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## **'Fundamental freedoms' inquiry has fundamental problems**

Australian Lawyers for Human Rights (**ALHR**) has identified deficiencies in the inquiry which the Commonwealth Attorney-General (the **Attorney**) has set the Australian Law Reform Commission ('**ALRC**' or '**the Commission**') in relation to 'traditional rights, freedoms and privileges'. ALHR's President, Nathan Kennedy, said "ALHR will be making a full submission to the Commission but, given the problems in the Attorney's Terms of Reference, ALHR considers it useful to raise some issues prior to its submission to enable other parties to consider these points".

The Attorney issued proposed terms of reference (**TOR**) in December 2013 and finalised these on 19 May 2014.<sup>1</sup> Members of ALHR are together formulating ALHR's submission, and have identified various problems with the TOR which are fully explained in a paper by Dr Tamsin Clarke on ALHR's website.<sup>2</sup> There are three particular issues about the TOR identified in Dr Clarke's paper.

### **1. The Terms of Reference are unworkably wide**

The Attorney has essentially required the Commission to examine every Commonwealth law for potential infringement in any respect of each one of the rights and 'freedoms' identified in an open-ended list. It is not clear how this list is to be applied (as described below). Furthermore, the Commission must analyse whether any identified encroachment is 'appropriately justified'. The Commission is given no indication as to how to determine what is 'appropriately justified'. The breadth of the task makes it exceedingly difficult for the Commission to be able to address the full TOR. This problem is explained in more detail in Dr Clarke's paper at [8]-[10] & [54]-[74].

### **2. Confusion about 'traditional rights, freedoms and privileges'**

The Attorney's TOR direct the Commission to analyse 'common law' rebuttable presumptions in the context of 'traditional' rights and freedoms. The word 'traditional' connotes something deriving from history - and historically the common law protected a

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<sup>1</sup> <http://www.alrc.gov.au/inquiries/freedoms/terms-reference>

<sup>2</sup> <http://alhr.org.au/fundamental-freedoms-inquiry-has-fundamental-problems>

freedom to own slaves, to abuse a spouse, and to hire children. ALHR assumes the Attorney is not asking the Commission to consider whether these 'traditional' rights should be resurrected. But the lack of direction from the Attorney as to how the reference to 'tradition' should be interpreted gives little assistance to the Commission as to what it should be examining or as to the values that should underpin its analysis. These issues are addressed in Dr Clarke's paper at [36]-[43] & [47]-[49].

### **3. Role for international human rights standards**

In light of the above problems, ALHR suggest that international human rights law provides a clear and appropriate reference point upon which the ALRC should rely in carrying out its inquiry. These legal standards, agreed by Australia and adopted by the United Nations and countries around the world, specifically address what it would appear that the Commission is being asked to address: what rights and freedoms are important and how are these to be balanced where they interact. These issues are explained in Dr Clarke's paper at [11], [44], & [85]-[87].

ALHR will be informing the Commission, the Attorney, and interested parties of this initial research and analysis. They will be provided with a copy of this statement and Dr Clarke's paper (which are also available on ALHR's website). ALHR is also preparing a full submission to the Commission addressing the TOR.

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ALHR (Australian Lawyers for Human Rights) is a network of Australian lawyers active in practicing and promoting awareness of international human rights standards in Australia. ALHR has a national membership of over 2500 lawyers and law students, with active National, State and Territory committees.