Problems with Terms of Reference of the 'Freedoms' Enquiry

Introduction

This document has been produced in the context of studies and research undertaken by several members of Australian Lawyers for Human Rights (**ALHR**) in response to the terms of reference (**TOR**) given to the Australian Law Reform Commission (the **Commission** or the **ALRC**) in May 2014 by the Commonwealth Attorney-General (the 'Freedoms' Enquiry).

The author has kindly given permission for this document to be published on the ALHR website as a discussion paper prior to the finalisation of the ALRC submission to the Commission, with a view to encouraging wider consideration of the matters raised. The views in this paper do not necessarily represent the views of the ALHR but are the personal opinions of the author.

The author thanks John Southalan for his considerable and valuable input.

Contents

Terms of Reference

[1] The Commonwealth Attorney General has asked the Commission to enquire and report upon:

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

'having regard to the rights, freedoms and privileges recognised by the common law.'

[2] The TOR then state that for the purpose of the enquiry, 'laws that encroach upon traditional rights, freedoms and privileges' are to be understood as laws that:

- reverse or shift the burden of proof;
- deny procedural fairness to persons affected by the exercise of public power;
- exclude the right to claim the privilege against self-incrimination;
- abrogate client legal privilege;
- apply strict or absolute liability to all physical elements of a criminal offence;
- interfere with freedom of speech;

- interfere with freedom on religion;
- interfere with vested property rights;
- interfere with freedom of association;
- interfere with freedom of movement;
- disregard common law protection of personal reputation;
- authorise the commission of a tort;
- inappropriately delegate legislative power to the Executive;
- give executive immunities a wide application;
- retrospectively change legal rights and obligations;
- create offences with retrospective application;
- alter criminal law practices based on the principle of a fair trial;
- permit an appeal from an acquittal;
- restrict access to the courts; and
- interfere with any other similar legal right, freedom or privilege.

[3] The list in [2] is based on the "fundamental rights, freedoms or immunities" identified by Chief Justice Spigelman in a 2008 lecture[1] as common law principles of statutory interpretation or 'rebuttable common law presumptions' which he suggests together effectively constitute a 'common law bill of rights.' However there are some differences between the list quoted in [2] and the list of Chief Justice Spigelman, as discussed further below.

[4] Proposed TOR were originally published in December 2013 in substantially similar terms to the final TOR. Generally, the final TOR clarify that neither:

(a) the list of 'traditional' rights; nor

(b) the reference to Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation and workplace relations;

were intended to be exhaustive.

[5] The final item in the list of 'traditional rights' now provides a 'catch all' in relation to 'other similar legal rights, freedoms or privileges' not enumerated in the list. This addition is welcomed, particularly in the light of comments by Mr Justice Mason that while Australian general law includes judge-made common law, equity, ecclesiastical and maritime law, Australian legal proceedings are generally unaffected by concerns as to the actual derivation of asserted rights or defences, and that in applying the law such labels are essentially unhelpful. [2]

[6] Other 'similar legal rights, freedoms or privileges' not enumerated in the rest of the list could include:

(a) the other common law rebuttable presumptions identified by Chief Justice Spigelman;

(b) other common law rights which are important such as personality rights (including the rights to confidentiality, privacy, personal autonomy, identity and image)[3], riparian rights, copyrights,

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1 The Honourable J J Spigelman AC Chief Justice Of New South Wales, "The Common Law Bill of Rights," First Lecture In *The 2008 McPherson Lectures: Statutory Interpretation & Human Rights*, University Of Queensland, Brisbane 10 March 2008, accessed 25 May 2014 at p 183 in: www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2008.pdf

2 Justice Keith Mason, "Fusion: Fallacy, Future or Finished?" Speech at the Fusion Conference, 16 December 2004, pp 16 and 17 of 23, accessed 25 May 2014 at p 180 of the collected speeches: www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mason_speeches.pdf

3 See for example Elspeth Reid, 'Protection for Rights of Personality in Scots Law: A Comparative Evaluation' *Electronic Journal of Comparative Law*, vol 11.4 (December 2007), http://www.ejcl.org/114/art114-1.pdf, 3-4.

trade secrecy rights, and so on, being related to the 'freedom of property' heading identified by Commissioner Wilson[4];

(c) equitable rights and remedies;

(d) human rights which are the subject of international law;

(e) other statutory rights (see further below).

[7] That is, it is now clearer that the aim of the TOR is to protect and enshrine rights, freedoms and privileges in Australian law, no matter how they may be categorised. However there are various conceptual confusions and difficulties of language which remain unchanged between the proposed TOR and the final TOR which detract from the TOR's apparent purpose and which add to the enormous task described in the final TOR.

The Problems

The size and complexity of the task

[8] Unfortunately the open-ended nature of the list in the final TOR contributes to the gargantuan nature of the Commission's task. The process required by the TOR is so extensive and complicated as to be a virtual 'labour of Sisyphus.' Basically, the ALRC is being asked not only to examine every provision of every piece of Commonwealth legislation in order to identify each potential impingement upon the matters in the open-ended list, but then is being asked to analyse whether the extent of the possible encroachment is in each case 'appropriately justified' or proportionate. That is, the ALRC is being asked to carry out an exhaustive analysis of the statutory law, followed by hundreds or even thousands of theoretical determinations which will require an understanding of the relevant case law and will effectively be similar in scope to court decisions.

[9] And where does one draw the line in considering the ambit of 'traditional' rights, given the open-ended nature of the final item added to the list? Does the inquiry need to consider common law rights relating to marriage and spousal property notwithstanding the promulgation of the Family Law Act? No doubt many other examples can be imagined.

[10] It is not clear whether the Government comprehends the extent of the work that is being required of the ALRC in accordance with even the narrowest reading of the TOR.

[11] Nor is it clear why the comparison requested is of Commonwealth legislation against a list originally, and now mainly, comprised of rebuttable common law presumptions which sometimes overlap with, and sometimes fall short of, internationally accepted human rights. As described below, this will be a tortuous process. It would seem to be more appropriate and simpler to make a direct comparison with accepted human rights – particularly in the light of:

(a) the open-ended nature of the final item added to the list;

(b) subsequent government publications which have indicated the list in the TOR is intended to reflect 'human rights and freedoms'[5] (which, apart from the final item, it does not); and

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[4] Tim Wilson, "The Forgotten Freedoms", Speech at the Sydney Institute, 13 May 2014, accessed 25 May 2014 at www.timwilson.com.au/articles/speech-to-the-sydney-institute-the-forgotten-freedoms

[5] A 'programme deliverable' identified by the Attorney General's Department in the *Portfolio Budget Statements 2014-2015 Full Report, Budget Related Paper No. 1.2, Attorney-General's Portfolio*, 26 was to: "Protect and promote human rights and freedoms, including through reforms to section 18C of the *Racial Discrimination Act 1975* and through facilitating a review of Commonwealth laws for consistency with common law rights" at www.ag.gov.au/Publications/Budgets/Budget2014-15/Pages/PortfolioBudgetStatements2014-15.aspx accessed 25 May 2014.

(c) Australia's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR').

The one-sided nature of the task

[12] If the aim of the inquiry is to improve Commonwealth laws so as to better reflect human rights and Australia's obligations under ICCPR, which would seem to be the case, it is not clear why the Commission is being asked only to look at the ways in which statute impinges or encroaches upon rights, rather than also considering areas in which statute falls short of supporting and articulating the same rights. That is, the Commission is being asked to consider if what is there already in the words of the statute should be deleted (or amended), but is not being asked to consider the omissions - if what is *not* there already in the words of the statute should be *added*. This is particularly a problem – indeed a review in these terms becomes impossible - where the right to be considered is a statutory right and not a common law right (see further at [24] and following below).

[13] Under the original proposed TOR considering only existing wording and not omissions in wording was perhaps not so much an issue when there was the possibility that the list of 'traditional rights' was limited to the category of common law rebuttable presumptions. However now that the TOR have been widened to cover all similar legal rights, freedoms and privileges, what the Commission is being asked to do would appear to be only one side of the requisite process.

[14] While there would seem to be a conceptual difference between encroaching as little as possible upon something and better protecting it, the distinction may make little difference in the work of the Commission. For example, if under the last point on the list the Commission considers the 'right to be free from racial discrimination' identified by Chief Justice Spigelman[6] on the basis of the decision in *Constantine v Imperial Hotels Ltd* [7] and asks itself if Section 18C of the *Racial Discrimination Act* - either in its current or in its proposed amended form – inappropriately encroaches on that right, then it will be necessary for the Commission to consider, at least theoretically, whether alternate wording would encroach less upon that right. This will be difficult to do without considering the aspirational issue of how the wording of the statute could better protect that right.

The confusion of language

(1) Why are common law rights confused with 'traditional' rights?

[15] There is confusion in the TOR between 'the rights, freedoms and privileges recognised by the common law' (here, 'common law rights') and 'traditional rights, freedoms and privileges' ('traditional rights').

[16] In the 'recital' or preamble to the TOR, it is said that the referral to the ALRC is being made 'having regard to the rights, freedoms and privileges recognised by the common law.'

[17] The list to which the attention of the ALRC is drawn in the referral (the 'list') itself comprises most (but, curiously, not all) of the "fundamental rights, freedoms or immunities" identified by Chief Justice Spigelman in a 2008 lecture[8] as common law principles of statutory interpretation which he suggests together effectively constitute a 'common law bill of rights'.

[18] However the text of the referral itself says specifically that the list is about 'traditional' rights, not common law rights. It is not clear why the different language is used or whether this alternate phrase is intended to mean something more or less than the common law rights listed. This is discussed further below, and perhaps is no longer of crucial significance now that the 'catch all' item has been

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6 op cit, 25.
7 [1944] 1 KB 693 at 708.
8 op cit.

added to the list in [2]. However the confusion of wording does make it difficult to follow what principles underlie the final form of the TOR.

(2) Differences from Spigelman's list

[19] It is not clear why the original list in the proposed TOR did not include other common law 'rights' or even the other rebuttable presumptions identified by Chief Justice Spigelman as fundamental, being that Parliament did not intend to:

(a) infringe personal liberty;

(b) interfere with the course of justice;

(c) alienate property without compensation; nor

(d) allow persons to be subjected to racial discrimination.[9]

[20] Happily, these matters may now be included as a result of the addition in the final TOR of the last listed item in [2], and minor differences between the items described in [2] and Chief Justice Spigelman's list will also no longer be relevant in the light of the 'catch all' item.

[21] It is not clear why the item 'interfere with equality of religion' in Chief Justice Spigelman's list was changed to ' interfere with freedom of religion' in the proposed TOR, and then to 'interfere with freedom on religion' in the final TOR. 'Freedom on religion' is not a commonly used term, nor one with a distinct legal meaning. Perhaps this is a reference to the right of free speech in the context of religion, that is, to the right to be free to apostasise and to blaspheme?

[22] Perhaps these changes indicate that the principle underlying the TOR is the concept that the common law starts from a general commitment to liberty or freedom whereby every citizen has the right to do what he likes unless restrained by common law or statute?[10] Fortunately, the width of the catch all item will continue to protect the concepts of 'equality of religion' and 'freedom of religion' (with the related concept of freedom 'from' the religions of others) which might otherwise appear to have been inadvertently excluded.

[23] As Meagher states, 'the cases are not clear as to how and when a right or freedom becomes fundamental at common law. '[11] Therefore it would assist the inquiry if the Attorney General were to explain the rationale – which is not obvious - for the changes made to Chief Justice Spigelman's list of common law rebuttable presumptions during its metamorphis into a list of 'traditional rights, freedoms and privileges.' We note in this regard that the High Court has indicated that 'the general objective of the common law ...[is] the preservation and protection of society as a whole', which must surely be the starting point for any rationale of the TOR.[12]

(3) Why does the list of 'rights' not specifically include statutory rights?

[24] As discussed below, because common law and statute are interwoven and dynamically respond to each other, many rights known to Australian law stem from statute[13] – whether Commonwealth

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9 op cit, 23 and 24.

10 This concept was cited approvingly by Sir Gerard Brennan in the Preface to Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant,* 2000, Ashgate, vii. Commissioner Wilson does however appear to favour this approach, saying: 'in a liberal democracy all speech is legal until it is made illegal, and not the other way around', op cit.

11 Dan Meagher, The Common Law Principle of Legality in the Age of Human Rights' 35 (2011) *Melb Uni LR* 449, 464, accessed 25 May 2014 at www.mulr.com.au/issues/35_2/35_2_5.pdf

12 *Western Australia v Ward* [2002] HCA 28; 213 CLR 1, [21] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

13 See Spigelman, op cit, 38.

statutes, the Australian Constitution, or older English statutes to which common law has responded. And common law then informs the interpretation of all current statutes.

[25] Logically, if all 'rights' are to be examined to see if they have been inappropriately limited at Commonwealth level, statutory rights should be considered as well: the benefits the statutes were intended to give may have been undermined by bad drafting, the statutes may not have been brought up to date in accordance with community expectations, or common law interpretation may have inappropriately limited the ambit of the statutes. In the context of the Australian Constitution, the statutes may have been inappropriately drafted.[14]

[26] The fact that statutory rights were originally excluded from the TOR raised concerns that an underlying agenda was to restrict the ambit of certain statutes such as anti-discrimination legislation.[15]

[27] Happily, with the changes from the proposed TOR to the final TOR, that concern can now be dismissed. Anti-discrimination legislation is inherently about promoting equality and freedom from harm, in the sense of all humans having the right to be treated with respect and dignity by virtue solely of their humanity. It is the foundation for human rights law. It contradicts the assumption of the 'culture of contentment' that the *status quo* is natural, uncoerced and good.[16] It recognises that the ideals of equality and freedom from harm are not always realised[17] and that the *status quo* is not necessarily the best of all possible worlds: it challenges "white, male, able-bodied, heterosexist hegemony"[18] by supplying legislation to cure the defects of that hegemony. In the words of Montesquieu:

> *Dans l'état de nature, les hommes naissent bien dans l'égalité, mais ils n'y sauraient rester. La société a leur fait perdre, et ils ne redeviennent égaux que par les lois.*[19]

To be discriminated against implies that one has been treated unfairly in that the discriminator has adverted to an improper or irrelevant consideration in deciding upon his treatment of the victim.[20] These are matters dependent upon context. Australian courts have recognised the contextual nature of equality, rejecting formal equality or formally identical treatment as the sole test for the presence of equality or the absence of discrimination. The contextual concept of equality used in both Australia and European jurisdictions should continue to be followed in Australia, in contrast to the United States practice of recognising only formal equality.[21]

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[14] Thus the High Court held in *Unions NSW & Ors v State of New South Wales* [2013] HCA 58 that sections 96D and 95G(6) of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) were invalid as impermissibly burdening the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution: www.hcourt.gov.au/cases/case_s70-2013 , accessed 25 May 2014.

[15] "A special Castan Centre event: Freedom forum", the Castan Centre for Human Rights Law, Monash University, www.law.monash.edu.au/castancentre/public-events/events/2014/freedom-forum.html, accessed 25 May 2014.

[16] See generally John Kenneth Galbraith, *The Culture of Contentment,* Houghton Mifflin Company, Boston, 1992 and Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca and London, 1990, 21.

[17] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, see generally Introduction and 2.

[18] Thornton, op cit, 7-8.

[19] Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*, Martinus Nijhoff Publishers, The Hague, Boston & London, 1998, 50, quoting Montesquieu, *De l'Esprit des lois* (The Spirit of the Laws) (1748) (T. Nugent trans and J. V. Prichard, rev ed 1952) 148: "In the state of nature, all men are born in equality, but they do not forever remain so. Society causes them to lose it, and they again become equal only by the law."

[20] Thornton, op cit, 2.

[21] As Salbiah Ahmad points out (in 'Gender Equality under Article 8: Human Rights, Islam and "Feminisms"', a paper presented at the *13 Malaysian Law Conference,* 16-18 November 2005 at p 4, accessed 25 May 2014 at www.law.emory.edu/ihr/worddocs/sa_gender_equality.doc), under the Formal Equality Model there is no discrimination under American law so long as similarly classified groups are treated the same. Thus qualified lawyers, so classified, must be treated the same whether male or female, because gender is not relevant to that

[28] Developed countries have generally introduced anti-discrimination laws over the last fifty years[22]. The principle of equality is enshrined, for example, in Article 3 of the German Basic Law[23] and holds a central place in the jurisprudence of the French Constitutional Council[24] consistently with French philosophy.[25] For Australia to resile from its Commonwealth anti-discrimination regime would not only have been in breach of its treaty obligations but would have been such a retrogressive move that it is hard to even contemplate.

(4) The TOR appear to misconceive the relationship between common law and statute

[29] The TOR, particularly through its 'one-sided' approach, as discussed above at [12], appears to reflect a popular misconception that common law and statute, like oil and water, can readily be separated[26] whereas they are thoroughly interwoven and not easily separable. Mr Justice Leeming points out that "A great deal of what is simplistically described as 'common law' is the historical product of, or response to, statutes." [27]

[30] "What is commonly thought of as 'common law'," he says, "namely, the various bodies of judge-made law, including equity and admiralty, taught in law schools and written about in law books is and always has for the most part been sourced in statute and is unintelligible without reference to statute."[28]

[31] Similarly Gleeson CJ comments that:

> *Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship*.[29]

[32] Indeed Meagher points out how often 'the common law adopts as fundamental those rights and freedoms enshrined in landmark and enduring statutes' such as the Habeas Corpus Act 1679, Magna

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qualification. But where people are not similarly situated, the principle does not require equal treatment. The formal equality model therefore allows the dismissal of women who become pregnant. It must be proved that there was an intention to discriminate before legislation or activities can be regarded as unconstitutional under the Fourteenth Amendment – a requirement which is obviously very difficult to meet. (Carol A. Aylward "Critical Race Theory" in *Canadian Critical Race Theory: Racism and the Law*, Fernwood Publishing, Halifax, 1999, 30 to 33) This doctrine has the unfortunate effect of enabling the Supreme Court to strike down affirmative action legislation which refers to race and at the same time to uphold state action that has a clearly racist intent or effect, so long as the action is couched in race-free language. As Stanley Fish notes (*There's No Such Thing as Free Speech and It's a Good Thing Too*, Oxford University Press, Oxford and New York, 1994, 106), United States courts are not in the business of protecting speech *per se*, but in the business of classifying speech as protected or not.

22 Thornton, op cit, see generally Introduction.

23 "(1) All human beings are equal before the law. (2) Men and women enjoy equal rights. The state promotes the factual accomplishment of equal opportunities for women and men and works towards the elimination of existing disadvantages. (3) Nobody may be discriminated against or favoured on the grounds of their gender, birth, race, language, national or social origin, faith, religion or political opinion. No one may be discriminated against on the grounds of their disability": Sabine Michalowski and Lorna Woods, *German Constitutional Law: The protection of civil liberties*, Ashgate, Dartmouth, 1999, 161 (their translation). Justification for unequal treatment is only permitted according to criteria which are in conformity with the Basic Law and which must be reasonable: ibid 162.

24 Danièle Lochak, "Les Minorités et le Droit Public Française: du Refus des Différences à la Gestion des Différences" in Alain Fenet et Gérard Soulier (eds), *Les Minorités et leurs Droits Depuis 1789*, Editions L'Harmattan, Paris, 1989, 111 at 115, 114 and 117.

25 see for example Jacques Bidet, *John Rawls et la théorie de la justice*, Presses Universitaires de France, Paris, 1995.

26 See Jack Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291, 308.

27 Mark Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" [2013] UNSW Law J 40; (2013) 36(3) UNSW Law J 1002 accessed 25 May 2014 at: www.austlii.edu.au/au/journals/UNSWLJ/2013/40.html

28 ibid. The original footnotes are not included in this quotation.

29 *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512, 532 [31].

Carta and the later Petition of Right 1628.[30]

[33] Chief Justice Spigelman points to the fact that 'the fundamental features of tort as we know it were established by legislation which overturned common law rules restricting liability in tort.' It may be, he says, 'that in many of these respects the common law would have developed in the same way.' However we cannot know what might have happened in the absence of legislation, because the relevant rights were created by statute.[31]

[34] Legislative change may operate as a catalyst to prompt changes in judge-made law notes Leeming,[32] the driving force then being 'considerations of coherence.'[33] He concurs with the comments of Professor Williams that:

> *The common law [should be understood] not as a body of law whose change is impeded or blocked by a static body of statutory rules, but as a process best served by the rational integration of judge-made and legislative law*.[34]

[35] One further point that needs to be stressed is that if the inquiry were to be used so as to repeal any statutory provisions that the government disagreed with, the common law in that area would revive.[35] Indeed, the common law might be pushed further towards the concept of non-discrimination as a common law right.[36] The results might not be what the government anticipated.

(5) What are traditional rights, freedoms and privileges?

[36] "Traditional rights, freedoms and privileges" is not a common phrase. Neither does it have a specific legal meaning. If the list in the TOR were exhaustive, there would perhaps be no need to analyse the phrase. However given that it is now clear that the list is not exhaustive, it is necessary to understand what criteria is being applied in composing the list and how to interpret the 'catch all' item at the end of the list. Given that the majority of items on the list appear not to be 'traditional rights' either in the sense understood by Australian courts or in the dictionary sense of 'tradition', it would seem that the reference to 'tradition' is not intended to apply as a limitation on, or a way of reading down, the rights, freedoms and privileges that the Commission needs to take into account.

[37] Chief Justice Spigelman in his 2008 speech refers rather to 'rights, freedoms and immunities', noting that the phrase he uses is 'the authoritative formulation from the joint judgment in *Coco*.'[37] Presumably, the reference to 'privileges' rather than 'immunities' is a reference to legal professional privilege or client legal privilege and the 'privilege' against self-incrimination.

[38] "Tradition" is relevantly defined in the Oxford Dictionary as meaning 'a statement, belief or practice transmitted (especially orally) from generation to generation' and as 'More vaguely: a long-established and generally accepted custom or method of procedure, having almost the force of a law; an immemorial useage'. Other definitions relate to the traditions of different religions. 'Traditional' is relevantly defined as meaning 'belonging to, consisting in, or of the nature of, tradition.'

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30 Meagher, op cit, 457.
31 Leeming, op cit, text at footnote 78.
32 Leeming, op cit, paragraph prior to footnote 133.
33 Leeming, op cit, text following footnote 136.
34 Leeming, op. cit, footnote ref 181 citing Robert F Williams, 'Statutes as Sources of Law Beyond their Terms in Common-Law Cases' (1982) 50 *George Washington Law Review* 554, 599.
35 John Southalan, 'Common Law v Human Rights: Which Better Protects Freedoms?' (2011) December *Brief*, 10, 11, accessed 25 May 2014 at www.researchgate.net.
36 See Meagher, op cit, 475ff.
37 op cit, p 34, referring to *Coco v The Queen* (1994) 179 CLR 427.

[39] However many of the items listed as 'traditional' in the TOR have been enunciated relatively recently, therefore the phrase does not appear to be intended in the TOR context to be about timescale alone.

[40] That something is traditional or long-standing does not necessarily mean that it is good or desirable. Age alone is an insufficient test by which to judge the desirability or otherwise of particular laws or values. Even conservatism as a political movement does not seek to retain *everything* from the past, only the 'best elements' from the past. Indeed, to favour longstanding concepts over newer ideas is to refuse to progress.

[41] The English common law did not restrict slavery until the Slave Trade Act of 1807, nor the use of child labour until a series of Factory Acts from 1802 onwards. Presumably 'freedom to own slaves' and 'freedom to hire children' are not freedoms that one would wish to resurrect today, and indeed it is desirable that Australia joins with other nations in strengthening legislation against forced labour.[38] There needs to be an agreed framework as to how to value rights. We will return to this question below.

[42] Matters listed as 'traditional rights' have been defined differently by courts over the years, their scope and even their nature changing. A right might be 'founded' in mediaeval law, but it will not be interpreted in that way today. As Mr Justice Leeming notes, quoting Maitland:

> *[W]hat is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts.*[39]

[43] The use of the term 'traditional' could also be taken as a reference to the recent move by various undemocratic countries to undermine the generally accepted concept of 'human rights' and to return to local and inegalitarian regimes[40].

[44] 'Human Rights' are rights that relate to the freedoms that should be ours because of our physical existence as humans. Human rights confer the freedom to do what is natural and normal for any human being – taking into account the rights of others.[41] Where 'tradition' does not enshrine these rights and freedoms, legislation can and should provide a remedy.[42]

[45] In 2013 Russia, China, Cuba and Pakistan proposed that the United Nations adopt the concept of "traditional values of humankind" - which excludes the concept of equality - as a 'different' basis for human rights law.[43] Effectively this is an attempt to undermine the progress that has been made since World War II in articulating an international human rights law.

[46] We assume here that the TOR does not intend to align Australia with Russia, China, Cuba and Pakistan in promoting such a retrogressive proposal.

[47] To further confuse matters, Australian courts have defined 'traditional rights' to mean, consistently with the narrower of the dictionary meanings quoted above, only those rights which both (1) existed before the 1900s, and (2) have been explained by each generation to the next.[44] If a right does not

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[38] See generally the International Labour Organisation on the economics of forced labour: www.ilo.org/global/about-the-ilo/multimedia/video/video-interviews/WCMS_243343/lang--en/index.htm

[39] Leeming, op. cit., at footnote reference 75.

[40] Maggie Murphy, "'Traditional values' vs human rights at the UN", 18 February 2013, Open Democracy at www.opendemocracy.net/5050/maggie-murphy/traditional-values-vs-human-rights-at-un

[41] George Lakoff, *Whose Freedom?* Farrar, Straus and Giroux, New York, 2006, 46.

[42] Lakoff, op cit, 88.

[43] Murphy, op cit.

[44] *Risk* v *NT* [2007] FCAFC 46 at [82] per French, Finn & Sundberg JJ; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [46] per Gleeson CJ, Gummow & Hayne JJ.

meet both these criteria, then it is not a 'traditional right' which the courts will recognize and protect today, even if many people respect that right and its contemporary importance.[45]

[48] Presumably the Commonwealth Attorney-General does not intend the ALRC to use these criteria in determining what matters fall within 'traditional rights'. Or is the ALRC being asked to apply yet another level of assessment in determining what matters to cover in its review?

[49] In brief, problems in understanding the phrase 'traditional rights, freedoms and privileges' in the context of the TOR include:

(a) the term is not self-explanatory and not in common use;

(b) not all traditions or traditional rights are beneficial and it is necessary to apply agreed principles in determining which traditional rights are worthy of preservation;

(c) relativist concepts of tradition and culture can be used to undermine the universality of human rights principles, as a number of countries are attempting to do through promoting 'traditional values of humankind' as excluding the notion of equality; and

(d) Australian courts have defined 'traditional rights' very narrowly.

(6) The TOR appear to misconceive the role of legislation in promoting freedoms

[50] While it has been argued that the law itself is not the "solution to all of society's ills,"[46] to quote Bhikhu Parekh:

> *Because the law throws the society's collective moral and legal weight behind a particular set of norms of good behavior, it does have some influence on attitudes; its role is limited but nonetheless important*. [47]

[51] Legislation sends a message to the community as to the values that the government wishes to promote. Conversely, failure to legislate undermines democracy, justice and equality. Government has a crucial role in this process. Only government can legislate. Only Government can give the appropriate message.[48]

[52] Categories of rights and obligations which are 'traditional' in the common law do not always meet the needs of persons whose rights have been abused. Legislation has a role to play.

[53] Interestingly, Mr Justice Leeming notes that where legislation falls short of expected community mores either in its drafting or because necessary of a failure to legislate, this is likely to give rise to an expansion of judge-made law in the area.[49]

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[45] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [47] per Gleeson CJ, Gummow & Hayne JJ (McHugh J agreeing at [135]).

[46] ABC radio interview with Tim Wilson, Human Rights Commissioner, "Law is not the solution to all of society's ills" 25 March 2014, www.abc.net.au/pm/content/2014/s3971254.htm, accessed 25 May 2014.

[47] Bhikhu Parekh, "Is there a case for banning hate speech?" *The Content and Context of Hate Speech: rethinking regulation and responses,* Michael Herz and Peter Molnar (eds), Cambridge University Press, Cambridge, 2012,51.

[48] 'Voluntary codes of conduct' as espoused by Commissioner Wilson (op cit) indeed give the negative message that the Government is not willing to enforce that conduct. One might point to the frequent occasions when commercial broadcasting organisations fail to meet their own voluntary codes of conduct, with apparent impunity. And what penalties could be applied by a voluntary code of conduct for individuals?

[49] He refers to the general recognition that the married women's acts embodied principles which were of wider import than the statutes in terms expressed and thus necessitated remoulding common-law doctrines to fit the statutory aims and to the way in which legislative inertia may inform judge- made law.

What is the process the TOR require?

[54] The TOR requires a multiple-step process:

(1) the identification of all Commonwealth laws that encroach upon 'traditional rights, freedoms and privileges'; and

(2) the identification of all Australian 'traditional rights, freedoms and privileges' (however, as explained above, the scope of this phrase is not clear and it is also not clear to what extent the Australian courts' interpretation of the phrase 'traditional rights' is to be applied);

(3) a critical examination of all of the Commonwealth laws identified under (1) to determine whether the encroachment upon any of those traditional rights is appropriately justified. In undertaking this examination, the TOR says that the ALRC "should consider:

(4) how [the] laws are drafted, implemented and operate in practice; and

(5) any safeguards provided in the laws, such as rights of review or other accountability mechanisms."

[55] The concept of the ALRC taking into account how laws are implemented and how they operate in practice is a valuable one but adds enormously to the ALRC workload. It is true that if laws are not appropriately enforced, whether by enforcement failures or discriminatory application, the public may lose faith in the social message that the law would otherwise give, and indeed may lose faith in the rule of law itself. Implementation is crucial. However it is questionable whether the ALRC will have the resources to carry out this part of the task on anything other than a 'hearsay' basis.

[56] Step (1) therefore requires each one of the hundreds of Commonwealth statutes to be compared from beginning to end in detail against at least each of the 'traditional rights' identified under Step (2) (the 'relevant rights'). There may be multiple places in a statute where the same relevant right is touched upon, and one statute might touch upon more than one relevant right. Given that many Commonwealth statutes are very lengthy, this first stage of the process is in itself a mammoth task. Migration legislation alone will give rise to multiple examples of potential breaches.

[57] At this stage, for the purpose of identifying what Commonwealth legislation needs to be examined more closely, it might not be essential to examine the exact scope of each of the 'relevant rights'. The rights could be taken as 'aspirational.'[50] However this will not be adequate for the purposes of the next step.

[58] Steps (2) and (3) both require an examination of the foundations and limits of each of the 'relevant rights' by reference to the relevant case law, because that case law informs our understanding of *both* of the items being compared – the right and the relevant part (or parts) of the statute.

[59] Firstly, what 'traditional rights' are covered must be determined by the Commission (Step (2)).

[60] Interpretation of both the nature of the 'traditional rights' and of the Commonwealth statutes themselves is dependant upon case law. As Mr Justice Leeming noted:

> *the legal meaning of the same statutory language can and will change depending upon the contextual change in the judge-made law in which the statute operates*.[51]

[61] The problem is that the relevant rights are not necessarily found 'fully formed'. As Peter Bailey says:

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[50] See Meagher, op cit, 463-4, referring to Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights' (2004) 15 *Public Law Review* 103, 106.

[51] op cit, text after footnote 154.

> *… a common law "freedom" is not really like a human rights type claim. A common law "freedom" is built up as a general principle appears to be established by individual cases. The single instances come first; the "freedom" follows as a kind of title. In human rights, the "right" comes first and the remedy (if one can be achieved) follows….*[52]

[62] Similarly, Meagher notes that:

> *the content and scope of most common law rights … [are] highly contextual and also subject to reasonable disagreement….*[53]

[63] While Meagher contemplates a methodology that requires the prior determination of the content of the relevant common law right, this is in terms of what the right requires in a particular context,[54] and so will not be appropriate to the process required by the TOR, which is acontextual.

[64] To explain the issue, let us take the example of free speech or free communication.

[65] Chief Justice Spigelman cites *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 31 and *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 ('*Simms*') at 125–127, 130 as evidence for the rebuttable presumption that Parliament did not intend to interfere with freedom of speech. However those cases deal with quite different subject-matters and do not conclusively decide every example of what will or will not be protected in the name of 'free speech'.

[66] In *Nationwide News* the High Court held that in Australia there is an implied constitutional right to freedom of political communication. The context was the validity of provisions of the Industrial Relations Act which prohibited certain behaviour, including writing or speaking words calculated to bring the Commission or its members into disrepute.

[67] In *Simms* the Lords of Appeal of the English House of Lords held that a prisoner has the right to an oral interview (as opposed to correspondence) with a journalist, contrary to standard prison regulations, in the context where the interviews are aimed at promoting in the media the possibility of the prisoner's innocence.

[68] When the ALRC goes to consider, for example, whether any provision of the Commonwealth *Corporations Act* unduly impinges upon free speech (that is, to carry out the 'Stage (1)' test), the types of speech permitted in *Nationwide News* and in *Simms* will simply not be relevant.

[69] Nor can the ALRC simply take 'free speech' as an absolute. In the case of free speech, as Lord Steyn said in *Simms*, 'freedom of expression is not an absolute right. Sometimes it must yield to other cogent social interests.' Similarly, as Lord Wright said 1936, freedom of public discussion means 'freedom governed by law' – that is, governed by legal restrictions based on decency, public order, defamation[55], sedition, etc.[56]

[70] Obviously no human right or freedom can be absolute because our planet contains more than one person and therefore, as the saying goes, 'the freedom to extend one's fist ends just short of the other

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[52] Peter Bailey, *The Human Rights Enterprise in Australian Law*, LexisNexis, 2009, 1.5.3, quoted by Chief Justice RS French, "The Common Law and the Protection of Human Rights", paper presented to the Anglo Australasian Lawyers Society, 4 September 2009, 5, accessed 25 may 2014 at www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf

[53] Meagher, op cit, 462.

[54] Meagher, op cit, 471.

[55] Although note the common law principle mentioned by French, whereby local authorities and other organs of government cannot sue for libel at common law in the interests of protecting freedom to criticise public bodies, applied in *Ballina Shire Council* v *Ringland* (1994) 33 NSWLR 680: op cit, 13.

[56] *James v Commonwealth* (1936) AC 578, 627.

person's nose.' A real freedom must exist for everybody, not just for one person.

[71] But more than that: for the inquiry process to be a valid and effective one, the content and scope of the 'relevant rights' such as 'free speech' cannot be uncritically accepted as universal values with agreed content but must be analysed by reference to the relevant case law.

[72] That is, it would appear that the only way in which the ALRC can practically apply the TOR is to apply the principles articulated by the courts as underlying the 'relevant rights' to every situation where it has found a relevant right which is touched upon by a Commonwealth statute.

[73] In the case of freedom of speech, the principles articulated in the two cases referred to above can be summarised as follows:

(a) freedom of expression is not an absolute right

(b) freedom of expression may be subject to restrictions necessary in a democratic society

(c) the English common law is effectively the same in this area as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)

(d) face to face communication has benefits over and above those of written communication

(e) not all types of speech have an equal value

(f) speech which is aimed at correcting legal or institutional wrongs is particularly valuable and should be protected including:
- speech of a prisoner to communicate his legitimate attempts to obtain a review of his conviction or sentence (*Simms*); and
- speech or writing which reveals true facts to the public benefit or contains fair and reasonable criticism, even if it bring a Federal Commission or a member of the Commission (in that capacity) into disrepute (*Nationwide News*)

(g) speech which is aimed at public discussion of matters significant to political and economic life in Australia, including of government and its institutions and agencies, is essential to the operation of a representative democracy because it is from such discussions that voters form their political judgments *(Nationwide News).* [57]

[74] After completing this process it is then necessary, as mentioned above, for the ALRC to consider whether the encroachment upon those traditional rights is appropriately justified, taking into account:

(a) how the law is drafted;

(b) any safeguards provided in the law in relation to the particular provisions in question, such as rights of review or other accountability mechanisms; and

(c) how the law is implemented / operates in practice.

What value system should be applied?

[75] This last Stage requires a value judgment, potentially both political and philosophical[58], and a balancing or weighting of competing rights – raising 'significant methodological issues'[59]. The Commonwealth *already* has an accepted and well established process by which a broad balancing process should occur

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[57] It should be noted that this right stems from statute (the Australian Constitution), not from the common law, and that doubt was cast by the High Court upon whether a similar right could be identified at common law in the United Kingdom.

[58] See Meagher, op cit, 469.

[59] Meagher, op cit, 470.

in law reform: regulatory impact assessment and it is submitted that this is the process that should apply here.[60]

[76] As explained above, none of the relevant rights or freedoms can be considered as absolute. At its simplest, freedom is being able to do what you want to do without anyone intentionally preventing you.[61] But it is also generally accepted that being free does not make you free to interfere with the freedom of others.[62] And for the first person to be free, those who interfere with her freedoms must be restricted.[63]

[77] Disagreements arise when one comes to the question as to what amounts to 'interference' – that is as to which freedoms shall be legally protected. It is generally accepted that causing harm is interference with freedom. Harm can be physical, economic (stealing), psychological or emotional.[64] Coercion also interferes with freedom.[65]

[78] Talking about 'free speech', Stanley Fish explains the problems in isolating the value system to be applied. The concept of 'free speech' is a nonsense, he says, unless one considers its content and context; it only makes sense to the extent that speech can be distinguished from other areas of human conduct and activity and to the extent that the 'speech' involves some particular value. There is nothing that can be identified in all contexts and for all time as 'free speech'.

[79] Nor can we determine the content and form of the right to free speech through any model of human rights.[66] Abstract concepts like 'free speech' do not have any natural content. Their limits must be determined by reference to other values, or to put it another way, by the agendas we wish to advance.[67]

[80] Thus any understanding of free speech will be political, for in order to answer the question 'What is free speech for?' one must consider situations in which speech with certain undesirable effects should not be tolerated.[68] This involves having some vision of the way one wants the world to be in the future.[69]

[81] Decisions about whether or not a statute inappropriately infringes a relevant right will therefore need

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60 See Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Research report November 2012, Australian Government, Canberra, accessed 25 May 2014 at www.pc.gov.au/__data/assets/pdf_file/0003/120675/ria-benchmarking.pdf This is also considered by the OECD as an appropriate process: Organisation for Economic Co-operation & Development, *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, Version 1.0, October 2008, accessed 25 May 2014 at http://www.oecd.org/gov/regulatory-policy/44789472.pdf

61 Lakoff op cit 25.

62 Lakoff op cit 40.

63 H.L. Pohlman, *Political Thought and the American Judiciary*, University of Massachusetts Press, 1993, 6.

64 Lakoff op cit 41.

65 Lakoff op cit 42.

66 As Campbell notes, while there may be general community agreement about the existence of particular human rights such as free speech, the intuitive model of human rights is insufficient, on its own, to determine the content and form of those rights. There is no agreed methodology for the articulation of even the least controversial rights; choices have to be made: Tom D., Campbell, "Democracy, Human Rights, and Positive Law" (1994) 16 *Sydney Law Review* 195, 200 to 201.

67 Fish, op cit, 14, 15, 104, 106 to 108. See also Eric Barendt, *Freedom of Speech*, Clarendon Press, Oxford, 1985 Chapter III, and Jean-François Gaudreault-DesBiens, "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2001) 46 *McGill L.J*. 1117, 1125ff.

68 Fish, op cit, 107.

69 Fish, op cit, 14 and 15. The line to be drawn between protected speech and speech that may be regulated will always reflect a political decision, he points out, even though the line will always be presented as if the political considerations were all on one side, and the considerations of principle on the other.

to be based, it is submitted, on evaluations of:

(a) harm that may be caused to others by an individual exercising a rights or freedom only in their own interests, and

(b) how rights and freedoms can best interrelate, for the benefit both of society and the individual.[70]

[82] In the words of Louis D. Brandeis:

> *liberty means exercising one's rights consistently with a like exercise of rights by other people…liberty is distinguished from license in that it is subject to certain restrictions, and … no one can expect to secure liberty … without having his rights curtailed in those respects in which it is necessary to limit them in the general public interest*[71]

[83] It can generally be said that there are two main streams of thought in interpreting rights and freedoms:

(a) the 'conservative' interpretation, which takes a narrow view of responsibility and causation and puts freedom from constraints on economic activity at the heart of its interpretation, and

(b) the 'progressive' interpretation which takes account of systemic causation and believes that a shared, government-backed, infrastructure is necessary for the achievement of individual freedoms.[72]

[84] Generally, the 'progressive' stream of interpretation encourages the expansion and better articulation of the concepts of rights and freedoms that follow from the moral values of empathy and responsibility, fairness and equality. The principles relating to the relevant rights are to be found in international human rights law, which should also be taken into account.

[85] Dyzenhaus, Hunt and Taggart argue that international human rights norms are a 'good steer' as to what the relevant common law principles and values should be, saying that it would be consistent with the common law's own methodology for it to draw on those norms.[73]

[86] Indeed, statutory interpretation in common law countries, including Australia, is informed by international human rights law[74], as is the presumption of consistency (although not necessarily the 'principle of legality' that fundamental rights cannot be overriden by general or ambiguous words).[75]

[87] It is submitted that the 'progressive stream' of interpretation in accordance with international human rights standards is the appropriate way in which to conceptualise the 'relevant rights', as well as to interpret the statutes in question.

Dr Tamsin Clarke

26 May 2014

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[70] This is consistent with the concept that the common law will not protect rights which clash with the general objective of the common law of the preservation and protection of society as a whole: see Southalan, op cit, 12, quoting *Western Australia* v and *Ward* [2002] HCA 28 at [21].

[71] Testimony before the 1915 US Commission on Industrial Relations, quoted in Pohlman, op cit, 63.

[72] Lakoff, op cit, 123, 141.

[73] David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 32-3 cited in Meagher, op cit, 464-5.

[74] *Cheedy (Yindjibarndi People) v Western Australia* [2011] FCAFC 100, [77] and see generally Dyzenhaus, Hunt and Taggart, op cit.

[75] See Meagher, op cit, 466 ff.