AND-PROCEDURES/GRANTS-POLICY-MANUAL/Pages/guidelines-state%E2%80%93criminal.aspx>.

2 Legal aid will also be granted where the applicant suffers from a disability or disadvantage which prevents self representation. See <http://www.legalaid.tas.gov.au/Guidelines/3%20Matter%20Type/3B%20State/Criminal/Guideline%2014%20Criminal%20Law.htm>.

3. 'Special circumstances' is not defined. The guidelines state that 'special circumstances' will be considered on a case by case basis http://www.lsc.sa.gov.au/cb_pages/practitioners_eligibility.php#specificguidelines.

4 Legal aid will also be granted if there is a 'special circumstance' precluding self-representation. Special circumstance includes mental illness, intellectual and physical disability, and language difficulties (see http://www.legalaid.wa.gov.au/InformationForLawyers/Documents/chapter_6b_July_06.pdf pp10-11). 'Specified orders' means **either** a suspended

imprisonment order (conditional or otherwise) imposed by the Magistrates Court and has a similar charge to the one for which the suspended imprisonment order was made; **OR** parole, or an intensive supervision order or a suspended imprisonment order (conditional or otherwise) imposed by the Supreme Court, the District Court or the President of the Children's Court. (See http://www.legalaid.wa.gov.au/InformationForLawyers/Documents/chapter_6b_July_06.pdf pp10-11).

5 Legal aid will also be granted where conviction is likely to result in dismissal from employment or loss of livelihood or vocation (see http://www.legalaidact.org.au/pdf/la_act_guidelines_jun_2013.pdf, p 5. There are some other situations in which legal aid will be granted such as initiating or responding to domestic violence orders etc. Special circumstances are also considered.

6 <http://www.legalaid.vic.gov.au/information-for-lawyers/grants-guidelines/criminal-law-guideline-change>. Special circumstances are mentioned in the

VLA Handbook for Lawyers however, the link to the handbook appears to be broken <http://www.legalaid.vic.gov.au/handbook>.

7 http://www.ntlac.nt.gov.au/left_menucontent/guidelines/Chapter05Guidelines.pdf See guideline 2(b).